

JULY 2002

COMMISSION DECISION AND ORDERS

06-24-2002	Freeman United Coal Mining Company (This is a corrected version) This decision replaces the uncorrected version appearing at 24 FMSHRC pg. 524.	LAKE 2000-102-R	Pg. 613
07-10-2002	Aurora Materials, Ltd.	CENT 2002-223-M	Pg. 631
07-10-2002	Arnold Crushed Stone	CENT 2002-242-M	Pg. 635
07-10-2002	Pioneer Aggregates, Inc.	PENN 2002-142	Pg. 639
07-10-1001	CDG Materials, Inc.	WEST 2002-404-M	Pg. 642
07-22-2002	Cranesville Aggregates Company, Inc.	YORK 2002-52-M	Pg. 645
07-22-2002	Douglas R. Rushford Trucking	YORK 1999-39-M	Pg. 648
07-23-2002	John Richards Construction	WEST 2000-168-M	Pg. 655
07-23-2002	Phelps Dodge Sierrita, Inc.	WEST 2002-429-M	Pg. 661
07-23-2002	J. P. Donmoyer, Inc.	PENN 2002-164-M	Pg. 665
07-23-2002	Watkins Engineers & Constructors	WEST 1999-280-M	Pg. 669
07-24-2002	Highlands Mining & Processing Co., Inc.	KENT 2002-110	Pg. 685
07-25-2002	Lodestar Energy, Inc.	KENT 2000-79	Pg. 689
07-26-2002	Nathan B. Harvey v. Mingo Logan Coal Co.	WEVA 2001-38-D	Pg. 699

ADMINISTRATIVE LAW JUDGE DECISIONS

07-05-2002	Freeman United Coal Mining Co.	LAKE 2000-102-R	Pg. 705
07-10-2002	Cannelton Industries, Inc.	WEVA 2002-111-R	Pg. 707
07-17-2002	Felix Maurice Sykes v. Har-Lee Coal Co.	VA 2002-33-D	Pg. 713
07-24-2002	Willie Ray Shaffer v. Gray Quarries Inc.	LAKE 2002-47-DM	Pg. 715
07-25-2002	Summit Anthracite, Inc.	PENN 1999-213	Pg. 720
07-26-2002	Sec. Labor on behalf of Wyman Owens, et al. v. Drummond Company, Inc.	SE 2002-114-D	Pg. 768
07-31-2002	Dacotah Cement	CENT 2001-218-M	Pg. 782

ADMINISTRATIVE LAW JUDGE ORDERS

05-03-2002	BGS Construction, Inc.	WEVA 2002-41	Pg. 787
06-20-2002	BGS Construction, Inc.	WEVA 2002-41	Pg. 791
07-03-2002	Hazel Olson v. Wyoming Fuel d/b/a/ Dry Fork Coal Company	WEST 2002-304-D	Pg. 794
07-05-2002	UMWA, Local 2368, Dist. 20 v. Jim Walter Resources, Inc.	SE 2002-22-C	Pg. 797
07-26-2002	Cord Easley v. Morrill Asphalt Paving	WEST 2001-133-DM	Pg. 801

JULY 2002

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

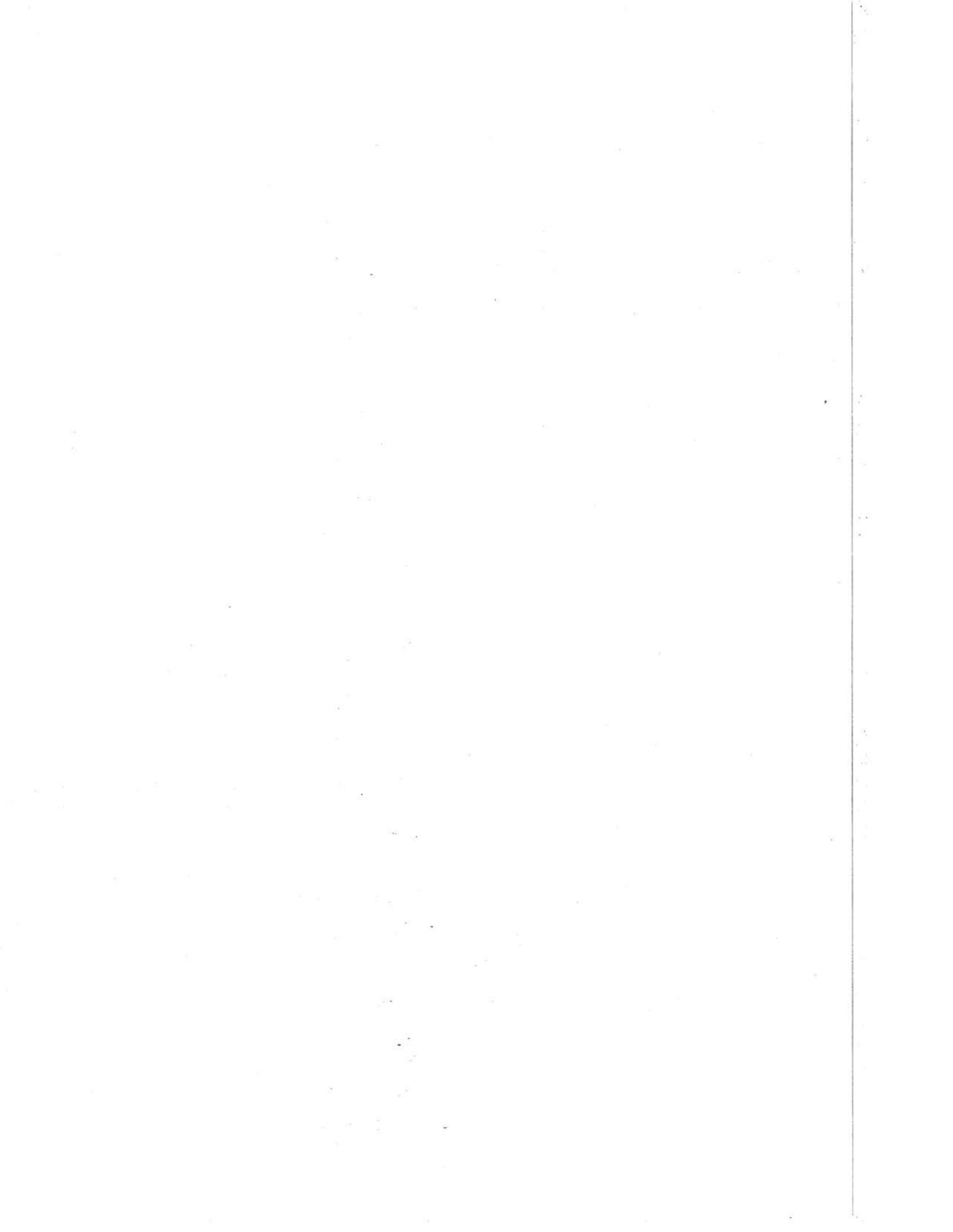
Secretary of Labor, MSHA v. John Richards Construction, Docket Nos. WEST 2000-168-M and WEST 2000-470-M. (Limited Grant of Judge Manning's September 13, 2001 decision).

Georges Colliers, Inc. v. Secretary of Labor, MSHA, Docket No. EAJ 2002-2. (Chief Judge Barbour, June 14, 2002).

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

Ronald Harrison v. Sidco Minerals, Docket No. CENT 2000-88-DM. (Harrison's request to reconsider May 10, 2002 Commission Order).

Nathan Harvey v. Mingo Logan Coal Company, Docket No. WEVA 2001-38-D. (Harvey's request to reopen decision of Judge Hodgdon issued January 8, 2002).



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

I.

Factual and Procedural Background³

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

Disposition

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

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

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

Commissioner Jordan, reversing and remanding:

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

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

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

¹ Section 7.90 provides:

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

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

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

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

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

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

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

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

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

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

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

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


Mary Lu Jordan, Commissioner

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

Commissioner Beatty, reversing and remanding:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

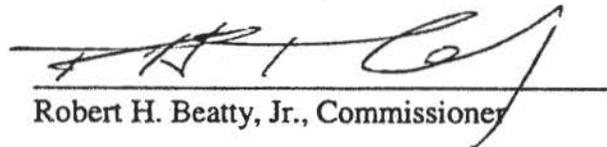
⁶ At oral argument, the judge requested that the parties try and work out stipulations "with respect to whether these engines met the approval requirements." Oral Arg. Tr. 63. However, counsel were unable to do this. Letter to Judge Melick, dated Oct. 20, 2000. Therefore, whether the cited engines were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

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

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

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

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



Robert H. Beatty, Jr., Commissioner

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

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

Chairman Verheggen, dissenting:

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

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

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

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

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

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

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

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

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

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

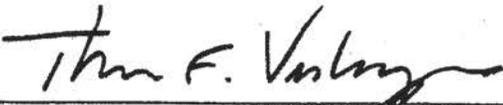
violates no existing rule.” 199 F.3d at 1342. Instead, it is incumbent upon the Secretary to protect the health and safety of miners by instituting a rulemaking to clarify its regulation, not “bring one more unsupportable citation.” *Id.*

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

I note that although my colleagues reverse the judge here, their reasons for doing so are diametrically at odds. Commissioner Beatty finds section 7.90 ambiguous whereas Commissioner Jordan, finds it plain. The effect of this split decision is that the judge’s decision is reversed under no rationale, and the case remanded simply for the assessment of a penalty. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992). In other words, there is no *Commission* rationale. The split rationales on which my colleagues base their separate opinions are non-binding and non-authoritative, and are thus dicta.¹ The result they reach has no basis – neither plain meaning nor deference – that will bind future Commissioners under the principle of stare decisis. I find this unfortunate in light of the congressional charge to us to “develop a uniform and comprehensive interpretation of the law . . . [and to] provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law.” *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm’n Before the Senate Comm. on Human Res.*, 95th Cong. 1 (1978).

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

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



Theodore F. Verheggen, Chairman

Distribution

Tina Peruzzi, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Edward M. Green, Esq.
Timothy M. Biddle, Esq.
Crowell & Moring, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 10, 2002

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

v.

AURORA MATERIALS, LTD.

:
:
:
:
:
:
:
:

Docket No. CENT 2002-223-M
A.C. No. 41-04147-05504

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; and Beatty, Commissioner

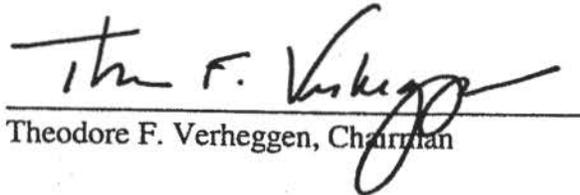
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 13, 2002, the Commission received from Aurora Materials, Ltd. ("Aurora") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

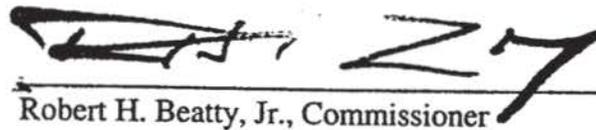
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In its request, Aurora, apparently proceeding pro se, requests relief from the final order, but offers no explanation for its failure to avoid entry of the final order. Mot. We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("JWR"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has

applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. See 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. See *Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

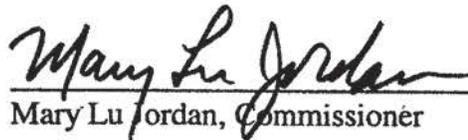
On the basis of the present record, we are unable to evaluate the merits of Aurora's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Aurora has met the criteria for relief under Rule 60(b). See *Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (remanding to judge where operator offered no explanation for failure to timely file request for hearing); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Theodore F. Verheggen, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, Aurora has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Consequently, I respectfully dissent.


Mary Lu Jordan, Commissioner

Distribution

Vaughn Proffitt, Limited Partner
Aurora Materials, Ltd.
P.O. Box 1755
Roanoke, TX 76262

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Myra James, Chief
Civil Penalty Compliance Office
U. S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2002

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

v.

ARNOLD CRUSHED STONE

:
:
:
:
:
:
:
:
:
:

Docket No. CENT 2002-242-M
A.C. No. 41-03882-05515

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; and Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 24, 2002, the Commission received from Arnold Crushed Stone ("Arnold") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, Arnold, apparently proceeding pro se, requests relief from the final order, but offers no explanation for its failure to avoid entry of the final order. Mot. It attached a copy of the proposed penalty assessment to its request. *Id.*, Attach.

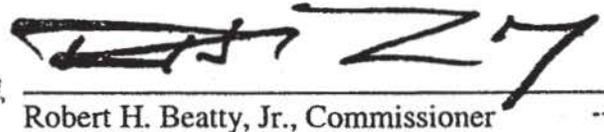
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case

may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Arnold's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Arnold has met the criteria for relief under Rule 60(b). *See Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (remanding to judge where operator offered no explanation for failure to timely file request for hearing); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



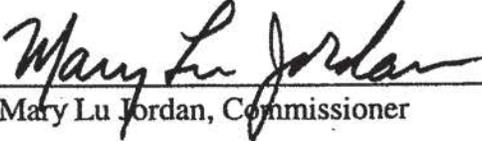
Theodore F. Verheggen, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, Arnold has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Consequently, I respectfully dissent.



Mary Lu Jordan, Commissioner

Distribution

Mike Arnold, President
Arnold Crushed Stone
P.O. Box 632
Blum, TX 76627

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Myra James, Chief
Civil Penalty Compliance Office
U. S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2002

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

v.

PIONEER AGGREGATES, INC.

:
:
:
:
:
:
:

Docket No. PENN 2002-142
A.C. No. 36-08273-03510

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

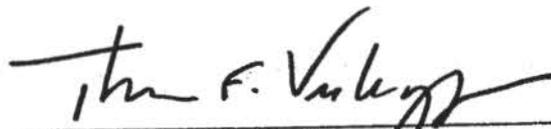
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 16, 2002, the Commission received from Pioneer Aggregates, Inc. ("Pioneer") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

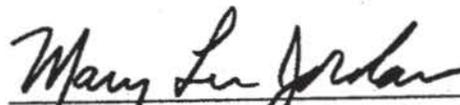
In its request, Pioneer asserts that it did not submit a request for a hearing because it did not receive the proposed penalty assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. It contends that, although the proposed penalty assessment contains Pioneer's correct address, the assessment was returned to MSHA as undeliverable. *Id.* Pioneer attached to its request a copy of MSHA's delinquency letter dated May 8, 2002, and a copy of the proposed penalty assessment which it received by fax on May 13, 2002. *Id.*, Attachs.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied “so far as practicable,” Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

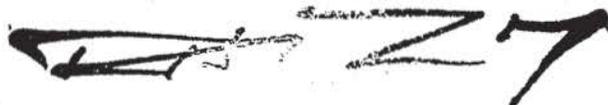
On the basis of the present record, we are unable to evaluate the merits of Pioneer’s position. While Pioneer claims that it did not receive the proposed penalty assessment, the reasons for and circumstances surrounding that alleged non-receipt are not clear from the record. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See John Richards Constr.*, 22 FMSHRC 1054, 1054-55 (Sept. 2000) (remanding where operator did not provide support for its allegation that it did not receive proposed penalty assessment); *Warrior Inv. Co., Inc.*, 21 FMSHRC 971, 971-73 (Sept. 1999) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Theodore F. Verheggen, Chairman



Mary Lu Jordan, Commissioner



Robert H. Beatty, Jr., Commissioner

Distribution

Tom Nilon
Pioneer Aggregates, Inc.
202 Main Street
Laflin, PA 18702

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Myra James, Chief
Civil Penalty Compliance Office
U. S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-404-M
v.	:	A.C. No. 04-05476-05507
	:	
CDG MATERIALS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

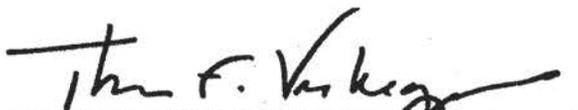
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On June 3, 2002, the Commission received from CDG Materials, Inc. (“CDG”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

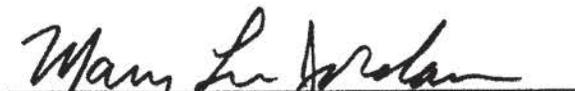
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

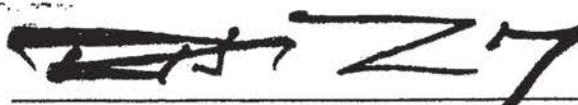
In its request, CDG asserts that it timely mailed a request for a hearing to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to contest the proposed penalty assessment but that, “[d]ue to current events,” its delivery may have been delayed because of “a lack in efficiency of the postal service.” Mot. It attached to its request a copy of the proposed penalty assessment issued on November 9, 2001. *Id.*, Attach. On June 18, 2002, the Secretary filed a response asserting that CDG received the proposed penalty assessment on November 29, 2001, but did not mail its hearing request to MSHA until January 4, 2002, after the 30-day deadline for mailing the request had passed. Sec’y Resp. at 1 n.1; *see* 29 C.F.R. § 2700.26. The Secretary attached to her response a copy of a certified mail receipt indicating that CDG received the proposed penalty assessment on November 29, 2001. Sec’y Resp., Attach. She did not include any documents supporting her allegation that CDG mailed its hearing request on January 4, 2002.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied “so far as practicable,” Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of CDG’s position. The record contains no documentation to support CDG’s allegation that it timely mailed its hearing request, or the Secretary’s contrary assertion that CDG failed to timely mail its request. Accordingly, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See CDG Materials, Inc.*, 24 FMSHRC 419, 419-21 (May 2002) (remanding to judge where operator alleged it timely mailed hearing request, but its delivery to MSHA was late due to postal delays resulting from September 11 events); *H & D Coal Co., Inc.*, 23 FMSHRC 382, 383 (Apr. 2001) (remanding to judge where operator allegedly mailed hearing request, but MSHA did not receive it). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

Distribution

David O. Beck
C.D.G. Materials, Inc.
P.O. Box 20758
Riverside, CA 92516

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Myra James, Chief
Civil Penalty Compliance Office
U. S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 22, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2002-52-M
v.	:	A.C. No. 30-00964-05527
	:	
CRANESVILLE AGGREGATES	:	
COMPANY, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

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

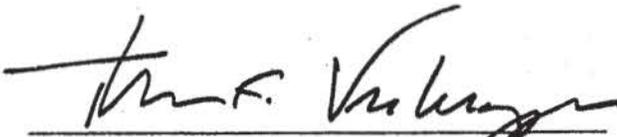
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

Cranesville's request was submitted by Joseph Sagarese, the company's safety director. Mot. He asserts that Cranesville failed to file a hearing request because, pursuant to conversations with officials from the Department of Labor's Mine Safety and Health Administration ("MSHA"), it was awaiting the results of an MSHA investigation. *Id.* Sagarese claims that he believed that Cranesville had been granted an extension of time in which to contest the related penalties. *Id.* He further states that the company wishes to contest two penalty issues relating to the penalty proceedings but he does not specify which of the 19 proposed penalties listed in the proposed penalty assessment the company wants to contest. *Id.* Cranesville is

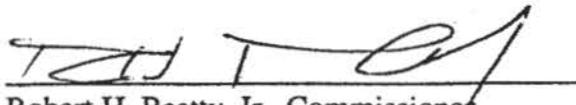
apparently proceeding pro se. Attached to its request are copies of MSHA's delinquency letter and the proposed penalty assessment. *Id.*, Attachs.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Cranesville's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cranesville has met the criteria for relief under Rule 60(b). *See Powell Mt. Coal Co., Inc.*, 23 FMSHRC 144, 144-47 (Feb. 2001) (remanding to judge where operator alleged it failed to timely file green card based on erroneous information from MSHA officials); *Dean Heyward Addison*, 19 FMSHRC 681, 681-83 (Apr. 1997) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

Distribution

Joseph A. Sagarese, Safety Director
Cranesville Aggregates Co., Inc.
427 Sacandaga Road
Scotia, NY 12302

W. Christian Schumann, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Myra James
Civil Penalty Compliance, MSHA
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 22, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 99-39-M
	:	
DOUGLAS R. RUSHFORD TRUCKING	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding involving a miner fatality arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Upon a second remand for reassessment of a civil penalty, Administrative Law Judge Gary Melick assessed a penalty of \$4,000 for Citation No. 7716903 against Douglas R. Rushford Trucking ("Rushford"). 23 FMSHRC 1418 (Dec. 2001) (ALJ); Gov't Ex. 5. This is the same amount the judge assessed in his previous decision. See 22 FMSHRC 1127, 1132-33 (Sept. 2000) (ALJ). We granted the Secretary of Labor's petition for discretionary review challenging the judge's penalty assessment. For the reasons set forth below, we vacate the judge's penalty and assess a penalty of \$15,000 against Rushford.

I

Factual and Procedural Background

This is the third time that this proceeding has been before the Commission. A summary of the background facts and the judge's decisions can be found in the Commission's prior decisions. *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000) ("*Rushford I*") and 23 FMSHRC 790 (Aug. 2001) ("*Rushford II*"). We briefly summarize below the relevant facts and procedural history pertinent to this proceeding, as well as the judge's most recent decision.

A Rushford employee was fatally injured while attempting to inflate a truck tire without using a stand-off device. *Rushford I*, 22 FMSHRC at 599. The Department of Labor's Mine

Safety and Health Administration (“MSHA”) charged, and the judge found, that Rushford violated 30 C.F.R. § 56.14104(b)(2),¹ which requires stand-off inflation devices to be used during tire inflation. 22 FMSHRC at 599. The judge also determined that the violation was significant and substantial (“S&S”) and a result of Rushford’s unwarrantable failure.² *Id.* He assessed a \$3,000 civil penalty, rather than the Secretary’s proposed penalty of \$25,000. *Id.*

On review, in *Rushford I*, we concluded that the judge neglected to make findings on all of the penalty criteria set forth in section 110(i).³ *Id.* at 602. We instructed the judge to provide a more complete explanation of his penalty assessment on remand, and that if he decided that a substantial reduction in the penalty proposed by the Secretary was warranted, he must explain any such decision, especially in light of his finding of “gross negligence.” *Id.* We also directed the judge to examine Rushford’s lack of history of violations and, because the record was unclear on this point, indicated that the judge could reopen the record to assist in his examination. *Id.*

On remand, the judge discussed each of the section 110(i) criteria. 22 FMSHRC at 1128-31. Of particular interest to the instant appeal, he determined that an increase in the penalty was warranted because Rushford’s lack of history of violations stemmed from its mistaken failure to file quarterly forms and, according to the Commission’s instructions, could not be a mitigating factor in the penalty assessment. *Id.* at 1128-30. The judge reached this conclusion

¹ 30 C.F.R. § 56.14104(b)(2) provides in pertinent part: “To prevent injury from wheel rims during tire inflation, one of the following shall be used . . . [a] stand-off inflation device which permits persons to stand outside of the potential trajectory of wheel components.”

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” The unwarrantable failure terminology, taken from the same section of the Act, establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

³ Section 110(i) provides in pertinent part:

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

notwithstanding his observation that the Commission's review of the Secretary's history of violations claim lacked "legal authority." *Id.* at 1128. With respect to the negligence criterion, the judge stated that, although the violation was the result of "high" and "gross" negligence, he considered that Rushford's negligence resulted from "self-imposed ignorance" of the standard rather than any "intentional non-compliance," making the violation arguably "not the result of unwarrantable failure," and factored this consideration into his penalty determination. *Id.* at 1130. The judge assessed a civil penalty of \$4,000, noting that the Secretary's proposed assessment of \$25,000 lacked analytical support. *Id.* at 1132-33.

On review for a second time, in *Rushford II*, we vacated the judge's penalty assessment because he erred in his analysis of the negligence criterion. 23 FMSHRC at 792-94. We concluded that the judge's negligence determination on remand conflicted with his original findings that the violation was a result of unwarrantable failure and "high negligence." *Id.* at 792 (comparing 22 FMSHRC at 1130 with 22 FMSHRC at 77-78). Those initial findings of high, gross negligence and unwarrantable failure had become the law of the case and therefore any attempt to retract the findings was erroneous. 23 FMSHRC at 793. Additionally, we held that the judge's reasoning that "self-imposed ignorance" reduced an operator's negligence contravened Commission precedent. *Id.* We remanded the matter for assessment of a new penalty, explaining that all six findings made by the judge on the statutory penalty criteria were to remain undisturbed. *Id.* at 794. In particular, we reiterated that the judge's negligence finding in his original decision was the law of the case, and that this finding served as an aggravating factor for penalty purposes. *Id.* (citing 22 FMSHRC at 77-78).

In his most recent decision on remand, the judge again assessed a penalty of \$4,000, stating "that the underlying premise for the remand in [*Rushford II*] was incorrect." 23 FMSHRC at 1420. The judge justified his former negligence determination, explaining that the "'gross negligence' herein was not at the highest end of the 'gross negligence' continuum," and that he did not formally modify the unwarrantable failure or gross negligence findings. *Id.* at 1419. The judge stated that the \$1,000 increase in the civil penalty from his initial decision to his first remand decision included the gross negligence finding. *Id.* As in his previous remand decision, the judge again faulted the Secretary's proposed special penalty assessment because she failed to produce any information underlying her penalty analysis. *Id.* at 1420.

II.

Disposition

We find that, once again, the judge failed to adhere to our remand instructions. In particular, he failed to acknowledge our holding in *Rushford II* that self-imposed ignorance could not be a mitigating factor in determining the level of Rushford's negligence. *See* 23 FMSHRC at 793. His decision is devoid of any acknowledgment of this error, much less any reconsideration of the penalty amount in light of the error.

The judge also erred when he maintained that he entered no formal modification of his original findings of gross negligence and unwarrantable failure in his first remand decision. *See* 23 FMSHRC at 1419. Although the judge stated that the \$1,000 increase in the civil penalty from his original decision was based on Rushford's gross negligence (*id.*), this statement is inconsistent with his first remand decision. In that decision, he specified that "[t]he increase in penalty herein" reflected the Commission's instructions regarding Rushford's history of violations, i.e., that the lack of any such history could not be a mitigating factor because it was due at least in part to the company's failure to file quarterly reports. *See* 22 FMSHRC at 1128-30. Moreover, the discussion of the company's negligence in the first remand decision reveals that the judge took into account when assessing the penalty his mistaken view that self-imposed ignorance of the law made the violation arguably not an unwarrantable failure. *Id.*

We find it inexcusable that the judge refused to acknowledge the legal errors in his earlier decisions and to follow our simple instructions. Recently, the Commission stressed "the overwhelming importance we attach to judges faithfully carrying out the remand instructions we provide in our decisions." *Dolan v. F & E Erection Co.*, 23 FMSHRC 235, 242 (Mar. 2001). In this case, we directed the judge to take full account of his original finding of high, gross negligence when assessing a penalty, and not to mitigate this finding based on the legally incorrect assumption that Rushford's ignorance of the law reduced its culpability. Had he focused on these clear directions instead of trying to prove that the "underlying premise" of our decision in *Rushford II* was "incorrect" (23 FMSHRC at 1420), the parties would in all likelihood have avoided the expense and time involved in this additional round of proceedings. It is not in the best interests of the parties, nor the Commission as an institution, for a judge to second-guess the body charged by Congress with reviewing his or her decision. *See* 30 U.S.C. § 823(d)(2)(C) (providing the Commission with the authority to direct, modify, affirm or set aside the decisions of its judges). A judge's refusal to adhere to our directions undermines the statutory framework for resolving disputes and therefore cannot be condoned.

When faced with a similar situation, the Commission in *Westmoreland Coal Co.* assessed a penalty it found appropriate rather than remanding the matter to the judge again. 8 FMSHRC 491, 493 (Apr. 1986).⁴ In this instance, in light of the fact that findings have been entered on each of the statutory penalty criteria, we too find it preferable to assess a penalty ourselves rather than remanding the matter to the judge. *See Steen employed by Ambrosia Coal & Constr. Co.*, 20 FMSHRC 381, 386 (Apr. 1998) (holding that, in the interest of a speedier resolution to litigation, the Commission may assess a penalty rather than remand to the judge for

⁴ In *Westmoreland*, the Commission initially reversed the judge's unwarrantable failure determination and remanded for reconsideration of the civil penalty. 8 FMSHRC at 492. On remand, although the judge revised his original negligence finding so as to comply with the Commission's instructions, he assessed a civil penalty in the same amount as in his original opinion. *Id.* In deciding to assess the penalty itself, the Commission stated that the judge's "determination of an appropriate penalty to be assessed necessarily should have been affected by [the Commission's determination] of a lesser degree of negligence." *Id.*

assessment). We note that the following findings entered on each of the statutory penalty criteria, as set forth in *Rushford II*, constitute the law of the case:

As to the history of violations criterion, we affirm as supported by substantial evidence the judge's findings on remand that the lack of history of violations was due to both MSHA's error in classifying the mine as "closed" as well as to Rushford's failure to file the required quarterly reports with MSHA. Accordingly, the lack of history of violations is neither an aggravating nor a mitigating factor for penalty purposes. With respect to the criteria of size and good faith abatement, the judge found, and we affirm, that Rushford is a very small operator, and demonstrated good faith in complying with the standard after the fatality. These two findings support some mitigation of the penalty. We also leave undisturbed the judge's finding that a penalty as high as \$25,000, the amount proposed by the Secretary, would have no adverse effect on Rushford's ability to continue in business. This finding on the ability to continue in business criterion does not weigh in favor of reducing the proposed penalty. . . . [T]he law of the case with respect to negligence is controlled by the judge's finding from his original decision that the violation was a result of "high and gross negligence."⁵ This finding on the negligence criterion serves as an aggravating factor for penalty purposes. We also affirm the judge's finding that the violation, "which caused the death" of the Rushford employee in this case, was of high gravity. This gravity finding also serves as an aggravating factor for penalty purposes. Finally, [in connection with the company's negligence], we find Rushford's alleged ignorance about a protective device as well known as stand-off inflation equipment, which is ubiquitous in any industry working with split rim truck tires, truly remarkable and unfortunate. For the benefit of the entire mining community, it is important to emphasize that, in this case, for the lack of a common and inexpensive safety device, a miner died.

23 FMSHRC at 794-95 (citations and footnote omitted).

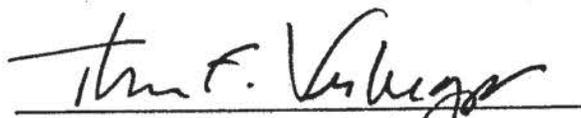
⁵ In the judge's original decision, he concluded that "a finding of unwarrantability and gross negligence" were "clearly support[ed]" by "the evidence that Rushford had never bothered to obtain a copy of the health and safety regulations governing the operation of [the] mine," that the appropriate tire-inflating device was not available at the mine, and that the mine owner "did not even know what a stand-off inflation device was." 22 FMSHRC 74, 77-78 (Jan. 2000).

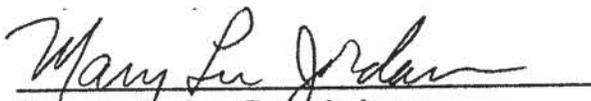
In assessing this penalty, we note that the size of the operator and its good faith abatement merit some reduction to the proposed penalty. In light of the fact that this case involves a fatality that resulted from Rushford's S&S violation of the cited standard, and the operator's unwarrantable failure and gross negligence, a substantially higher penalty than the \$4,000 assessed by the judge is justified. In consideration of the findings set out above, we assess a civil penalty of \$15,000.

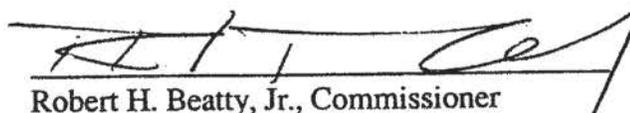
III.

Conclusion

For the foregoing reasons, we vacate the judge's assessment of a penalty of \$4,000 for the violation of 30 C.F.R. § 56.14104(b)(2) and assess a civil penalty of \$15,000.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

Distribution

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Thomas M. Murnane, Esq.
Harris Beach, LLP
One Cumberland Avenue
P.O. Box 2947
Plattsburgh, NY 12901

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2000-168-M
ADMINISTRATION (MSHA)	:	A.C. No. 24-02070-05503
	:	
v.	:	Docket No. WEST 2000-470-M
	:	A.C. No. 24-02070-05504
JOHN RICHARDS CONSTRUCTION	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Beatty, Commissioner

On October 30, 2001, the Commission received from John Richards Construction ("Richards Construction") a request for relief from part of a final Commission decision on the merits issued by Administrative Law Judge Richard W. Manning on September 13, 2001. 23 FMSHRC 1045 (Sept. 2001) (ALJ). The judge's jurisdiction in this matter terminated when his decision was issued on September 13, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1).

Richards Construction failed to file a timely petition for discretionary review of Judge Manning's decision within the 30-day deadline. Because the Commission did not direct review on its own motion, the judge's decision became a final decision of the Commission 40 days after its issuance. Under these circumstances, we construe Richards Construction's request as a motion for relief from a final Commission decision. *See Tunnelton Mining Co.*, 8 FMSHRC 1142, 1142 (Aug. 1986) (construing request filed after 40-day deadline as request for relief from final Commission decision).

When considering whether relief from a final Commission decision is appropriate, the Commission has found guidance in, and has applied “so far as practicable,” Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

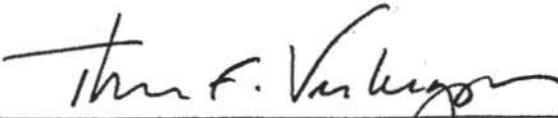
Richards Construction’s request for relief was sent to the Commission by John Richards, the mine owner. Mot. at 1-3. Richards, apparently proceeding pro se, alleges that Richards Construction did not file a timely petition for discretionary review because of a delay in his receipt of the judge’s decision. *Id.* at 2. He claims that the decision was sent by certified mail to him at an apartment complex in Arizona and that office personnel at the apartment complex signed for the certified mail without his permission on October 16, 2001. *Id.* He claims he received the copy of the judge’s decision several days later. *Id.* The judge’s decision indicates that it was sent by certified mail to Richards at an address in Montana, the same address that was listed as Richards’ contact address on the Proposed Assessment of Civil Penalties. 23 FMSHRC at 1069.

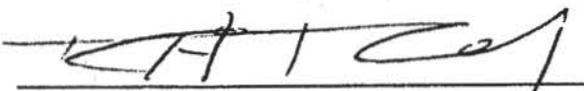
Because of confusion in the record, we are unable to evaluate Richards Construction’s request. The following information is needed before this case can proceed:

1. A full and clear explanation of why the operator allegedly received a copy of the judge’s decision only after the 30-day time limit to file a petition for discretionary review had expired. The explanation should be accompanied by any available supporting documentation, such as mail receipts and affidavits.
2. Supporting evidence that the decision was sent, as Richards alleges, to him at an apartment complex in Arizona rather than to the Montana address listed for him on the judge’s decision.

Upon consideration of Richards Construction’s request, it is hereby granted for the limited purpose of affording the operator an opportunity to provide the Commission with the above information. Accordingly, it is ordered that within 30 days from the date of this order, Richards Construction either provide the Commission and the Secretary with the above

information or show good reason for its failure to do so. Otherwise, an order will be entered denying Richards Construction's request for relief. The Secretary may file a response with the Commission to the additional information provided by Richards Construction within 10 days after her receipt of the information.


Theodore F. Verheggen, Chairman


Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

The Mine Act and the Commission's procedural rules require that a petition for discretionary review be filed within 30 days of the issuance of a judge's decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Although the judge in this case issued his decision on September 13, 2001, the Commission did not receive the petition from John Richards Construction ("Richards Construction") until October 30, 2001, approximately two weeks past the statutory deadline.

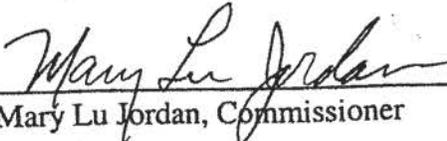
John Richards, the mine owner, attempts to excuse this late filing by claiming that the judge's decision was sent to him in Arizona, but that someone at his apartment complex there signed for it, so he did not receive it until several days thereafter. Mot. at 2. Although at times we have, in accordance with Rule 60(b)(1) of the Federal Rules of Civil Procedure, afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake, Richards' excuse for this late filing does not meet these criteria.

Contrary to Richards' assertion that the decision was sent to him at an Arizona address, the judge's decision shows that it was sent by certified mail to him at a post office box address in Montana, the same address listed as Richards' contact address on the Proposed Assessment of Civil Penalties. 23 FMSHRC 1045, 1069 (Sept. 2001) (ALJ). In addition, I take notice of the fact that the Commission's logbook of mailing by certified mail indicates that on September 13, 2001, the day the decision was issued, a mailing was sent by certified mail to Richards at his address in Montana. I also take notice of the fact that the certified mail receipt indicates that the decision was sent to Richards' mailbox address in Montana.

Commission records thus decisively indicate that the judge's decision was mailed to Richards in Montana. Other than his assertion that the decision was sent to Arizona, Richards has submitted nothing to prove otherwise, and he has offered no theory - much less any evidence - to indicate how the decision got to Arizona. His claim is completely inconsistent with the Commission's documents, and he offered nothing to cause me to refrain from relying on the Commission's records.

Moreover, Richards Construction has already availed itself of the opportunity to defend its case before a judge. See *Knock's Bldg. Supplies*, 21 FMSHRC 483, 484 (May 1999) (request for relief from final Commission decision denied when operator offered no explanation for failure to timely submit a petition for discretionary review). Nothing it has submitted gives me reason to believe I should disturb the finality of the judge's decision. See *Duval Corp. v.*

Donovan, 650 F.2d 1051 (9th Cir. 1981) (upholding Commission's denial of petition for reconsideration of dismissal of petition for discretionary review received 31 days after issuance of ALJ decision). Accordingly, I respectfully dissent.


Mary Lu Jordan, Commissioner

Distribution

John Richards
John Richards Construction
Box 316
Seeley Lake, MT 59868

W. Christian Schumann, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 2002

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

v.

PHELPS DODGE SIERRITA, INC.

:
:
:
:
:
:
:
:

Docket No. WEST 2002-429-M
A.C. No. 02-00144-05577

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On July 1, 2002, the Commission received a request from Phelps Dodge Sierrita, Inc. (“Phelps Dodge”) filed by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. *Id.*

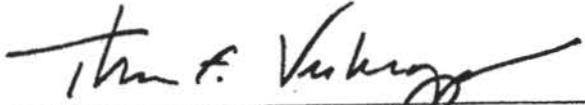
Phelps Dodge asserts that it intended to contest the proposed penalty associated with Citation No. 7949365, but that it did not submit a green card because it inadvertently paid the assessment along with fourteen other assessments it intended to pay, which were proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) at the same time. Mot. at 2. Phelps Dodge asserts that it received Citation No. 7949365 on January 24, 2002, and that it filed a Notice of Contest of that citation on February 22, 2002. *Id.* at 1. The contest was assigned Docket No. WEST 2002-239-RM, and is currently on stay before Administrative Law Judge August Cetti. *Id.* On May 10, 2002, MSHA issued proposed assessments of \$1,327 for fifteen citations, including \$55 for Citation No. 7949365. *Id.* at 2. Phelps Dodge asserts that it erroneously paid the proposed penalty for Citation No. 7949365 because of “an internal

misunderstanding and confusion over the status of the citations at issue.” *Id.* Attached to Phelps Dodge’s request is the affidavit of Joe Mortimer, the safety and health manager for the Sierrita Mine. Ex. A. Phelps Dodge requests relief under Rule 60(b) of the Federal Rules of Civil Procedure.

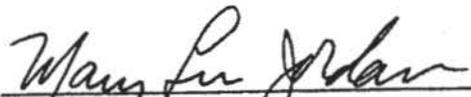
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied “so far as practicable,” Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record reflects that Phelps Dodge intended to contest the penalty related to Citation No. 7949365 and that, but for apparent confusion on the operator’s part, it would have returned the green card and contested the proposed penalty assessment. The most compelling indication of Phelps Dodge’s intention to contest this penalty is the notice of contest it filed concerning Citation No. 7949365 in Docket No. WEST 2002-239-RM. In addition, Phelps Dodge has adequately supported its allegations in the affidavit of Mortimer. We find that Phelps Dodge has provided a reasonable and well-supported explanation for its failure to contest the proposed penalty, demonstrating “inadvertence” or “mistake” under Rule 60(b). We also note that the Commission has granted a request to reopen where the operator contested a citation, but then mistakenly paid the penalty associated with the citation. *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999). The Commission has also granted an operator’s motion to reopen where the operator inadvertently paid the penalty assessment when the operator submitted documents supporting its allegations. *See Cyprus Emerald Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999).

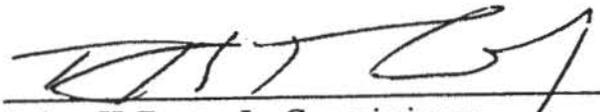
Accordingly, in the interest of justice, we grant Phelps Dodge's request to reopen, reopen the penalty assessment that became a final order, and remand to the Chief Administrative Law Judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Theodore F. Verheggen, Chairman



Mary Lu Jordan, Commissioner



Robert H. Beatty, Jr., Commissioner

Distribution

Laura E. Beverage, Esq.
Jackson & Kelly, PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

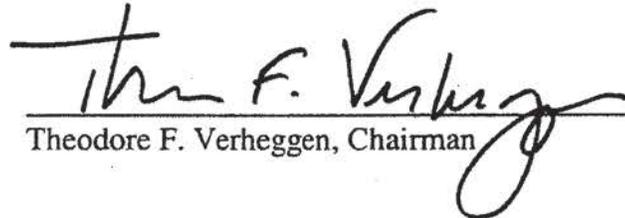
Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

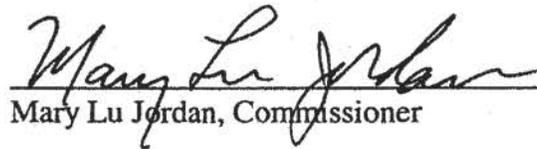
of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1. The operator contends that its safety director, Ken Kunes, did not understand the procedures he needed to follow to challenge penalties proposed by MSHA. *Id.* at 2. As a result, Kunes "returned the green card for only one of the proposed penalties . . . apparently under the mistaken impression that doing so was sufficient to contest all of the penalties for all of the citations that were pending." *Id.* Donmoyer attached to its motions a signed affidavit by James M. Kretz, the operator's controller. *Id.* at Attach. A.

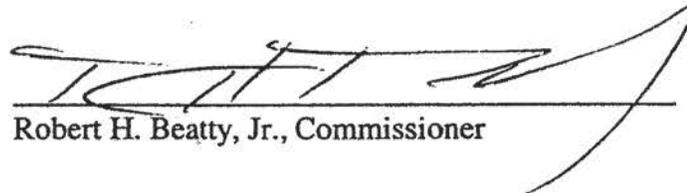
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Donmoyer intended to contest the proposed penalty assessments, but that it failed to do so in a timely manner due to internal processing errors that resulted from unfamiliarity with Commission procedure. The affidavit attached to Donmoyer's motions is sufficiently reliable and supports its allegations. Thus, Donmoyer's failure to timely request hearings in these matters resulted from inadvertence or mistake. *See, e.g., Leeco, Inc.*, 24 FMSHRC 338, 339-40 (Apr. 2002) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Harriman Coal Corp.*, 23 FMSHRC 153, 154-55 (Feb. 2001) (reopening case that went final due to operator's unfamiliarity with Commission procedure and operator's assertions were supported by affidavit).

Accordingly, in the interest of justice, we grant both of Donmoyer's motions to reopen, reopen the penalty assessments that became final orders, and remand to the Chief Administrative Law Judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

Distribution

Mark N. Savit, Esq.
Willa B. Perlmutter, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

we affirm the judge's jurisdictional and constitutional determinations, his three violation determinations, his S&S determinations, and his two unwarrantable failure determinations.

I.

Factual and Procedural Background

The Plant, which is located in Boulder County, Colorado, and owned by Southdown, Inc., produces portland cement.² 23 FMSHRC at 81. Portland cement is primarily composed of limestone, shale, and quartz. Tr. 33-36. Limestone and shale are mined at a nearby quarry owned by Southdown and transported to a primary crusher located at the quarry site. 23 FMSHRC at 81-82. Once crushed, the rock is carried on a two-mile conveyor belt to the Plant where it is stockpiled. *Id.* at 82. Quartz is mined at a second nearby quarry and is transported by truck to the primary crusher at the first quarry. *Id.* The crushed quartz is then transported to stockpiles at the Plant via the conveyor belt. *Id.*

The stockpiled material at the Plant then goes through various operational steps in the production of cement. *Id.* The material is crushed, ground into powder, and heated to 2,500 degrees Fahrenheit in a kiln where it undergoes a chemical reaction to form chunks of crystalized cement known as "clinker." *Id.*; see n.2, *supra*. The clinker is ground into fine powder in a finish mill. 23 FMSHRC at 82. The only waste created during cement production is large amounts of carbon dioxide released from the limestone when it is heated in the kiln. *Id.*; Tr. 39-40. The cement from the finish mill is drawn by vacuum into the "bag house" where it is collected in large bags. 23 FMSHRC at 82; Tr. 29-30. The cement in the bags is then emptied into hoppers and transported to storage silos for sale. Tr. 29-30.

The above description of the process is a simplification of a more complex process. 23 FMSHRC at 82. For example, other material, such as gypsum, is added and coarse material is recirculated back through the process at several steps. *Id.* Most of the material that enters the Plant is used in the finished product. *Id.*

In January 1999, Watkins, a construction contractor, was constructing a new bag house building for Southdown at the Plant. *Id.* at 81. During construction, openings at the north and south ends of the bag house building provided access to the large compartments inside the bag house. *Id.* at 89-90, 94. Each opening was four- to five-feet wide and was about 70 feet above the ground. *Id.* at 89. At the time of the accident, there were no railings or barriers at these openings. *Id.* at 89-90. The two openings were connected by a breezeway that ran between the

² Portland cement is "[a] calcium-aluminum silicate produced by fusing or clinkering limestone and clay in a kiln so as to drive off carbon dioxide and produce an oxide glass [or clinker]. The clinker is ground very fine and, when mixed with water, will recrystallize and set." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 420 (2d ed. 1997) ("DMMRT").

two compartments inside the bag house. *Id.* The floor of the breezeway was the top of a heating duct. *Id.*

Watkins accessed the opening on the north end of the bag house with the man-lift of a subcontractor onsite, Mountain States Engineering ("Mountain States"). *Id.* at 94. Prior to using the man-lift to transport employees to the breezeway, Mountain States and Watkins agreed that the long side of the man-lift basket would be positioned against the breezeway opening because the breezeway opening was nearly three feet wider than the short end of the man-lift's basket. *Id.* at 95-96.

On the day of the accident, January 21, 1999, Jeremy Boyette, a Watkins' employee, was operating the man-lift, which was transporting another Watkins' employee, Jefferson B. Davis, up to the north opening.³ *Id.* at 95. Davis testified that, for some reason, Boyette positioned the short end of the basket against the opening. *Id.* at 96; Tr. 102, 112-13. When the basket reached the opening, Davis pulled himself on top of the insulation panels that were in the basket.⁴ 23 FMSHRC at 96. When he reached the top rail of the end of the basket next to the building,⁵ he placed one foot on the middle rail and unhooked his safety line from the railing of the basket because that was as far as the safety line would allow him to go. *Id.*; Tr. 112. Davis did not attempt to re-tie the line because he was going to tie off on the structure of the bag house building. 23 FMSHRC at 96; Tr. 139. Davis testified that, as he was sitting on the top rail with one foot on the middle rail, he placed the other foot on the entrance to the breezeway. 23 FMSHRC at 96. His forward foot slipped and he fell backwards, hitting the left corner of the basket, and causing him to fall through the three-foot gap on to the concrete pad below. *Id.* Davis suffered serious injuries as a result of the accident and had to have one of his legs amputated. *Id.* at 99.

Following the accident, MSHA Inspector Richard Laufenberg inspected the Plant. He issued Citation No. 7923622 to Watkins, alleging that the unguarded openings constituted a fall hazard, and that the violation was S&S and caused by unwarrantable failure. *Id.* at 89, 92. He issued Order No. 7923625 to Watkins, alleging a failure "to ensure that a safe means of access [to the breezeway] was provided and being used," and that the violation was S&S and unwarrantable. *Id.* at 93-94. Finally, the inspector issued Citation No. 7923626 to Watkins, alleging that Davis' safety line was not tied off when he transferred from the basket to the breezeway, and that the violation was S&S and due to moderate negligence. *Id.* at 100.

³ Davis testified that a Mountain States employee operated the man-lift most of the time and that Boyette operated it at other times. 23 FMSHRC at 95.

⁴ There were four insulation panels, each of which were about 22 inches wide, 48 inches high, 4 inches thick, and weighed between 19 and 20 pounds. 23 FMSHRC at 95.

⁵ The basket contained a top and a middle rail. 23 FMSHRC at 95. Mountain States and Watkins had agreed that the proper way to enter and exit the basket would be to lift the middle rail and crawl under the top rail. *Id.*

Watkins contested the citations and order and also asserted that MSHA lacked the jurisdiction to inspect the Plant. It further contended that the authority granted to the Secretary to construe the term “milling” in section 3(h)(1) of the Mine Act was an unconstitutional delegation of legislative power.

The judge rejected the operator’s challenges. He determined that the Plant was within the jurisdiction of the Mine Act and that the authority granted to the Secretary was not an unconstitutional delegation of authority. *Id.* at 86-89. The judge affirmed the citations and order issued to Watkins and their S&S designations. *Id.* at 91-92, 98-99, 101-02. He also affirmed the unwarrantable designations for Citation No. 7923622 and Order No. 7923625, but determined that the violation in Citation No. 7923626 was not due to the operator’s negligence. *Id.* at 93, 100-01. The judge assessed a penalty of \$2000 for Citation No. 7923622 as proposed by the Secretary. *Id.* at 89, 93. However, he reduced the Secretary’s proposed penalties for Order No. 7923625 from \$50,000 to \$40,000, and for Citation No. 7923626 from \$35,000 to \$500. *Id.* at 94, 100, 102.

The Commission granted Watkins’ petition for discretionary review challenging the judge’s jurisdictional and constitutional determinations, his three violation determinations, and his two unwarrantable failure determinations.⁶

II.

Disposition

A. Whether the Plant is Within MSHA’s Jurisdiction Because it Engages in “Milling”

Section 4 of the Mine Act provides, in part, that “[e]ach coal or other mine, the products of which enter commerce, . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Section 3(h)(1) of the Act defines a “coal or other mine” to include “facilities . . . used in . . . the milling of . . . minerals.” 30 U.S.C. § 802(h)(1). Section 3(h)(1) further provides that, in determining “what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.” *Id.* The term “milling” is not defined in the Act.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord*

⁶ Watkins did not contest the judge’s S&S determinations on review. Hence, because we affirm the violations, we also automatically affirm the associated S&S determinations.

Local Union No. 1261, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). However, when a statute is ambiguous or silent on a point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. See *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. See *In re: Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 591 (5th Cir. 2000) ("Congress expressly delegated to the Secretary . . . authority to determine what constitutes mineral milling") (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13.

The Secretary has determined that the term milling can apply to facilities like the cement plant at issue here, which engage in the grinding and crushing of ore, even if the plant does not separate waste from valuable material. Sec'y Br. at 21-24. Consistent with that view and noting the administrative convenience that would be served, the Secretary in 1979 entered into an interagency agreement (the "Agreement") with OSHA, section B(6) of which gave MSHA jurisdiction over "alumina and cement plants." 44 Fed. Reg. 22827, 22827 (Apr. 17, 1979).

Watkins (W. Br. at 11), however, directs our attention to Appendix A of the Agreement, wherein milling is defined as requiring the "separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." 44 Fed. Reg. at 22828. Watkins claims that this section restricts MSHA's jurisdiction to only those facilities which also engage in this separation process. W. Br. at 12-13. We note, however, that section B(6) of the Agreement, does not place any restrictions on the kinds of cement plants that fall within MSHA jurisdiction. 44 Fed. Reg. at 22827.

Moreover, the section upon which Watkins relies is not the only relevant definitional provision. The appendix also refers to a list of "general definitions of milling processes for which MSHA has authority to regulate subject to [Section B(6) of] the Agreement." *Id.* at 22829.

This “general definitions” section defines “milling” in terms of “one or more of” a list of processes. *Id.* The list includes crushing, grinding, pulverizing, sizing, calcining, and kiln treatment, all of which, according to the uncontested testimony of Steven Mossberg, Southdown’s safety and environmental compliance manager at the Plant, occur at the plant at issue here. *Id.*; Tr. 21-29, 31, 38-39, 71, 73-76. We conclude that the Agreement, when read as a whole supports MSHA’s application of the term “milling” to cement plants regardless of whether the facility engages in the separation of waste from valuable material.⁷ *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1548, 1552 (D.C. Cir. 1984) (stating that, although “not dispositive,” the Agreement could assist in resolving the jurisdictional question of whether the Secretary’s application of the term “milling” to a slate gravel processing facility was reasonable).⁸

The Secretary’s interpretation of “milling” is consistent with the general usage of the term within the mining industry and with ordinary usage. Within the industry, milling is defined as: “The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents . . . ,” while mill is defined as a “mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted.” *DMMRT* at 344 (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of “to mill” is “to crush or grind (ore) in a mill,” and the term “a mill” is defined as “a machine for crushing or comminuting some substance.” *Webster’s Third New Int’l Dictionary (Unabridged)* 1434 (1993); *see also Nolichucky Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) (“Commission . . . look[s] to the ordinary meaning of terms not defined by statute”). These definitions are consistent with the Secretary’s interpretation that milling includes processes such as grinding and crushing, but that

⁷ Contrary to Watkins’ assertion (W. Br. at 19-20), the Secretary provided a sufficient explanation for her determination that cement plants fall under MSHA jurisdiction. In section B(6) of the Agreement, the Secretary explained that cement plants are under MSHA jurisdiction for “convenience of administration” considerations. 44 Fed. Reg. at 22827. In section B(5) of the Agreement, she described various factors used to determine whether a facility is under MSHA jurisdiction, including “Congress’ intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.” *Id.*

⁸ Watkins contends that the “convenience of administration” clause in section 3(h)(1) was intended solely to alleviate the potential for overlapping jurisdiction at “one physical establishment,” and does not extend MSHA’s authority to plants where no mineral milling occurs. W. Br. at 13-15; 30 U.S.C. § 802(h)(1). This argument fails for two reasons. First, in *Donovan*, the D.C. Circuit, rejecting a similar argument, held that the “convenience of administration” clause of section 3(h) (on which the Secretary relied in formulating the Agreement) is a broader concept than the need to eliminate overlapping jurisdiction. 734 F.2d at 1553. Second, Watkins’ argument assumes that no milling occurs at the Plant, a premise that we reject. *See infra* at 7-8.

the separation of waste from valuable materials is not an essential component of milling.⁹ Sec’y Br. at 21-23.

Dr. Baki Yarar, Watkins’ expert witness, testified that milling requires a separation of waste from valuable materials, but he admitted that people in the mining industry use other definitions of milling “[a]ll of the time.” Tr. 332, 340, 368-69. The judge correctly concluded that Yarar’s testimony related to a technical definition of milling that is not dispositive of the scope of mineral milling under the Mine Act. 23 FMSHRC at 84. In enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act’s legislative history did it intimate that such separation was critical to the determination that “milling” took place. Moreover, Watkins’ position, that a cement plant is outside of MSHA jurisdiction if it does not separate waste from valuable materials, implies that, for jurisdictional purposes, the Secretary must determine for each cement plant whether at some point in its operations it separates valuable from waste materials. As the judge noted, under Watkins’ interpretation, whether a cement plant comes under MSHA or OSHA jurisdiction could depend on the current purity of the limestone entering the plant, presumably a variable factor at some plants. *Id.* at 86. Hence, administrative convenience is served by including all cement plants under the jurisdiction of MSHA. 30 U.S.C. § 802(h)(1) (stating that the Secretary should take “the convenience of administration” into account when determining what constitutes milling).

Many processes at the Plant are commonly associated with the concept of milling and fall squarely within the Secretary’s interpretation of that term. Mossberg gave uncontested testimony that the processes at the Plant include crushing (Tr. 21-22, 24, 31, 38, 71), grinding (Tr. 23, 25, 28-29, 73-74, 77-78), pulverizing (Tr. 23), sizing (Tr. 73), calcining (Tr. 39, 75), and kiln treatment (Tr. 26-28, 71, 75-76). He also testified that the Plant’s processes include a “raw mill,” also called a “ball mill,”¹⁰ comprising a 25-foot long rotating cylinder in which raw materials are ground and pulverized using steel balls. Tr. 23. He further testified that the Plant uses a 50-foot long “finish mill” in which cement clinker and gypsum are ground using steel balls. Tr. 28-29. He described the operations taking place in the finish mill as “fine milling.” Tr. 38.

The legislative history of the Mine Act also supports the Secretary’s interpretation of “milling.” Congress clearly intended that any jurisdictional doubts be resolved in favor of

⁹ We note that, although the Secretary did not challenge Watkins’ assertion before the judge or on review that waste is not separated from valuable components at the Plant, the judge determined that waste in the form of carbon dioxide is released at the facility when the limestone is heated in a kiln. 23 FMSHRC at 82. The record reveals that “out of every hundred tons of limestone that [enters the Plant, only] 60 tons . . . ends up in the cement,” because of the release of carbon dioxide from the limestone during heating in the kiln. Tr. 39-40.

¹⁰ The *DMMRT* definition of “mill” expressly encompasses separate components such as a ball mill. *DMMRT* at 344.

coverage by the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) (“*Legis. Hist.*”) (“[I]t is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.”).

In addition, the Secretary has enforced her interpretation consistently. All cement plants in the nation, including the plant at issue here, have been inspected by MSHA since the agency’s creation in 1978. 23 FMSHRC at 82, 87-88. Until the subject litigation, MSHA’s jurisdiction over the Plant has never been challenged. *Id.* at 88. Even the present jurisdictional challenge is not being raised by Southdown, the owner and operator of the Plant, but by Watkins, a contractor working at the facility. *Id.* at 81.

We find further support for the Secretary’s interpretation in relevant precedent. In *Kaiser*, the operator of the alumina plant claimed that its plant was not within MSHA’s jurisdiction because of operational differences between its plant and other alumina plants. 214 F.3d at 590-91. The operator maintained that the processes at its plant were predominantly chemical, while “milling” under the Mine Act refers to mechanical processes involving primarily crushing and grinding. *Id.* at 591-92, *quoting* *DMMRT* at 344. The court determined, in light of the explicit delegation of authority granted to the Secretary in section 3(h)(1) to define milling, that the Secretary’s definition of milling was reasonable. *Id.* at 592-93. The court reasoned, in part, that the Mine Act does not exclude chemical processes, and that the Secretary’s interpretation was supported by definitions in the *DMMRT* and the Agreement. *Id.* at 592.

Thus, the Secretary’s application of the term “milling” to cement plants is consistent with both ordinary usage, as well as the general usage of the term within the mining industry. It is also consistent with the legislative history of the Mine Act, the Secretary’s past enforcement, relevant precedent, and the Agreement. Accordingly, we conclude that the Secretary’s interpretation is reasonable and entitled to deference.

For the foregoing reasons, we affirm the judge’s determination that the Plant is a mill within MSHA’s jurisdiction.

B. Whether Delegation was Constitutional

We reject Watkins’ assertion that Congress’ grant of authority to the Secretary in section 3(h)(1) to construe milling was an unconstitutional delegation of legislative power. W. Br. at 22-26. The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const., Art. I, § 1. From this language, the Supreme Court has derived the “nondelegation doctrine,” which provides that “Congress may not constitutionally delegate its legislative power to another branch of Government.” *Touby v. United States*, 500 U.S. 160, 165 (1991). In applying the nondelegation doctrine, however, the Supreme Court has also recognized that, “[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated

authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (internal quotation marks and citation omitted). Expanding on this principle, the Supreme Court recently stated that it “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474-75 (2001) (internal quotation marks and citation omitted) (holding that Clean Air Act provision requiring EPA to set air standards at levels “requisite to protect the public health” was not an unconstitutional delegation of legislative power).

Moreover, in the instant case we believe that the Mine Act places sufficient constraints on the Secretary’s authority to define the term “milling” so as to prevent an unconstitutional delegation of legislative power. First, in defining the term “milling,” section 3(h)(1) requires the Secretary to take into consideration “the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.” 30 U.S.C. § 802(h)(1). Second, section 3(h)(1) expressly restricts the Secretary’s interpretation of the term “milling” to the milling of minerals extracted from their natural deposits. Third, the legislative history of the Mine Act indicates that the Secretary must follow the principle that jurisdictional doubts be decided in favor of Mine Act coverage. S. Rep. No. 95-181, at 14 (1977), *reprinted in Legis. Hist.* at 602; *see Mistretta*, 488 U.S. at 376 n.10 (“legislative history provides additional guidance” for agency to determine limits of its delegated power). For the foregoing reasons, we affirm the judge’s determination that Congress’ grant of authority to the Secretary to construe the word “milling” was not an unconstitutional delegation of legislative power.

C. Violations and Unwarrantable Failure

1. Citation No. 7923622

Watkins asserts that the judge erred in determining that it violated section 56.11012,¹¹ and that the violation was unwarrantable. W. Br. at 26. It maintains that, at the time of the accident, the breezeway was not a travelway within the meaning of the standard. *Id.* at 27-28. Watkins contends that the judge erred in his unwarrantability determination because the alleged violation was not obvious and only lasted for two days prior to the accident. *Id.* at 29. The Secretary responds that the judge properly determined that Watkins violated section 56.11012 and that the violation was due to unwarrantable failure. Sec’y Br. at 29-30, 32-33.

¹¹ 30 C.F.R. § 56.11012 provides, in pertinent part, that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.”

Substantial evidence¹² supports the judge's determination that the breezeway was a travelway under section 56.11012. The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. The record indicates that the breezeway was the designated way for accessing the bag house area because Watkins instructed employees to use it and, significantly, it was the only available route. Tr. 95, 194, 197-98. Employees regularly used the breezeway several times a day for several days prior to the accident. 23 FMSHRC at 90-91; Tr. 100, 195-97. We reject Watkins' additional argument (W. Br. at 27-28) that the breezeway was not a travelway because the permanent travelway had not yet been constructed. As the Secretary correctly noted (Sec'y Br. at 30-31), the fact that the permanent travelway was not yet available supports the proposition that the breezeway was being used as a travelway.¹³

In addition, substantial evidence supports the judge's conclusion that the openings were unguarded and created a fall hazard. 23 FMSHRC at 89-91. It is undisputed that the openings adjacent to the breezeway were not protected by railings, barriers, or other guards and that each opening led immediately to a 70-foot drop. *Id.* at 89; Tr. 193. Employees also passed through and near to the unguarded openings several times a day for several days prior to the accident. 23 FMSHRC at 92; Tr. 100, 195, 197. The inspector testified that there were tripping hazards on the breezeway and that its surface could be slippery due to snow or rainfall. Tr. 195. Accordingly, we affirm the judge's determination that Watkins violated section 56.11012.

Substantial evidence also supports the judge's unwarrantable failure determination. 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. The Commission has recognized that 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.

¹² When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹³ We are not persuaded by Watkins' assertion that, even if the breezeway were a travelway, the railings or barriers were not required because the standard calls for railings that are parallel rather than perpendicular to the travelway. W. Br. at 28. The standard sets forth no such limitations. *See* 30 C.F.R. § 56.11012.

2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *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.

Substantial evidence supports the judge's finding that the violation was obvious. 23 FMSHRC at 93. The inspector testified that the cited condition was obvious because a number of employees accessed the bag house several times through the unguarded openings. Tr. 196. His testimony was corroborated by Davis who testified that he used the unguarded openings at least eight times a day. Tr. 100.

Because the openings were unguarded and led immediately to a 70-foot drop, the record also supports the proposition that the openings posed a high degree of danger. We find unconvincing Watkins' argument (W. Br. at 29) that the unguarded openings posed minimal danger because, when positioned properly with its long side next to the bag house, the man-lift basket completely covered the opening. As we have already stated, often the short end of the basket was placed against the opening and it is undisputed that the short end was narrower than the opening and left unprotected gaps there. Tr. 52, 108, 141, 263, 300. The judge credited the inspector's testimony that Boyette and Donald Busbee, both hourly employees of Watkins, told him that the short end of the basket was regularly placed next to the openings when employees were accessing the breezeway. 23 FMSHRC at 98; Tr. 176, 179, 182. We do not find the lack of evidentiary support that would form a basis for overturning the judge's credibility determination. *Cf. Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (providing that the Commission will not affirm credibility determinations if there is no evidence or dubious evidence to support them). Furthermore, the practice of placing the short end of the basket next to the opening was corroborated by Davis. 23 FMSHRC at 98; Tr. 101-03. Robert Bartholomew, Watkins' construction superintendent, also testified that the short end of the man-lift basket was against the opening when he arrived at the accident scene soon after the accident. 23 FMSHRC at 98; Tr. at 232-33, 245, 290.

As to the duration of the violation, we reject Watkins' argument that the judge erred in concluding that the violation was unwarrantable because the cited condition only lasted for two days prior to the accident. In light of the degree of danger and obviousness of the violation, a duration of two days demonstrates aggravated conduct. *Cf. Midwest Material*, 19 FMSHRC at 32, 36 (finding unwarrantable failure for extremely unsafe violation that lasted only minutes). Further, the operator had knowledge of the existence of the violation, because on the day of the accident but prior to its occurrence, Bartholomew passed through the unguarded opening en route to inspect the bag house worksite. Tr. 274, 285; *see Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator was aware of brake malfunction but failed to remedy problem). Accordingly, given the obviousness,

danger, duration of the violation, and the operator's knowledge of the violation, we affirm the judge's unwarrantable failure determination.

2. Order No. 7923625

Watkins asserts that the judge erred in determining that it violated section 56.11001,¹⁴ and that the violation was unwarrantable. W. Br. at 30. It contends that it provided safe access to the breezeway because it provided the man-lift and a safe procedure for using it, and it maintains that it was unaware that employees were accessing the breezeway using the short end of the man-lift basket. *Id.* at 30-32. Watkins asserts that the alleged violation was not unwarrantable because the man-lift was only used for two days before the accident to access the breezeway and because Davis knew the correct method for accessing the breezeway from the man-lift. *Id.* at 33. The Secretary responds that the judge's determinations were correct. Sec'y Br. at 31-32.

The Commission has held that section 56.11001 comprises the dual requirements of providing and maintaining safe access to working places. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001). In *Lopke*, we explained that the term "maintained" in the standard "incorporates an on-going responsibility on the part of the operator to ensure that [the] 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." *Id.*

Even if Watkins initially provided a safe means of accessing the breezeway, substantial evidence supports the judge's determination that Watkins violated the standard by failing to maintain safe access. As discussed above, we accept the inspector's credited testimony that the short end of the basket was regularly placed against the unguarded opening and that employees had to climb over the top rail on the short end to enter the breezeway. 23 FMSHRC at 98; Tr. 179, 182. Davis also testified that the short end of the basket was regularly used to access the opening. 23 FMSHRC at 98; Tr. 103. He testified that, although he knew how the basket should have been positioned with respect to the breezeway opening, no one instructed him on how to get in and out of the basket. Tr. 139-41, 145-46. In addition, Watkins does not contest that Boyette, who operated the man-lift at the time of the accident, had not been instructed on how to operate the man-lift to provide safe access to the breezeway. 23 FMSHRC at 95, 98; Ex. P-8 at 4-5. The inspector also gave uncontested testimony that Watkins' general foreman, Jeffery Bochette, stated that he never discussed with his employees the proper procedure for accessing the breezeway via the man-lift. 23 FMSHRC at 94-95; Tr. 185.

We are also not persuaded by Watkins' argument that, because management did not know that employees were using the short end of the man-lift basket, the judge erred in determining that it violated section 56.11001. W. Br. at 30-31. Watkins' alleged lack of knowledge is no defense against the judge's violation determination because "[t]he Mine Act is a strict liability

¹⁴ 30 C.F.R. § 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places."

statute and an operator may be held liable for violations without regard to fault.” *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (Jan. 1994). Watkins’ assertion that it did not know that employees were regularly using the short end of the basket actually supports the judge’s finding that Watkins failed to adequately maintain safe access because it shows that Watkins took inadequate steps to determine whether the procedure for safe access was implemented. 23 FMSHRC at 99; *see Lopke*, 23 FMSHRC at 708 (holding that section 56.11001 incorporates ongoing responsibility to ensure safe access is maintained). Thus, we affirm the judge’s determination that Watkins violated section 56.11001.

The judge’s unwarrantable failure determination is also supported by substantial evidence. Watkins failed to instruct employees such as Davis and Boyette on the safe procedure for accessing the breezeway and failed to follow up to ensure that employees were accessing the breezeway in a safe manner. 23 FMSHRC at 100; Tr. 145-46, 185; Ex. P-8 at 4-5. As to the extent of the violation, the inspector’s credited testimony and Davis’ collaborating testimony support the judge’s finding that employees frequently accessed the breezeway using the unsafe short end of the basket. 23 FMSHRC at 98; Tr. 100, 179, 182, 196. Furthermore, the violation posed a high degree of danger, given the 70-foot fall hazard (Tr. 189), such that Watkins should have had a heightened sense of awareness that precautions were called for when accessing the breezeway. The violation was also obvious because employees regularly accessed the breezeway using the short end of the basket, and this position of the basket against the opening would have been clearly visible. Tr. 100, 196. Given the danger and obviousness of the violation, the two day duration of the violation demonstrates aggravated conduct. Accordingly, we affirm the judge’s unwarrantable failure determination.

3. Citation No. 7923626

Watkins disputes the judge’s determination that it violated section 56.15005.¹⁵ W. Br. at 33-35. It asserts that the plain language of the standard requires employees to wear safety belts and lines, but does not require that such belts and lines be used or “tied off.” *Id.* at 33-34. Watkins argues that it complied with the standard because Davis was wearing a safety belt and line at the time of the accident. *Id.* The Secretary responds that the judge properly concluded that Watkins violated section 56.15005. Sec’y Br. at 34. She contends that the standard requires safety lines to be tied off and that this interpretation is supported by Commission case law and by the language and purpose of the standard. *Id.* at 34-35.

The purpose of the Part 56 regulations is “the protection of life, the promotion of health and safety, and the prevention of accidents.” 30 C.F.R. § 56.1. Consistent with that purpose, the Commission has interpreted section 56.15005 to require that safety lines not only be worn but be worn in a safe and proper manner in the vicinity of a fall hazard. *Mar-Land Indus. Contractor*,

¹⁵ 30 C.F.R. § 56.15005 provides that “[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.”

Inc., 14 FMSHRC 754, 757 (May 1992). Similarly, the Commission has previously recognized with respect to 30 C.F.R. § 57.15-5 (1979), a regulation with wording almost identical to section 56.15005, that “[a]lthough a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the [safety enhancing] purposes of the Part 57 regulations and this standard in particular.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). In *Kerr-McGee*, the Commission affirmed the judge’s determination that the operator violated section 57.15-5 when a miner, wearing a safety belt and line, suffered a fatal fall because his safety line was not properly used. *Id.* at 2497-2500; *see also Austin Power, Inc.*, 9 FMSHRC 2015, 2019-21 (Dec. 1987), *aff’d* 861 F.2d 99 (5th Cir. 1988) (affirming violation of a similarly worded regulation where three miners wearing safety belts and lines did not use their safety lines in the presence of a fall hazard).

Moreover, an interpretation of section 56.15005 requiring that a safety belt or line be used, in addition to being worn, in the presence of a fall hazard is consistent with a harmonious reading of all portions of the standard. *See Morton Int’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (holding that regulations should be read as a whole). The second part of section 56.15005 requires that “a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.” As the Secretary notes (Sec’y Br. at 34-35), it does not make sense to require an operator to assign a second person to tend the safety line if, as Watkins asserts, the employee wearing the safety line does not have to use it.

We conclude that substantial evidence supports the judge’s determination that Watkins violated the standard. Watkins does not dispute (W. Br. at 7-8) that, although Davis was wearing a safety belt and line immediately prior to the accident, he did not tie off his safety line before moving from the man-lift to the opening. Tr. 111. As discussed, the judge’s determination that the openings adjacent to the breezeway created a fall hazard finds substantial evidentiary support in the record. 23 FMSHRC at 101; Tr. 189, 193, 195. Accordingly, we affirm the judge’s determination that Watkins violated section 56.15005.

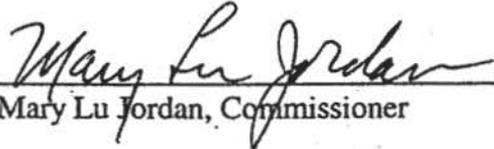
III.

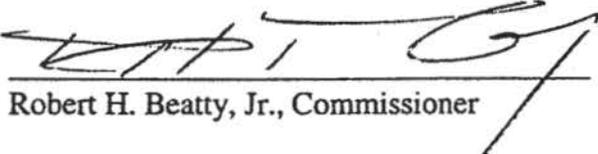
Conclusion

For the foregoing reasons, we affirm the judge’s determinations that the Plant falls within MSHA jurisdiction and that the authority granted to the Secretary by section 3(h)(1) to define “milling” is not an unconstitutional delegation of legislative power. We also affirm the judge’s

determinations that Watkins committed S&S violations of sections 56.11001, 56.11012, and 56.15005, and that the violations of sections 56.11001 and 56.11012 were due to Watkins' unwarrantable failure to comply with the standards.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

Distribution

Carl B. Carruth, Esq.
Jason M. Bradley, Esq.
The McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211

Jack Powasnik, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Administrative Law Judge Richard Manning
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1244 Speer Blvd., Suite 280
Denver, CO 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 2002

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

v.

HIGHLANDS MINING & PROCESSING
COMPANY, INC.

Docket No. KENT 2002-110

A.C. No. 15-16011-03527

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Pursuant to a timely request for hearing filed by Highlands Mining & Processing Company, Inc. ("Highlands"), on February 11, 2002, the Secretary of Labor filed a petition for assessment of civil penalty against Highlands for alleged violations of the Mine Act. On April 10, 2002, Chief Administrative Law Judge David F. Barbour issued an order to Highlands directing the company to file an answer within 30 days or show good cause for failing to do so. On June 3, 2002, noting that Highlands failed to comply with his April 10 order, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering Highlands to pay civil penalties in the sum of \$1,871.

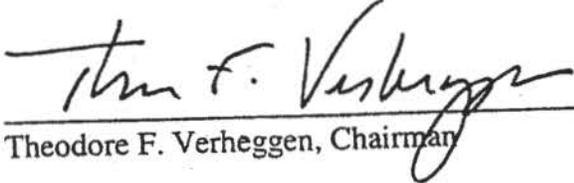
On July 8, 2002, the Commission received a request from Highlands to reopen the penalty assessment. In its request, Highlands, apparently proceeding pro se, requests relief from Judge Barbour's order, but offers no explanation for its failure to answer the Secretary's petition. Mot. Instead, Highlands asserts that its "financial condition does not permit [it] to pay the amount of the penalty at this time." *Id.*

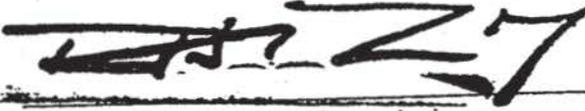
The judge's jurisdiction over this case terminated when he issued his order of default on June 3, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(I); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's

issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission has not directed review of the judge's order here, which became a final decision of the Commission on July 15, 2002.

Relief from a final Commission judgment or order is available to a party under Rule 60(b)(1) of the Federal Rules of Civil Procedure in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); see 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). The Commission has also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Here, Highlands has provided no explanation for its failure to answer the Secretary's petition for assessment of penalty. On the basis of the present record, we are thus unable to evaluate the merits of Highlands' position. In the interest of justice, we remand the matter for assignment to the Chief Administrative Law Judge to determine whether Highlands has met the criteria for relief under Rule 60(b). See *Aurora Materials, Ltd.*, 24 FMSHRC ___, slip op. at 1-2, No. CENT 2002-223-M (July 10, 2002) (remanding to judge where operator offered no explanation for failure to timely file request for hearing); *Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (same); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

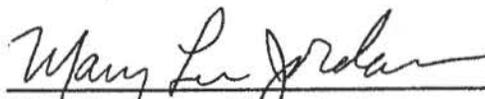

Theodore F. Verheggen, Chairman


Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would deny the operator's request for relief from the Commission's final order. Although under Fed. R. Civ. P. 60(b)(1) we may grant relief from a final order upon a sufficient showing of mistake, inadvertence, or excusable neglect, *F.W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995), Highlands has offered no explanation for its failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. This case is thus almost identical to *Cusic Trucking, Inc.*, 21 FMSHRC 701 (July 1999), in which the Commission denied the operator's request for relief from the final Commission decision because it had offered no reason for its failure to respond to the petition for penalty assessment or to the judge's show cause order. *Id.* at 702-03. We noted in *Cusic* that, as in the instant case, "the judge's show cause order . . . unambiguously and in plain language ordered [the operator] to 'send an Answer . . . within 30 days or show good reason for [failing] to do so.'" *Id.* at 702 n.1 (citation omitted).

Given the complete lack of any explanation as to why this instruction was entirely disregarded, I would deny the request for relief, and thus respectfully dissent.



Mary Lu Jordan, Commissioner

Distribution

Charles Robert Stump, President
Highlands Mining & Processing Co., Inc.
P.O. Box 280
Whitesburg, KY 41858

Tommy D. Frizzell
Conference & Litigation Representative
U.S. Department of Labor, MSHA
H.C. 66, Box 1762
Barbourville, KY 40906

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

measured 10,000 feet long by 1000 feet wide in the Baker Mine. *Id.* Mining began with the development of entries around a panel using continuous miners, including a set of three entries that ran the length of each side of the panel, three intake entries on the right and three tailgate entries on the left. *Id.* As longwall mining progressed, continuous miners developed the intake entries for the next adjacent panel. *Id.* When the longwall had extracted the first panel, its intake entries became the tailgate entries of the next panel. *Id.*

Of the three intake entries involved in this proceeding, the No. 3 entry, which was closest to the panel, served as a belt line entry and an alternate escapeway. *Id.* The No. 2 entry served as the primary escapeway. *Id.* Together, the No. 1 and 2 entries carried intake air to the face where it mixed with air coming across the face and eventually exited the mine. *Id.* The No. 1 entry was a source of intake air for worked-out areas inby crosscut 74. Tr. 24-25.

On October 26, 1999, MSHA ventilation specialist Robert Sims assisted in a quarterly triple A inspection at the mine. 23 FMSHRC at 230. At that time, Lodestar was mining a longwall panel designated "K" in the 11th East Gates section of the mine. *Id.* Intake air entered the No. 1 and No. 2 entries from a common source at crosscut 10. *Id.* At that point, a portable metal stopping, called a "Kennedy Stopping," partially blocked the No. 1 entry. *Id.* A portion of the airflow continued down the No. 1 entry, but the larger portion of air was directed into the No. 2 entry. *Id.* From crosscut 10 to crosscut 73, a distance of about 6615 feet, the No. 1 and 2 entries were separated by coal pillars and permanent stoppings. *Id.* Inspector Sims determined that the No. 2 entry had been examined for hazardous conditions at least every seven days. *Id.* However, Lodestar had not conducted weekly inspections of the No. 1 entry. *Id.* The potential hazards that a physical examination could disclose included methane accumulations and potential and actual roof falls. *Id.* at 231-32.

Sims issued a citation that charged Lodestar with violating 30 C.F.R. § 75.364(b)(1). *Id.* at 230. The citation stated:

The # 1 entry (intake) of the 11th East Gates was not being examined from crosscut 10 to crosscut 73 at the Baker Mine. At least every 7 days, an examination for hazardous conditions shall be made in at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

Jt. Ex. 4. Section 75.364(b)(1) provides:

(b) *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b)(1). The ventilation regulations define “air course” as follows:

Air course. An entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage.

30 C.F.R. § 75.301. Although MSHA had performed prior quarterly inspections, it had not cited Lodestar for failing to examine the No. 1 entry. 23 FMSHRC at 230; Tr. at 88-90.

Lodestar contested the Secretary’s proposed penalty assessment, and a hearing was held. Before the judge, Lodestar argued that the No. 1 and 2 entries constituted a set of entries and that, by inspecting the No. 2 entry, it was complying with the regulation. 23 FMSHRC at 231. The judge noted that the feature that distinguishes one entry (or set of entries) from another was that the only mixing of air currents was by leakage, not by design. *Id.* The judge found that the two entries were separated by stoppings and solid blocks of coal for over a mile and there was no mixing of air except by leakage. *Id.* The judge rejected Lodestar’s argument that, because common air entered the two entries at crosscut 10 and became common air again at crosscut 73, the entries were part of the same air course. *Id.* While the judge acknowledged the MSHA inspector’s testimony that only two blocked crosscuts would not create a separate air course, he concluded that the operator had created separate air courses when it blocked 63 crosscuts. *Id.* Finally, the judge noted the inspector’s testimony concerning the hazards that could occur in the No. 1 entry that an examination might detect, including methane accumulation and potential and actual roof falls. *Id.* at 231-32. The judge concluded that Lodestar violated the regulation by not examining the No. 1 entry. *Id.* at 232. In light of MSHA’s failure to cite Lodestar for failing to examine the No. 1 entry during prior and subsequent inspections, the judge considered Lodestar’s negligence as low, and he assessed a civil penalty of \$45. *Id.*

II.

Disposition

Lodestar argues that the judge’s conclusion that the No.1 and 2 entries are separate air courses is legally erroneous. L. Br. at 5-6. Lodestar relies on the Commission’s decision in *Mettiki Coal Corp.*, 10 FMSHRC 1125 (Sept. 1988), in which two entries that were separated for a distance of 2000 feet were found to be a single air course. Lodestar asserts that in this proceeding the distance between crosscuts is no more a factor under the regulatory definition than it was in *Mettiki*. L. Br. at 6-7. Lodestar further argues that section 75.301 is too vague because it does not specifically state the distance by which entries must be separated. *Id.* at 7. Lodestar maintains that the airflow between the No. 1 and 2 entries was not limited to leakage and, therefore, they were not separate air courses within the plain language of the regulation. *Id.* Finally, Lodestar asserts that it was not previously cited over the last 17 quarterly inspections, demonstrating that a reasonably prudent person familiar with the mining industry and the

protective purposes of the standard would not have recognized the Secretary's proposed interpretation of section 75.301. L. Reply Br. at 1-2.

The Secretary argues that substantial evidence supports the judge's finding that the No. 1 entry is a separate air course within the meaning of section 75.301. S. Br. at 6. In support, the Secretary states that it is undisputed that the No. 1 and 2 entries were separated by permanent ventilation controls and solid coal for a distance of 1.25 miles, and one would have to conduct a separate examination to detect hazardous conditions that could occur in each. *Id.* at 7. The Secretary distinguishes the *Mettiki* decision on the grounds that, after the decision, she promulgated a detailed definition of "air course" on which she relied in this proceeding. *Id.* at 7-8. The Secretary continues that the preamble to the final rule specifically stated that two air courses were not considered to be the same if separated for more than 600 feet. *Id.* at 8. Finally, the Secretary counters Lodestar's notice argument, asserting that a reasonably prudent person familiar with the mining industry would recognize that the No. 1 and 2 entries were "separated" within the meaning of section 75.301. *Id.* at 8-11 & n.6.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable). Additionally, "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Section 75.364(b)(1) provides: "At least every 7 days, an examination for hazardous conditions shall be made . . . [i]n at least one entry of each intake air course, in its entirety . . ." 30 C.F.R. § 75.364(b)(1). Section 75.301 further defines "air course" as "[a]n entry or a set of entries separated from other entries by stoppings, . . . or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." 30 C.F.R. § 75.301. The No. 1 and 2 entries at issue here have a common source of air below crosscut 10, are separated by

stoppings between crosscuts 10 and 73, and mix into a single air course again above crosscut 73 before exiting the mine. The plain language of the regulations does not address the fact situation here — whether entries with a common entry and exit can be separate air courses. Accordingly, the regulation is ambiguous, and we must ascertain whether the Secretary's interpretation is reasonable.

In analyzing the reasonableness of the Secretary's interpretation, we begin with an analysis of the statutory provision that is the basis for the regulation. The Federal Coal Mine Health and Safety Act of 1969 ("Coal Act") contained a predecessor provision at section 303(f), 30 U.S.C. § 863(f) (1976), which required weekly inspections of air courses. The purpose behind the provision was to "require[] a weekly examination of areas not normally examined during the regular preshift and onshift examinations" in order to discover and correct conditions posing a hazard to miners. H.R. Rep. No. 91-563, at 44 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1074 (1975). Section 303(f) of the Coal Act was adopted in the Mine Act without change. That section requires weekly examinations for hazardous conditions in "at least one entry of each intake and return aircourse in its entirety." 30 U.S.C. § 863(f) (1994). The Secretary's regulation requiring weekly examination of air courses tracked the statutory language. *See* 30 C.F.R. § 75.305 (1991).

In 1992, the Secretary issued revised standards governing underground coal mine ventilation. 57 Fed. Reg. 20868 (1992). The substance of the weekly inspection requirement was largely unchanged (although renumbered). *See id.* at 20897-98 ("Paragraph (b)(1) requires at least one entry of each intake air course to be examined weekly."). In the final rules, the Secretary rejected a proposed rule that would have allowed, in certain circumstances, the use of an atmospheric monitoring system ("AMS") in lieu of a weekly physical examination in return air courses, because the AMS would not disclose all hazardous conditions which might be discovered during a physical examination. *Id.* at 20869. Most significantly, the Secretary added to the rules the definition of "air course," which is at issue in this proceeding. *Id.* at 20870.

The Secretary's interpretation that the No. 1 and 2 entries must be separately examined for hazards is "logically consistent with the language of the regulations and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d at 1327. As the judge correctly surmised, Lodestar's assertion that, because the entries have a common entry and exit, they should be treated as one air course, taken to its logical conclusion, could lead to the absurd result that only one entry in an entire mine would need to be examined. 23 FMSHRC at 231. Hence, the Secretary's interpretation also furthers the safety purposes of the Mine Act that the weekly examination requirement was drafted to ensure. In light of the foregoing, we conclude that the Secretary's interpretation is reasonable, and we agree with the judge that, under the

standards at issue, the No. 1 and 2 entries were separate and each had to be examined for hazardous conditions.²

We find unpersuasive Lodestar's contention that the Commission's 1988 decision in *Mettiki*, 10 FMSHRC 1125, is controlling. Although the Commission held there that the operator did not violate the weekly inspection requirement then in effect, 30 C.F.R. § 75.305 (1986), when it failed to separately inspect entries that were separated by a block of coal that was 300 feet wide and 2000 feet long, the Commission limited its disposition to the record before it, stating: "We are not defining for all purposes the meaning of 'aircourse' as used in section 75.305." *Id.* In addition, the regulatory landscape changed significantly following *Mettiki*. Since the Commission's decision in 1988, the Secretary revised her regulations in 1992 to include a definition of "air course" which is at issue here. Thus, *Mettiki* is no longer applicable to the case at bar.

Finally, Lodestar contends that the regulation is impermissibly vague and affords too much discretion to inspectors. L. Br. at 7; L. Reply Br. at 1-2. In cases involving ambiguous standards, the issue of whether the regulated party has received fair notice of the Secretary's interpretation of the regulation arises. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). Where the imposition of a civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm.*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. See *General Elec. Co. v. EPA*, 53 F.3d at 1333-34.

The appropriate test for notice is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Here, Lodestar specifically contends that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, would not have recognized the specific prohibition or requirement of the standard," because MSHA did not identify the entries as separate air courses during the previous 17 inspections. L. Reply Br. at 1. In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory

² Chairman Verheggen believes that, for the reasons set forth in his dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999) (Comm'r Verheggen, dissenting), the relevant question here is whether "we will accord special weight to the Secretary's view of the [Mine] Act and the standards and regulations [she] adopts under them" (quoting *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979)). Here, Chairman Verheggen would accord special weight to the Secretary's interpretation of the regulations at issue because of her expertise in the examination of ventilation air courses.

history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. See *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); see also *Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

Because here the judge failed to address whether the standards at issue provided Lodestar with adequate notice, a remand is necessary for further analysis and fact finding. See *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). It will be up to the judge to weigh Lodestar's contentions as well as all other record evidence bearing on notice pursuant to Commission precedent.³ See, e.g., 57 Fed. Reg. at 20870 (relevant preamble discussion); Tr. 52-54, 88-90. He shall also consider whether, based on the record as a whole, a reasonably prudent person, familiar with the mining industry and the protective purpose of section 75.364(b)(1), would have recognized that weekly examinations of the No. 1 entry were necessary to discover and remedy potential dangers to miners. See *Ideal Cement*, 12 FMSHRC at 2416.

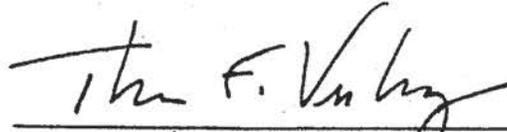
³ One source of notice is the preamble to the revised regulations, but on remand the judge must determine whether it was sufficiently clear to put the regulated community on notice of the Secretary's interpretation. See *Morton*, 18 FMSHRC at 539 (rejecting confused regulatory history and erroneous preamble as adequate notice). The Secretary cites the preamble for the proposition that MSHA "does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet." S. Br at 8 (citing 57 Fed. Reg. at 20870).

At one point the preamble states that MSHA "does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet." 57 Fed. Reg. at 20870. However, the proposed rules had included in the definition of "air course" additional language that stated in pertinent part, "two adjacent entries . . . with an open crosscut or crosscuts between them shall be considered separate air courses if the distance between open crosscuts is greater than 300 feet in seam heights below 48 inches and 600 feet in seam heights of 48 inches or above." 53 Fed. Reg. 2382, 2413 (1988). In the final rule the language was omitted from the definition, MSHA stating that it "has reconsidered this issue and final rule does not include that part of the definition addressing entries which are common at both ends." 57 Fed. Reg. at 20870.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that the Secretary's interpretation of sections 75.364(b)(1) and 75.301 was reasonable and remand to the judge to determine whether Lodestar had sufficient notice of the Secretary's interpretation.



Theodore F. Verheggen, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

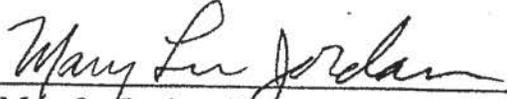
I would affirm the judge based on the plain meaning of the regulation. The standard defines "air course" as "[a]n entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." 30 C.F.R. § 75.301. I conclude that both the No. 1 and the No. 2 entries constitute separate air courses under this definition, and are thus subject to the inspection requirement at issue.

Focusing on the No. 1 and No. 2 entries from crosscut 10 to crosscut 73 (a distance of about 6615 feet), 23 FMSHRC 229, 230 (Feb. 2001) (ALJ), it is undisputed that between these two crosscuts the entries were separated by coal pillars and permanent stoppings. *Id.* at 231. For over a mile, therefore, the only mixing of air between the two entries was due to leakage, not design. I recognize that the air ventilating the No. 1 entry is air that has been split off at crosscut 10 from a larger current of air, and that at crosscut 73 this No. 1 split of air once again becomes part of a larger air current. In between these two crosscuts, however, the air flow in the No. 1 entry does not mix with other air currents. Consequently, between those crosscuts, the No. 1 entry constituted a separate air course. The fact that the air current used to ventilate the No. 1 entry was initially split off from, and subsequently joined up with a larger air current, does not preclude application of 30 C.F.R. § 75.301 to this split of air. If that were the case, then arguably, as the judge pointed out, no entry in the mine would be considered a separate air course.

Like my colleagues, I find Lodestar's reliance on *Mettiki Coal Corp.*, 10 FMSHRC 1125 (Sept. 1988), unpersuasive. Slip op. at 6. Although the Commission in *Mettiki* described the regulation as ambiguous, that case preceded the 1992 regulatory revision which supplied a definition of air course. *Id.*

Finally, because I find the language of the regulation plain, I would conclude that the operator had adequate notice of its provisions. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that adequate notice provided by unambiguous regulation).

For the foregoing reasons, I would affirm the judge's decision, and therefore respectfully dissent.


Mary Lu Jordan, Commissioner

Distribution

Richard M. Joiner, Esq.
Mitchell, Joiner & Hardesty, PSC
113 E. Center Street
P.O. Box 659
Madisonville, KY 42431

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 2002

NATHAN B. HARVEY :
 :
 v. : Docket No. WEVA 2001-38-D
 :
 MINGO LOGAN COAL COMPANY :

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Jordan, Commissioner

This discrimination proceeding arose under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On June 24, 2002, the Commission received from Nathan B. Harvey a request to reopen a decision issued by Administrative Law Judge T. Todd Hodgdon on January 8, 2002. 24 FMSHRC 71 (Jan. 2002) (ALJ). In his decision, Judge Hodgdon dismissed a discrimination complaint brought by Harvey against Mingo Logan Coal Company ("Mingo") because he determined that Harvey had not engaged in protected activity and had been discharged based solely on his poor work attitude. *Id.* at 73-80.

Harvey bases his request on unsworn statements he contends he obtained from eight of his co-workers after the decision was issued¹ and which Harvey alleges are inconsistent with the testimony of the operator's witnesses at hearing. Mot., Attachs. Mingo opposes Harvey's request on the grounds that these statements are not new evidence and could have been obtained with due diligence prior to the hearing. M. Mot. at 4-5.

The judge's jurisdiction in this matter terminated when his decision was issued on January 8, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Harvey's request was received by the

¹ We note that one of these co-workers, Darren Hatfield, testified at the trial.

Commission's Office of Administrative Law Judge's on June 24, 2002, several months past the 30-day deadline. Because the Commission did not direct review of the case sua sponte, the decision became a final decision of the Commission on February 18, 2002.

Relief from a final Commission judgment is available to a party under Rule 60(b) of the Federal Rules of Civil Procedure. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); see 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Grounds for relief from a final judgment under Rule 60(b) include in pertinent part: "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

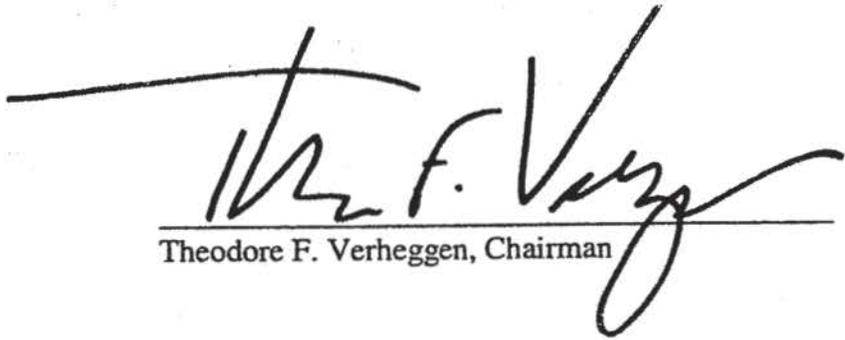
We conclude that Harvey has failed to allege sufficient grounds to reopen the proceedings under Rule 60(b)(2). All of the information contained in the signed statements attached to Harvey's request pertain to whether he had a bad work attitude. None of the information in the statements directly counters the judge's initial finding that Harvey did not engage in protected activity. Thus, the information in the statements would not have changed the judge's determination that no discrimination occurred. 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.42[9] (3d ed. 1997) ("movant must show [for Rule 60(b)(2) relief] that the evidence was 'of such magnitude that the production of it earlier would have been likely to change the disposition of the case.'") (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987)). Moreover, the statements simply raise issues tangential to the operator's affirmative defense, and do not even bring into question most of the evidence on which the judge based his finding that Harvey was fired because of his poor attitude. 24 FMSHRC at 77-80. In sum, even if the statements Harvey submitted were true and served to refute the operator's witnesses on this one discrete point, the judge's finding that Harvey was not discharged for engaging in protected activity would still stand.

Our dissenting colleague would remand this case because he believes the unsworn statements submitted by Harvey may constitute evidence of perjury, warranting the reopening of the proceedings under Rule 60(b)(3). Slip op. at 4-5. The dissent acknowledges, however, that this type of claim merits relief "only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case." *Id.* at 4 (citations omitted). The statements obtained by Harvey contradict company testimony that Harvey's co-employees did not want to work with him. That testimony, however, related only to a tangential point in the operator's evidence regarding Harvey's poor work attitude. Notably, the judge found that, in addition to testimony that miners did not want to work with Harvey, the record was "replete with evidence . . . of Harvey refusing to speak to supervisors, even going so far as not acknowledging receipt of work assignments, of his failing to check back with supervisors to find out his next assignment after completing one, of supervisors having to check up on him to make sure he was doing his job and of his otherwise uncooperative attitude." 24 FMSHRC at 78. Thus, the alleged perjury in no way thwarted Harvey's presentation of his case, nor does it undermine the central underpinnings of the operator's defense. See *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985) (an adverse party's fraud or

subornation of perjury permits relatively free reopening of the judgment when the perjury goes to the heart of the issue).

In *Metlyn*, the Seventh Circuit noted the importance of “protect[ing] the finality of judgments against efforts to turn the vicissitudes of litigation into grounds for more litigation still.” *Id.* The Commission adopted this principle in *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142 (Aug. 1986), cited by our colleague, when it denied a Rule 60(b)(3) motion alleging perjured testimony and other deception during trial as “merely attempts to relitigate evidentiary matters and assertions ruled upon by the judge.” *Id.* at 1143. *See also* 11 Charles Alan Wright et al., *Federal Practice and Procedure*, § 2860 at 314 (2d ed. 1995) (Rule 60(b)(3) motion will be denied if it is merely an attempt to relitigate a case).

Accordingly, Harvey’s request to reopen these proceedings is denied.



Theodore F. Verheggen, Chairman



Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

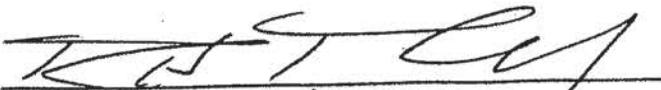
While I agree with my colleagues that Harvey's request to reopen these proceedings fails to allege sufficient grounds to reopen under Rule 60(b)(2), that is not the only provision of Rule 60(b) relevant to Harvey's allegations. Grounds for relief from a final judgment under Rule 60(b) also include "(3) fraud . . ., misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3).

Review of the signed statements accompanying Harvey's request discloses information that contradicts some of the testimony given by the operator's witnesses during the hearing. For example, maintenance foreman Robert Tillery and maintenance superintendent Gary Griffith both testified that electrician Kelly Dingess told them that he did not want to work with Harvey. Tr. Vol. I 297, 345-46. Maintenance foreman John Morgan also testified that Harvey's co-workers Don Tharp, Ronnie Mullins, and Dave VanMeter informed him that they did not want to work with Harvey. Tr. Vol. I 249. The judge relied on this hearsay testimony in determining that Harvey was not discharged for any protected activity. 24 FMSHRC at 78, 80. However, in their signed statements attached to Harvey's request, Dingess, Tharp, Mullins, and VanMeter state that they never made these statements to management. H. Mot., Attachs.

A demonstration of perjured testimony can be grounds for relief under Rule 60(b)(3). See *Harre v. A.H. Robins*, 750 F.2d 1501, 1504-05 (11th Cir. 1985) (holding that perjury can constitute fraud under Rule 60(b)(3)). The Commission has noted that fraudulent conduct under Rule 60(b)(3) must be proven by clear and convincing evidence. *Secretary of Labor on behalf of Pena v. Eisenman Chem. Co.*, 11 FMSHRC 2166, 2167-68 (Nov. 1989) (denying miner's request for relief because it failed to provide "clear and convincing evidence" of fraud or misconduct where miner alleged that operator defrauded him in the settlement of his discrimination suit); *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (Aug. 1986) (finding that miner failed pursuant to Rule 60(b)(3) to provide "clear and convincing evidence" of operator's alleged fraud during hearing). Further, "when the claim of perjury at trial is raised under Rule 60(b)(3), relief is granted only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case." 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.43[1][c] (3d ed. 1997) ("*Moore's*"); see also *Wadding*, 8 FMSHRC at 1143 ("movant under Rule 60(b)(3) must establish that wrongdoing prevented moving party from fully and fairly presenting his case."). Under Rule 60(b)(3), "the moving party does not have to prove that he or she would prevail in a retrial in order to secure relief from judgment on the basis of fraud of an adverse party." *Moore's* at ¶ 60.43[1][d]; see also *Lonsford v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) ("A determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict.").

If the signed statements Harvey has submitted are accurate, they may constitute evidence of perjury which under Rule 60(b)(3) would warrant reopening these proceedings. On the basis of the present record, however, I am unable to evaluate whether the proceedings should be reopened under Rule 60(b)(3). Instead, the judge who presided at the hearing and heard the

witnesses is in the best position to determine whether the proceedings should be reopened. Accordingly, in the interests of justice, I would vacate the judge's decision and remand the matter to him for the limited purpose of reviewing the statements in the context of the testimony previously presented by Mingo Logan's witnesses.¹ After that, the judge would be able to determine whether sufficient grounds exist to fully reopen the proceedings under Rule 60(b)(3).



Robert H. Beatty, Jr., Commissioner

Distribution

¹ The majority correctly points out that the judge found a number of reasons other than the opinions of Harvey's co-workers for his dismissal by the company. Slip op. at 2. What my colleagues fail to acknowledge, however, is that these findings were all predicated on the judge's crediting of the company's witnesses, whose overall veracity may be called into question by the statements of the co-workers. See 24 FMSHRC at 77-80. Given that the judge, and not the Commission, is in the best position to determine witness credibility in light of the statements, remand is called for here. See *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Nathan B. Harvey
P. O. Box 14
Man, WV 25635

Mark E. Heath, Esq.
Heenan, Althen & Roles, LLP
BB & T Square
300 Summers St., Suite 1380
P.O. Box 2549
Charleston, WV 25329

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, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 5, 2002

FREEMAN UNITED COAL COMPANY,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. LAKE 2000-102-R
	:	Citation No. 7584882; 6/22/2000
	:	
	:	Docket No. LAKE 2000-103-R
v.	:	Citation No. 7584883; 6/22/2000
	:	
	:	Docket No. LAKE 2000-104-R
	:	Citation No. 7584884; 6/22/2000
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2000-105-R
MINE SAFETY AND HEALTH	:	Citation No. 7584885; 6/22/2000
ADMINISTRATION, (MSHA),	:	
Respondent	:	Crown II Mine
	:	Mine ID 11-02236

DECISION

Before: Judge Melick

On June 24, 2002, a Commission majority remanded these Contest Proceedings for a civil penalty assessment. However these cases were filed with this Commission pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994), the "Act," to challenge only the validity of the four "Section 104(a)" citations at bar. No civil penalty has been sought in these contest cases and the Secretary of Labor has not, to date, filed any petition or other pleading seeking any civil penalty for the violations charged in these citations. Under the circumstances, this Commission is without jurisdiction in these contest cases to assess a civil penalty.

Accordingly, the Commission majority's decision on June 24, 2002, effectively dismissing these Contest Proceedings, must be considered the final disposition of these proceedings.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Timothy M. Biddle, Esq., Edward Green, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004

Sheila Cronan, Esq., & James Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2002

CANNELTON INDUSTRIES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2002-111-R
	:	Citation No. 7191145; 5/15/2002
v.	:	
	:	Docket No. WEVA 2002-112-R
	:	Citation No. 7191146; 5/15/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Shadrick Mine
ADMINISTRATION (MSHA)	:	Mine ID 46-08159
Respondent	:	

DECISION

Appearances: David J. Hardy, Esq., Heenan, Althen and Roles, LLP, Charleston, West Virginia, for Contestant;
M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest brought by Cannelton Industries, Inc., against the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests Citation Nos. 7191145 and 7191146, which allege violations of the Secretary's mandatory health and safety standards. A hearing was held in Charleston, West Virginia, on June 12, 2002. For the reasons set forth below, I vacate Citation No. 7191145 and affirm Citation No. 7191146.

Background

Cannelton Industries, Inc., operates the Shadrick Mine, an underground coal mine, in Kanawha County, West Virginia.¹ On May 3, 2002, the mine was idled and put into non-producing status because it was unable to sell its coal and its stockpiles were growing too large. All, or most, of the miners were laid off.

¹ The mine is also referred to as the "Stockton" mine in the testimony. (Tr. 34.)

Since the mine is still capable of producing coal, the company plans to reactivate it in the event that coal sales improve. To be able to do this it is necessary to keep the pumps running or the mine will flood. Consequently, beginning on May 6 or 7, the company started having certified personnel, mostly management employees, go into the mine on each shift to check the pumps. For example, on May 15 Jeff Styers, an electrician, was assigned to go underground with Dan Baker, a foreman, to check "permissibility," maintain the pumps and test the circuit breakers on the transformers to make sure that they were properly ground faulted.

On May 15, MSHA Inspector Gilbert L. Young went to the mine to investigate a complaint that the mine was not conducting required weekly examinations. After talking to Styers, Jimmy Nottingham, a company safety engineer, and Baker, and examining the company's preshift and on-shift examination books, Young issued two citations.

The first citation alleges a violation of section 75.360(a)(1) of the Secretary's regulations, 30 C.F.R. § 75.360(a)(1), because: "A pre-shift examination within 3 hours preceding the beginning of an 8 hour intervals [*sic*] was not conducted by a certified person during which a person was schedule [*sic*] to work or travel underground." (Govt. Ex. 1.) The second citation charges a violation of section 76.364(b), 30 C.F.R. § 75.364(b), in that: "An examination every 7 days for hazardous condition [*sic*] has not been conducted since 5-03-2002 as recorded in the approved recorded [*sic*] book, miners have been working during this period of time." (Govt. Ex. 2.)

Cannelton contested the citations and requested an expedited hearing on the matter. Cannelton contends that section 75.360(a)(2), 30 C.F.R. § 75.360(a)(2), the "pumpers exception," is applicable in its case and that the company is complying with it. With regard to the weekly examination, it believes that it does not have to conduct one because its employees are not "working" in the mine, they are "patrolling." On the other hand, it is the Secretary's position that the "pumpers exception" does not apply in this case, or if it does, that the company has not met the conditions for it to be pertinent. The Secretary also contends that Cannelton's employees are "working" in the mine.

Findings of Fact and Conclusions of Law

Citation No. 7191145

Section 75.360(a) requires that:

(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination

has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

(2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions found by the pumper shall be made and retained in accordance with § 75.363.

The operator sends a certified pumper into the mine on all three shifts. According to the company, the pumper's main function is to maintain the pumps so the mine does not flood. MSHA's position is that a preshift examination must be performed before the pumper can go into the mine. Cannelton argues that section 75.360(a)(2) permits the pumper to conduct an examination for hazardous conditions, test for methane and oxygen deficiency and determine if the air is moving in the proper direction as he goes into the mine because that is the area in which he is working or traveling, and no one else is going into the mine. While it is a close question, I find that the "pumpers exception" is applicable to this situation and, thus, the company is not in violation of the regulation.

Section 75.360(a)(2) did not exist until the rule was amended in March 1996. In adopting the change, MSHA stated, in the preamble to the regulation, that: "This standard recognizes that pumpers travel to remote areas of the mine to check on water levels and the status of pumps, making regular preshift examinations impractical." *Section 75.360 Preshift Examination*, 61 Fed. Reg. 9790, 9792 (Mar. 11, 1996). It went on to state:

Under a previous standard replaced in 1992, persons such as pumpers, who were required to enter *idle* or abandoned areas on a regular basis in the performance of their duties, and who were trained and qualified, were authorized to make examinations for methane, oxygen deficiency and other dangerous conditions for themselves. Under the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2).

Id. (emphasis added).

In this case, where the whole mine has been idled, and the pumper is the only one going into the mine, he will be examining the area where he travels and works. As MSHA indicated when the rule was promulgated, in such a situation *either* type of examination is satisfactory. Furthermore, from a practical standpoint, it makes little sense to double the exposure to possible hazards in the mine, by requiring another examiner to preshift those areas where the pumper is going to travel and work. *See Rawl Sales & Processing Co.*, 23 FMSHRC 463, 471 (May 2001) (Commissioner Verheggen, concurring).

Counsel for the Secretary and the inspectors who testified expressed concern that all of the records resulting from a preshift examination, such as the locations of air and methane measurements and the results of methane tests, would not be logged by the pumper. However, MSHA rejected the same concern when it adopted the rule by stating that: "In the case of the pumper-examined area, the records required under paragraph (a)(2) will assure that mine management is made aware of any condition which results in a hazardous condition and will facilitate corrective action being taken." 61 Fed. Reg. at 9792.

In a case such as this, where the mine has been idled and the only person entering the mine is examining the places he travels as he goes in, and the places he works, as he gets to them, it is apparent that the "pumpers exception," as described by MSHA when it enacted the rule, provides the safeguards that a preshift examination would provide.² Accordingly, the citation will be vacated.

Citation No. 7191146

There is no similar exception to the required weekly examination for hazardous conditions. Section 75.364(b) requires that: "At least every 7 days, an examination for hazardous conditions. . . shall be made by a certified person designated by the operator" Nevertheless, the company argues that this examination need not be made based on an excerpt from an MSHA training manual, concerning section 75.364(f), 30 C.F.R. § 75.364(f), which states that, "the entrance of examiners or other certified persons, into the mine for the purpose of examination or patrol does not require a weekly examination." (Cont. Ex. 3.) This document was faxed by Inspector Jerry Richards, to Jack Hatfield, Cannelton's Safety Manager, as a result of questions by mine management concerning what examinations had to be performed at the idled mine. (Tr. 311.) The Respondent reads more into this language than it says.

Section 75.364(f)(1), 30 C.F.R. § 75.364(f)(1), provides that: "The weekly examination is not required during any 7 day period in which no one enters any underground area of the mine." Since someone is entering the mine three times a day during the workweek, this section clearly does not apply in this case. Section 75.364(f)(2), 30 C.F.R. § 75.364(f)(2), states that: "Except for certified persons required to make examinations, no one shall enter any underground area of

² The mine is keeping records of the pumper's examinations as required by section 75.363(b), 30 C.F.R. § 75.363(b). (Tr. 373-74, 437, 38.)

the mine if a weekly examination has not been completed within the previous 7 days." Thus, it is apparent that, if a weekly examination has not been performed, the only person who can go into the mine is the person who is performing the examination. The company does not contend that that is what they are doing.

Instead, the operator claims that they are "patrolling." The term "patrol" does not appear in the regulation. Since it is not in the regulation and is not further defined in the training excerpt, it is not clear exactly what "patrol" was intended to convey. While there are several definitions in the dictionary, the only one that appears pertinent to this situation is to "make routine observations of for purposes of defense or protection." *Webster's Third New International Dictionary* 1656 (1993). Consequently, I find that "patrol" refers to making routine observations of the mine for the purposes of protecting it, in this case, from flooding.

I further find that Cannelton was doing more than making routine observations. It is clear that pumps were being turned on or off, pumps were being moved on occasion and electrical examinations were being performed on the power centers which powered the pumps. While this may not seem to be much, it is significant. Any one of those activities could precipitate a dangerous situation, a spark, a shock or a methane explosion, just to name a few possibilities, for the miner performing them. If the intake and return air courses or the escapeways are not examined for hazardous conditions, and hazardous conditions had developed in them, such as bad air, roof or rib falls, flooding or other blockages, a dangerous situation could turn into a fatal one.

Therefore, I conclude that even though the mine was idled, since the operator had three people going into the mine every day, not just to make an examination or to make routine observations, but to activate and move pumps and to perform electrical tests on power centers, the weekly hazardous condition examination was required to be performed. Since it was not being performed, I conclude that the Respondent was in violation of section 75.364(b).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies*

criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

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

Taking the *Mathies* criteria in order, a violation of a safety standard has been found. On the second issue, Inspector Young testified that failure to conduct the weekly hazardous condition examination could result in the failure to detect dangerous roof conditions, blocked or improperly maintained air courses and escapeways and bad air, among other things. (Tr. 184-87.) Accordingly, I find that the violation created a distinct safety hazard. With regard to the third and fourth requirements, the inspector testified that these hazards were reasonably likely to result in head injuries or broken bones. (Tr. 184.) Clearly, they could also result in death. Therefore, I find that the third and fourth criteria are present.

Finding that all of the *Mathies* criteria have been met, I conclude that the violation is "significant and substantial."

Order

Based on the above, it is **ORDERED** that the contest in Docket No. WEVA 2002-111-R is **GRANTED** and Citation No. 7191145 is **VACATED** and that the contest in Docket No. WEVA 2002-112-R is **DENIED** and Citation No. 7191146 is **AFFIRMED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution: (By Fax and Certified Mail)

David J. Hardy, Esq., Heenan, Althen & Roles, LLP, P.O. Box 2549, Charleston, WV 25349

M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2002

FELIX MAURICE SYKES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. VA 2002-33-D
	:	NORT CD 2002-02
	:	
	:	
HAR-LEE COAL COMPANY,	:	Mine ID 44-06966
Respondent	:	No. 10 Mine

DECISION

Appearances: Felix Maurice Sykes, Clintwood, Virginia, *Pro Se*, for the Complainant;
Louis Dene, Esq., Dene & Dene, Abingdon, Virginia, for the Respondent.

Before: Judge Schroeder

Introduction

This case is before me on the Complaint filed by Mr. Felix Maurice Sykes pursuant to Section 105(c)(3) of the Mine Safety Act. The Complaint alleged discrimination by the Respondent in violation of Section 105(c)(1). All the conditions necessary to file a complaint were satisfied by Mr. Sykes. A hearing was scheduled on July 9, 2002, and notice of the hearing was served on both parties. Verification of receipt of the notice was made by telephone approximately one week prior to the hearing.

On July 9, 2002, at the schedule time and place, the hearing was commenced. Mr. Sykes failed to appear even after waiting a reasonable time to allow for difficulties in transportation. Mr. Sykes has failed to apply for a continuance of the hearing or to provide an explanation for his failure to appear.

At the hearing, Mr. Dene provided an offer of proof as to the testimony which would be provided by his four witnesses if they were required to testify. In the absence of objection to the offer of proof, I accept as true the factual matters that Mr. Dene described.

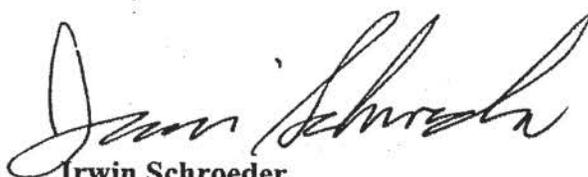
Findings and Conclusions

Complainant was employed by the Respondent as a miner for less than a year. His usual assignment was a roof bolter operator. Mr. Sykes' pay and privileges as a roof bolter operator

have never been reduced by the Respondent. Each time Mr. Sykes has expressed concern about safety, Respondent's mine management has taken reasonable and prompt steps to investigate his concerns and to take appropriate corrective action if necessary. Mr. Sykes' employment was not terminated by Respondent because of expression of safety concerns. Mr. Sykes voluntarily resigned his position with the Respondent after refusing to continue working in the mine. Respondent has not discriminated against Mr. Sykes in violation of Section 105(c)(1) of the Mine Safety Act.

Order

For the foregoing reasons, I find in favor of the Respondent and against the Complainant on the issues in this case. Accordingly, the complaint is **DISMISSED**.



Irwin Schroeder
Administrative Law Judge

Distribution:

Mr. Felix Maurice Sykes, Rt. 1, Box 463, Clintwood, VA 24228 (Certified Mail)

Louis Dene, Esq., Dene & Dene, P.C., Box 1135, 138 Court St., N.E., Abingdon, VA 24210 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 2002

WILLIE RAY SHAFFER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2002-47-DM
v.	:	NC MD 01-10
	:	
GRAY QUARRIES INCORPORATED,	:	
Respondent	:	Gray Quarry
	:	Mine ID 11-00073

DECISION

Appearances: Willie Ray Shaffer, Loraine, Illinois, *pro se*;
Thomas F. Hartzell, Esq., Hartzell, Glidden, Tucker and Hartzell,
Carthage, Illinois, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Willie Ray Shaffer, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the "Act." Mr. Shaffer alleges in his complaint that Gray Quarries Incorporated (Gray Quarries), violated Section 105(c)(1) of the Act when he was discharged on June 7, 2001, shortly after informing the mine superintendent that "the right people would be contacted to correct" certain problems.^{1 2}

¹ Section 105(c)(1) of the Act provides as follows:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of

In his handwritten complaint filed with the Department of Labor's Mine Safety and Health Administration (MSHA) on July 24, 2001, Mr. Shaffer alleged that, after performing hazardous work cleaning the catwalk beneath the scalper screens where 25 to 30-pound boulders were falling, he told mine superintendent Joe Richardson that "I was going to do the job even if it meant endangering my life but the right people would be contacted to correct these problems." More particularly, Mr. Shaffer alleges that at the beginning of his shift on June 7, 2001, he was directed by superintendent Richardson to perform hazardous work cleaning rocks off the catwalk beneath the scalper screen while the plant was in operation. It is undisputed that such work would be hazardous because rocks weighing up to 35 pounds could fall onto miners working on these catwalks. It is also undisputed that a chain customarily barring entry onto the scalper screen catwalk had been removed and that all employees, including Mr. Shaffer, had been warned against working on that catwalk while the plant was in operation.

At hearings, Shaffer testified that he had been working for Gray Quarries for seven years. He worked as a truck driver and performed manual labor at the quarry. On June 7, 2001, he was working the 6 a.m. to 5 p.m. day shift. When he appeared for work that morning expecting to drive "my Euc" he was apparently irritated by the fact that mine superintendent Richardson had given that Euclid truck to one of his relatives to drive. (Tr. 16). He was apparently further irritated when Richardson told him to check the air in the tires of another Euclid truck then at the shop. Shaffer claims that he had been driving that truck the night before and had told Richardson that a bearing on the truck had locked up the wheel. Shaffer believed Richardson sent him to the shop knowing that there was a court order pending to keep he and John Schrecke (the shop mechanic) away from each other. Shaffer appears to suggest that Richardson gave him this assignment, not to perform any necessary work function, but only to further aggravate Shaffer.³

Shaffer testified that he nevertheless went ahead and put air in the tires of the Euclid and determined from Schrecke that a new bearing had to be ordered for the truck so that he would not be able to drive the truck that day. Shaffer claims that he then returned to Richardson for further instructions and that Richardson directed him to clean the catwalk under the scalper screens. He testified that he saw Richardson remove the chain guarding this catwalk before instructing him to clean it. He maintains that while cleaning this catwalk he was nearly struck by three falling rocks.

himself or others of any statutory right afforded by the Act.

² At hearing Shaffer also claimed he suffered adverse action in that he was also denied the right to a hearing test. However this adverse action preceded the protected activity here alleged and the Respondent produced at hearing a written document signed by Shaffer waiving this right (Exh. R-1).

³ The record shows that Schrecke had previously been convicted of criminal assault upon Shaffer and that as a condition of his bond Schrecke was not to have contact with Shaffer.

Shaffer claims that, upon completion of the cleanup work, Richardson told him to clean the other catwalks - - apparently not a hazardous job. Shaffer maintains that later, after the morning break, he assisted foreman Mike McMillan, in removing a bad bearing. Still, later that morning superintendent Richardson appeared. During the ensuing conversation Shaffer claims that he made the following statement to Richardson: "Joe, no matter what you tell me to do, I am going to do it even if it means endangering my life, but as of today, I'm going to talk to the right people." Shaffer later testified that he also stated to Richardson at this meeting as follows:

You got a kid that's been driving for eight weeks, and I've been driving approximately seven years, I should be in the Euc. If you want me to clean the catwalks off, that's fine, I'm going to do it, but I'm going to inform the right people . . . (Tr. 36).

According to Shaffer, Richardson responded by saying he was "tired of this fucking bullshit" and "went flying out of the shop area up the hill" to mine owner Bob Miller's office (Tr. 38). According to Shaffer, Miller came down from his office about 15 minutes later and told him that his services were no longer needed. He was told to go to the scale house and get his time card and paycheck. Shaffer testified that McMillan tried to intervene but Miller told him to "shut up, I've heard one side of the story and I'm not going to hear the other." (Tr. 40).

Gray Quarries foreman, Michael McMillan, testifying on behalf of Shaffer, stated that around 7:30 or 7:45 that morning, Shaffer complained to him that he had been working on the scalper catwalk, that "Joe" had told him to work there and that rocks were falling down. (Tr. 62-63). McMillan told Shaffer that it was not necessary for him to work on that catwalk if rocks were falling and that he should go to another section to clean catwalks. McMillan testified that he later saw Shaffer cleaning the catwalk at the "big screen," an area that was not unsafe. Still later, and at McMillan's request, Shaffer came over to the shop to help McMillan.

According to McMillan, mine superintendent Richardson later stopped by the shop and informed Shaffer that a transmission had just arrived for Shaffer's truck. Shaffer began complaining that they had been dragging their feet on replacing his transmission and a "heated exchange" followed. During this exchange he heard Shaffer say, in apparent reference to his working on the scalper screen catwalk, "you tell me to do something like that, I'll do it." (Tr. 70-72). Finally, Richardson said he was "not going to listen to this anymore" and departed. (Tr. 72). Later, mine owner Bob Miller appeared and told Shaffer, "you're finished down here, I want you to get your paychecks." (Tr. 73). McMillan testified that he tried to speak but Miller cut him off stating "I've heard enough, I'm not going to hear anymore sides to the story." (Tr. 73-74). McMillan testified that he was unable to speak a word during this exchange. (Tr. 75).

Mine superintendent Joe Richardson testified that, at the beginning of the shift on June 7, 2001, he and Shaffer were standing by the mine office and he directed Shaffer to first check the air in the Euclid tires and determine whether the truck was running. He maintains that he then also told Shaffer that if the truck was not running, then to go clean the catwalks. Richardson

testified that he did not tell Shaffer to clean any particular catwalk and noted that there were many catwalks at the plant including catwalks at the main screens and the chip plant as well as at the scalper. Richardson also testified that he was unaware that the chain guarding the scalper catwalk had been taken down. Richardson maintained that Shaffer, as well as the other employees, had been instructed to stay off the scalper catwalk while the plant was in operation because it presented a hazard from falling rocks. Richardson further testified that he never saw Shaffer working at the scalper catwalk and that, if he had seen Shaffer working at that location, he would have told him to get off. Shaffer never reported to him that he had been injured while working on the catwalk.

Richardson testified that later that morning, as he was carrying Shaffer's regular paycheck to him, he told Shaffer that the transmission for his truck had come in. According to Richardson Shaffer "blew up on me." According to Richardson this was not the first time Shaffer had done this and that he "kept blowing up" at various times. After this confrontation, Richardson proceeded to Miller's office. Miller was not in, so Richardson called him on the radio. He purportedly told Miller only that "I got a problem." They later met and, according to Richardson, as soon as Miller saw him, Miller said "it's Willie isn't it." According to Richardson he responded "yes." Nothing else was said and Miller went to the shop to talk to Shaffer. Mine owner, Miller, did not testify at the hearings. According to Richardson, Shaffer was fired because of his temper. Shaffer had "blown up" at him three or four times before and had intimidated other employees. "We just had enough of it." (Tr. 87).

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by the activity. *Secretary o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), *rev'd* on other grounds, *sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981) and *Secretary o/b/o Robinette v. United Castle Coal Company*, 3 FMSHRC 803, 817-18 (1981). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20.

On the facts of this case I do not find that Shaffer's discharge was motivated in any part by protected activity. Indeed, I do not find that Shaffer engaged in protected activity. I first find that, with respect to Shaffer's work assignment to clean the catwalks, both Shaffer and Richardson's testimony is largely credible. I find that Shaffer believed in good faith, but erroneously, that Richardson directed him to work only on the hazardous catwalk beneath the scalper screen. I also find however that Richardson actually directed Shaffer to clean the catwalks in general, without specifying the scalper screen catwalk in particular. It is not disputed that, because of the well-known hazards of working on the scalper screen catwalk, all employees, including Shaffer, had previously been warned not to work there while the plant was operating. There was no particular reason to assign Shaffer to clean only the hazardous catwalk when other catwalks could be cleaned and there was a serious reason not to assign him to that catwalk. I do

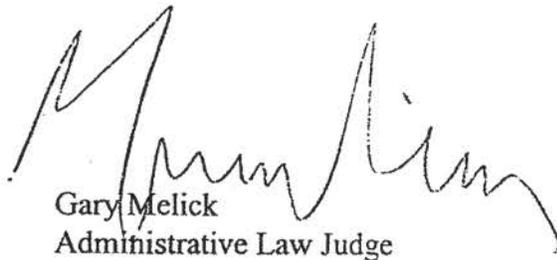
not believe that Richardson would have sent Shaffer to work where he could easily have been killed.

I consider the testimony of Shaffer's own witness, Michael McMillan, the most credible however with respect to the subsequent confrontation between Shaffer and Richardson. According to McMillan, Shaffer said, in a not unambiguous statement and in apparent but not clear reference to his working on the catwalks, only "you tell me to do something like that, I'll do it" (Tr. 70-72). McMillan notably did not corroborate Shaffer's claims that he also told Richardson that he would "talk to the right people" or that he would "do it [presumably work on the catwalk] even if it means endangering my life."

Within this framework of evidence I do not find that the credible version of events as presented by McMillan constitutes a protected safety complaint. Accordingly the Complainant has failed to meet his burden of proof and this case must be dismissed.

ORDER

Discrimination Proceeding Docket No. LAKE 2002-47-DM is hereby dismissed.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Willie Ray Shaffer, 1354 N. 2700th Avenue, Loraine, IL 62349

Thomas F. Hartzell, Esq., Hartzell, Glidden, Tucker and Hartzell, P.O. Box 70, Carthage, IL 62321

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-213
Petitioner	:	A.C. No. 36-07328-03541
v.	:	
	:	Docket No. PENN 99-254
SUMMIT ANTHRACITE, INC.,	:	A. C. No. 36-07328-03542
Respondent	:	
	:	Docket No. PENN 2000-9
	:	A.C. No. 36-07328-03544
	:	
	:	Docket No. PENN 2000-10
	:	A.C. No. 36-07328-03545
	:	
	:	Tracy Vein Slope

DECISION

Appearances: Donald K. Neely, Esq., Natalie A. Appetta, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of Petitioner; Mike Rothermel, President, Summit Anthracite, Inc., Klingerstown, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petitions allege that Summit Anthracite, Inc., is liable for 22 violations of mandatory safety and health standards applicable to underground coal mines. A hearing was held in Harrisburg, Pennsylvania. Subsequently, Respondent moved to reopen the record to allow the submission of documentary evidence related to its financial condition and ability to pay civil penalties. That motion was granted, conditionally, by Order dated March 7, 2002. The Secretary was also granted leave to submit additional evidence related to Respondent's financial condition. Respondent satisfied the condition imposed and the financial evidence was admitted as part of the record. The Secretary submitted additional evidence on April 10, 2002, which was also admitted. The Secretary submitted a brief following receipt of the transcript. By letter dated May 6, 2002, Respondent elected not to submit a brief, and offered the mine for sale at a price of \$0.00, provided that existing liabilities be assumed, including "five years back pay for the 3 stockholders." At the commencement of the hearing, the Secretary

withdrew two of the alleged violations and the petitions as to those citations will be dismissed.¹ The Secretary proposes civil penalties totaling \$57,039.00 for the remaining charges. For the reasons set forth below, I find that Summit committed twelve of the alleged violations and impose civil penalties totaling \$16,330.00.

Findings of Fact - Conclusions of Law

Background - Anthracite Mining

Respondent operated an underground anthracite coal mine, the Tracy Vein Slope, located near Goodspring, in Schuylkill County, Pennsylvania. The coal vein varied from five to eight feet thick and sloped at an angle of 70-80 degrees, i.e., nearly vertical. The mine liberated approximately 35,503 cubic feet of methane every 24 hours. Thirteen miners normally worked at the site, nine underground and four on the surface. Coal was produced on one shift and was processed at Summit's preparation plant. Anthracite is hard coal, with a high percentage of fixed carbon and a low percentage of volatile matter. Because of its hardness and the configuration of the typical coal seam, anthracite coal is mined by drilling and blasting. Virtually none of the mechanized equipment used in the mining of bituminous coal can be used in anthracite mining, and it is highly labor intensive.

Anthracite coal is mined through pairs of entries driven into the coal seam horizontally off a haulage slope. The lower entry is called the "gangway" heading or entry. It has tracked haulage cars to transport coal to the haulage slope and serves as the main air intake and primary escapeway. The upper entry, called the "monkey" heading, is driven 50-60 feet above and parallel to the gangway heading and serves as the return air course and secondary escapeway.

Openings, called "chutes," are developed upward from the gangway to the monkey heading at approximately 50-foot intervals. Coal mined at the monkey heading level is passed down the chutes to the gangway level, where it is loaded out on the railed haulage cars. Wooden "batteries" are constructed at the bottom of the chutes to control the coal and facilitate loading it into the haulage cars. Manways are constructed in the chutes, and provide a means of travel between the gangway and monkey headings. They are separated from the coal portion of the chute by boards, or lagging. As new chutes are developed, the old ones are closed off. The last inby open chute, i.e., the chute nearest to the gangway and monkey faces, serves as the main air course from the gangway (intake) to the monkey (return) level.

Openings similar to chutes, called "breasts," are driven upward from the monkey heading at roughly the same spacing as the chutes. Breasts are driven up 60 or more feet above the monkey heading. The bottoms of the breasts open into the monkey heading, where the coal is confined by timbers and lagging boards constructed in an "L" shape. Together with the side of

¹ The Secretary also withdrew the citation and order at issue in Docket No. PENN 99-297. That case was dismissed shortly after the conclusion of the hearing.

the monkey heading they form a three-sided box. The open side of the "box" faces inby, i.e., toward the monkey face and is adjacent to the corresponding chute opening in the floor of the monkey heading. Coal from the breast is fed down the chute to the gangway level, where it is loaded out of the mine.

Underground coal mines are inspected by MSHA four times each year. The last regular inspection of the Tracey Vein Slope was completed on June 12, 1998. The mine had an excellent safety record. Only one violation of federal mandatory safety and health regulations had been cited in the two years preceding August 14, 1998.

The Incident

On July 16, 1998, there was a major accident at the mine. An explosion, or similar event, occurred on the monkey heading. One miner was killed and another was severely injured. The nature and exact location of the "explosion" remain in dispute. Mike Rothermel, Respondent's President, was at the mine and became aware of the incident when he received a call from underground indicating that something serious had happened. He immediately entered the mine and found one miner, Gary Laudenslager, with an apparently mortal head wound, lying on the floor of the monkey heading, partially into the No. 45 chute. Sticks of explosive and detonators were scattered for about 150 feet over the floor of the monkey heading. Those in close proximity to the deceased miner were picked up and put into explosive shipping boxes, or parts of boxes that were in the vicinity. The deceased miner was removed from the mine. The injured miner was able to ambulate, with assistance, and was helped out of the mine. Immediately following the accident Rothermel observed a great deal of methane gas present in the mine. He proceeded to the monkey face and found "everything gone," i.e., the ventilation fan and tubing were no longer present and a heavy "drag boat" used to drag coal from the face to the nearest open chute was deposited some 30 feet down that chute. He located a compressed air hose and dragged it to the monkey face, tied it off on a support timber and turned it on. He then proceeded to the surface, where he encountered Jack McGann, an MSHA inspector who had arrived to participate in an inspection of the accident.

Several MSHA inspectors and other federal and state officials were on the scene that day and commenced an investigation. Temporary ventilation controls were reestablished, where necessary, and by the following Monday, July 19, 1998, the methane concentrations had been reduced to safe levels. MSHA's lead investigator was Vincent Jardina, who had served as an inspector for 22 years, including 13 years as an accident investigator. Prior to becoming an inspector, he worked as a miner for seven years and obtained certification as an assistant mine foreman. He has had considerable experience with bituminous coal mines, but very limited experience with anthracite mines.

Jardina had never inspected the Tracey Vein Slope, which was one of the factors that resulted in his being chosen as the lead investigator. It is MSHA policy to designate an accident investigator that has had no direct contact with the mine and does not know the operators or

miners. The investigative team included a total of 23 MSHA personnel, many with specialized areas of expertise, such as blasting. Five representatives of the Pennsylvania Department of Environmental Protection were also involved. Jardina was responsible for conducting the investigation and personally surveyed the mine, noting the locations of various objects and pieces of equipment, damage apparently resulting from the accident, and other conditions. He prepared a drawing of the mine, reflecting the results of his survey, Government exhibit 7, which is attached as an appendix to this decision. Other members of the investigative team interviewed and took statements from miners. Physical evidence was removed from the mine and tested in various laboratories. The on-site investigation was concluded on August 28, 1998. Testing results were not available until December 21, 1998.

MSHA was ultimately unable to determine the cause of the accident. The "conclusion" section of the report, Government exhibit 6, read:

The direct cause of the accident was an unplanned detonation of explosives in or around the No. 46 breast of the 001-0 working section. Although testing was conducted on evidence gathered from the accident scene, the source of origin for the unplanned detonation could not be identified, due to the extent of damage from the blast. A significant factor increasing the severity of the accident was improper storage and handling of explosives and detonators. One of the following three factors were considered as a possible cause of the accident:

1. Undetonated explosives in the north borehole remaining from a misfire, which could not be totally removed, may have been drilled into from the south borehole or heat generated by the drilling operation may have caused the explosives to burn in the hole which in turn caused an ignition of detonators and explosives in the No. 46 breast or on the floor of the monkey.
2. Coal or rock may have fallen striking the detonators and/or explosives left in or around the No. 46 breast or on the floor of the monkey level.
3. An unintentional detonation of the wrong firing line possibly connected to an unconfined shot used to free hanging material may have detonated other explosives in or around the No. 46 breast.

MSHA's causation theories, and Respondent's objections thereto, are discussed in more detail, *infra*, in conjunction with the violations that initially were alleged to have been contributing factors to the fatal accident.

The citations are discussed below in the order that they were presented at the hearing.

Docket No. PENN 2000-10

Citation No. 7001585

Citation No. 7001585 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1310(a), which requires that: "Only permissible explosives . . . and permissible blasting units shall be taken or used underground." The conditions noted on the citation were:

During a fatal accident investigation conducted between July 16, 1998 and August 3, 1988, it was discovered that Prima Cord, a non-permissible explosive, was found and used underground at the 2nd Level East 001-0 active working section. On July 22, 1998, one (1) full and two (2) partial rolls of Prima Cord (detonating cord) were found buried beneath wooden liner boards located between the No. 34 and 35 chutes of the monkey (return) heading. On July 24, 1998, two (2) partial rolls were found buried beneath wooden posts and line boards between the No. 42 and No. 43 chutes of the monkey (return) heading. The mine operator admitted that Prima Cord, a non-permissible explosive, was used for blasting of long holes.

He concluded that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that seven persons were affected and that the violation was due to the operator's reckless disregard of the standard and the consequences of violating it. The citation was issued under section 104(d)(1) of the Act, based upon Jardina's conclusion that the violation was a result of the operator's unwarrantable failure to comply with the standard. A civil penalty of \$3,000.00 is proposed.

The Violation

Permissible explosives are those that have been tested and approved by MSHA for use in underground coal and certain metal/non-metal mines. They are designed to minimize the risk that methane gas will be ignited. Prima Cord has not been tested or approved by MSHA for use in underground mines and is not a permissible explosive. Prima Cord was found at two locations in the mine. Rothermel knew that Prima Cord was not an approved permissible explosive and also knew that it was used in the mine. Tr. 93, 1730-31. He chose to use it for long hole blasting because he believed that it was the "lesser of two evils." While it burned at a high temperature, posing a risk of igniting any methane present in the blast area, it assured complete detonation. He felt that use of permissible blasting materials would result in incomplete detonation and/or a slow burning of explosive which posed a greater danger. Respondent did not apply to MSHA for an exception to allow the use of Prima Cord, because Rothermel believed that the only exceptions granted in the past involved situations where citations had been issued, i.e., that Summit would have to incur a safety citation and fine for the practice sought to be approved.

Respondent violated the regulation by using Prima Cord, a non-permissible explosive, in its underground coal mine.

Significant and Substantial

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

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g*, *Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The violation was significant and substantial. Prima Cord poses a danger because of its

very nature. While it is a high explosive, it looks like rope and those untrained in its use tend to underestimate how dangerous it is. An unplanned detonation of Prima Cord being mishandled by a miner would result in serious injury or death. Tr. 962-63. The Tracey Vein Slope was a "gassy" mine. In excess of 30,000 cubic feet of methane was liberated on a typical mining day. The use of non-permissible explosives in that mine could ignite methane and seriously injure miners. There can be little question that despite Rothermel's belief that Prima Cord, as used in the Tracey Vein Slope, did not present as much of a hazard as alternative approved products, use of that non-permissible explosive in the mine posed a reasonable likelihood that an injury would occur and that the injury would be of a reasonably serious nature.

While I find that the violation was S&S, I also find that the danger was not as great as perceived by Jardina. The ignition of methane in an underground mine would obviously be an extremely serious event. However, it appears that Summit's primary use of Prima Cord was in longhole blasting, i.e., when the coal between breasts or chutes was being "slabbed" or "pillared." In order to mine the coal between breasts, holes are drilled from the monkey heading alongside the breast, approximately 50-60 feet in length. The holes are loaded with explosives and the entire side of the breast is blasted into the open breast. It is difficult to ventilate the breasts, especially since methane is lighter than air and tends to get trapped in the top of the breast. However, it is unclear exactly how miners would have been further imperiled by an ignition of methane in a breast, considering the large amounts of explosives used in the pillaring operation.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an 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); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb.

1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

While Rothermel disputes whether the use of Prima Cord increased the danger to miners, there is no question that he deliberately chose to use it, knowing that it was not a permissible explosive. Consequently, I find that the violation was the result of an unwarrantable failure by Respondent.

Citation No. 7001587

Citation No. 7001587 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators "develop and follow a ventilation plan approved by the district manager." The conditions noted on the citation were:

The mine ventilation plan approved on March 26, 1997 and revised on January 27, 1998, was not being followed at the 2nd Level East 001-0 active working section. An accident investigation conducted on July 17, 1998, indicates that approved face ventilation controls were not being used at the advancing No. 50 chute face developed off the gangway, the monkey (return) heading face area, the No. 46 breast area and the No. 44 breast area. There was no evidence of face ventilation controls at these areas by use of line brattice, ventilation tubing, or compressed air movers. Pages C(3), G(7), H(8) and I(9) of the Approved Ventilation Plan specif[y] these requirements. Statements, interviews and evidence in the mine indicated that compressed air lines were being used to ventilate the working faces.

He concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that seven persons were affected and that the violation was due to the operator's high negligence. The citation was issued under section 104(a) of the Act. A civil penalty of \$2,000.00 is proposed.

The Violation

Summit's approved mine ventilation control plan required that ventilation devices, fans/air movers and 12-inch ventilation tubing or line brattice, be used to provide ventilation within 20 feet of working faces. Jardina based his conclusion that Respondent did not comply with that requirement on his observations, statements made to him by Rothermel and statements made by other miners to other members of the investigative team. In his survey of the mine following the accident, Jardina did not see evidence of any ventilation tubing or line brattice at the monkey heading, the #50 chute, the #46 breast or the #44 breast. He went into the #44 breast for a short distance and looked around. There was some air flow up the #44 breast. He could not enter the #46 breast. He briefly looked up the #51 chute, but he could not look up the #50 chute because it was blocked by coal. Tr. 1444. It is clear, and Respondent does not contend otherwise, that neither ventilation tubing nor line brattice were used in the chutes or breasts.

However, the absence of ventilation controls in a chute or a breast does not, standing alone, establish a violation of the ventilation control plan, which requires that ventilation tubing or line brattice be within 20 feet of a working face. If there is no working face more than 20 feet beyond the heading, ventilation controls are not required by the plan. Tr. 153, 161. Kevin Wolfgang was a miner working on the gangway level on July 16, 1998. He had been employed only for about two months and had initially assisted in driving the gangway face. He began to drive chutes when another miner was moved up to the monkey heading. He was working in the #51 chute on the day of the accident, and stated that he frequently used a methane detector to check for methane and used a compressed air hose to keep methane levels within acceptable limits. The #51 chute had been advanced only about 15 feet, and no ventilation controls were required under the plan. There is a conflict in the evidence as to how far the #50 chute had been driven. Jardina did not measure or observe it because it was blocked with coal. He thought that Rothermel had told him that it was advanced about 45 feet. Rothermel asserts that the #50 chute was advanced only 15 feet beyond a corner where ventilation tubing was installed. Ex. G-43.

There were no ventilation devices at the monkey face when Jardina inspected it, save for a compressed air hose that Rothermel had dragged there following the accident. However, an air mover/fan and a piece of ventilation tubing were found in coal that was later loaded out of the #49 chute. Rothermel testified that there was proper ventilation at the monkey face prior to the accident, i.e., the air mover and tubing were in use at the monkey face and had been thrown down the #49 chute by the force of the blast. Tr. 1648-49; ex. G-43. Mott surmised that the air mover and tubing had been used at the monkey face. Tr. 1447-48. Jardina offered no explanation as to what the air mover and tubing had been used for and apparently made no assumption about their use. He based his conclusion that no ventilation controls were being used at the monkey heading on the absence of such controls at that location after the blast, and a report by another inspector that Pete Klinger, the miner injured in the blast, had said that he only used an air hose at the monkey face. Tr. 120-21. This, at least second-hand hearsay statement, related entirely out of context, is deserving of virtually no weight.² I find that when actively being worked, prior to the

² Jardina frequently relied upon statements attributable to miners. The miners were interviewed by other members of the investigative team. Jardina acknowledged that virtually none

accident, the monkey face was ventilated by an air mover and ventilation tubing, in compliance with the plan.

According to Rothermel, ventilation tubing and line brattice were not used in the chutes or breasts because they would be destroyed each time coal was blasted from the advancing face. Consequently, miners were not assigned to work at the face of any chute that had been developed beyond 20 feet. To drive the chute the rest of the way up to the monkey heading, boreholes were drilled down from the monkey heading to the partially developed chute. Methane, which is lighter than air, was vented up through the holes to the monkey (return) heading. Explosives were pushed down to the last, or bottom, 4-6 feet of the holes and the coal was blasted in successive steps until the chute connected with the monkey heading. Tr. 1648-50, 1733-35. Under this approach, there never was a miner working at the face of any chute advanced beyond 20 feet.

Breast ventilation had to be handled differently because there was no heading immediately above the monkey heading. Instead, holes were drilled and/or headings were driven from the developing breast to the adjoining outby breast and air would then flow up through the developing breast over into the existing breast. In the area of the #44, #43 and #42 breasts, pillaring was being performed, i.e., the coal between breasts was being mined. The pillaring had proceeded slightly in by the #43 breast. The #44 breast had been connected to the #43 breast by a heading or holes, which provided air flow part way up the #44 breast. Tr. 1482. As explained by Mark Mott, MSHA's Assistant District Manager, ventilating the #44 breast by connecting it to the #43 breast was acceptable and in conformance with the plan. Only by driving the face of the #44 breast more than 20 feet above the connecting passage would ventilation tubing or line brattice be required to ventilate the working face. Tr. 1482-85. Neither Jardina, nor any other MSHA investigator, inspected or measured the #44 breast to determine whether there was a working face more than 20 feet beyond the connection. Jardina went only a few feet into the breast and checked the air flow. He did not further examine the breast and did not know if there were holes or a heading connecting it to the #43 breast. Tr. 216-17, 224. His determination that the ventilation plan was not being complied with at the #44 breast was based, in essence, solely on the fact that he did not observe ventilation tubing or line brattice in that area. Tr. 216-17.

Gary Laudenslager, the miner who was killed, had been working in the #46 breast two days prior to the accident. However, his last blast at the face had dislodged support timbers and rock that had blocked the breast opening. Because the breast had "crashed," no one was scheduled to work there, i.e., there was no working face in the #46 breast on July 16, 1998. Tr. 1658-59, 1664. No ventilation controls were required in the #46 breast.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an

of the statements were made to him and his knowledge of such statements was derived from other investigators' discussions of the statements. The statements were not offered into evidence and Jardina did not read them. Tr. 303-05.

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).

It is clear that there was no violation of the ventilation control plan at the monkey face or the #46 breast. Whether the #50 chute had been developed to 45-50 feet above the gangway heading, or less than 20 feet as Rothermel believed, there was no miner working at the face of that chute once it was advanced beyond 20 feet. The holes drilled through from the monkey heading to the chute face ventilated methane in the chute, and it does not appear that the chute development process followed by Summit violated the ventilation control plan, despite Rothermel's understanding that it wasn't consistent with it. There may have been a violation of the plan in the #44 breast. However, the absence of ventilation controls, Jardina's sole focus, does not establish a violation of the plan. The Secretary introduced no proof, and there is no other convincing evidence, that there was a working face in the #44 breast more than 20 feet beyond the heading or the connection with the #43 breast. The Secretary has failed to carry her burden of proof with respect to this alleged violation.

Order No. 7001591

Order No. 7001591 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1322(d), which requires that: "Each borehole 4 or more feet deep shall be stemmed for at least 24 inches." The conditions noted on the order were:

During a fatal accident investigation conducted between July 16, 1998 and August 3, 1988, it was determined that stemming was not being used during the process of loading bore holes which were 4 feet or more in depth at the gangway face, No. 50 chute face and the monkey (return) face of the 2nd Level East 001-0 active working section on July 16, 1998 and prior dates. Also, stemming materials were not found in the 001-0 section during this investigation.

He concluded that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's reckless disregard of the standard and the consequences of violating it. The order was issued pursuant to section 104(d)(1) of the Act, based upon the determination that the violation was the result of the operator's unwarrantable failure to comply with the standard. A civil penalty of \$2,800.00 is proposed.

The Violation

Stemming is an inert substance, e.g., clay, that is tamped into a borehole after the explosives have been inserted. It serves to confine the blast, reducing the possibility of fly rock

being “rifled” out of the borehole. It also displaces any methane that might have been in the borehole and confines the explosion flame, reducing the possibility that methane outside the borehole will be ignited. Stemming materials can be purchased, e.g., tubing that can be filled with clay, sand, water or some other inert substance, or inert materials can simply be tamped into the borehole. Neither Jardina, nor Thomas Lobb, an MSHA blasting expert, observed any evidence of stemming materials being used in the mine. Jason Dodson, a miner who performed blasting, testified that he did not use stemming for boreholes that were typically drilled six feet deep. While there was some question about the number of boreholes that exceeded four feet in depth, it should be noted that 30 CFR § 75.1322(d) requires that boreholes less than four feet deep be stemmed for at least half of their depth.

Respondent offered little defense to the violation. It stated, in response to discovery requests, that explosive and detonator containers were formed into tubing, filled with drillings and used as stemming. Ex. G-43. However, there is no other evidence that the containers were used in this fashion, or that any other method was used to stem boreholes. I find that Respondent violated the subject regulation.

Significant and Substantial

MSHA’s blasting expert, Lobb, testified that the potential for injury as a result of failure to properly stem boreholes is primarily that miners may be struck by fly rock that is “rifled” out of the open end of the borehole or that small amounts of methane in the borehole may be ignited. Tr. 968-69. Jardina, however, based his assessment of the likelihood and severity of injury on the possibility that large accumulations of methane, outside of the borehole, would be ignited. Tr. 281-82.

I find that the violation was not significant and substantial. Miners would normally position themselves out of the direct line of sight from any blast. The possibility of increased fly rock would not appear to pose any significant risk of injury. Jardina apparently did not perceive an increased risk of injury from fly rock because he did not base his assessment of the probability of injury on that mechanism. Nor did he base it on the possibility that a small amount of methane might reach explosive concentrations in the borehole itself, which might have marginally increased the force of the explosion. While there was a large amount of methane liberated in the mine, there is no evidence that a methane explosion would be likely to occur as a result of blasting. It is undisputed that Respondent could detonate unconfined explosives for certain purposes, e.g., starting a battery for a chute or creating a pocket for installation of a timber. Tr. 289, 970. Jardina could not explain his determination that the failure to use stemming created such a high potential for serious injury when unconfined blasting, which would arguably pose a greater risk, is permissible under the regulations. Tr. 295. Moreover, the regulations require testing for methane concentrations in a blast area immediately before shots are fired and that no shot be fired when concentrations are 1% or higher. 30 CFR § 75.1324. While, as noted *infra*, some of the miners performing blasting did not possess the proper certification to test for methane, they were competent to perform the relatively simple methane

concentration test and were performing such tests.³ The Secretary argues that Jardina's conclusion that Respondent was not complying with its ventilation plan provides further justification of his assessment of the possibility of a methane explosion. However, as noted above, the Secretary failed to prove that Respondent violated its ventilation plan.

Considering the evidence as a whole, and the fact that the firing of unconfined shots was permissible, for certain purposes, in Respondent's mine, I find that the Secretary has failed to carry her burden of proving that the violation was significant and substantial. I find that the violation was unlikely to result in an injury, but that any injury could be permanently disabling.

Unwarrantable Failure

Based upon the considerations discussed above, I find that the violation was not the result of the operator's unwarrantable failure. While Rothermel likely knew that stemming was not being used in the mine, his actions do not rise to the level of a reckless disregard of a serious safety risk or a serious lack of reasonable care. In light of the permissibility of firing unconfined shots, Rothermel did not perceive any significant threat posed by the non-use of stemming, a practice that had likely been followed, as the Secretary argues, for some time prior to July 16, 1998. Respondent had not previously been cited for such a violation in prior MSHA inspections. Under the circumstances, I find that the operator's negligence was no more than moderate.

Order No. 7001592

Order No. 7001592 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.360(b)(3), which requires that a qualified person conduct a preshift examination of working areas and sections where miners are scheduled to work, to assure, *inter alia*, the presence of required ventilation controls and proper air movement. The conditions noted on the order were:

The preshift examination conducted by Michael Rothermel, President, on July 16, 1998 of the 2nd Level East 001-0 active working section was not adequate. The No. 44 and No. 46 breast work areas were not examined and approved ventilation controls were not being used in the No. 44 breast, No. 46 breast, No. 50 chute face and monkey face.

³ Methane detectors are about the size of a package of cigarettes and provide an "LED" readout of methane concentration when a button is pushed. All of the underground miners had methane detectors. Tr. 1737-38. The miners that testified stated that methane detectors were used. Tr. 759, 763, 776-79.

He concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that seven persons were affected and that the violation was due to the operator's reckless disregard of the standard and the consequences of violating it. The citation was issued under section 104(d)(1) of the Act, based upon Jardina's conclusion that the violation was a result of the operator's unwarrantable failure to comply with the standard. A civil penalty of \$2,500.00 is proposed.

The Violation

Preshift examinations were conducted by Rothermel every morning before the shift began. The order was issued because it was determined that the examination on July 16, 1998, was inadequate for several reasons: neither the #44 breast nor the #46 breast was examined and the examination in the #50 chute and the monkey face failed to note the hazardous condition of the absence of required ventilation controls at those locations.

As noted above, the Secretary failed to prove that required ventilation controls were not being used at the #50 chute and the monkey face. The failure to note hazardous conditions at those locations does not evidence a violation of the regulation, because no such hazardous conditions existed. Rothermel readily admitted that he did not conduct a preshift examination of the #46 breast or the #44 breast. Tr. 310-11, 1733-35. The # 46 breast had "crashed." The last blasting done at the face had dislodged support timbers in the breast, likely those near the blast at the top of the breast, and the breast opening was clogged with coal, rock and timbers. Because of the hazardous condition in the #46 breast, Rothermel had not scheduled anyone to work there on July 16, 1998. Tr. 1658-59, 1664. Jardina appears to have expanded Rothermel's admission that there was a hazardous condition in the #46 breast, to include part of the monkey heading in the "area" or "vicinity" of the #46 breast, and concluded that when Rothermel assigned a man to work near the #46 breast drilling test holes, he failed to assure that the miner was not exposed to a known hazardous condition. Tr. 319, 332-34. However, there is no evidence that the hazardous condition that Rothermel knew of in the #46 breast posed any danger to miners either working or traveling on the monkey level.⁴ Rothermel had inspected the monkey, or return, heading and noted no hazardous conditions. I find that there was no hazardous condition on the monkey heading where Laudenslager had been assigned to work and that the failure to note such a condition on the preshift report does not evidence a violation of the regulation.

⁴ There was evidence that roof supports were installed near the #46 breast following the accident. However, it appears that some supports that had been dislodged during the accident were simply replaced. Tr. 341, 344-45. Jardina did not know the condition of the roof supports prior to the accident and failed to explain why he interpreted Rothermel's acknowledgment of a hazardous condition in the #46 breast as an admission that there was a hazardous condition on the monkey heading in the area of the #46 breast. Jardina, Rothermel and other investigators were working in the same "vicinity" of the #46 breast after the roof supports had been replaced and noone, including Jardina, perceived any dangerous condition. Tr. 346.

Rothermel admitted that he had not conducted a preshift examination of the #44 breast, either on July 16, 1998, or for several days prior thereto. Tr. 1735. A miner, Randy Maurer, was assigned to work in the #44 breast. This, ostensibly, would be a violation of the regulation. However, Maurer was a certified mine foreman, who was, himself, qualified to conduct a preshift examination of working places. Rothermel had been told by an MSHA official, whom he described as "Bob Elam, MSHA official in charge of policy in Arlington," that allowing a certified person to conduct the examination prior to commencing work in the area was permissible as a supplemental or auxiliary examination under 30 C.F.R. § 75.361. Tr. 1733-37. Rothermel disclosed this information in discovery and in his prehearing report.⁵ The Secretary made no effort to rebut Rothermel's claim of what he had been told. Rather, Jardina testified that that interpretation of the regulations was erroneous, and that such supplemental examinations were permissible only where an operator had no intention of working in a particular area when the preshift examination was conducted, and it was later determined that work needed to be performed there. Tr. 313.

I credit Rothermel's testimony regarding what he was told by an MSHA official and find that in reliance upon that information, he believed that allowing Maurer to inspect his work area before commencing work was in compliance with the regulation. Although Respondent, represented by Rothermel, a lay person, has not asserted a formal due process defense, I hold that the Secretary cannot enforce the regulation under the circumstances presented here.

In *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan 1998), the Commission explained that due process may prevent enforcement of an agency's interpretation of a regulation, stating:

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

Assuming, *arguendo*, that the interpretation offered through Jardina represents the Secretary's authoritative position on the meaning of the regulation and that it is entitled to deference, it represents a significant change to the interpretation previously given to Respondent, invalidating the practice that had been established in reliance on MSHA's advice. I find that Respondent cannot be held liable for violating the regulation as alleged in the subject order.

⁵ Ex.G- 43, R-6.

Docket No. PENN 2000-9

Citation No. 7001401

Citation No. 7001401 was issued by Jardina on August 14, 1998, and alleged a violation of 30 C.F.R. § 50.10 which requires that: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." The conditions noted on the citation were:

The mine operator failed to immediately contact the Mine Safety and Health Administration, District or Headquarters Office, of a reportable fatal accident which occurred on July 16, 1998 at approximately 10:30 hours. However, the Mine Safety and Health Administration was alerted about the accident from an outside source at 11:00 hours and was never contacted by the operator.

He concluded that there was no likelihood that the violation would result in an injury, that the violation was not significant and substantial, that two persons were affected and that the violation was due to the operator's high negligence. The citation was subsequently modified to reflect that the operator's negligence was moderate, because the "mine operator assumed that when his wife called 911 all appropriate parties were contacted." The citation was also modified to specify that the time of the accident was 9:15 rather than 10:30. No reason was given for that modification. A civil penalty of \$55.00 is proposed.

Jardina originally concluded, as stated on the citation, that the accident occurred "at approximately 10:30 hours." He did not know why the citation was subsequently amended to reflect a time of 9:15. Tr. 394. The earlier time is also reflected in the accident investigation report, Government exhibit 6, though the source of the information is not specified. Presumably, it was a statement by one of the miners. Rothermel testified that the accident occurred sometime after 10:20 a.m., based upon records of calls made from the office phone. Tr. 1643; ex. R-9. When he finished the 10:20 a.m. call, he had a discussion with a state mine inspector. *Id.* After the mine inspector had left, he got a "panic call" from the mine indicating that help was needed. He did not know what had happened, or how bad things were. Tr. 1644. He immediately went underground to investigate. He assisted in attending to the injured miners and their removal from the scene, picked up some explosives in the immediate vicinity of the victims that had been scattered during the incident and dragged an air hose to the monkey face to provide some ventilation because the air mover and tubing were no longer present and there was an excessive amount of methane. He returned to the surface shortly after 11:00 a.m., and encountered MSHA inspector Jack McGann, who was already on the scene. Tr. 1703-04. At no time did Respondent telephone the MSHA office to report the accident. Tr. 389, 1644. Jardina concurred that MSHA personnel arrived shortly after 11:00 a.m. and that, thereafter, no call to MSHA was required. Tr. 390.

30 C.F.R. § 50.10 requires that MSHA be notified "immediately" when a reportable

accident occurs. Jardina interpreted “immediately” to mean within 20 minutes, depending upon the circumstances. Tr. 390. He felt that, while Rothermel was properly engaged in assisting at the accident scene, there were other Summit personnel, including Rothermel’s wife, who were present in the office and should have notified MSHA. Tr. 396-98.

The Commission interpreted the regulatory accident reporting obligation in *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989), where it stated:

Although the regulation requires operators to report immediately certain “accidents” as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable “accidents” within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay, and in light of the regulation’s command of prompt, vigorous action. The immediateness of an operator’s notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

It could hardly be disputed that Rothermel took prompt, vigorous action to find out what had happened in the mine and render assistance as needed. He did not know what had happened when the “panic” call came in. Although he might have assumed that a reportable accident had occurred, he was entitled to investigate. I credit his testimony and find that the accident occurred at approximately 10:30 a.m. After proceeding underground and arriving at the location of the victims on the monkey heading, he knew that a reportable accident had occurred. However, there was no mine phone in that area. He soon proceeded out of the mine and encountered an MSHA inspector, shortly after 11:00 a.m.

The Secretary has failed to carry her burden with respect to the alleged violation. It is unclear exactly when Rothermel arrived at the scene of the accident and knew that it was reportable. While there may have been agents of Respondent on the surface, it is unknown when they became aware that a reportable accident had occurred. Apparently, a call was placed for emergency assistance, but there is no evidence as to when that call was made. Nor is there evidence of when, within this relatively short time frame, MSHA became aware of the accident or the length of time it took its inspector to travel to the scene. It is likely that Rothermel encountered the MSHA inspector within approximately 20 minutes of his arrival at the scene of the accident. I find that the regulation was not violated.

The “Contributing Factor” Violations

The remaining four violations in this docket were determined to be contributing factors to the fatal accident and, with one exception, the alleged gravity of the violations was premised, in part, on the fact that a fatality had occurred as a result of the violation. They were specially

assessed on that basis and substantial civil penalties, ranging from \$5,000 to \$20,000 were proposed. In light of those allegations, Respondent took the position that one of the major issues in the case would be to determine the actual cause of the accident. The Secretary, knowing that MSHA had been unable to determine the actual cause, or causes, of the accident, took the position that it was not necessary to litigate that issue. Tr. 23-24, 27.

When questioned as to how the Secretary could sustain the gravity allegations without establishing the cause, or causes, of the accident, the Secretary announced that the only violation alleged to have been an actual contributing factor to the fatality was Order No. 7001594, alleging that miners doing blasting did not possess the required qualifications. *Id.*; tr. 516-17. The Secretary also amended Order No. 7001595, alleging that boreholes were drilled less than 24 inches apart, to reduce the operator's negligence from "high" to "moderate," and to make it a citation issued pursuant to section 104(a) of the Act. Tr. 12. Despite these changes, the proposed civil penalties were not altered and, with one exception, the Secretary continues to urge that they be imposed.

As noted, *supra*, despite MSHA's very thorough investigation, the actual cause of the accident was not identified, and there are significant disputes between the parties regarding the conduct of the investigation and many of the conclusions reached. Under MSHA's preferred theory, as described by Lobb, the victim, Gary Laudenslager, was drilling the south borehole just inby the #46 breast. The drill encountered undetonated explosives that had been loaded into the north borehole, or existed from a previous misfire in the #46 breast, and a low-order explosion resulted, rifling fly rock down the open north borehole, striking the victim and generating a secondary explosion of one or more sticks of explosive that were located in that vicinity. Tr. 1007-18. According to Lobb, an explosion appeared to have occurred just inby the #46 breast, because that is where the most significant damage was and the forces appeared to go outward from that point.

Rothermel took issue with MSHA's theories, arguing that they are not consistent with the physical evidence, including the location of the victim, the absence of any "blast effect" on the victim, the presence of the drag bucket, fan and vent tubing in the #49 chute, and the location of the drill. MSHA's responses to Rothermel's objections fall considerably short of conclusive rebuttals.

The location of the victims following the accident was openly disputed. MSHA investigators could not explain how the victim could have been recovered near the #45 chute, a considerable distance outby where the explosion was thought to have occurred, if it occurred as he was drilling the south borehole. Tr. 629-30, 642, 1532. Rothermel was certain that Laudenslager was lying on the monkey heading floor, partially down the #45 chute, as indicated in Government exhibit 7. Tr. 1700. Jardina did not believe that Laudenslager was at that location immediately following the accident, and maintained that position as of the hearing. Tr. 174-75, 625. Mott also did not think that the victims' locations, as reflected on exhibit G-7, were the result of the explosion. Tr. 1531. Jardina obtained some luminol, a chemical substance that

can indicate the presence of blood, and tested in the vicinity of #46 breast, where the injury was thought to have occurred. However, the results were inconclusive in that environment. Tr. 171-73. It was obviously with great reluctance that he indicated the position of the victim as he did on the diagram of the accident scene, a location admittedly inconsistent with the accident theory that MSHA considered most likely. The autopsy report, exhibit G-44, noted that there was "no evidence of severe disruptive injury, severe thermal trauma, or blast effect" on the victim's body, which would also appear inconsistent with his having been in close proximity to an explosion in the relatively confined space of the monkey heading.

The drag bucket on the monkey heading was a heavy wooden sled-like device that was used to drag coal from the monkey face to the #49 chute. Following the accident, it was found about 30 feet down the #49 chute, along with a fan and ventilation tubing that had been supplying air to the monkey face. Rothermel felt that the location of these objects indicated that a powerful force must have originated near the monkey face, pushing the drag bucket outby and into the #49 chute, obviously negating the theory that the main force of the explosion occurred near the #46 breast, which would have pushed the drag bucket toward the face. MSHA's investigators had no credible explanation for the location of the drag bucket. Jardina formed no conclusion as to how the drag bucket got into the chute. He did not consider it significant and stated that it was of no concern to him. Tr. 181-82, 187. Lobb did not consider the drag bucket part of the physical evidence. Tr. 1083. Mott did not know how the drag bucket got into the chute, did not believe that it was by the force of the explosion and didn't factor it into the theories "one way or the other." Tr. 1534-35, 1575. In addition, Jardina never did identify a cause of the damage on the gangway level at the #48 chute, and did not consider it to have resulted from the accident. Tr. 89, 836.

Rothermel also noted that the drill supposedly being used by Laudenslager was found under some coal near the boreholes lying on top of neatly coiled air hose, indicating that it was not being used at the time of the accident. He pointed out similar inconsistencies with respect to the second theory, including that the #46 breast was blocked and nothing could have fallen out of it or from the lagging in that area. He also questioned the third possible cause, an unintentional detonation of the wrong firing line, because there was no tamped and wired unfired shot found after the accident. Tr. 1565-67.

MSHA's theories were certainly consistent with much of the physical evidence. However, there were also significant facts that tended to negate those theories. While there is general agreement that there was no methane explosion, MSHA candidly acknowledges that, despite the thorough investigation, it never came to a definitive conclusion as to what caused the accident. Tr. 1119-20. Rothermel recently postulated a theory that there may have been an "outburst," an explosive release of highly pressurized methane, at the monkey face. Tr. 1677-97, 1719-20, ex. R-8. Lobb considered that unlikely. However, it would explain a number of the facts that appear inconsistent with MSHA's theories. Ultimately, no cause for the accident has been identified, and, as noted, *infra*, none of the alleged violations can be said to have caused, or to

have been a contributing factor to, the fatal accident. Rothermel's outburst theory is intriguing, but it remains only a possible theory.

The "contributing factor" violations are addressed individually below.

Order No. 7001588

Order No. 7001588 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1313(a), which requires that: "The quantity of explosives outside a magazine for use in a working section . . . shall . . . [n]ot exceed 100 pounds; or . . . the amount necessary to blast one round when more than 100 pounds of explosives is required." The conditions noted on the order were:

The quantity of explosives outside a magazine for use in the 2nd Level East 001-0 working section or other area where blasting was to be performed on July 16, 1998, exceeded 100 pounds and exceeded the amount necessary to blast one round. This violation was determined to be a contributing factor to a fatal accident."

He concluded that a fatal accident occurred as a result of the violation, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. The order was issued pursuant to section 104(d)(1) of the Act as being attributable to the operator's unwarrantable failure. While Jardina believed that this violation was a contributing factor to the fatal accident, he was unable to articulate a causal relationship. Tr. 416. As noted above, the Secretary announced during the hearing that she no longer took the position that this violation was a contributing factor. The position taken in the Secretary's post-hearing brief is that this violation should be found to have been highly likely to contribute to a fatal accident. A civil penalty of \$5,000.00 was proposed by special assessment, prior to the Secretary's change of position.

The Violation

MSHA personnel recovered 357 sticks of explosives, weighing 385 pounds, from that working section of the mine following the accident. They also determined that no more than 57 sticks, or approximately 60 pounds, of explosives would be required to blast one round, if each of the working faces was blasted at the same time. Tr. 411-16. Under the regulatory scheme, explosives at mines are to be stored in wooden magazines and only limited amounts, essentially the amount expected to be used during a shift, are to be taken into the working section. Explosives that are not used during the shift are to be returned to the magazine. 30 C.F.R. § 75.1313(c); tr. 408-09, 417. Respondent's only magazine was on the surface. It is apparent that the prevailing practice at Summit was that boxes of explosives would periodically be taken into the mine, and that considerably more than 100 pounds of explosives, generally more than would be

needed for blasting during one shift, would be stored on shelves in the gangway and monkey headings. Unused explosives were not taken back to the surface and returned to the magazine at the end of the shift. Tr. 448-49, 775.

Respondent does not dispute these essential facts. In defense, it contends that 1,400-1,500 pounds of explosives had been used in one round when pillaring was being done, and that under the regulation it could have had up to that amount outside a magazine in a working section without violating the regulation. Ex. R-6; tr. 1730. The regulation does not specify which "one round" is to be used to measure the maximum amount of explosives permitted in a working section, i.e., whether it is a round projected to be fired during the shift, or whether it could be any round ever fired in the mine. Jardina exhibited some uncertainty on this issue. Tr. 439-40, 448, 452-57. However, the "one round" referred to in subpart (a) must be a round that is expected to be fired on the current shift, because subpart (c) of the regulation requires that explosives not used during the shift must be returned to a magazine by the end of the shift. Any other reading of the regulation would be nonsensical.

It is undisputed that no pillaring was being done on July 16, 1998. Tr. 476, 1730. Consequently, less than 100 pounds of explosives would have been required to fire one round on that shift. Respondent had 385 pounds of explosives in the working section and violated the regulation.

Significant and Substantial

Jardina's primary reason for determining that the violation was significant and substantial was that it was deemed to have been a contributing factor to the fatal accident. Tr. 416. As noted above, however, the Secretary has abandoned that position. There is also little evidence to support such a contention and Jardina's own testimony contradicts his assertion. He testified that his determination that the handling and storage of explosives was a contributing factor to the fatality was based upon the explosives that were found near the #46 breast, and the possibility that there were other explosives "up in number 46 that weren't properly being stored." It had nothing to do with the explosives found in boxes on the gangway level. Tr. 528-30. The same would appear to be true for the explosives found stored in boxes on shelves in the monkey heading.

Under the regulation, Respondent was allowed to have up to 100 pounds of explosives in the working section. Of the 385 pounds of explosives recovered, the vast majority of it was found in boxes on shelves in the gangway and monkey headings. The remainder of the explosives does not appear to have exceeded 100 pounds. The violation was based upon the large quantity of explosives in boxes on shelves. Those explosives played no role in the accident, and this violation was not a contributing factor to the fatal accident.

The mere presence of these explosives does not establish that the violation was significant and substantial. The detonation of even one stick of explosive could easily cause

substantial injury or death. However, the explosives themselves are not highly sensitive. They must be detonated with a blasting cap or detonator which must be fired in very close proximity to, virtually touching, the explosive. During the investigation, both explosives and detonators were found at several places in the mine, sometimes in close proximity. This clearly was a concern of Jardina's, because the closer the proximity of detonators to explosives, the greater the risk of an unplanned detonation. However, detonators and explosives were not kept in close proximity in the mine under normal conditions. With the exception of the debris around the #48 chute, there were no explosives within five feet of detonators on the gangway heading and Jardina agreed that the same situation likely existed on the monkey heading prior to the accident. Tr. 428-29. The relatively orderly location of explosives and detonators on the gangway level contrasted sharply with that on the monkey level, but it is clear that those explosives and detonators had been scattered by the accident. Kenneth Chamberlain, an MSHA inspector, had inspected the mine prior to the accident and found no explosives "lying around" and everything in "very good shape." Tr. 1410-11. Detonators and explosives were placed in close proximity as a result of the emergency situation presented by the accident. Rothermel picked up sticks of explosives and detonators that were lying in the vicinity of the victims and placed them into the nearest available container. Tr. 1701-02. Jardina found that action reasonable. Tr. 509-10.

Respondent has also asserted a more general due process defense. It contends that it had been conducting its mining operations in the same manner for many years prior to July 16, 1998, that MSHA inspectors had been through the mine numerous times and observed those conditions and that no citations had been issued. Ex. G-43, R-6. Even Lobb conceded that he would not be surprised if Summit had stored explosives and detonators in the same manner for six years. Tr. 1058. While these precise conditions probably did not exist during other inspections, as Respondent claims, it is highly likely that explosives and detonators were being temporarily stored in the working section in the approximate same amounts. Because there is no evidence as to the exact amount of explosives present during prior inspections, or whether pillaring was being done, or had been or would be done in close proximity to any such inspections, Respondent has not established a due process defense to the violation. However, the fact that several inspectors observed and did not issue citations for similar conditions, does suggest that the presence of explosives in the mine did not present a reasonable probability of an unplanned detonation. Considering all of the factors discussed above, I find that the violation was not significant and substantial. I find that a fatal injury was unlikely to occur as a result of the violation.

Unwarrantable Failure

Rothermel was fully aware of the amount of explosives that were taken into the working section. He also knew that the quantity generally exceeded that needed for blasting on the shift and that unused explosives were not being transported back to the surface magazine at the end of the shift. However, those practices had been ongoing for many years and numerous MSHA inspectors had not cited Respondent for violating the subject regulation. I find that the operator's negligence was not "high," and that the violation was not the result of an unwarrantable failure.

Respondent's negligence was no more than moderate.

Order No. 7001589

Order No. 7001589 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1313(b), which requires that:

Explosives and detonators outside a magazine that are not being transported or prepared for loading boreholes shall be kept in closed separate containers made of nonconductive material with no metal or other conductive material exposed inside and the containers shall be -- (1) At least 15 feet from any source of electric current; (2) Out of the direct line of the forces from blasting; (3) In a location to prevent damage by mobile equipment; and (4) Kept as dry as practicable.

The conditions noted on the order were:

On July 16, 1998, explosives and detonators, which were not being transported or prepared for loading boreholes, were not kept in closed separate containers made of nonconductive material. This violation was determined to be a contributing factor to a fatal accident.

He concluded that the fatal accident occurred as a result of the violation, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. The order was issued pursuant to section 104(d)(1) of the Act as being attributable to the operator's unwarrantable failure. As noted above, the Secretary announced during the hearing that she no longer took the position that this violation was a contributing factor to the fatal accident. A civil penalty of \$10,000.00 was proposed by special assessment, prior to the Secretary's change of position.

The Violation

This alleged violation is closely related to the preceding one and many of the same considerations apply. Again, the focus of this citation was the explosives and detonators that were in boxes on shelves. Tr. 479-90.⁶ As noted above, these explosives played no part in the

⁶ Explosives that are being transported or prepared for loading into boreholes do not need to be in containers of any kind. A miner can take explosives that he is going to use, place them aside, e.g. three feet away on the mine floor where nothing is likely to fall on them, drill a borehole and load the explosives. Tr. 525-26. There was no evidence that the loose, or scattered, explosives found at various places in the mine following the accident, were not in the process of being transported or being prepared for loading into boreholes and, as noted above, the violation was not premised on those explosives.

fatal accident and this alleged violation was not a contributing factor to it, nor does the Secretary so claim. Jardina's determination that the violation had been a contributing factor to the fatal accident was based upon conjecture that there may have been improperly stored explosives near, or up in, the #46 breast. Tr. 517-18, 528. It had nothing to do with the explosives found in boxes on the gangway level. Tr. 528. The conditions on the monkey level, following the accident, were somewhat chaotic. Explosives had been scattered over a large portion of the heading and Rothermel had picked up loose explosives and detonators in the vicinity of the victims and placed them into the nearest available box. Tr. 1701-02; ex. R-6. Jardina agreed that under those emergency conditions, such actions were reasonable, and that the conditions in at least one area on the monkey level may have been affected by the accident. Tr. 488, 509.

On the basis of the essentially undisputed evidence that explosives, that were not being transported or prepared for loading into boreholes, were temporarily stored on the gangway level in cardboard containers, some of which did not have lids, I find that the regulation was violated. Respondent's principal defense to this violation is that this type of temporary storage of explosives in their original shipping boxes had been observed, and, at least tacitly, sanctioned by numerous MSHA inspectors over the previous six years. Ex. G-43, R-6. However, there is no evidence that the precise conditions observed by Jardina, i.e., the missing lids, had been observed by other inspectors. Jardina and Lobb also felt that the cardboard containers were inappropriate, in that they were not substantial and tended to deteriorate and become conductive with moisture that was prevalent in the mine. Tr. 493, 981. I do not base my finding of a violation on those considerations. There is nothing in the regulation that requires the containers to be "substantial." Moreover, the original shipping containers were apparently viewed as suitable by other MSHA inspectors. They did not contain any conductive material and apparently had plastic liners. Tr. 1127-28. While cardboard might become conductive if it becomes saturated with water, the cardboard pieces depicted in Government exhibit 18 and the description by Lobb that the cardboard didn't make noise when torn indicate that the cardboard was not "wet" and there is no evidence that it was conductive. Moreover, the regulation is likely directed at obviously conductive materials, such as metal. It seems likely that a box made of wood, the preferred material, might also become conductive as it absorbs moisture.

Significant and Substantial - Unwarrantable Failure

For the same reasons discussed with respect to the previous violation, I do not find this violation to have been significant and substantial or the result of Respondent's unwarrantable failure. I find the operator's negligence to have been low, and that an injury was unlikely to result from the violation.

Order No. 7001594

Order No. 7001594 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1325(a), which requires that: "Shots shall be fired by a qualified person or a person working in the presence of and under the direction of a qualified person." The conditions

noted on the order were:

Blasting of explosives was being performed by persons who were not qualified in accordance with Section 75-1325-(a) and who were not working under the direct supervision of a person qualified by MSHA. This violation was determined to be contributing factor to a fatal accident.

He concluded that the fatal accident occurred as a result of the violation, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's reckless disregard of the standard and consequences of violating it. This order was issued pursuant to section 104(d)(1) of the Act because the violation was determined to be a result of the Respondent's unwarrantable failure. This is the sole violation that the Secretary now alleges was a contributing factor to the fatal accident. Tr. 555. A civil penalty of \$20,000.00 is proposed.

The Violation

As defined in the regulations, a "qualified person," is one who has been certified to use permissible explosives by the State in which the mine is located, or who has demonstrated to an authorized representative of the Secretary the ability to use permissible explosives safely. 30 C.F.R. § 75-1301. The only miner working underground on July 16, 1998, who possessed the requisite qualification was Randy Maurer, who was working alone at the #44 breast. Tr. 548-53. In general, new miners at Summit began working with experienced miners and rather quickly progressed to essentially independent mining activities, including blasting. With the exception of Maurer, all of the miners working in that section of the mine were performing blasting activities without the proper certification. Maurer was working alone in the #44 breast and was not in the presence of, or directing the activities of, the other miners. The regulation was violated.

Significant and Substantial

Allowing unqualified persons to independently perform blasting presents a reasonable possibility of a serious injury occurring. This is not a situation like the methane testing qualifications violation, where the miners were entirely capable of performing, and did perform, the required testing, but merely lacked a credential. The unqualified persons conducting blasting in Respondent's mine lacked training in the proper blasting methods, failed to use stemming, as required by the regulations, and failed to test blasting circuits with a galvanometer, as discussed, *infra*. Misuse of explosives in a mine poses a grave threat to all miners underground and any miners who would be involved in a rescue in the event of an unplanned explosion. As Lobb explained, untrained blasters tend to believe that explosives are considerably safer than they are and may fail to exercise appropriate care. Tr. 1004. He also opined that the various theoretical causes of the accident could have been avoided if the miners had been properly trained and qualified. Tr. 1003-05. While I do not fully accept that aspect of his testimony, I find that the violation was significant and substantial.

Unwarrantable Failure

Rothermel was fully aware that the miners doing blasting in that section of the mine, with the exception of Maurer, were not qualified within the meaning of the regulation. While there is evidence that he made efforts to provide training to new miners, it appears that most of the training on blasting procedures was provided by the more experienced miners, most of whom were also not properly qualified. It is not surprising that deficiencies existed in their blasting techniques, including failure to test blasting circuits with galvanometers and failure to use stemming. Whether Rothermel was fully aware of these deficiencies or was ignorant of them, it was his responsibility to assure that the miners performing blasting were properly trained and qualified, and that proper blasting procedures were being followed. His failure to do so amounts to an unwarrantable failure to comply with the regulation.

I cannot find, however, that this violation was a contributing factor, or cause, of the fatal accident. It is possible that it was. But, the actual cause of the accident was never determined and, it is also possible that some unexpected event that had nothing to do with a deficient or unsafe blasting procedure caused the accident, e.g., a rock falling on explosives that were being transported or prepared for loading into boreholes. Consequently, while I find that the violation was significant and substantial, I do not accept the gravity assigned by the Secretary. I find that the violation was highly likely to result in a permanently disabling injury.

Order No. 7001595

Order No. 7001595 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1315(b), which requires that: "Each borehole in coal for explosives shall be at least 24 inches from any other borehole and from any free face, unless prohibited by the thickness of the coal seam." The conditions noted on the order were:

During a fatal accident investigation it was determined that two (2) boreholes, one of which contained explosives, were not drilled at least 24 inches apart. The two holes were drilled in the high side coal rib approximately 6 feet in by the No. 46 breast of the monkey (return) heading area of the 2nd Level East 001-0 working section on July 16, 1998. These boreholes were approximately 6 inches apart. This violation was determined to be a contributing factor to a fatal accident.

Despite the above notation, he concluded that it was reasonably likely that a fatal accident would occur as a result of the violation, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. The Order was modified on January 10, 2002, to change the operator's negligence to "moderate" and to reflect that it was a citation issued pursuant to section 104(a) of the Act. There was no change made to the proposed penalty of \$10,000.00, although the Secretary suggests, in her brief, that a penalty "slightly less" than that proposed may be appropriate in light of the amendments.

The Violation

There is no dispute that two boreholes were drilled, approximately six inches apart, 38-40 feet up into the high rib, or roof, of the monkey heading about six feet in by the #46 breast. The north hole was approximately 38 feet deep and the south hole was 40 feet deep. The question is whether or not these boreholes were intended to be loaded with explosives. Tr. 662. If they were test holes, as contended by Respondent, there would be no violation. I find that there was no intention that the holes be loaded with explosives and that the regulation was not violated.

Rothermel consistently stated that the holes were not intended to be used for explosives. They were drilled to try and ascertain the location of a fault. The fault had been encountered in a different set of headings 300 feet higher in the coal seam, and Rothermel expected to encounter it in the neighborhood of the #40 chute, but hadn't done so. Randy Maurer, the miner who normally drilled long holes for pillaring, had encountered problems near the #43 and #44 breasts. Gary Laudenslager had been driving the #46 breast, but encountered rock on the last shot fired that had taken out the timber supports, precluding further work in the breast. Rothermel assigned him to drill test holes in by the #46 breast to locate the fault and try and project where it would intersect the monkey heading. Tr. 662, 1659-66, 1678; ex. G-43, R-6.

Jardina concluded that the holes were intended to be used for explosives based upon a number of considerations. Traces of undetonated ammonium nitrate explosives were found in scrapings from the holes and in material blown out of the south hole by the induction of compressed air into the north hole. A piece of detonator wire, shaped like it had been attached to a stick of explosive, had been removed from the opening of the north hole. Tr. 662-66. Drill steels and a bit were recovered from the south hole. The wire and the drill bit also bore traces of undetonated ammonium nitrate explosive. Jardina felt that test holes would be drilled at least 5-10 feet apart because drilling them that close together would provide little useful information. Tr. 663-64.

Lobb also believed that the holes were not test holes and that blasting operations were being performed. Tr. 929, 941. He relied upon essentially the same factors as Jardina. Faults, like that ostensibly being explored by Laudenslager, change elevation gradually, such that he expected that test holes would be drilled 50-100 feet in by the #46 breast in the monkey heading, not within six feet of the breast and definitely not within six inches of one another. Tr. 946-48. It was his opinion that the location of the holes was more indicative that a miner was engaged in slabbing the pillar, in part, because drilling two parallel holes was consistent with Respondent's slabbing practice. Tr. 948-50. He placed considerable significance on the piece of detonator wire and the lab tests that showed the presence of ammonium nitrate based explosives in the samples, with the highest concentrations on the drill bit, the detonator wire and the scrapings from the north hole.

Respondent raised several issues that cast some doubt on the theory that the boreholes

were intended for explosives, including the possibility that the samples were contaminated in a number of ways. The holes were not drilled directly into solid coal. Rather, the drill had been inserted through openings in the lagging boards on the top of the monkey heading. Immediately above the lagging is rock fill, and/or fractured coal, ranging from a few inches to several feet thick. Such material is placed there to fill the space between the lagging and the coal left undisturbed when the face is blasted. Additional material is thrown into that space when the face of the monkey heading is next blasted. Tr. 702-04. Respondent argues that the scrapings and material purportedly obtained from the "holes" were actually recovered from the openings in the lagging and could have included materials from the fill. Respondent also argues that the detonator wire could have been in the fill material and points out that it was recovered from the collar of the hole, the space immediately above the lagging. Tr. 675, 928. Another source of contamination suggested by Respondent was the surface of the plastic compressed air pipe that was used to probe the holes.⁷

Lobb conceded that there was a possibility of contamination, and that the presence of the detonator wire could be attributed to other factors. However, he felt that it was highly unlikely that there was any significant contamination and noted that the results of the testing were consistent with the conclusion that there was ammonium nitrate based explosive in the north hole that underwent a low-order detonation when the south hole was drilled into it. Higher concentrations of undetonated explosive were found on the drill bit and the scrapings from the north hole. Relatively low concentrations were found in the scrapings from the south hole, which would have been largely blocked by the drill steels at the time of the detonation.

⁷ There were two types of permissible explosives used in, and recovered from, the mine -- Atlas 7D and Coalite 8S. Respondent made much of Lobb's testimony that the explosive found in the scrapings and on the drill and wire was Atlas 7D, a pliable substance considerably less suitable for use in long holes than the more rigid Coalite 8S. However, after careful review of Lobb's testimony and the forensic report appended to the "Executive Abstract Summary of the Laboratory Technical Investigation on the Summit Anthracite, Tracey Mine Explosives Accident," Government exhibit 32, I have concluded that Lobb was mistaken in that aspect of his testimony. Lobb stated that the test results showed the presence of undetonated ammonium nitrate based explosives, which he identified as the 7D and *not* 8S, which he stated was a nitroglycerine based high explosive, contradicting the conclusion in the abstract summary of the technical report. Tr. 954-55, 1028-32. However, the report is internally consistent and was not erroneous. The report on testing of the explosives done by the National Institute for Occupational Safety and Health, pages 5 and 6, shows that the 7D and 8S explosives are *both* ammonium nitrate based explosives, with similar concentrations of that compound (66.77% and 68.06% for the two samples of 7D and 63.72% and 64.33% for the two samples of 8S). Ex. G-32. Consequently, the undetonated explosives found in the long holes could have been the more suitable Coalite 8S, and were not necessarily the Atlas 7D. Lobb was likely confusing the Coalite 8S explosive with the illegal Prima Cord, which is a more powerful explosive.

The Secretary's theory necessarily requires that a number of unlikely events occurred. First, Gary Laudenslager, the decedent, would have had to have decided, on his own, that rather than drill test holes to locate the fault, he would attempt to blast more coal into the "crashed" #46 breast. He was not the miner who performed such tasks, and it would apparently have been inconsistent with Summit's mining sequence to pillar the #46 breast when the long hole pillaring work being done by Randy Maurer had proceeded in by only to the #44 breast. Laudenslager would also have had to drill the north hole first, load it with explosives, and then drill the south hole in very close proximity to it, a sequence that Lobb believed would have been highly unusual. Tr. 1098-99.

It is highly unlikely that this sequence of events occurred. I conclude that the Secretary has not carried her burden with respect to this alleged violation. The possibility of these events occurring is slightly more probable because of the fact that Laudenslager was not properly qualified as a blaster, and also lacked training. However, there was general agreement that Rothermel provided excellent instruction to his miners. Tr. 1162, 1167, 1204-06, 1361. Also of significance is the fact that, while this sequence of events was found to be more likely than other potential scenarios to have caused the accident, MSHA was ultimately unable to identify the cause. I am also troubled by the pristine condition of the detonator wire, which was described as very clean and intact. Tr. 723-24. There were sharp protrusions, especially in the north hole, evidenced by the fact that shavings were scraped off the plastic air line used to probe them. Tr. 924-25. It would seem that a detonator wire, also with a plastic coating, that was wrapped around a stick of explosive only slightly smaller than the diameter of the borehole and tamped up to the top of the 38 foot hole, and subjected to a low-order detonation, would have shown some signs of this relatively violent treatment. Tr. 723-24. Lobb did concede that there was no forensic evidence that established that a detonator had exploded in the boreholes. Tr. 1075. It is possible, if there was a detonation of explosives, that it was explosives from a previous misfire in the #46 breast, itself. Tr. 727-28, 1025-26, 1103-04. If so, there was never any explosive loaded into either of the two holes. I agree with Jardina and Lobb that the location of the holes was difficult to reconcile with the concept that they were intended to locate the fault. However, their proximity would also have been unusual if they were boreholes intended to be loaded with explosives, especially if the second hole was drilled after explosives had been placed into the north hole.

DOCKET NO. PENN 99-254

Citation No. 7001590

Citation No. 7001590 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1323(j), which requires that: "Immediately prior to firing, all blasting circuits shall be tested for continuity and resistance using a blasting galvanometer or other instrument specifically designed for testing blasting circuits." The conditions noted on the citation were:

During a fatal accident investigation conducted between July 16, 1998 and August

3, 1988, it was determined that immediately prior to firing the gangway working face and the monkey (return) face, blasting circuits were not tested for continuity and resistance using a blasting galvanometer or other instrument specifically designed for testing blasting circuits. This testing was not conducted on July 16, 1998 and prior dates. These areas are located at the 2nd Level East 001-0 active working section.

He concluded that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that seven persons were affected and that the violation was due to the operator's high negligence. A civil penalty of \$1,000.00 is proposed.

The Violation

A galvanometer is an instrument that will show both the continuity and resistance of a blasting circuit. Each of the electric detonators has two plastic coated wires extending from it out of the borehole. They have about three inches of bare wire at their ends. The detonators are connected together in series by twisting the bare ends of the wires together to form part of the blasting circuit. As many as 20 detonators may be fired in one round. Each of the detonators has a known electrical resistance, e.g., 1.5 ohms. Use of a galvanometer will inform a miner that the blasting circuit has continuity and, by indicating the overall resistance of the circuit, that the proper number of detonators are wired in series. That would confirm that none of the bare portions of the detonator wires have unintentionally touched, possibly short circuiting, or eliminating, some of the detonators from the blasting circuit, which could result in a misfire. Misfires of explosives are the second or third leading cause of blasting accidents. Tr. 879-82, 885-86, 991-96, 1001-02.

Galvanometers were generally not used at Respondent's mine, except when there was a misfire of explosives. Two miners testified to that effect and other miners had so stated in their statements to MSHA. Tr. 760, 778-79, 787, 883-84. Rothermel asserts that there were galvanometers in the gangway and monkey headings and that the miners used a blasting battery that checked the continuity of the circuit. Tr. 1738; ex. R-6, G-43. Whether galvanometers were present, as Rothermel claims, it is clear that they were not being used, as required by the regulation, and that the miners who were doing blasting had not been instructed to use them. Use of a firing battery that checked for continuity, but not for resistance of the circuit, would not comply with the regulation. The regulation was violated.

Significant and Substantial

Failure to use a galvanometer, or other such instrument, to check the continuity and resistance of blasting circuits significantly increased the risk of misfires, making it reasonably likely that a reasonably serious injury would occur. A misfire could result in the presence of undetonated explosives and blasting caps in coal being loaded out of the mine, creating a

possibility of an unplanned detonation and a high risk of serious or fatal injury to miners. The violation was significant and substantial.

Despite his efforts to provide training to his anthracite miners, Rothermel should have been aware of their failure to properly use galvanometers and the surprising ignorance of some of the newer miners regarding what a galvanometer was or what it was used for. I concur with the assessment that the violation was attributable to the operator's high negligence.

Citation No. 7001453

Citation No. 7001453 was issued by MSHA Inspector Kenneth Chamberlain on March 17, 1999, and alleged a violation of 30 C.F.R. § 75.370(a)(2), which requires that operators submit proposed revisions to a mine's ventilation plan to MSHA's district manager in writing. The conditions noted on the citation were:

The operator did not comply with the current approved Ventilation Plan in that the middle fan located between the 002-0 and 001-0 sections has been discontinued and is not operating. A proposed revision to the plan was not submitted to MSHA for review and approval prior to implementation.

He concluded that it was unlikely that an injury would result from the violation, that the violation was not significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed.

On a regular inspection, conducted in March of 1999, Chamberlain observed that the middle mine fan, operation of which is envisioned in Respondent's approved ventilation plan, had been shut off and the power disconnected. He ascertained that no revision to the plan, embodying that change, had been submitted to or approved by MSHA. Tr. 1406-08. The air samples he took in the mine revealed no methane or bad air, and he agreed that the shutting down of the fan had no effect on the major mine air ventilation currents. Tr. 1409-11. The fan at issue was not a main mine fan and the mine was engaged in pillaring at the time. The fan was shut down because the entryway to the middle mine fan had collapsed and no additional ventilation of the mine would have been provided whether or not the fan was operating. Ex. R-6, G-43. Chamberlain did not travel the entryway to the fan and acknowledged that it could have been closed. Tr. 1410-11.

The regulation requires that proposed ventilation plans and any revisions thereto be submitted in writing to the district manager. 30 C.F.R. § 75.370(a)(2). A corresponding provision, § 75.370(d), provides that:

Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of miners, or any change to the information required in § 75.371 shall

be submitted to and approved by the district manager before implementation.

The Secretary argues, citing *Harlan Cumberland Coal Co.*, 17 FMSHRC 1342 (Aug. 1995) (ALJ), that “the shutting down of an auxiliary fan is a major ventilation change requiring the prior approval of MSHA.” Gov. Br. at p. 95. Here, she continues, Respondent “removed its middle fan from service . . . without seeking approval of MSHA before doing so, as a result, the Operator failed to comply with its ventilation plan.” *Id.* It appears that the subject violation could more properly have been charged as a violation of § 75.370(d), i.e., the implementation of a “major ventilation change” prior to securing MSHA’s approval. The issue is whether or not the regulation obligated Respondent to submit, in writing, a proposed change to its ventilation plan and secure MSHA’s approval prior to shutting down the fan.

The essence of the regulation, as stated in section 75.370(d), is that intentional significant changes to a mine’s ventilation system must be approved prior to implementation. Normally, the shutting down of a mine fan would be such a change. However, here, the entryway to the fan had collapsed and the shutting down of the fan had no effect on the mine’s ventilation system, which remained highly effective. There is no suggestion that the collapse of the entryway was due to an intentional act by Respondent. The shutting down of the fan and disconnection of the power cables was an intentional act but, under the circumstances, had no effect on mine ventilation. I find that the Secretary has not carried her burden of proving that Respondent violated the regulation.

DOCKET NO. PENN 99-213

Citation No. 7001403

Citation No. 7001403 was issued by Jardina on August 14, 1998, and, as amended, alleged a violation of 30 C.F.R. § 75.312(h), which requires that: “Records, including records of [main] mine fan pressure . . . shall be retained at a surface location at the mine for at least 1 year and be made available for inspection by authorized representatives of the Secretary and the representative of miners.” The conditions noted on the citation, as amended, were:

During a fatal accident investigation, it was determined on July 17, 1998 that records of the mine’s East and West main mine fans, pressure recording gauges, were not being retained. Only 16 weekly interval fan charts could be provided by the mine operator. The oldest dated fan chart was for the week of October 9-15, 1997.

He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that nine persons were affected and that the violation was due to the operator’s high negligence. The negligence assessment was later amended to moderate because the operator had reported vandalism in the past, which resulted in destruction of records. A civil penalty of \$55.00 is proposed.

Under the regulation Respondent was obligated to maintain twelve months of weekly fan pressure reading records. On July 17, 1998, it was unable to produce records for the period October 16, 1997 through July 17, 1998. The asserted reason for the apparent violation was recurrent vandalism at the mine, some of which had been previously reported. Due to the repetitive nature of the vandalism, Respondent had stopped reporting it. Ex. G-43.

I accept Respondent's assertion that at least some of the fan pressure records were either taken or destroyed by vandals. However, there is no credible evidence that vandalism accounted for all of the missing records. Absent evidence that there was vandalism at the mine on or shortly prior to July 17, 1998, and that the records had been maintained, as required, only to be lost or destroyed by vandals, I find that the regulation was violated. I also concur with the assessment of low gravity and moderate operator negligence.

Citation No. 7001405

Citation No. 7001405 was issued by Charles Moore, supervisor of MSHA's Wilkes-Barre, District One office, and an education and training specialist, on August 14, 1998, and alleged a violation of 30 C.F.R. § 48.5(a), which requires that: "Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties." The conditions noted on the citation were:

During a fatal accident investigation conducted between July 16, 1998 and August 3, 1998, it was determined that Adam Laudenslager, who was performing work in the gangway area of the 2nd level East 001-0 working section on July 16, 1998, had not received the required 40 hours of new miner training as specified in CFR, Title 30, Section 48.5 (a) - (c). Mr. Laudenslager was hired by this company on or about July 3, 1998 and only completed part of the required training. This miner is no longer employed at this mine.

He concluded that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$113.00 is proposed.

The Violation

Moore issued the citation on the basis of information provided to him by an MSHA field office supervisor who had interviewed the subject miner, Adam Laudenslager. Moore did not speak to the miner himself, nor does it appear that he read any written statement by the miner. According to the field office supervisor, the miner had spent a day at the mine, had watched two instructional video tapes and had been shown how to use a methane detector. That was the extent of the training provided. Moore was also informed that the miner had no prior experience as an underground miner. Tr. 1158-60.

Adam Laudenslager is Rothermel's nephew and, while he apparently had not previously worked as an underground miner, he had considerable exposure to the anthracite mining industry. Ex. R-6, G-43. He had spent one full day at the mine and watched video tapes that had been assembled by Rothermel based upon their subject matter and relevance to anthracite mining. Rothermel has been instrumental in developing training materials for anthracite mining, which is somewhat of a blend of underground bituminous coal and metal/non-metal mining. Tr. 1750-51.

The regulation was violated. While there is some question about the length of the video tapes, the clear weight of the evidence is that Adam Laudenslager was not provided with 40 hours of new miner training and that not all of the required subject matters were addressed in the training that was provided.

Significant and Substantial

Moore concluded that the violation was significant and substantial because a new miner, somebody off the street, with no previous mining experience, finds himself in a "completely alien environment" and can be a danger to himself and other miners, especially in anthracite mining because of the use of explosives and labor intensive nature of the work. Tr. 1164-66. He did not feel that the fact that a person was raised in a mining community was a proper substitute for the required training, because he has found that such individuals are sometimes exposed to erroneous or unsafe methods and it is important to correct the "misinformation" that a person may have. Tr. 1172-74.

Putting a person with no prior mining exposure or experience to work as a miner without providing the required new miner training would be a prototypical example of a significant and substantial violation. However, Adam Laudenslager was not such a person and he had been provided with a significant amount of training – in the words of Rothermel, some of the "best training" available for anthracite miners. Ex. R-6, G-43. Moore, like other MSHA personnel, had a very high regard for Rothermel's capability and competency as a trainer. Tr. 1162, 1167. Rothermel helped to assemble training materials for his miners, because he felt that much of the material used in the typical new miner training had very little to do with anthracite mining. As he explained: "The majority of the training that made a difference between life and death to those guys was given at the mine." Tr. 1750-51. Adam Laudenslager did receive a full day of training at the mine and had watched training videos that had been carefully selected as being highly pertinent to anthracite mining.

Moore was handicapped in his assessment of whether the violation was significant and substantial because he was dependent upon hearsay for information regarding what training experiences had been provided. His assessment appears to be based more on the hypothetical putting to work of a completely inexperienced miner without any training. He had virtually no knowledge as to what training areas had been covered during the day Laudenslager spent at the mine, what subjects were covered in the videos, or how they were covered. It is the Secretary's burden to prove that this particular violation was significant and substantial, not that it could

have been in a hypothetical sense. I credit Rothermel's assertion that some of the best training available was given to Laudenslager. While there were, no doubt, essential areas of new miner training that were not covered, e.g., statutory rights of miners, without some qualitative evidence of the shortcomings of the training that was provided, I find that the Secretary has failed to carry her burden of proving that the violation was significant and substantial. I find that the violation was reasonably likely to result in a lost time accident. I agree that the violation was the result of the operator's moderate negligence.

Citation No. 7001406

Citation No. 7001406 was issued by Moore on August 14, 1998, and alleged a violation of 30 C.F.R. § 75.1324(b), which requires that: "Immediately before shots are fired, the methane concentration in a working place or any other area where blasting is to be performed, shall be determined by a person qualified to test for methane." The conditions noted on the citation were:

During a fatal accident investigation conducted between July 16, 1998 and August 3, 1998, it was determined that 4 miners conducted tests for methane and oxygen deficiency immediately before blasting. These miners were not qualified to make these tests as required by CFR 30, Part 75.151. Their daily work practices included the above tests and the charging and detonation of explosives.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that seven persons were affected and that the violation was due to the operator's moderate negligence. The citation was later amended to reflect that the violation was unlikely to result in an injury and that it was not significant and substantial. A civil penalty of \$55.00 is proposed.

As defined in 30 C.F.R. § 75.151, a person qualified to test for methane is a person who "demonstrates to the satisfaction of an authorized representative of the Secretary that he is qualified to test for methane with a portable methane detector." Respondent does not dispute that the subject miners did not have the requisite qualification. Tr. 1199-1200. On the other hand, MSHA does not dispute that the miners had been trained to use a methane detector or that they competently tested for methane prior to blasting. Tr. 1190, 1205-06. It was the lack of the paper certification that resulted in the violation.

I find that the regulation was violated and that the gravity, as amended, and operator negligence were properly assessed.

Citation No. 7000327

Citation No. 7000327 was issued by MSHA Inspector Ronald Pinchorski on August 20, 1998, and alleged a violation of 30 C.F.R. § 75.904, which requires that: "Circuit breakers shall be marked for identification." The conditions noted on the citation were:

The circuit breakers and disconnecting devices installed and operational in the 2nd level west gangway (001-0) did not have any type of identification to describe their function. This electrical equipment was used for the control of the pumps which were rated at 440 volts.

He concluded that it was unlikely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed.

Pinchorski was performing a regular AAA inspection of the mine at the time the citation was written. However, he had been told of the condition by other inspectors who had been involved in the accident investigation. The inspection was performed over a period of many weeks and Pinchorski observed the conditions recorded on the citation sometime around August 4 or 5. Tr. 1366. He also observed the switch boxes on August 20, the day the citation was issued and, on the basis of that observation, terminated the citation. Tr. 1366, 1368.

Respondent's exhibits 4 and 5 are pictures depicting two switch boxes at the subject location. Each bore a tag from the motor being controlled that identified specific characteristics of the motor, e.g., its horsepower. Also depicted are pink plastic stickers stating, respectively, "MAIN" and "50 HP PUMP." The pictures were taken on August 20, and the presence of the stickers was sufficient to justify termination of the citation. Tr. 1367-68. Rothermel testified that the pink stickers had been placed on the boxes over two years prior to the inspection. Tr. 1610. Pinchorski was fairly certain that the pink stickers were not on the switch boxes he observed on August 4 or 5, because he did not believe that he would have issued the citation if they had been present. Tr. 1370, 1375, 1379. The tags from the motors were present at that time, but they were not sufficient to satisfy the regulation because they did not identify the device, i.e., which pump or a fan, the switch controlled. Tr. 1357-60.

I credit the testimony of Pinchorski and find that he observed switch boxes on August 4 or 5, 1998, that had no pink stickers identifying the particular device that the switch controlled. It is not clear exactly how many switch boxes were observed by Pinchorski that day. Consequently, it is not clear that the two boxes depicted in Respondent's exhibits 4 and 5 were the only boxes that were the subject of the citation. The precise basis of Rothermel's testimony is also less than clear. I have no doubt that there were pink stickers identifying electrical devices on many switch boxes in the mine and that they had been affixed well prior to the inspection. However, I find that there were some switch boxes without proper identification. The stickers shown in Respondent's exhibit may have been supplied by someone other than Rothermel after Pinchorski first observed the switches and questioned compliance with the regulation. I credit Pinchorski's testimony because I found him to be a credible witness and it is highly unlikely that he issued a citation for the same conditions that he found satisfied the regulation some two weeks later, when it was terminated.

Pinchorski assessed the gravity of the violation as unlikely to result in an injury and the operator's negligence as moderate. He believed that Rothermel trained his miners well and that they knew which devices were controlled by the switches. I agree with his determinations on gravity and negligence.

Citation No. 7001027

Citation No. 7001027 was issued by MSHA inspector Harold Glandon on August 20, 1998, and alleged a violation of 30 C.F.R. § 75.370(d), which requires that: "Any intentional change to the ventilation system that alters the main air current or any split in the main air current in a manner that could materially affect the safety and health of miners . . . shall be submitted to and approved by the district manager before implementation." The conditions noted on the citation were:

The mine operator intentionally implemented a change to the mine ventilation system for the 002-0 working section. This change materially altered the main air currents prior to the submission for approval by the District Manager. The changes made by the operator included the construction of an overcast, rerouting of the intake and return air currents, including the alternate escapeway, development of the intake haulage slope to a deeper level and the initiation of the 4th level gangway development. Completion of the final pillar recovery in the 4th level east gangway workings also occurred.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that two persons were affected and that the violation was due to the operator's moderate negligence. The citation was later amended to reflect that the violation was unlikely to result in an injury and that it was not significant and substantial. A civil penalty of \$55.00 is proposed.

Respondent had ceased mining on the east side of the slope and began to develop a gangway heading on the west side. In order to properly ventilate the new development, both intake and return air were routed through the same area and it was necessary to construct a channel so that the air currents could cross without mixing. The channel, called an "overcast," was constructed so that the return air could cross over the intake air and exit the west fan. Tr. 1253. Respondent did not submit a proposed change to its ventilation plan before constructing the overcast. Tr. 1256. Respondent's defense to the alleged violation is that initiating a new gangway heading was normal mine development and rerouting of air to the new work area was not a change that needed to be reflected in the mine ventilation plan. Ex. R-6. During cross-examination, Rothermel attempted to compare the change to that which occurs when a new chute is opened as gangway and monkey headings are developed. The intake air induced into the gangway heading is routed up the new chute to the monkey heading, a change that is part of normal mine development that does not need to be reflected in an amendment to the mine's ventilation plan.

The change that occurred here was not simple routine mine development, where air is routed through different headings and chutes of specified size. Rather it required construction of a special channel to allow return air to course over intake air. Nothing in the ventilation plan addressed the construction of overcasts. If the overcast was not properly constructed, ventilation to the new working places could be restricted, materially affecting the health and safety of miners. Tr. 1262. I find that the construction of the overcast was an action that was required to be approved as an amendment to the mine's ventilation plan before it was implemented, and that Respondent violated the regulation.

Glandon inspected the overcast and found it to be well-constructed and of adequate size to assure proper ventilation. The design of the overcast, as constructed, was approved as an amendment to the ventilation plan. For those reasons, it was concluded that the probability of injury was unlikely and that the violation was not significant and substantial. I agree with those conclusions. I also agree that the violation was the result of the operator's moderate negligence. Rothermel was an experienced operator who understood the regulation and had previously submitted amendments to the ventilation plan. He should have realized that an amendment was required for construction of the overcast.

Citation No. 7001029

Citation No. 7001029 was issued by Inspector Glandon on August 20, 1998, and alleged a violation of 30 C.F.R. § 75.220(a)(1), which requires that operators "develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The conditions noted on the citation were:

Manways with steps spaced at no greater than 30 inches were not provided in the open chutes of Nos. 47, 48 and 49 in the 2nd level east gangway, 001-0 working section. The approved roof control plan dated 5/13/94 states that when the pitch of the coal vein exceeds 20 degrees, manways will be provided in open chutes and breasts and steps in the manway will not be spaced greater than 30 inches. The last travelable manway was at the No. 32 chute, a distance of approximately 860 feet from the gangway face. The pitch of the vein in the vicinity of chutes 47, 48 and 49 ranged from 70-80 degrees.

He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that three persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed.

As stated in the citation, Respondent's approved roof control plan required that manways, with steps spaced not greater than 30 inches, be provided in open chutes where the pitch of the coal vein exceeded 20 degrees. The pitch of the coal vein in Respondent's mine was 70-80 degrees and chutes numbered 47, 48 and 49 were open. Manways, with the required step spacing

were, therefore, required in those chutes. Glandon looked up each of the chutes from the gangway level to the monkey level and did not see any ladders or steps. Tr. 1300-02.

Respondent contends that there were manways in the chutes, with plank steps on less than 30 inch centers. Respondent's exhibit 3a-d purports to show the steps in the #48 chute. They appear to be at least partially covered with coal, or were so covered shortly before the pictures were taken. Although not directly stated, Respondent also appears to contend that similar steps were present in the #47 and #49 chutes. Ex. G-43, R-6. Respondent also contends that the violation was written because MSHA interprets the standard to require a ladder, rather than steps on less than 30 inch centers, and that Glandon wrote the citation because there were no ladders. Tr. 1294-95, 1300. However, there was some confusion during cross-examination over the use of the term "ladder," which may well have been interpreted by Glandon to include plank steps.

I find that there were plank steps on less than 30 inch centers in the #48 chute. They may have been obscured by coal when Glandon looked up the chute. I also find that there were steps in the #49 chute. However, there was no evidence introduced by Respondent to establish that the required steps were also in the #47 chute. On the basis of Glandon's testimony, I find that there were no such steps in the #47 chute, and that the regulation was violated. Allowing plank steps in a manway to be covered with coal, making them virtually unusable, would also be a violation of the standard. I agree that the violation was unlikely to result in an injury and that it was due to the operator's moderate negligence.

Citation No. 7001448

Citation No. 7001448 was issued by MSHA Inspector Kenneth Chamberlain on December 10, 1998, and alleged a violation of 30 C.F.R. § 75.381(c)(3), which requires that each escapeway be maintained in a safe condition, specifically, that they be "[p]rovided with ladders, stairways, ramps or similar facilities where [they] cross over obstructions." The conditions noted on the citation were:

The alternate escapeway from the 002-0 section was not maintained in a safe condition in that ladders were not provided from the 4th level monkey heading to the 3rd level gangway.

He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that three persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed.

There was no ladder provided in the alternate escapeway from the 3rd level gangway to the 4th level monkey heading. However, there were plank steps, on less-than 30 inch centers, in that chute. Tr. 1396-98. The prevailing practice in anthracite mines is, apparently, to provide ladders in chutes and other portions of escapeways in steeply pitched mines. Tr. 1395-96. MSHA also appears to interpret the standard as requiring a ladder, because Chamberlain was

looking only for a ladder to determine whether the standard was complied with. Tr. 1397-98. While I reject Respondent's argument that the 70-80 degree pitch of the coal vein through which the chute was driven is not an obstruction requiring a ladder, stairway, ramp or similar facility, I find that the Secretary has failed to carry her burden of proving the alleged violation, and has failed to justify MSHA's restrictive application of the standard so as to recognize only ladders as a means of compliance.

The standard provides that portions of escapeways that traverse obstructions, including steep slopes, be provided with ladders, stairways, ramps or similar facilities. The manway portion of the escapeway chute had the typical, and required, steps on less-than-30 inch centers. That is the means by which miners routinely travel the manways between different levels of the mine. MSHA has advanced no explanation or justification for its position that such steps do not satisfy the requirement that ladders, *stairways, ramps or similar facilities* be provided. Although Chamberlain testified that, in his opinion, such steps did not satisfy the standard, he did not explain the rationale of his position and it is not apparent from other portions of his testimony. Tr. 1398-99.

Citation No. 7001586

Citation No. 7001586 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.325(e)(1), which requires that: "At least 1,500 cubic feet [of air] per minute [reach] each working face where coal is being mined." The conditions noted on the citation were:

A quantity of at least 1,500 cubic feet a minute of air was not providing ventilation to the gangway face of the 2nd Level East 001-0 active working section. On

July 16, 1998, it was determined by an authorized representative of the Secretary that a quantity of only 754 cubic feet per minute of air was being maintained at the inby end of the 12 inch diameter flexible tubing. It was further determined that the flexible tubing was damaged prior to the accident. An approved calibrated anemometer was used to determine the air velocity. Coal was in the process of being loaded.

He concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$131.00 is proposed for this violation.

The Violation

Although Jardina issued the citation, he did not take the measurements referred to. Rather, he relied upon discussions with Jack McGann, another inspector, and notes that he took.

Tr. 844-45. The citation was written based upon the post-accident measurement of 754 cubic feet per minute made by McGann. Jardina did not know where that measurement was taken in relation to the gangway face or the end of the ventilation tubing. Tr. 844. He acknowledged that the ventilation tubing may have been damaged during the accident. Tr. 837. He concluded, however, that it was likely that less than 1,500 cubic feet per minute of air was being supplied to the gangway face because some repairs had been made to the damaged ventilation tubing and Rothermel admitted that there was some damage to the tubing prior to the accident. Tr. 821-23, 848-49.

Rothermel was closely involved in the rescue and recovery operation. After the victims had been administered to, a comment was made about damage to the ventilation tubing in the gangway heading. He went to investigate, accompanied by McGann, and found considerable damage at the #48 chute. The chute battery had been blown down by the explosion, and there was a pile of coal and several sticks of explosives on the gangway floor. The ventilation tubing had been disconnected and there were many holes in the tubing, some of them big enough to put a hand through. Tr. 1704-07. Rothermel, who had done the preshift examination that morning, and assured that there was at least 1,500 cubic feet per minute of air at the gangway face, knew that the holes and damage to the ventilation tubing near the #48 chute had occurred during the explosion. Tr. 1707. He knew that there was excessive methane in the mine and that it was critical to reestablish damaged ventilation controls. However, he was concerned about altering the accident scene, which would violate MSHA regulations.⁸ With McGann's at least tacit permission, he "sewed" the larger holes with 10d nails and replaced a piece of ventilation tubing at the gangway face, extending it to the last set of timbers and cutting off the end at that point. Tr. 1711. Closing the holes by overlapping the edges and piercing them with nails reduced the diameter of the tubing and severely restricted the air flow. Ex. G-43, R-6. He explained that the end of the ventilation tubing closest to the face is usually damaged by blasting, but that the required air flow was always maintained within 20 feet of the face. *Id.*; tr. 1710.

Neither Jardina, nor McGann, had measured the air flow at the gangway face prior to the accident. Jardina's "opinion" that it had been less than 1,500 cubic feet per minute is based upon McGann's later measurement, a determination that the accident had caused virtually no damage to the ventilation tubing, the fact that repairs had been made, and Rothermel's admission that there was some damage to the tubing prior to the accident. There are two significant problems with Jardina's analysis. His determination that the accident caused virtually no damage to the tubing is unsupported by the evidence, and his belief that the prior damage included holes near the #48 chute was erroneous.

Jardina's conclusion that the damage to the tubing near the #48 chute was not caused by

⁸ 30 C.F.R. § 50.12 makes it unlawful for an operator to "alter an accident site or an accident related area until completion of all investigations . . . except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

the accident,⁹ was based largely upon his conclusion that coal striking a chute battery, like the battery at chute #45 depicted in Government exhibit 28, would not bounce and strike the ventilation tubing that was attached to the rib near the roof supports. However, he acknowledged that, depending upon the severity of the accident's impact at the #48 chute, damage to the ventilation tubing was possible.¹⁰ The accident produced a violent impact at the #48 chute battery on the gangway level, sufficient to damage it and deposit a pile of coal and several sticks of explosive. Ex. G-7. I accept Rothermel's testimony regarding the condition of the tubing during the preshift examination and that the damage in the area of the #48 chute, including the large holes in the ventilation tubing, was a result of the accident.

Jardina was also somewhat uncertain in his recollection of what McGann had told him about Rothermel's statement that some damage to the tubing was present prior to the accident. Tr. 823. He indicated at one point that his recollection of McGann's reports of Rothermel's statements regarding pre-existing damage to the tubing included "various locations down to and including 48 chute." Tr. 855-57. However, he had previously related that McGann had been referring to statements made by Rothermel about damage to the tubing at the gangway face. Tr. 822-23. There was no damage in by the #48 chute or in the vicinity of the #45 chute. Tr. 824, 836. I find that Rothermel's statements regarding pre-existing damage to the ventilation tubing were far less incriminating. He was referring to the end of the tubing closest to the face that would typically be damaged when the face was blasted. The regulation and ventilation plan require that ventilation be supplied within 20 feet of the face. Tr. 834-35. Damage to tubing within 20 feet of the face is irrelevant to compliance because the measurement should be taken 20 feet from the face. Jardina did not know where the measurement had been taken, but seemed to recall that it may have been taken near the end to the ventilation tubing, and he did not know where that had been.

⁹ Mott was also of the opinion that it was unlikely that the ventilation tubing near the #48 chute was damaged by the accident. Tr. 1431-33. His opinion, like Jardina's, was based upon his assessment that coal coming down a chute and striking a battery, like the battery at #45 chute depicted in Government exhibit 28, would not bounce up and hit the tubing attached to the left side of the heading near the roof supports. As noted above, I find his and Jardina's conclusions essentially speculative and that they fail to take into account the violent thrust of coal and debris down the chute that damaged the chute battery.

¹⁰ Jardina was somewhat defensive on this point, refusing to acknowledge that the coal and explosives found at that location had come down the chute as a result of the accident. Tr. 836. He also did not consider that the damage at the #48 chute resulted from the accident. Tr. 89.

Jardina and the Secretary make much of the fact that, prior to the new piece of ventilation tubing being replaced at the gangway face and the holes being "sewed" up, the flow would have been less than the 754 cubic feet per minute measured by McGann. This point is relevant only if the repairs had been made to damage that existed prior to the accident. I have found, however, that the damage near the #48 chute, repair of which severely restricted the air flow, occurred as a result of the accident. I also find that, while the end of the tubing nearest the face was damaged prior to the accident, that whatever damage existed further than 20 feet from the face, was not sufficient to reduce the air flow below the required level. I find that the regulation was not violated.

Citation No. 7001593

Citation No. 7001593 was issued by Jardina on January 28, 1999, and alleged a violation of 30 C.F.R. § 75.1715, which requires that:

Each operator of a coal mine shall establish a check-in and check-out system which will provide positive identification of every person underground, and will provide an accurate record of the persons in the mine kept on the surface . . . [and] shall bear a number identical to an identification check that is securely fastened to the lamp belt worn by the person underground. The identification check shall be made of rust resistant metal of not less than 16 gauge.

The conditions noted on the citation were:

The check in - check out system established by the operator, which will provide positive identification of every person underground was not being followed. During a fatal accident investigation it was determined that a lamp belt worn by Gary Laudenslager (victim) did not have any identification (check) number securely fastened to the belt. This condition was observed on July 17, 1998, at approximately 0822 hours.

He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. The citation was amended at the hearing to specify that the operator's negligence was low. A civil penalty of \$55 was proposed for this violation, prior to the amendment.

Respondent contends, and asserted in discovery, that its check in - check out system consisted of the miner's name being placed on his mine light and on the charger located on the surface. Mine lights absent from the charger indicated who was underground. The mine light bearing the miner's name, was securely fastened to his belt before going underground. Ex. G-43. Respondent additionally contends that this system was followed for nine years prior to, and two years following, the accident and no citations were issued during any other inspection. Ex. R-6.

Jardina testified that Gary Laudenslager's mine belt was found in the mine, that no identification marking was on the belt itself, and there was no evidence of any marking having been permanently affixed to the belt. Tr. 872, 875. He did not look at any other miner's belt and had no recollection of whether or not Laudenslager's mine lamp was affixed to his belt or whether the lamp bore Laudenslager's name. Tr. 876-78. He testified that use of a name system on a mine light would not satisfy the regulation because a miner might borrow someone else's light and that, if the names were painted or stenciled on, they might wear off or become obscured.

I find that Respondent had, for many years, operated with a check in - check out system as described in its discovery response. Gary Laudenslager had worn his mine belt into the mine on July 16, 1998, with his mine lamp securely affixed to it and bearing his name. I find Jardina's testimony somewhat defensive on those points. He was careful to specify that there was no identification marking "on the belt." I interpret that testimony to mean only that there was no permanent identification marking separately affixed directly to the belt - not that no identification marking was on something else, like a mine lamp, that was affixed to the belt. His concerns about the borrowing of lights and shortcomings of painted or stenciled names appear valid. If those situations occurred, they might well be violations of the regulation. There is no indication in the evidence, however, that any miner had borrowed any other miner's lamp or that the marking on Laudenslager's mine lamp, which was affixed securely to his belt, was not legible and fully sufficient to identify him.

The Secretary has failed to carry her burden of proving that the regulation was violated. In addition, I credit Respondent's assertion that its identification system had been in use for many years and had never been found to be in violation of the regulation by a multitude of other MSHA inspectors. While it is conceivable that one or two inspectors might not have specifically examined the system, it is highly unlikely that all of them failed to notice or inspect the system for compliance with the regulation. Having had its system at least tacitly approved by many prior inspectors, Respondent was not provided fair notice that its system was deficient, and the regulation cannot be enforced in this situation, consistent with due process.

The Appropriate Civil Penalties

The parties stipulated that Summit Anthracite had only one, non-S&S, assessed violation in the two year period preceding August 14, 1998, that Summit Anthracite, and the Tracey Vein Slope, had produced 11,721 tons of coal in the year preceding that date, and that the operator demonstrated good faith in achieving compliance with the regulations. The violations, gravity and negligence assessments with respect to each alleged violation are discussed above.

Summit maintains that the imposition of civil penalties in the approximate amount of \$57,000.00 proposed by the Secretary would threaten its ability to remain in business. It relies on financial statements and tax returns for three years, 1998-2001, that were submitted following the hearing. The Secretary, in response, submitted an analysis by a certified public accountant,

Steven Dearien, who concluded that the documents are insufficient to establish that payment of civil penalties in the proposed amounts would impair Summit's ability to continue in business. The Secretary points out that the financial statements submitted were unaudited and bore a disclaimer stating that they were based upon unverified information supplied by management. Dearien's conclusion was based upon a number of factors, including the fact that Summit's cash balance, inventory and sales for 2001 were the highest they had been in five years, and that no information was supplied regarding a related and interdependent company, S & R Coal Company, whose partners are the same as the stockholders of Summit Anthracite.

On the basis of the evidence and arguments advanced by the Secretary and considering that the civil penalties imposed below are significantly lower than the proposed amounts, I find that the operator has failed to demonstrate that the civil penalties imposed below would threaten its ability to remain in business.

Docket No. PENN 2000-10

Citation No. 7110585 was affirmed as a significant and substantial violation and the result of Respondent's unwarrantable failure. However, the danger posed by the violation was found to be not as great as determined by the inspector. A civil penalty of \$3,000.00 was proposed by the Secretary. I impose a penalty in the amount of \$2,500.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Order No. 7001591 was affirmed. However, the violation was found not to be significant and substantial or the result of the operator's unwarrantable failure. Rather, the violation was found to be unlikely to result in a serious injury and the operator's negligence was found to be moderate. A civil penalty of \$2,800.00 was proposed by the Secretary. I impose a penalty in the amount of \$1,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Docket No. PENN 2000-9

Order No. 7001588 was affirmed. However, the violation was found not to have been significant and substantial or the result of the operator's unwarrantable failure. The operator's negligence was moderate and the possibility of injury was unlikely. The proposed penalty for this violation was \$5,000.00, which was based, in part, upon a determination that the violation was a contributing factor to the fatal accident, a position now abandoned by the Secretary. Considering the gravity and negligence factors, as found, and that a civil penalty of \$90.00 would appear to be the result of application of the formula specified in 30 C.F.R. § 100.3, Respondent is directed to pay a civil penalty of \$1,000.00 within 45 days.

Order No. 7001589 was affirmed. However, the violation was found not to have been significant and substantial or the result of the operator's unwarrantable failure. The operator's negligence was moderate and the possibility of injury unlikely. The proposed penalty for this

violation was \$10,000.00. However, that special assessment was based upon a determination that the violation was a contributing factor to the fatal accident, a position now abandoned by the Secretary. Considering the gravity and negligence factors, as found, and that a civil penalty of \$55.00 would likely have been imposed in a normal assessment, Respondent is directed to pay a civil penalty of \$500.00 within 45 days.

Order No. 7001594 was affirmed as a significant and substantial violation that was the result of the operator's unwarrantable failure. The proposed penalty for this violation was \$20,000.00. However, the gravity of the violation was not as high as alleged because it was not found to have been a contributing factor to the fatal accident. Considering the gravity, as found, and the other factors specified in section 110(i) of the Act, Respondent is directed to pay a civil penalty of \$10,000.00 within 45 days.

Docket No. PENN 99-254

Citation No. 7001590 was affirmed in all respects. A civil penalty of \$1,000.00 was proposed by the Secretary. Considering the factors specified in section 110(i) of the Act, Respondent is directed to pay a civil penalty of \$1,000.00 within 45 days.

Docket No. PENN 99-213

Citations Nos. 7001403, 7001406, 7001327, 7001027 and 7001029 were affirmed in all respects. A civil penalty of \$55.00 was proposed for each violation. Considering the factors specified in section 110(i) of the Act, a civil penalty of \$55.00 is imposed for each violation and Respondent is directed to pay a civil penalty of \$275.00 within 45 days.

Citation No. 7001405 was affirmed. However, the violation was found not to have been significant and substantial. A civil penalty of \$113.00 was proposed by the Secretary. Considering, the above and the factors specified in section 110(i) of the Act, Respondent is directed to pay a civil penalty of \$55.00 within 45 days.

ORDER

Docket No. PENN 2000-10

Citation No. 7001587 and Order No. 7001592, are hereby **VACATED**, and the petition as to them is hereby **DISMISSED**.

Citation No. 7110585 is **AFFIRMED** and Order No. 7001592 is **AFFIRMED** as modified, and Respondent is directed to pay a civil penalty of \$3,500.00 within 45 days.

Docket No. PENN 2000-9

Citation Nos. 7001401 and 7001595, are hereby **VACATED**, and the petition as to them is hereby **DISMISSED**.

Orders numbered 7001588, 7001589 and 7001594 are **AFFIRMED** as modified, and Respondent is directed to pay a civil penalty of \$11,500.00 within 45 days.

Docket No. PENN 99-254

Citation No. 7001453 is hereby **VACATED**, and the petition as to it is hereby **DISMISSED**.

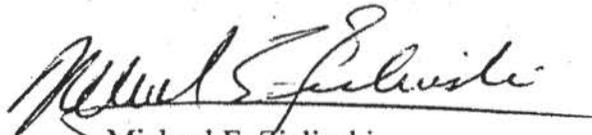
Citation No. 7001590 is **AFFIRMED** and Respondent is directed to pay a civil penalty of \$1,000.00 within 45 days.

Docket No. PENN 99-213

As to the citations vacated by the Secretary, Citation Nos. 7001403 and 7001028, the petition is **DISMISSED**.

Citation Nos. 7001448, 7001586 and 7001593 are hereby **VACATED** and the petition as to them is **DISMISSED**.

Citations Nos. 7001403, 7001406, 7001327, 7001027 and 7001029 are **AFFIRMED**, and Citation No. 7001405 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$330.00 within 45 days.


Michael E. Zielinski
Administrative Law Judge

Distribution:

Donald K. Neely, Esq., Natalie A. Appetta, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106 (Certified Mail)

Mike Rothermel, President, Summit Anthracite, Inc., R. D. No. 3, Box 12-A, Klingerstown, PA 17941 (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, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of WYMAN OWENS, Complainant v.	:	TEMPORARY REINSTATEMENT PROCEEDINGS Docket No. SE 2002-114-D BIRM CD 2002-04
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of GARY WATSON, Complainant v.	:	Docket No. SE 2002-115-D BIRM CD 2002-05
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of HENRY JOHNSON, Complainant v.	:	Docket No. SE 2002-116-D BIRM CD 2002-07
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: MaryBeth Bernui, Esq., Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants.
Harry Hopkins, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, Birmingham, Alabama, for the Respondent.

Before: Judge Weisberger

1. Introduction

On May 9, 2002, May 16, 2002, and May 20, 2002, Gloy Wyman Owens, Gary Lee Watson and Henry S. Johnson, each respectively, filed a Discrimination Complaint with the Mine Safety and Health Administration, alleging in each case, that they were discharged by Drummond Company on March 20, 2002.

Owens alleged that he and eighteen other employees were terminated for alleged involvement in a theft ring; that nine of the other employees who had been "accused of equal or more severe things" were brought back to work; that two more of the other employees were allowed to resign and receive full retirement benefits, and that he was unjustly terminated because he was a member of the union safety committee.

Watson alleged that he was discharged for theft of property, but that he believed "... the decision to fire me was in retaliation for my entering stuff in the fire boss book."

Johnson alleged that he was fired for alleged theft of company property but believed "... the decision to discharge me was in retaliation for entering stuff in the fire boss book and/or shutting down areas."

On June 13, 2002, the Secretary served Drummond with Applications for Temporary Reinstatement on behalf of Owens, Watson, and Johnson and filed these with the Commission on June 17, 2002,¹ alleging, in essence, that the Complaints filed by Owens, Watson, and Johnson, were not frivolous. On June 27, 2002, during a telephone conference call with counsel for both parties, initiated by the undersigned, the parties agreed to discuss settlement, and if settlement could not be reached they agreed on a trial date of July 22, 2002.² In a subsequent conference call the parties agreed to have the trial rescheduled to July 10 and 11, 2002. On June 28, 2002, the Secretary advised that counsel were not able to reach a settlement. A hearing in these cases was held on July 10 and 11, 2002, in Birmingham, Alabama.

After the parties rested, the Secretary presented an oral argument. Drummond filed a Memorandum in Opposition to Complainants Request for Temporary Reinstatement (sic), and also presented an oral reply to the Secretary's argument.

At the conclusion of the hearing a bench decision was issued which, with the exception of corrections of grammar and style, is set forth below:

¹The Applications, which are assigned separate docket numbers, SE 2002-114-D, 115-D, and 116-D, are **hereby consolidated**.

²On July 3, 2002 a Request for Hearing was received by the Commission.

II. The Secretary's Witnesses

a. Gloy Wyman Owens [testified that he] worked for Drummond for over 25 years. He worked at [the] Shoal Creek [Mine] from January 1994 through March 22, 2002, when he was terminated.

He was a full-time Health and Safety Committee person for the United Mine Workers Union. However, his salary was paid by Drummond, except when he performed work duties off the site of the mine at issue.

For the last three years [until he was terminated], he worked the 3 p.m. to 11 a.m. shift Monday through Saturday, and occasionally on Sunday.

The Health and Safety Committee consists of three persons including Owens. His duties include checking if there are violation or accidents, accompanying MSHA inspectors on their inspections, [and] discussing with employees regarding the conditions in the mine on the shift that the employees have just come off.

Owens indicated that if any problems are reported to him, he then inspects for hazardous conditions. Owens indicated that if a miner asks him to look at a condition, he then looks at it. If Owens finds that a condition is hazardous, he then makes contact with whoever is in charge, such as a supervisor or a foreman to report the condition. Owens indicated that if any of these individuals asks him to give his recommendation as to what to do to abate or correct the condition, he then gives his opinion. Owens testified that if the condition is then not abated, he then shuts the mine down and notifies proper management officials in order to explain [the condition].

In February 2001, drilling had occurred for an overcast. According to Owens, there was not [sufficient] air in the area to ventilate [it]. He contacted the immediate foreman, Mary Lewis, who told him that he was told to do so, and Owens in response said that he (Lewis) could not do it. Owens then shut the mine down until the ventilation was approved. Owens then called the mine shift foreman, Doug Altizer, explained the situation, and Altizer then told Lewis to get the air to the area. The situation was corrected, and the mine was reopened.

In late 2001 [Owens] had to shut down the section, but was unable to remember the details. He indicated that he has met with officials at Drummond regarding safety issues. According to Owens, in March 2001 he met with [different levels] of individuals five or six times regarding a petition for modification relating to the use of a 24,000 volt Miner. Among these officials were Ken McCoy, the director of operations; Rich Painter, the mine manager; and Dickie Estep, the director of health and safety. Owens stated that he conveyed to Drummond that they had to

agree to various stipulations, or otherwise the union would oppose the petition for modification. He also indicated that at these meetings at times there were differences of opinion.

In June 2001, the safety committee had a petition presented regarding the use of truss-bolts. This was presented to McCoy, Painter, and Estep. Owens indicated that they knew that the usage of this equipment would weaken roof support and so stated that position at these meetings. He indicated, however, that the parties tried to maintain respect for the other side, and there was not any cursing.

In July 2001 a petition was re-submitted by Drummond to modify from a 35 foot cut to a 40 foot cut. According to Owens, at a meeting with Painter and Estep, he, along with two other union members, opposed the petition and said that they would not be able to get proper air in the face. Subsequently the petition was granted for a 40 foot cut, but was not implemented.

In March 2002, Drummond asked for a waiver from the State of Alabama to use a backup fan should another fan not be operative. Owens opposed this petition to the owl shift foreman, Tom Sheback.

Owens indicated that, [along with the safety director at the mine], he normally meets with MSHA inspectors once a month after their inspections, and the citations and violations are discussed. He indicated that over the last six months prior to his termination, the union did not support Drummond's request to have the citations vacated. [I]n the last year prior to his termination on [only] one occasion he agreed with Drummond that two citations should be combined.

At a Stakeholder's meeting with MSHA officials Owens indicated that he disagreed with McCoy, who in his speech, advocated more of a role for management. Owens stated that at the time, when disagreeing with McCoy, he indicated that rates of citations, accidents, and severity of citations had not been decreasing.

On March 27, 2002, Owens met with management officials regarding a letter he had received relating to an intent to discharge him because of stolen property. At such a meeting he was told by a Mr. [Eller] that he had taken a battery or batteries, either automobile or marine. In response, Owens said that he did not receive any such items from Terry Clark, and on only one occasion did he take batteries from Clark, who worked at the warehouse, because the safety department had ordered batteries. [These batteries] which were then put in a locker, were the size of a nine-volt battery, [and not the size of an automobile or marine battery]³

³This underlined phrase we inadvertently omitted from the bench decision

He gave his opinion that he was discharged due to his past record relating to his safety positions and positions taken against the company. On cross-examination none of the essentials of his testimony were impeached.

b. Gary Lee Watson has worked for Drummond since 1985 and at the Shoal Creek facility since March 1994. He served as a fireboss since 1995, a job that he bid on.⁴ [Watson] indicated that as a fireboss his responsibility is to perform a preshift examination which involves walking the belt lines and walkways, and inspecting for dangerous conditions. He indicated that there are four separate routes, and the firebosses rotate inspection these routes on a monthly basis. Any dangerous conditions are noted in the fireboss book which is kept in the foreman's office. According to Watson, if a condition is noted as being hazardous, it is to be addressed immediately. [I]t is the practice for a foreman to also sign the fireboss book.

[Watson] indicated that if a conditions found in the preshift examination, he then would call a foreman or an assistant foreman. [I]f [they are] not present, he then would call the communication office. In addition, Watson would make a note of it in the fireboss book.

In the period between January and March 2002, he had noted icing on a slope walkway which is part of an escape way. In addition, he reported this condition to the supervisor, and roped off the area. It was then de-iced the next shift. Leonard Woodby, the mine foreman, told Watson on the same day that he had sent men over to de-ice and they had told him that they did not have any problem fixing it.

In the month of February 2002, Watson noted water accumulations more than twenty-four inches deep and roped the area off and reported the condition to the foreman.

In the year 2001, he [had] noted problems with air changes while men were underground. He said this occurred two or three times. [Watson testified that] at a safety meeting at which Dickie Estep, Don Hendrickson, and Leonard Woodby were present, he said that if this happens again, they will have to act.

Also in 2001, he noted a dangerous [roof] condition and discussed it with management who told him that it would be taken care of. He also noted accumulations of water and mud in Route No. 2, reported these to management, and noted them in the fireboss book.

[Watson] indicated that in discussing safety conditions with management, that

⁴The day shift has five firebosses; the evening shift has five firebosses; the owl shift has four firebosses; and over the weekend there are five firebosses.

management did not always agree with him. He said that several times over the last eight years management officials told him that what he had termed to be hazardous should have been put in the comment section of the fireboss book

On March 21, 2002, Watson was advised by management that he was being suspended for theft of property. He said that management told him that he had taken five gallons of gas, a bag of Quickrete cement, cleaning supplies, a pick, an ax, a shovel, a pre-made sandwich, and a soft drink.

Watson indicated that he told the management officials that he had obtained company gas only one occasion and in an emergency situation and with the approval of his supervisor, Gus Humphreys, who, [on March 21, 2002] was no longer employed by Drummond. Watson explained that on the day in question he was at the hospital visiting his father who was in serious condition, and called Humphreys because he was going to be late. According to Watson, Humphreys told him to get to work as quick as possible. Watson, [stated that] he ran out of gas as he entered the property, and coasted into the parking lot. He then told Humphreys that he had arrived but had run out of gas, and Humphreys told him to call the supply house to have them give him some gas. Watson then spoke with Nick Phillips in the supply office and informed him that Humphreys had said it was okay. Watson testified that Phillips then talked with Humphreys who told him it was okay. Watson then asked Phillips for just enough gas to get to a gas station. But he did not see Phillips actually put the gas in his car.

Regarding the Quickrete, according to Watson, this term came up in a conversation with employees at the supply office as he, along with one of the employees, were in the process of [discussing the] building of water gardens. According to Watson, when Quickrete was discussed as the building tool for the garden, [Watson] told Teddy Clark that he (Watson) had used creek rock instead, as it was more aesthetic. Specially, Watson [testified] that he did not take any Quickrete and [had] told that to management.

Watson indicated that in addition to fireboss duties, he is also required to clean the portable trailer bathrooms on a regular basis each shift. In that connection he would order supplies which would then be unloaded on a dock. Watson told Humphreys that instead he would get the supplies himself from the warehouse. He then put these supplies in a truck to take back to the parking lot, where he unloaded the supplies to be used at the portable trailer bathrooms. Those supplies that were not used were stored in a locker in the women's bathroom. He said that he did not steal any cleaning supplies.

According to Watson, he did obtain a pick, ax, and shovel from the supply office. [However, he did pick up these items] on a number of occasions at the request

of Humphreys who [had] asked him to pick up these supplies for him. [Watson] indicated that he did not steal either an ax, shovel, or a pick.

He stated that he did not deny taking pre-made sandwiches and soft drinks, but stated that it was a common practice for persons to take these items which were stored for the use of overtime people. He indicated that he had seen approximately 25 people obtaining these sandwiches and soft drinks from such a source.

Watson gave his opinion that he was fired from Drummond because of his activities as a fireboss for eight years and the confrontations that occurred during those times. He indicated that the biggest arguments had to do with whether conditions should be noted as hazardous or just placed as comments [in the fireboss book]. He also indicated that John Redmill, a mine foreman, who was not in that position on March 20, 2002, had cursed him all the time.

On cross-examination he stated that he agreed with Terry Clark who had stated that he (Watson) had the run of the warehouse and was able to get what he wanted.

On cross-examination the essence of his testimony [on] direct examination was not impeached.

c. Henry Johnson had worked for Drummond since 1975 or 1976, and worked at Shoal Creek since June 1995, until he was discharged in March 2002. He worked as an outby utility man, but served as a fireboss four to five days a week during the 11 p.m. [to] 7 a.m. owl shift. He indicated that if he found a hazardous condition, he would call his immediate supervisor or the assistant, or mine foreman, or the company operator. He indicated that he would shut down an area of the mine if necessary.

On an occasion he noted a bad leak in a fire line which had to be replaced, as this line would be used to put out fires as it was located in the escape way. [On] another occasion he observed water at the level of his knees which he indicated as being more than 16 inches, and spoke to the assistant foreman Tom Sheback about this condition. On another occasion he noted that ice had extended nine hundred feet in the escapeway path, and there were huge icicles [hanging] from the roof. He notified the mine foreman.

He indicated that every other night there were instances of spillage of coal and rollers turning in coal. [H]e [then] shut down the line and called the foreman.

In the year 2001, on occasions, he [had] noted excess water, [and] mud in the

returns, and spoke to management officials about these conditions. On another occasion he found an excess of Methane, shut the mine down, and pulled the men out. He notified the company operator, mine foreman, and the company safety man. On another occasion he had observed rollers with sparks, excessive coal on the belt, unsupported rib pins, and pins coming out of the ribs. [He] told Sheback and Woodby about these conditions. Johnson indicated that in the period between January 2002 and March 2002 when he had noted conditions in the fireboss book, Robert Payne, a foreman, told him that other firebosses on his shift had not seen these conditions.

According to Johnson, if he observes a hazardous condition and it still exists the next time he makes his examination, he notes it again and continues to talk to someone in the safety department. Johnson indicated that on an occasion [when] he had to shut down the main belt due to gas and the problems were corrected the next day, he was told by a member of management, "Don't you ever shut down my damn belt."

On March 20, 2002, Johnson was notified by the company that it intended to terminate him. He stated that he was told that on two separate occasions he had purchased one pill for which he paid three dollars. Johnson said that it was a Lortab 5. Johnson was told he also had stolen soap, paper towels, garbage bags, Windex, a car battery, a No. 9 spray, a wire brush, and brought 40 dollars worth of marijuana to Terry Clark. Johnson indicated that none of these allegations are true except for [an] incident involving two pills.

Johnson indicated that Humphreys, who had fractured a bone, asked him for some pain pills, and Johnson provided with a Lorcet 10 for which he had a prescription. [A]ccording to Johnson, he brought [the prescription] to the second meeting with management to show to management. Johnson testified that he did not give or sell Terry Clark any Lortabs. He testified that he did not ever steal soap, paper towels, garbage, Windex, or Spray No. 9 from the mine. He also denied ever selling 40 dollars worth of marijuana to Terry Clark. When asked whether he ever stole a wire brush or a battery from the company, his answer was, "No."

He stated that in his opinion he was fired because of his activities as a fireboss and some harassment over the years.

On cross-examination, he indicated that Humphreys had not provided him with any Lortabs. Indicated that he did not give Humphries ten to twelve Lortabs. He indicated that as fireboss he did what he was paid to do, and that each fireboss does his own area. Also on cross-examination he was asked whether he had purchased goods from Terry Clark by paying for them with Lortabs and his answer was no. He then was asked whether he had purchased goods from Terry Clark by

paying for them with Lorcet and his answer was no. The essential parts of his testimony were not impeached on cross-examination.

III. Drummond's Witnesses

a. Kenneth [Ray] McCoy, who was Drummond's director of human resources, testified for Drummond. [He said] his responsibilities include safety and hiring. He indicated that at various meetings he attended with the Union Safety Committee that Owens was no more vocal than the other two Union Safety Committee members. He said that on occasion there were differences in approach between the company and the union which were resolved in a civil manner; but most of the time there was agreement.

He stated that at a Stakeholder Meeting he attended he made a presentation arguing that MSHA needed to change as the industry had changed since 1977. He did not say that Owens had made any comments to him regarding his (McCoy's) speech.

McCoy testified that he has closed down the Shoal Creek mine on occasion. He stated that if there are rollers turning in coal, he has told the staff either to fix the condition or close the mine. He indicated that if he sees such a condition, he then closes down the mine, and indeed has done so in order to avoid a fire. He said that ice on a walkway or slope is a significant slipping hazard. According to McCoy, if he finds such a condition, he either washes it if the temperature allows, or puts sand on it.

He said that in late summer 2001 the company received a report of a missing coal belt or belts worth more than \$35,000. He then contacted the president of Drummond, Mike Zervos, and hired an investigative agency to do surveillance. The agency informed McCoy that theft had been occurring mainly on the second and third shift. It was decided that areas should be staked out for a month and video cameras set up. The stakeout continued for a month and was terminated on December 2, 2001, when the investigative personnel were discovered by employees and the surveillance ended. [On] that day the investigator's car had been broken into, and a video camera and tapes were stolen.

According to McCoy, some tapes did remain, which he observed. In addition, the company received an anonymous call which provided details as to materials stolen. The second time this caller provided his or her name. The informant then met with the Drummond security man, Tim Mosko. [McCoy said that] the informant had extensive knowledge of drug use and selling of drugs, and theft by numerous individuals. [According to McCoy] the informant stated that in his apartment he had a significant amount of Drummond's equipment which another employee had stolen.

The police subsequently investigated Terry Clark, a supply clerk, who was not a union member, and was arrested. Clark was then terminated by McCoy.

In late January 2002, McCoy hired another agency and David Frizell, [from] this agency came to the site to investigate. McCoy did not direct Frizell to any particular employee to investigate. [O]n a weekly basis from the second week of February to March 20, 2002, McCoy met with various union officials to inform them that the Company knew that there [were] serious theft, drug, and alcohol abuse [problems] on company property, and that [there] was an ongoing investigation.

On or about March 20, 2002, 18 represented employees were terminated pursuant to this investigation; and seven management and unrepresented employees resigned or were terminated; two union represented employees resigned; [and] the following employees who had been terminated were reinstated pursuant to a union grievance procedure without back pay: Ray Wallace, Terry Short, Mike Alexander, Johnny Cooley, Rick Marquis, B.G. Evans, Earl Cagle, Marlin Strickland, and Mike Williams.

McCoy indicated that statements that Terry Clark had made to Frizell which were then given to him (McCoy) played a major part in the decision to terminate the individuals who were terminated. McCoy indicated that in the middle of February, Frizell had told him that Terry Clark was reliable. McCoy had also received from Frizell, on March 14, 2002, and on March 21, 2002, documentary summar[ies] of Frizell's investigation. These documents contain the name of each individual who had been investigated; the various allegations against each individual; witnesses, if any; and "additional evidence," if any. McCoy indicated that Drummond decided to believe Clark.

McCoy noted that Teddy Clark, Terry Clark's twin, had also provided Drummond with information. Initially Drummond believed his testimony. However, based on Frizell's recommendation that his ([Teddy] Clark's) story was not consistent, Drummond decided not to use the information provided by him.

On cross-examination, McCoy indicated that Terry Clark had not been with Drummond for a long period of time, and was terminated on December 11, 2002. There was no impeachment on cross-examination of the essential parts of McCoy's testimony.

b. David Paul Frizell, Jr., an experienced investigator, (see Defendant's Exhibits 39 and 40) commenced an investigation of Drummond on February 11. He indicated that no one from Drummond directed him to investigate any particular employee. A total of 17 employees were interviewed, 10 of whom had worked at the warehouse. In addition, Frizell conferred with the informant.

In the course of the investigation [Frizell] met with Terry Clark five or six times spending a total of fifteen hours with Clark. In March 2002 he told the following individuals that in his opinion Clark was credible: Curt Jones, Ken McCoy, Mike Zervos, Dean Hubble, Mike Tracey, David Muncher, Richard Painter, and Ed Sellers.

Frizell testified that his opinion of [Terry] Clark was formed in the course of the investigation, and based on his (Frizell's) experience and background. He testified that his opinion was based on the following factors which he also explained to the individuals mentioned above: that he found [Terry] Clark to be truthful, [and] without malice or fabrication; that [Terry] Clark was highly consistent each time they spoke; that there was a high consistency within numerous statements; that [Terry] Clark made full admission without minimizing or rationalizing his involvement; that he made statements against his own interest; that there was a high percentage of corroboration between [Terry] Clark's statements and what other elements of the investigation disclosed, particularly the admission of others; that [Terry] Clark was always careful to provide caveats between his facts and his opinion; [and] that his statements did not contain any major or significant discrepancies or disparity with other facts gathered in the investigation from other sources.

IV. Drummond's Position

Essentially it is [Drummond's] position in this matter that it placed a good faith reliance on the reports of Frizell, [regarding] the statements of [Terry] Clark; that it would be most unreasonable for Drummond to have spent the resources and time for the purpose of going after three miners; that it is unreasonable to allow firebosses to do what they are paid to do on behalf of the company and then become untouchable while others do not receive the same treatment. Drummond also cites the fact that 22 employees, a significant number, were terminated as a result of [Terry]Clark's testimony.

V. Discussion

The issue in this case is not whether or not the Secretary has established a prima facie case. The issue is not whether Drummond's evidence indicated that the Company does not have a prima facie case; i.e., that the discharge of the three complainants in this case was not motivated in any way by protected activities. Nor is this case about the establishment of Drummond's affirmative defense based on any good faith action on its part. Rather, this case involves the narrow issue as to whether or not the complaints filed by the individuals were frivolously brought.

Under section 105(c)(2) of the Act, the Secretary is required to file an application for the temporary reinstatement of a miner when he finds that the

underlying discrimination complaint has not been 'frivolously brought.' Under Commission Rule 45(d), 29 C.F.R. § 1700.45(d), the issues in a temporary reinstatement hearing are limited to whether the miner's Complaint was frivolously brought. The Secretary has the burden of proving that the Complaint was not frivolous.

The phrase 'not frivolously brought' is not defined in the Mine Act. In *Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000), the Commission noted that "[t]he Mine Act's legislative history defines the 'not frivolously brought' standard as indicating that a miner's complaint's appears to have merit". S. Rep. 95-181, at 36 (1977) reprinted in Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624."

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), concluded that 'not frivolously brought' is indistinguishable from the 'reasonable cause to believe' standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, the Court equated 'reasonable cause to believe' with a criteria of 'not insubstantial or frivolous' and 'not clearly without merit.' 920 F.2d 738 at 747. (See also, *Centralia Mining Co.*, supra).

Drummond relies on two Commission cases that really don't apply to the case at bar. The first case is *Secretary on behalf of Ronald A. Markovich v. Minnesota Ore Operations*, 18 FMSHRC 1349 (1996). In *Minnesota Ore Operations*, supra the Commission, in a two to two split decision, affirmed a decision by former Commission Judge Arthur Amcham denying an application for temporary reinstatement. Under Commission rules a two to two split decision has the effect of leaving standing the decision of the trial judge [and] affirming [that decision]. However, a two to two split decision has very little, if any, precedential value.

The decision of Judge Amcham in *Minnesota Ore*, 18 FMSHRC 1250, is similarly not dispositive. A decision of a fellow judge is not binding, and I choose not to follow it regarding any particulars that are inconsistent with my decision herein.

Drummond also relies on *Centralia*, supra. The facts in *Centralia*, supra are not at all similar to those presented herein. In *Centralia*, supra, the only issue before the trial judge, and hence before the Commission, was whether or not the complainant voluntarily quit his job, or had been discharged. Indeed the parties had stipulated that the individual involved had engaged in protected activity, and that the sole issue for hearing was whether there was a colorable claim that the complainant

had been discharged. [Therefore] the decision in *Centralia*, supra, is not pertinent to the case at bar. In contrast to *Centralia*, supra, in the case at bar there is not any dispute that Owens, Watson, and Johnson were discharged.⁵

I note there are some inconsistencies in the record; first of all, some difference in the testimony between McCoy and Owens regarding conversations, [and] statements made at the Stakeholder Meeting; [and] some question regarding disparate treatment of the individual complainants. I note that credibility issues arise in most discrimination cases. This does not per se establish that the Complaint[s] [were] without merit. I also note in this case that [Drummond's] motivation is based on facts related to it by [Terry] Clark. It is significant to note that [Terry] Clark was not called to testify by the Company, nor did Counsel represent that he was unavailable.⁶

In summary, the testimony of all three individuals who had filed Complaints with MSHA contained details of protected activities, disagreements with management over the exercise of some of these protected activities, and all were terminated.

Within the above case law that I set forth above, I find the Secretary has met its burden in this case; in that, it has been established that the Complaints [have] not been frivolously brought.

VI. Relief

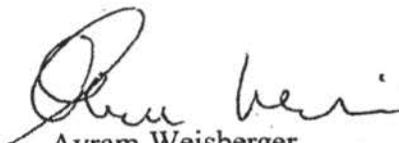
With regard to relief, the parties stipulated that should it be found that the applications for temporary reinstatement be granted – and I am so finding – that the parties agree to the following relief: (I am quoting from Paragraph two of the document entitled Waiver and Stipulation Executed 11 July, 2002, which was filed earlier.) ‘Those miners reinstated by the Administrative Law Judge’s order granting temporary reinstatement will be entitled to back wages and all other benefits to which they are otherwise entitled under the Federal Mine Safety and Health Act, beginning and accruing on the eighth day following the close of the temporary reinstatement hearing in this case, these back wages to be paid and any benefits accruing recognized on the next regular payday for the effective miner or miners.’”

⁵The underlined text was inadvertently omitted from the bench decision.

⁶The underlined phrase was inadvertently omitted from the bench decision, but is part of the rationale for the decision.

ORDER

It is **Ordered** that the Applications for Temporary Reinstatement are **Granted**, and subject to the terms set forth above (VI, infra), agreed to by the parties.


Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

MaryBeth Bernui, Esq., Thomas A Grooms, Esq., Office of the Solicitor, U.S. Department of Labor,
2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Harry Hopkins, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, 1900 Southtrust Tower, 420
N. 20th Street, Birmingham, Alabama, 35203-3204

/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-218-M
Petitioner	:	A.C. No. 39-00022-05547
v.	:	
	:	
DACOTAH CEMENT,	:	
Respondent	:	Dacotah Cement Plant

DECISION

Appearances: Edward Falkowski, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the Petitioner;
Donald P. Knudson, Esq., Gunderson, Palmer, Goodsell & Nelson, LLP, Rapid City, South Dakota, for the Respondent.

Before: Judge Schroeder

Procedural History

This case is before me on a Petition by the Secretary of Labor alleging a violation of a mine safety regulation. Amendment of the Petition was permitted at the beginning of the hearing to broaden the scope of the regulation alleged to be violated. The Petition as amended alleges a violation of 30 C.F.R. § 46.7 for which the Secretary seeks to assess a Civil Penalty of \$5,000.00. The Respondent filed an answer and a prehearing order was issued which required the parties to develop their factual and legal positions in advance of a hearing. A hearing was convened on January 15, 2002, in Rapid City, South Dakota. Both sides filed briefs after the hearing and the briefs have been considered.

Issue Presented

The issue presented in this case is what constitutes a violation of 30 C.F.R. § 46.7, which concerns the requirement of training each miner in the tasks the miner is to perform. The regulation reads specifically as follows:

New task training.

(a) You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects and safe work procedures specific to that new task. This training must be provided before the miner performs the new task.

(b) If a change occurs in a miner's assigned task that affects the health and safety risks encountered by the miner, you must provide the miner with training under paragraph (a) of this section that addresses the change.

(c) You are not required to provide new task training under paragraphs (a) and (b) of this section to miners who have received training in a similar task or who have previous work experience in the task, and who can demonstrate the necessary skills to perform the task in a safe and healthful manner. To determine whether task training under this section is required, you must observe that the miner can perform the task in a safe and healthful manner.

(d) Practice under the close observation of a competent person may be used to fulfill the requirement for task training under this section, if hazard recognition training specific to the assigned task is given before the miner performs the task.

(e) Training provided under this section may be credited toward new miner training, as appropriate.

(Emphasis added)

My task in this case is to first determine whether a violation of this regulation was established in the record and, if so, the amount of a civil penalty that constitutes an appropriate sanction.

Factual Findings

Dacotah Cement operates a large portland cement production facility in Rapid City, South Dakota. In the production of cement, crushed limestone, shale, and iron ore are mixed together and sent to a losche mill. This mill consists of two rolling cylinders that press down against a rotating turntable. The ground material is mixed with water and sent through a kiln to become clinker. In the losche mill, the downward grinding pressure of the two rolls is controlled by an hydraulic system. When this system is energized for grinding, the oil in the system is pressurized to approximately 1000 psi. (Tr.14, 103, 117, 185, 200). The mill control panel includes valves for reduction and relief of this pressure in the event work is required on the system.

The hydraulic pressure is transmitted from a pump to the mill through heavy duty hoses. From time to time, these hoses develop leaks and need to be replaced. Responsibility for replacement of hoses falls on a group of employees of Dacotah Cement who generally service

and maintain equipment. On January 12, 2001, two service and maintenance crew employees were assigned to replace one of the hydraulic hoses of a losche mill. The employees were Mr. Robert Rohrback and Mr. Fred Juopperi.

Mr. Rohrback has been a maintenance employee for Dacotah Cement for more than ten years. Mr. Juopperi has been in maintenance for a little less than three years. (Tr. 101, 164). Mr. Juopperi had never performed significant maintenance work on the losche mill prior to January 12, 2001, but Mr. Rohrback had performed work on the mill which required that he operate the hydraulic system, including the pressure relief valves. He had never replaced a hydraulic hose on the losche mill.

Both Mr. Rohrback and Mr. Juopperi worked under the direction of a supervisor, on some days one person and on other days a different person. The supervisor responsible for the activities on January 12, 2001, Mr. Melvin Wooley, testified at the hearing as to the work history and training of both Mr. Rohrback and Mr. Juopperi. He testified that neither Mr. Rohrback nor Mr. Juopperi had received specific training in heavy hydraulic hose replacement but that he had observed Mr. Rohrback perform a great number of procedures on the losche mill which required use of the pressure relief valves.

On January 12, 2001, Mr. Rohrback began the work of replacing the hoses by assembling the necessary tools and cleaning the work area. He had just about completed these preparations when he was joined by Mr. Juopperi. A different task had occupied Mr. Juopperi earlier in the morning. Mr. Juopperi soon reminded Mr. Rohrback of the mid-morning coffee break and both left the losche mill for approximately 30 minutes to join the rest of the maintenance crew for coffee and conversation. When they returned to the losche mill they resumed the process of replacing the heavy duty hoses. For reasons no witness adequately explained, Mr. Rohrback made a critical error in the process which would have dire consequences for both himself and Mr. Juopperi.

A key step in the process of replacing high-pressure hoses is releasing the pressure which is present even when the pump is turned off. Unless the pressure in the hose is released in a controlled manner, the disconnection of the hose will result in sudden and violent depressurization similar to a fire hose with too few firemen to hold it down. The losche mill control panel includes two valves for the purpose of relieving system pressure. This pressure relief step in the hose replacement process was not done.

When Mr. Rohrback and Mr. Juopperi returned from their coffee break they began the task of removing the leaking hoses from the losche mill. While the connections were sufficiently resistant to turning so as to require some unorthodox tools be used, there is no evidence that the condition of the couplings would have given any warning that the system was still pressurized. After the coupling was broken loose and turning, Mr. Rohrback noticed fluid oozing from the threaded joint. Before he could take action on his suspicions that the oozing fluid meant the system was pressurized, the coupling parted and began to thrash about and spew fluid on both men. Mr. Juopperi received a blast of fluid in the eyes as he attempted to get away from the scene. Mr. Rohrback was struck by the metal end of the hose in addition to being doused with

fluid. Both men managed to scramble away from the immediate danger area and call for help. The spewing fluid rapidly decreased the system pressure and the danger abated.

Both Mr. Rohrback and Mr. Juopperi were taken to a hospital for medical attention. Mr. Rohrback had the more serious injury in that the metal coupling had fractured his elbow. Both men were released to home in a few hours. Notice of this accident event was duly given to the local MSHA office and a field investigator was sent to look at the scene and interview the persons involved. The investigator was Mr. Joseph Steichen, who testified at the hearing.

Mr. Steichen testified in general to the facts summarized above. He covered two additional points of consequence. First, Mr. Steichen testified concerning an interview he conducted with Mr. Rohrback subsequent to Mr. Rohrback's release from the hospital. Mr. Steichen testified he asked Mr. Rohrback if he had opened the pressure relief valves prior to disconnecting the hose and the Mr. Rohrback replied he did not know where the pressure relief valves were located. (Tr. 76) Mr. Steichen went on to say that this response was the essence of the reason he believed Mr. Rohrback had not been sufficiently trained in the task he was assigned to perform.

Second, Mr. Steichen testified as to his understanding of the position taken by the Secretary as to requirements for documentation of new task training. With the assistance of counsel, it was made clear that this case does not involve any requirement for documentation of training.

I have evaluated the testimony of both Mr. Steichen and Mr. Rohrback as to Mr. Rohrback's familiarity with the pressure relief valves on the losche mill. Mr. Steichen's testimony was based on a single interview of Mr. Rohrback at a time Mr. Rohrback could be expected to be suffering from traumatic shock and effects of pain medication. Mr. Rohrback's testimony as to his training history was corroborated by his supervisor. I give substantially greater weight to Mr. Rohrback's testimony as to the extent of his training by his employer.

Analysis

Analysis of this case must begin with a recognition of the importance of the burden of proof. The Secretary bears the initial burden of proving each of the elements of the offense alleged. *Mathies Coal Co.*, 6 FMSHRC 1 (1984) The burden must be sustained by the evidence offered and accepted at the hearing. In this case, the jurisdictional facts were stipulated. The initial and critical element in dispute was whether either employee involved in the January 12, 2001, incident had been inadequately trained in violation of 30 C.F.R. §46.7. It was further stipulated this element was not a matter of documentation of training but actual evidence of training under the regulation.

As noted above, the critical evidence submitted by the Secretary on this element consisted of a sickbed conversation between the safety inspector and one of the workers. The inspector, after examining the scene of the incident at the losche mill, took what amounted to a *res ipsa loquitor* attitude toward the training requirement, i.e. such an accident could not have happened

unless the worker were inadequately training as to both the techniques required and the risks associated with incorrect performance of the task. I do not find that attitude justified in experience or in jurisprudence. Familiarity with a task, through formal training or otherwise, often leads to shortcuts and expedient abbreviations of standard steps in the task. The use, for example, of a cheater bar in rotating the hose coupling by Mr. Rohrback is more consistent with a worker trained to familiarity than a person unaware of the proper procedures.

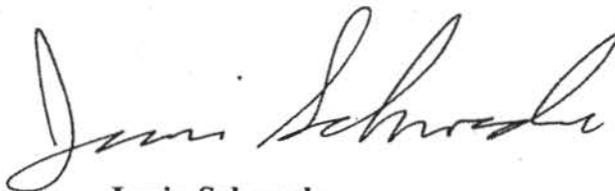
I have not located a case (and counsel have not suggested any to me) which stands for the proposition that the mere fact of an injury accident means that the participants in the accident were inadequately trained to perform their task.

The record in this case does not demonstrate that the January 12, 2001, accident was the result of inadequate training rather than carelessness or inattention. Since the Secretary has the burden of showing in the first instance that inadequate training was provided, I am unable to find a violation of the training regulation. I find the record supports a conclusion that Mr. Rohrback had been adequately trained in the task assigned to him on January 12, 2001, and he was able to provide sufficient supervision to Mr. Juopperi.

For the foregoing reasons, I find in favor of the Respondent and against the Secretary.

Order

For the reasons given above, the Petition is **DISMISSED**.

A handwritten signature in black ink, appearing to read "Irwin Schroeder", written in a cursive style.

Irwin Schroeder
Administrative Law Judge

Distribution:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

Donald P. Knudson, Esq., Gunderson, Palmer, Goodsell & Nelson, LLP, P.O. Box 8045, Rapid City, SD 57709 (Certified Mail)

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
May 3, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-41
Petitioner	:	A.C. No. 46-01968-03505 ZAG
v.	:	
	:	
BGS CONSTRUCTION, INC.,	:	Blacksville No. 2
Respondent,	:	

ORDER DENYING MOTION TO DISMISS **AND** **PREHEARING ORDER**

This case is before under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Respondent has moved to dismiss the case claiming that the Secretary did not notify it of the proposed civil penalty within a reasonable time as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

The two citations at issue in this case, alleging violations involving the death of a miner, were issued on September 15, 2000. The Mine Safety and Health Administration's (MSHA) investigation report was issued on November 9, 2000. The notice of the proposed assessment for the citations was mailed to the company on January 17, 2002. Thus, 14 months and eight days elapsed between the completion of the investigation and notification of the operator of the proposed penalty.

Section 105(a) provides that: "If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited" With regard to whether a civil penalty has been proposed within a "reasonable time," the Commission has furnished the following guidance:

Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on

the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steel Branch Mining, 18 FMSHRC 6, 14 (January 1996).

The Secretary asserts that the reason for the delay in this case was that:

[T]he Office of Assessments had a large case load and was understaffed during the relevant time period. During that period, four persons were responsible for processing over 2,500 citations and orders that were considered for special assessment. Two of those individuals were not in the office for extended periods of time.

(Sec. Resp. at 3.)

In *Steel Branch*, the Commission took official notice that the Secretary had an unusually high case load in 1992 and accepted that as an adequate reason for the delay, even though the "Secretary ha[d] not offered any explanation for his delay." *Id.* Consequently, keeping in mind Congress' expectation that failure to propose a penalty with promptness will not vitiate any proposed penalty proceeding, I find that the Secretary has provided an adequate explanation for the delay.

Turning next to the issue of prejudice to the operator, the company asserts that its "Safety Director, who was at the site and likely to testify on issues in the case, left the company in December 2001 and all BGS work at the Blacksville plant has ceased. Further, trial of this case would require witnesses to testify as to events almost two years old." (Resp. Mot. at 6.) These suppositions do not demonstrate actual prejudice. Although the Safety Director may have left the company, there is no indication that he would not be available for deposition or trial. In addition,

the fact that events are almost two years old is not an unusual occurrence in these cases and has the same effect on both sides. Furthermore, since the company has been aware of the factual allegations in this case since September 15, 2000, there is no reason that the Safety Director's testimony as well as the testimony of any other employees could not have been recorded to refresh recollections before trial.

Accordingly, an adequate explanation having been provided for the delay by the Secretary and the Respondent having failed to demonstrate actual prejudice, the Motion to Dismiss is **DENIED**.

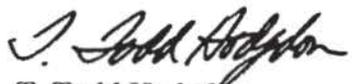
Prehearing Order

In accordance with the provisions of section 105(d) of the Act, 30 U.S.C. § 815(d), the above proceeding will be called for hearing on the merits at a time and place to be designated in a subsequent notice. Prior to setting the case for hearing, the parties are directed to confer for the purpose of discussing settlement. If a settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than **May 24, 2002**.

If settlement is not agreed upon, counsel for the Secretary shall initiate a telephone conference call with the Respondent's representative and the judge for the purpose of setting a hearing date. The conference call may be made at any time convenient to the parties, but not later than **May 31, 2002**.

Procedural motions filed in this case shall comply with Commission **Rule 10(c)**, 29 C.F.R. § 2700.10(c), which requires that "the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion."

Discovery requests made pursuant to Commission Rules 56, 57 and 58, 29 C.F.R. §§ 2700.56, 2700.57 and 2700.58, responses to discovery requests and depositions **should not be filed** with the judge.¹ However, copies of such requests or responses shall accompany any motion to compel or for other relief regarding discovery matters.


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

¹ Cover letters for discovery requests or responses may be filed with the judge if the party desires to have a record of the request or response in the official file.

Distribution: (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
22nd Floor West, Arlington, VA 22209

Mark E. Heath, Esq., Heenan, Althen & Roles, LLP, BB & T Square, P.O. Box 2549, Charleston,
WV 25329

yi

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-41
Petitioner	:	A.C. No. 46-01968-03505 ZAG
v.	:	
	:	Blacksville No. 2
BGS CONSTRUCTION, INC.,	:	
Respondent	:	

ORDER DENYING MOTIONS FOR RECONSIDERATION
AND
CERTIFICATION FOR INTERLOCUTORY REVIEW

This case is before me under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. On April 11, 2002, the Respondent filed a motion to dismiss the case because the civil penalty had not been proposed with "reasonable promptness." The motion was denied on May 3, 2002. The Respondent has now filed a Motion for Reconsideration or, in the Alternative, Motion for Certification for Interlocutory Review. The Secretary opposes both motions. For the reasons set forth below, the motions are denied.

Motion for Reconsideration

The Respondent asserts that the ruling should be reconsidered because: (1) the Secretary unnecessarily specially assesses penalties; (2) the ruling did not consider *United Metro Materials*, 23 FMSHRC 1085 (September 2001) or Program Policy Letter 99-III-5 (August 16, 1999); and (3) the reasons given by the Secretary for the delay do not excuse its failure to assess a penalty within a reasonable time. None of these reasons is compelling.

Besides the bald assertion that the Secretary over-assesses cases as special assessments, the Respondent presents no evidence to support this claim. The Secretary has established guidelines for determining when a case should be specially assessed. 30 C.F.R. § 100.5. There is nothing to suggest that these guidelines are not being followed or a re being abused.

The policy letter and *United Metro* were considered in my ruling, they were just not discussed. Whether the letter is a guideline or a deadline makes no difference in this case. It does not provide any basis for relief to the Respondent. Similarly, the facts in *United Metro* appear to be different than the ones in this case. Furthermore, unreviewed decisions of judges, although they may be instructive, are not binding precedent. 29 C.F.R. § 2700.72.

Finally, the Respondent's third assertion is only that, an assertion. It is not supported

by evidence, case law or even argument. The Respondent cites *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), for the proposition that “insufficient clerical help” may not excuse delay. Here the Secretary has done more than claim insufficient clerical help. But even if she had not, I find it significant that the legislative history states that “the Committee does not expect that the failure to propose a penalty with promptness shall vitiate *any* proposed penalty proceeding. S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (emphasis added).

Accordingly, the Motion for Reconsideration is **DENIED**.

Certification for Interlocutory Review

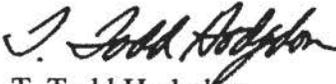
Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1), provides, in pertinent part, that: “Review cannot be granted unless: (i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding” The Respondent’s motion states neither what the controlling question of law is nor how immediate review will materially advance the final disposition of the proceeding. Nonetheless, I find that the interlocutory ruling does not involve a controlling question of law.

The Commission decided the question of law at issue in this case in *Steel Branch Mining*, 18 FMSHRC 6, (January 1996). There it set out the facts to be considered in cases where it has been alleged that the Secretary did not notify the operator of the civil penalty within a reasonable time. *Id.* At 14. Those factors were applied in denying the Motion to Dismiss. Therefore, this matter does not involve a controlling question of law. *Buck Creek Coal, Inc.*, 17 FMSHRC 1677, 1679 (October 1995).

The Commission’s rule on interlocutory review requires that both criteria be present for a ruling to be certified. Accordingly, since a controlling question of law is not involved, the motion for certification is **DENIED**.

Hearing Date

Counsel for the Secretary is directed to initiate a telephone conference call with the Respondent’s counsel and the judge, for the purpose of setting a hearing date, not later than July 5, 2002.


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

Distribution: (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Mark E. Heath, Esq., Heenan, Althen & Roles, LLP, BB & T Square, P.O. box 2549, Charleston, WV 25329

yi

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 3, 2002

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-304-D
	:	DENV CD 2001-03
	:	
v.	:	Mine I.D. 45-03357
	:	Dry Fork Mine
WYOMING FUELS-WYOMING, INC.,	:	
d/b/a DRY FORK COAL COMPANY	:	

ORDER DESCRIBING PURPOSE OF SECTION 105(C)(3) OF THE MINE ACT
ORDER GRANTING COMPLAINANT AN EXTENSION OF TIME

Hazel Olson called my office several times over the past week stating that she is seeking from the Department of Labor's Mine Safety and Health Administration ("MSHA") a copy of the file developed during MSHA's investigation of her discrimination complaints. Apparently, Ms. Olson has filed a Freedom of Information Act request with Sandra L. Yamamoto of MSHA's Technical Compliance and Investigation Division. She states that she needs this information to respond to Respondent's renewed motion to dismiss.

Under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Mine Act"), any miner or applicant for employment may file a complaint with MSHA alleging that he or she was discriminated against in violation of section 105(c)(1). MSHA is required to investigate the complaint of discrimination. If "upon such investigation," MSHA determines that section 105(c)(1) was violated, MSHA is required to file a complaint of discrimination on behalf of the complainant with the Federal Mine Safety and Health Review Commission (the "Commission"). If, on the other hand, MSHA determines that section 105(c)(1) was not violated, "the complainant shall have the right . . . to file an action on his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3).

The Commission is an independent agency that is not part of the Department of Labor or MSHA. In her response to Chief Judge Barbour's order to file an amended complaint, Ms. Olson replied:

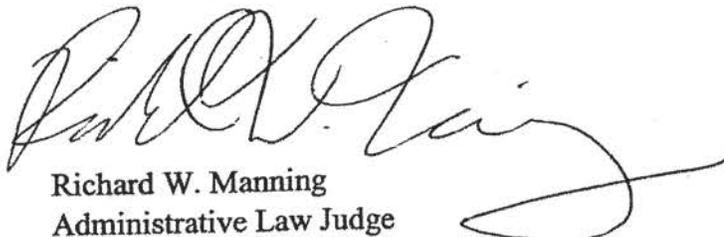
I can't get an interview for a job, much less a job, because MSHA has not done what they are supposed to do and protect me when I filed complaints. They just hung me out to dry.

As an administrative law judge with the Commission, I do not have the authority to order MSHA to reopen its investigation so that it can more thoroughly investigate Ms. Olson's complaints. I also do not have the authority to require MSHA to provide Ms. Olson with a copy of all or portions of its investigative files. Section 105(c)(3) of the Mine Act authorizes Ms. Olson to "file an action on her own behalf." Section 105(c)(3) was enacted to give a complainant an opportunity to try to establish that he or she was discriminated against, despite the fact that MSHA determined that there was no discrimination. Consequently, this case is not an appeal of MSHA's decision not to file a discrimination complaint but is a new, independent proceeding brought by Ms. Olson on her own behalf. The Commission does not review MSHA's investigation to determine whether it was competent or to determine whether MSHA's conclusions were correct. Neither the Secretary of Labor nor MSHA are a party in this case.

In order to prevail in this case, Ms. Olson must establish, "on her own behalf," that she engaged in protected activity and that Respondent's decision not to hire her was motivated at least in part by that protected activity. Commission Rule 42, 29 C.F.R. § 2700.42, requires that a complaint of discrimination "include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." In his order of May 24, the Commission's chief judge required Ms. Olson to amend her complaint to "state clearly what rights she allegedly exercised, when she allegedly exercised them, and what adverse action she allegedly suffered as a result, and when she suffered them," as required by Rule 42. Ms. Olson's response, dated June 12, 2002, contains some general allegations. Respondent filed a renewed motion to dismiss following its receipt of Ms. Olson's response.

Ms. Olson must respond to Respondent's renewed motion to dismiss. In her response, Ms. Olson should list the facts that she is relying on to establish that she was discriminated against. The list of facts must include what Mine Act rights she raised and when and where she raised them, and what adverse actions she suffered at the hands of Respondent and when and where she suffered them. Ms. Olson is the complainant in this case and she should have these facts at her disposal.

Because Ms. Olson is not represented by counsel and it appears that she originally believed that the Commission is empowered to review MSHA's investigation of her complaints, I am granting her an extension of time to respond to Respondent's renewed motion to dismiss. Ms. Olson shall file her response to the renewed motion to dismiss, as described above, on or before **August 5, 2002**.


Richard W. Manning
Administrative Law Judge

Distribution:

Ms. Hazel Olson, 16 Whoop-Up Canyon Road, Newcastle, WY 82701-9702

Rex E. Johnson, Esq., Sherard, Sherard & Johnson, P.O. Box 69, Wheatland, WY 82201-0069

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 5, 2002

UMWA, LOCAL 2368,	:	COMPENSATION PROCEEDING
DISTRICT 20, on behalf of miners,	:	
Applicant	:	Docket No. SE 2002-22-C
v.	:	
	:	
JIM WALTER RESOURCES INC.,	:	No. 5 Mine
Respondent	:	Mine ID 01-01322

ORDER DENYING MOTION FOR SUMMARY DECISION

This case is before me upon a Complaint for Compensation filed by the United Mine Workers of America Local 2368, District 20 (UMWA), pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994), the "Act," seeking compensation from Jim Walter Resources, Inc. (JWR) for miners idled following several explosions at JWR's No. 5 Mine on September 23, 2001.¹

It is undisputed that on September 23, 2001, at approximately 5:30 p.m., a portion of the roof in the No. 4 section at JWR's No. 5 Mine fell, followed by an explosion resulting in injuries. At approximately 6:15 p.m., a second, larger explosion occurred and all miners who had not already been told to do so were told to evacuate the mine. It is also undisputed that at around 6:05 p.m. on September 23, 2001, a mine employee notified Department of Labor, Mine Safety and Health Administration (MSHA) field supervisor Charles Terry Langley of the explosion at the No. 5 mine. Langley then called the mine and spoke with Harry House, a salaried JWR employee, who confirmed the explosion. Subsequently four MSHA inspectors traveled to the mine. Upon arriving at the mine around 7:15 p.m., they spoke to Dale Byram, another JWR salaried employee, and the mine rescue team. They then proceeded to the mine office.

¹ The Complaint herein is deemed amended to conform with the now undisputed evidence that Order No. 767687 was issued at 8:15 p.m. (not at 4:15 p.m. as alleged in the Complaint) and that the Union is now claiming compensation only for miners who were scheduled to work the 11 p.m. to 7 a.m. "owl shift" on September 23 and 24, 2001, in the amount of four hours regular pay (rather than the 12:01 a.m. to 8:00 a.m. shift on September 24, 2001). Finally, it appears that miners working the 4 p.m. to midnight shift on September 23, 2001, were in fact paid, therefore compensation sought in the Complaint for these miners is not at issue. See FED.R.CIV.P. 15(b), applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b).

By 7 p.m., mine manager Jesse Cooley and other JWR management decided to close the mine and notify all miners on subsequent shifts that the mine would be closed until further notice. Beginning at 7:30 p.m., JWR officials notified miners scheduled to work on subsequent shifts that the mine would be closed until further notice. At 8:15 p.m., MSHA Inspector Edward Nicholson, issued Order No. 7676787, pursuant to Section 103(k) of the Act.² The order stated that “a non-fatal, injury explosion has occurred on the No. 4 Section, this being issued to protect the miners, until and [sic] investigation is completed.” The order was modified at 8:58 p.m., extending it to the entire No. 5 mine. The order was terminated on June 11, 2002. It is undisputed that at least one “owl shift” miner, John Wallace, was not contacted about the mine closure until approximately 8:30 p.m.

In its motion for summary decision, JWR argues that it is entitled to a summary decision based on the undisputed facts and the Commission’s decision in *Local Union 1261, District 22, UMWA v. Consolidation Coal*, 11 FMSHRC 1609, (September 1989), *aff’d* 917 F.2d 42 (D.C. Cir. 1990). Section 111 of the Act provides that if a mine is “closed by an order issued under Section 103 . . . [and] such order is not terminated prior to the next working shift, all workers on that shift who were idled by such order shall be entitled to full compensation . . . but for not more than four hours of such shift.” In the *Local Union 1261* case the Commission held however that since the mine operator in that case had voluntarily withdrawn all miners for their safety before the issuance of the withdrawal order and since the operator advised miners on later shifts that the mine was “idle until further notice” none of those for whom compensation was claimed were on “the next working shift.” The Commission accordingly held that the miners in that case were not entitled to compensation. *Local Union 1261*, 1614 n. 6.

The rationale for this holding was stated by the Commission therein as follows:

Here, the record shows immediate action on the part of a mine operator to remove all afternoon shift employees from the mine because of rising gas levels - - clearly a threat to the health and safety of the miners. The wisdom of this action was attested by the action of MSHA inspectors who, after being summoned by the operator, issued a control order on the following morning, officially closing the mine and thereby confirming the evacuation order issued during the previous evening by the mine operator. Thus, apart from the fact that no miners were present in the mine when MSHA closure order was issued, it is apparent that the

² Section 103(k) of the Act provide as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return to the areas of such mine to normal.

safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as *Consol* took here.

The Commission noted in *Local Union 1261* however, that the case did not involve an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary, suggesting a different result if that were the case.

In its response to JWR's Motion for Summary Decision, the UMWA argues that the closure of the mine by JWR was only an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary, and that, therefore, the Commission decision in *Local Union 1261* is inapplicable to this case. The UMWA further argues that a factual dispute remains therefore as to whether JWR withdrew the miners only to avoid Section 111 liability in anticipation of withdrawal action by the Secretary or whether it was done for the protection of the miners consistent with the Commission's decision in *Local Union 1261*. I agree that such a factual dispute exists requiring evidentiary hearings and credibility determinations to resolve these issues.³

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

Under the circumstances herein, in light of the factual issue remaining in dispute, the motion for summary decision must be denied. Commission Rule 67, 29 C.F.R. § 2700.67.

³ The UMWA's claim that some "owl shift" miners were not notified of the mine closure and that some appeared at the mine before the 11 p.m. startup time (though it does not claim that any of the miners performed any work on that shift) is not in itself, directly relevant to the issue of compensation rights but goes only to the credibility of JWR's reasons for withdrawing the miners. In addition, the bald allegations asserted in this regard by the UMWA in its reply to the motion for summary decision are not in compliance with Commission Rule 67.

ORDER

The Motion for Summary Decision filed by Jim Walter Resources on May 31, 2002, is denied.

A handwritten signature in black ink, appearing to read "Gary Melick". The signature is fluid and cursive, with a large initial "G" and "M".

Gary Melick
Administrative Law Judge
703-756-6261

Distribution: (Certified Mail)

Joyce Hanula, Esq., United Mine Workers of America, 8315 Lee Highway, Fairfax, VA 22031

David M. Smith, Esq., William L. Campbell, Jr., Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

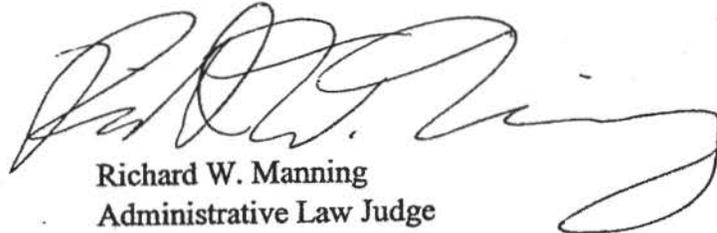
July 26, 2002

CORD EASLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2001-133-DM
	:	Portable Crusher #1
	:	
v.	:	Mine I.D. 45-03357
	:	
MORRILL ASPHALT PAVING,	:	
Respondent	:	

**ORDER DENYING RESPONDENT'S MOTION TO TAKE TESTIMONY
OF ROGER HARTING BY TELEPHONE**

Counsel for Respondent filed a letter-motion requesting that it be allowed to present the testimony of Roger Harding by telephone at the hearing in this case. Counsel stated that Mr. Harting no longer works for Respondent, lives in another state, and is not available on the date scheduled for hearing. Counsel for Complainant filed an objection.

Roger Harting is a critical witness in this case. Taking the testimony of such a key witness as Mr. Harting by telephone is fraught with difficulties and compromises Complainant's right of cross-examination. The Federal Rules make it clear that testimony should not be taken in such a manner except in extraordinary circumstances. *See* Fed. R. Civ. P. 43(a) including Advisory Committee Notes for 1996 Amendment. Deposition testimony provides a superior means of securing the testimony of a witness who is not available to testify. *Id.* Consequently, Respondent's motion to take Roger Harting's testimony by telephone is **DENIED**.


Richard W. Manning
Administrative Law Judge

Distribution:

Devin Poulson, Esq., Lacy & Kane, P.O. Box 7132, East Wenatchee, WA 98802-0132 (Fax and First Class Mail)

Lewis L. Ellsworth, Esq., Gordon Thomas, Honeywell, Malanca, Peterson & Daheim, P.O. Box 1157, Tacoma, WA 98401-1157 (Fax and First Class Mail)