AUGUST 2001

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

AUGUST 2001

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

Secretary of Labor, MSHA v. Vermont Unfading Green Slate Company, Inc., Docket Nos. YORK 2000-65-M, 66-M. (Judge Hodgdon, March 21, 2001)

Secretary of Labor, MSHA v. Dynatec Mining Corporation, Docket No. EAJ 2001-3. (Judge Manning, July 10, 2001)

Review was denied in the following case during the month of August:

Secretary of Labor, MSHA on behalf of Ernest J. Jensen v. Energy West Mining Company, Docket No. WEST 2000-203-D. (Judge Cetti, July 11, 2001)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. YORK 2000-65-M YORK 2000-66-M
v.	:	
VERMONT UNFADING GREEN SLATE COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 21, 2001, Administrative Law Judge T. Todd Hodgdon issued a decision vacating, modifying and affirming various citations alleging violations of mandatory safety standards issued to Vermont Unfading Green Slate Company, Inc. ("Vermont Slate"). 23 FMSHRC 310 (Mar. 2001) (ALJ). Vermont Slate subsequently filed with the Commission a petition for discretionary review, challenging the judge's decision.

In a letter to the Commission dated July 16, 2001, Vermont Slate states that it filed its petition with the Commission via facsimile on April 20, 2001. Vermont Slate attached to its letter a facsimile history report, and a copy of its petition. The Commission has determined administratively that it received Vermont Slate's petition on April 20.

The judge's jurisdiction in this matter terminated when his decision was issued on March 21, 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). Due to clerical inadvertence, the Commission did not act on Vermont Slate's petition within the statutory period for considering petitions for discretionary review. The

judge's decision became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

The Commission has recognized that, in appropriate circumstances, it may grant various forms of relief from final Commission orders. *Guilmette Bros. Corp.*, 22 FMSHRC 803, 804 (July 2000). 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"); *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); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

In the interest of justice, we reopen these proceedings. *See Cedar Lake Sand & Gravel Co.*, 15 FMSHRC 2253, 2254 (Nov. 1993); *Remp Sand & Gravel*, 16 FMSHRC 501, 502 (Mar. 1994). We shall consider the merits of Vermont Slate's petition and rule on whether review should be directed by separate order.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 10, 2001

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

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Gary Melick, upon remand for reassessment of penalty, correctly assessed a penalty against Douglas R. Rushford Trucking ("Rushford"). 22 FMSHRC 1127 (Sept. 2000) (ALJ). For the reasons that follow, we vacate the judge's penalty and remand for the reassessment of the civil penalty.

I.

Factual and Procedural Background

This is the second time that this proceeding has been before the Commission. A summary of the background facts and the judge's initial decision (22 FMSHRC 74 (Jan. 2000) (ALJ)) is found in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000) ("*Rushford I*"). Briefly, a Rushford employee was fatally injured when, as he was inflating a tire on a fuel truck, the wheel rim exploded and struck him in the head. At the time, he had not been using a stand-off inflation device. 22 FMSHRC at 599. MSHA charged Rushford with violating 30 C.F.R. § 56.14104(b)(2), which requires stand-off inflation devices to be used during tire inflation to prevent injury from wheel rims by permitting individuals to stand outside of the potential trajectory of wheel components. The Secretary proposed a civil penalty of $25,000. 22 FMSHRC at 599. The judge found a violation and determined that it was significant and

substantial ("S&S") and a result of Rushford's unwarrantable failure. *Id.* He assessed a $3000 civil penalty. *Id.*

On review, the Commission affirmed the judge's finding of a violation and its characterization as S&S and unwarrantable, but concluded that the judge neglected to make findings on all of the penalty criteria set forth in Mine Act section 110(i), 30 U.S.C. § 820(i),[1] particularly with respect to the gravity of the violation. 22 FMSHRC at 602. In our opinion remanding this proceeding, we instructed the judge to provide a more complete explanation of his penalty assessment. *Id.* We held that, if the judge decided a substantial reduction in the penalty proposed by the Secretary of Labor was warranted, he must explain the rationale for the reduction, especially in light of his finding of "gross negligence." *Id.* We also directed the judge to examine Rushford's lack of history of violations, which the Secretary claimed was a result of Rushford's failure to file quarterly reports and consequently could not be considered a mitigating factor in a penalty assessment. *Id.* Because the record was unclear on this point, we indicated that the judge could reopen the record to assist in his examination of Rushford's history of violations. *Id.* The judge held a supplemental hearing on August 24, 2000.[2]

On remand, the judge discussed each of the section 110(i) criteria. He determined that an increase in the penalty he had originally assessed was warranted because Rushford's lack of history of violations stemmed in part from its mistaken failure to file quarterly forms and, according to the Commission's instructions, could not be a mitigating factor. 22 FMSHRC at 1128-30. The judge found that Rushford was very small, and that it exhibited good faith in achieving rapid compliance by purchasing a stand-off device and posting the requirement that it be used at the mine. *Id.* at 1130-31. The judge noted the operator's acknowledgment that a $25,000 penalty would result in hardship, but would not cause it to cease operations. *Id.* Relying on *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984), he observed that without proof that the imposition of penalties would adversely affect an operator's ability to continue in business, there is a presumption that no such adverse effect would occur. 22 FMSHRC at 1131. He determined that the violation, which caused a fatality,

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[1] Section 110(i) of the Mine Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" the six statutory penalty criteria:

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

[2] Hearings in this case were held on August 26, 1999 ("Tr. I"), August 27, 1999 ("Tr. II"), October 5, 1999 ("Tr. III") and August 24, 2000 ("Tr. IV").

was of "high gravity." *Id.* The judge stated that, although the violation was the result of "high" and "gross" negligence, he considered that Rushford's negligence resulted from a "self-imposed ignorance" of the standard rather than any "intentional non-compliance," making the violation arguably "not the result of unwarrantable failure." *Id.* at 1130. The judge assessed a penalty of $4000, concluding that the Secretary's proposed penalty of $25,000 lacked analytical support and was disproportionate to an appropriate consideration of the penalty criteria. *Id.* at 1132-33.

II.

Disposition

On appeal, the Secretary argues that the judge's penalty assessment on remand was flawed. PDR at 2.[3] She asserts that the judge erred in determining that, because the violation was the result of operator "self-imposed ignorance" of MSHA standards, the operator's negligence was reduced for penalty assessment purposes. *Id.* at 5-7. That determination, according to the Secretary, is inconsistent with the judge's original decision, the Commission's decision and Commission precedent. *Id.* She contends that the judge also erred by requesting the Secretary to provide underlying information for her penalty assessment. *Id.* at 9-16. Rushford did not file a brief with the Commission.

Although Commission judges are accorded considerable discretion in assessing civil penalties under the Mine Act, in reviewing a judge's penalty assessment, the Commission must determine whether the factual findings of the penalty are supported by substantial evidence and are consistent with the statutory penalty criteria set forth in Mine Act section 110(i). *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

We agree with the Secretary that the judge's negligence determination on remand, on which he relied to reduce the penalty (*see* 22 FMSHRC at 1130), conflicts with his original decision. 22 FMSHRC 74. On remand the judge held that Rushford's "self-imposed ignorance of the . . . standard" made the violation "at least arguabl[y] . . . not the result of unwarrantable failure." 22 FMSHRC at 1130. However, in his original decision, the judge found that the violation was a result of unwarrantable failure and "high negligence." 22 FMSHRC at 77-78. Those findings stemmed from "the evidence that Rushford had never bothered to obtain a copy

[3] The Secretary designated her petition for discretionary review ("PDR") as her brief.

of the health and safety regulations governing the operation of [the] mine,"[4] 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." *Id.* The judge concluded: "these factors clearly support a finding of unwarrantability and gross negligence." *Id.* at 78.

In *Rushford I*, the Commission directed the judge to explain his reduction in the proposed penalty in light of his finding of gross negligence. 22 FMSHRC at 602. Instead of giving the required explanation on remand, the judge attempted to retract his earlier gross negligence finding. However, because the judge's original findings of gross negligence and unwarrantable failure were not appealed to the Commission, those issues were not subsequently remanded to him, and instead became the law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (holding that on remand, judge could not revisit unappealed portions of initial decision). Accordingly, to the extent the judge's remand decision purported to retract his initial findings of gross and high negligence, the judge erred.

Additionally, the judge's reasoning that "self-imposed ignorance" reduces an operator's negligence conflicts with Commission precedent. In the context of Mine Act section 110(c), 30 U.S.C. § 820(c),[5] we have held that in order to show section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Prabhu Deshetty*, 16 FMSHRC 1046, 1051-53 (May 1994). In *Deshetty*, the Commission affirmed a high negligence determination despite Deshetty's claim that he was not aware of whether the cited conditions were prohibited under the law. 16 FMSHRC at 1053. In *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984), the Commission explained that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." The judge's negligence discussion also contravenes the general principle that ignorance of the law is no defense. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996) (providing that ignorance of law is not a defense to a claim for punitive damages in a case arising under Title VII); *McGee v. C.I.R.*, 979 F.2d 66, 70 (5th Cir. 1992) (providing that innocent spouse relief under the Internal Revenue Code is "designed to protect the innocent, not the intentionally ignorant").

Because the judge's discussion of negligence in his penalty assessment on remand is

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[4] Rushford was not aware of the standard at issue because it did not have a copy of the Code of Federal Regulations governing its mining operation. Tr. III 109-10. Its office manager testified that no one, including the mine owner, asked her to obtain a copy of the regulations. Tr. III 111.

[5] Section 110(c) cases are instructive because they involve allegations of aggravated conduct. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). We have also held that highly negligent conduct "suggests an aggravated lack of care" and unwarrantable failure. *Mettiki Coal Corp.*, 13 FMSHRC 760, 770 (May 1991) (citing *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)).

"infected by plain error," the judge, in assessing a penalty of $4000, committed an abuse of discretion. *See U.S. Steel*, 6 FMSHRC at 1432. We therefore vacate his penalty.[6]

Having found that the judge committed legal errors in considering the section 110(i) penalty criteria, we remand the matter for the assessment of a new penalty amount. However, we leave undisturbed the following findings made by the judge on the six statutory penalty criteria. 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. 22 FMSHRC at 1129. Accordingly, the lack of history of violations is neither an aggravating nor a mitigating factor for penalty purposes.[7] 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. *Id.* at 1130-31. 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. *Id.* at 1131. This finding on the ability to continue in business criterion does not weigh in favor of reducing the proposed penalty. As discussed herein, the 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." 22 FMSHRC at 77-78. This finding on the negligence criterion

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[6] Because we have determined that the judge's penalty assessment was erroneous, we do not reach the Secretary's additional arguments challenging that penalty.

[7] We reject the judge's implication that the Commission should have declined review of the Secretary's claim, that the lack of history of violations could not be a mitigating factor, on the basis that it was a "new" theory, raised for the first time on review. 22 FMSHRC at 1128. Under Mine Act section 110(i), the judge had to consider and address on the record before him the history of violations penalty criterion. *Sec'y on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1299-1303 (Dec. 1998) (holding that judge must consider all six penalty criteria and ensure that a complete record is made on all criteria); 29 C.F.R. § 2700.69(a) (requiring judge's decision to include "all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion *presented by the record*") (emphasis added). The record evidence before the judge showed that MSHA did not inspect the mine from 1993 to 1998 and that the operator did not file quarterly reports during that time. Tr. I 239-244, 263-276, 290-300; Tr. III 128. Mine Act section 113(d)(2)(A)(iii), 30 U.S.C. § 823(d)(2)(A)(iii), proscribes appealing any question of law or fact to the Commission, over which the judge was not afforded an opportunity to pass. Here, the judge had the opportunity to pass on, and indeed decided, the issue of the impact of the lack of violations on the penalty assessed, without any examination or discussion of why Rushford had not been inspected for five years prior to the subject violation. 22 FMSHRC at 80. The issue was before the judge and should have been addressed in his original decision and the Commission properly requested the judge to re-examine it on remand.

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. 22 FMSHRC at 1131. This gravity finding also serves as an aggravating factor for penalty purposes. *Id.* Finally, we find Rushford's alleged ignorance about a protective device as well known as stand-off inflation equipment, which is ubiquitious in any industry working with split rim truck tires (Tr. I. at 420), 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.

We thus remand the assessment of the amount of the penalty to the judge, the trier of fact in the first instance. *Sellersburg*, 5 FMSHRC at 294.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand for the assessment of a civil penalty in accordance with this opinion.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 2001-113
BLACK GOLD TRUCKING COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, 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 3, 2001, the Commission received from Black Gold Trucking Company ("Black Gold") 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). In a letter dated May 17, 2001, the Secretary of Labor informed the Commission that Black Gold was cited in error in the above-captioned case and that the Secretary's proceeding against the company in this matter has been terminated.

Because the underlying citation that gave rise to Black Gold's motion to reopen has been terminated by the Secretary, we find the operator's motion to reopen moot.

Accordingly, Black Gold's motion to reopen is denied.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. CENT 2001-102
SAN JUAN COAL COMPANY	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 8, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") received from San Juan Coal Company ("San Juan Coal") the "green card" notice that the operator was requesting a hearing on five alleged violations for which MSHA had proposed penalties. On March 26, 2001, the Secretary of Labor filed a petition for assessment of civil penalties against San Juan Coal. The operator failed to answer the Secretary's petition as required by 29 C.F.R. § 2700.29. On May 25, 2001, Chief Administrative Law Judge David F. Barbour issued an Order to Respondent to Show Cause, directing San Juan Coal to file an answer within 30 days. On July 16, 2001, noting that no answer had been filed, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering San Juan Coal to pay civil penalties in the sum of $36,000.

On August 2, 2001, San Juan Coal filed a petition for discretionary review and motion, seeking relief in the form of an order vacating the Order of Default, reopening the proceedings, and granting it additional time in which to respond to the petition for assessment of civil penalties. It states that it has not completed its investigation into why it did not respond to the penalty assessment petition and show cause order. PDR at 2. It notes, however, that, when it sent its notice of contest to MSHA, it designated in-house counsel Charles Roybal as the appropriate company official to contact. *Id.* at 2 and Ex. C. It contends that, although it received

the petition for assessment of civil penalties and the show cause order, the documents were not sent to Roybal but to other company personnel. *Id.* at 3. It asserts that the person responsible for forwarding such information assumed in error that Roybal had already received copies of the documents and did not forward them to him. *Id.* It contends that Roybal only became aware of the penalty assessment petition and the show cause order after the judge issued the default order. *Id.*[1]

It appears from the record that the penalty assessment petition and the show cause order were sent to Carolyn Durga, senior safety advisor at San Juan Coal. Her name appears in the operator's address (which is printed by MSHA) on the MSHA form used to contest penalty proceedings. Attach. Ex. C. This information is generally obtained by MSHA from operators pursuant to the requirements of one of its "notification of legal identity" regulations. 30 C.F.R. § 41.11.

The judge's jurisdiction in this matter terminated when his decision was issued on July 16, 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). We deem that San Juan's petition for discretionary review was timely filed and we grant it.

We have 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). On the basis of the present record, including San Juan Coal's statement that it has not completed its investigation into why it did not respond to the petition for assessment of civil penalties and the show cause order, we are unable to evaluate the merits of its position. We are particularly puzzled about why, when Durga received the order to show cause (which indicated that no answer had been filed responding to the Secretary's penalty petition), she did not contact Roybal to be sure he had received the relevant documents.

In the interest of justice, we vacate the default order and remand this matter to the judge to determine whether relief from the final order is appropriate.[2] *See Middle States Res., Inc.*, 10 FMSHRC 1130, 1130-31 (Sept. 1988) (remanding where show cause order was allegedly sent to

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[1] No affidavits were included with San Juan Coal's petition for discretionary review and motion.

[2] The judge, if he reopens the proceedings, should determine whether to grant San Juan Coal's motion for additional time to respond to the penalty assessment petition.

a former corporate agent even though MSHA had allegedly been given notice of the change in agent); *Agronics, Inc.*, 21 FMSHRC 475, 475-77 (May 1999) (remanding where the default order was allegedly sent to the wrong company official).

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here. San Juan Coal received a penalty proposal and timely contested it, identifying Charles Roybal as the person on whom further papers should be served. PDR ¶ 3 and Ex. C (Roybal's name entered after the words "Company Official To Contact" on form). Roybal was San Juan Coal's in-house counsel. PDR ¶ 3. But MSHA failed to serve its penalty petition on Roybal. *Id.* and Ex. B at 4. As a result, and because of internal confusion at San Juan Coal (PDR ¶ 3), the company failed to file a timely Answer to the penalty petition, which in turn resulted in Judge Barbour issuing the default order at issue.

It is clear from the record that but for MSHA's failure to serve the penalty petition on San Juan Coal's in-house counsel, the company would have filed an Answer to the petition in a timely fashion. Given that MSHA is partly responsible for the company being held in default, it would be patently unjust to fail to grant San Juan Coal the opportunity to proceed with its contest of the proposed penalty. *Cf. Stillwater Milling Co.*, 19 FMSHRC 1021 (June 1997) (reopening proceeding in which operator mistakenly paid penalty because MSHA failed to serve proposed penalty on operator's attorney of record).

Our colleagues, however, inexplicitly prolong this proceeding by ordering a remand. It is obvious what the judge will do – reopen the case based on the very facts we have before us. A remand here is an utter waste of time and this Commission's resources. Nevertheless, in order to avoid the effect of an evenly divided decision – i.e., the unjust result of the default order being affirmed in result – we reluctantly join our colleagues in remanding the case. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2001-108-M
SHIRLEY LAND DEVELOPMENT INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 20, 2001, the Commission received from Shirley Land Development Inc. ("Shirley Land") 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 this case, Shirley Land did not timely submit its request for a hearing to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *See* 29 C.F.R. § 2700.26. In its motion submitted by Patricia R. Shirley, company president, it states that it never received notice of the proposed penalty assessment from MSHA. Mot. The operator was issued Citation Nos. 6067035 and 6067036, dated June 15, 2000, for violations of 30 C.F.R.

§ 56.14107(a). *Id.*, attachs. Shirley Land asserts that, having abated the alleged violations and having received no notice of proposed penalties, it concluded that no penalties had resulted from the citations. Mot. It contends that it was unaware of any penalties until it received a letter on April 14, 2001, from MSHA informing it that the proposed penalties associated with the cited violations had become final and that it was delinquent in payment of the penalties. *Id.*, attachs. Shirley Land requests that the Commission reopen this matter. 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," Fed. R. Civ. P. 60(b). *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 Shirley Land's position. 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 Idaho Minerals*, 22 FMSHRC 1301, 1301-03 (Nov. 2000) (remanding where operator alleged it did not receive proposed penalty assessment); *Bauman Landscape, Inc.*, 22 FMSHRC 289, 289-90 (Mar. 2000) (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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose the motion for relief, the operator has offered a sufficient explanation for its failure to timely respond, and no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2001-107-M
CANTERA BRAVO INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 20, 2001, the Commission received from Cantera Bravo Inc. ("Cantera") 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, Cantera, appearing pro se, asserts various reasons why the Department of Labor's Mine Safety and Health Administration ("MSHA") should not have issued the citations (Citation Nos. 07797264, 07797265, 07797266, and 07797267) against it that resulted in the penalty assessment at issue. Mot. It requests that the penalties be dropped but offers no explanation for its failure to timely file a request for a hearing. *Id.*

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," Fed. R. Civ. P. 60(b). *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 Cantera's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cantera has met the criteria for relief under Rule 60(b). *See Collier Stone*, 22 FMSHRC 483, 483-84 (Apr. 2000) (remanding to judge where pro se operator offered inadequate explanation for its failure to file a timely request for a hearing); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (remanding to judge where pro se operator offered no explanation for its failure to contest the penalty assessment). 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here. First, we note that the Secretary does not oppose Cantera's motion. We also note that Cantera is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Because Cantera, which is located in Puerto Rico, submitted its motion to reopen in Spanish (subsequently translated into English), language factors may have contributed to its failure to fully explain why it did not file a timely request for a hearing. Nor do we find any other circumstances that would render a grant of relief here problematic. Under these circumstances, we thus fail to see the need or utility for remanding this matter.

Nevertheless, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2001-154-M
CARRI SCHARF MATERIALS, COMPANY	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 25, 2001, the Commission received from Carri Scharf Materials, Company ("Carri Scharf") 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 this case, Carri Scharf did not timely submit its request for a hearing to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *See* 29 C.F.R. § 2700.26. In its pro se motion, it contends that it never received the proposed penalty assessment (Control No.

11-03013-05509) from MSHA.[1] *Id.* Carri Scharf also challenges the merits of one of the orders associated with the proposed penalty assessment (Order No. 7827502), stating that the information contained in the order is not accurate, and that there is new information pertaining to the case. It asserts that the civil penalty amount of $7259 is absurd and that another proposed penalty assessment (Control No. 11-03013-05508), for the amount of $1600, was issued to it and pertains to the present case. *Id.* Carri Scharf requests that the Commission reopen this matter. *Id.*

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," Fed. R. Civ. P. 60(b). *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).

[1] Carri Scharf attached to its motion a copy of a certified mail receipt showing that the proposed penalty assessment was sent by MSHA to Carri Scharf's P.O. box address but was returned to the agency undelivered. Mot., attachment.

On the basis of the present record, we are unable to evaluate the merits of Carri Scharf's position. 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 Idaho Minerals*, 22 FMSHRC 1301, 1301-03 (Nov. 2000) (remanding where operator alleged it did not receive proposed penalty assessment); *Bauman Landscape, Inc.*, 22 FMSHRC 289, 289-90 (Mar. 2000) (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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose the motion for relief, the operator has offered a sufficient explanation for its failure to timely respond, and no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2001-61-M
BAKER SLATE, INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 29, 2001, the Commission received from Baker Slate, Inc. ("Baker Slate") 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 this case, Baker Slate did not timely submit its request for a hearing to the Department of Labor's Mine Safety and Health Administration ("MSHA"). In its pro se motion, it states that it was advised by others in the slate industry to first contact Donald Corp of MSHA regarding the matter. Mot. It asserts that when it finally contacted him, after three weeks of attempting to do so, Corp said that he was no longer handling the matter and advised Baker Slate to call the MSHA telephone number printed on the proposed assessment. *Id.* Baker Slate contends that it called the MSHA number and was told to send a note and other documents to MSHA. *Id.* It

asserts that it did not do so because it was concerned that the documents might become lost. *Id.* It further asserts that, after a few days, it contacted an attorney who sent a letter to MSHA requesting a hearing on its behalf. *Id.* MSHA responded to the letter on May 17, 2001, informing Baker Slate that its hearing request was untimely and that the order had become final on April 21, 2001. Baker Slate requests that the Commission reopen this matter. *Id.*

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," Fed. R. Civ. P. 60(b). *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 Baker Slate's position. 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 Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to judge to determine whether asserted lack of familiarity with Commission procedures met criteria for relief under Rule 60(b)); *Peabody Coal Co.*, 16 FMSHRC 2030, 2030-31 (Oct. 1994) (remanding to judge where failure to timely submit a hearing request was allegedly due to operator's confusion about Commission procedures). 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose the motion for relief, the operator has offered a sufficient explanation for its failure to timely respond, and no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket Nos.	CENT 2000-65
	:		CENT 2000-80
GEORGES COLLIERS, INCORPORATED	:		

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

DECISION

BY THE COMMISSION:

In this consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge Gary Melick assessed penalties in the amount of $3713 against Georges Colliers, Inc. ("GCI"). 22 FMSHRC 1091, 1093-94 (Sept. 2000) (ALJ). GCI filed a petition for discretionary review ("PDR") challenging the judge's penalty assessments, which was granted. For the reasons set forth below, we vacate the judge's penalty assessments and remand for reassessment.

I.

Factual and Procedural Background

On September 10, 1999, the Secretary proposed penalties in the amount of $4896 for 18 citations and one section 104(b) order in Docket No. CENT 2000-65, and on September 16, she proposed penalties in the amount of $1255 for 10 citations in Docket No. CENT 2000-80. GCI contested each of the proposed assessments, which together totaled $6151. The Secretary then filed with the Commission petitions for assessment of penalties. Subsequently, the proceedings were consolidated. The parties agreed that the only issue in dispute was the effect of the penalties on GCI's ability to continue in business. A hearing was held on this issue on April 13, 2000.

At the hearing, GCI presented evidence of its financial condition, including audits, signed tax returns, letters from contract purchasers of coal indicating that GCI was unable to meet

production, letters from the holder of a secured note that GCI was in default, a list of outstanding delinquent unsecured debtors, and detailed testimony of an expert witness in support of its position that the penalties would affect its ability to continue in business. In addition, the judge instructed the parties to submit joint stipulated facts on the remaining penalty criteria.

While the parties were negotiating a joint stipulation of facts, they discovered that the Secretary had incorrectly determined GCI's history of violations. On August 14, 2000, the Secretary submitted to the judge amended proposed stipulations stating that GCI's violations history included 277 violations. S. Am. Proposed Stips. of Fact at 1. GCI disputed this calculation and the parties subsequently stipulated to a lower number of violations (218). Jt. Stips. of Fact at 1. As a result, the Secretary reduced the total proposed assessments. Letter dated Sept. 15, 2000 from Sec'y of Labor. On September 11, 2000, the parties submitted the joint stipulations, which included a reduction of the proposed penalty assessments from $4896 to $2819 in Docket No. CENT 2000-65, and from $1255 to $894 in Docket No. CENT 2000-80, for a total of $3713.[1]

The judge issued his decision on September 20, 2000. In his decision, he declined to consider "numerous financial records and extensive unrebutted factual and expert testimony" submitted by GCI at the hearing, stating that the evidence was "no longer relevant" due to the reduced proposed assessments. 22 FMSHRC at 1092. The judge also relied on the passage of time between April 2000, when the evidence was submitted at the hearing, and September 2000, when the parties submitted the joint stipulations to the judge, and the fact that GCI no longer operated the mine which was the subject of the violations. *Id.* at 1092-93. The judge assessed penalties totaling $3713. *Id.* at 1093-94. To minimize the financial impact of the penalty assessments, the judge directed GCI to make an initial payment of $113 on November 1, 2000, followed by equal payments of $150 on the first of each month for the succeeding 24 months. *Id.* at 1093.

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[1] While the judge stated in his decision that the Secretary's total reduced proposed assessment in both dockets was $3767, he assessed penalties totaling only $3713 without explaining his reduced assessment. 22 FMSHRC at 1091 & n.1, 1093-94. It appears that the discrepancy arises from inconsistent figures provided by the Secretary. The joint stipulations provided that the proposed assessment in Docket No. CENT 2000-80 was $948. Jt. Stip. of Facts at 1. However, in a letter from the Secretary's counsel to the judge, the Secretary listed the revised, along with the original, proposed assessments for each violation, indicating that the total revised proposed assessment in Docket No. CENT 2000-80 was $894. Letter dated Sept. 15, 2000 from Sec'y of Labor. This amount is consistent with the judge's assessment. 22 FMSHRC at 1093-94.

II.

Disposition

GCI argues that the judge abused his discretion when he declined to consider evidence of GCI's financial condition. PDR at 8-13.[2] GCI maintains that substantial evidence establishes that it was "insolvent" and, therefore, that the penalties would affect its ability to continue in business. PDR at 9, 12; G. Reply Br. at 5. GCI asserts that the judge committed a prejudicial procedural error by not allowing it an opportunity to demonstrate that the Secretary's reduced penalties would still affect its ability to continue in business, or to supplement or update evidence of its financial condition. PDR at 14-15; G. Reply Br. at 6-7. GCI clarifies that although its expert witness testified that it could pay the penalty, he indicated that it would have to forego payment to another debtor which would affect its operations at the mine. G. Reply Br. at 5. GCI requests the Commission to vacate the judge's penalty assessments and remand for consideration of its financial evidence. PDR at 16-17; G. Reply Br. at 9.

The Secretary responds that the judge did not abuse his discretion by assessing penalties in the amount of $3713. S. Br. at 10. The Secretary contends that GCI was not prejudiced by the judge's decision, because GCI's evidence did not establish that the proposed assessment of $6151 would affect its ability to continue in business and, thus, could not have satisfied its burden of proof for an even lower proposed assessment amount ($3713). *Id.* at 6-7. The Secretary asserts that the judge did not err by failing to provide GCI an opportunity to respond, because it was aware of the reduced proposed assessments in the joint stipulations, and could have filed a motion for leave to submit additional evidence before the judge issued his decision. *Id.* at 8-9. The Secretary points out that, in any event, GCI conceded at the hearing that a penalty in the amount of $3600 paid by amortized payments would not affect its ability to continue in business. *Id.* at 9-10. The Secretary requests that the Commission affirm the judge's decision. *Id.* at 10.

The Commission's judges are accorded considerable discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[3] *Id.* (citing *Sellersburg*

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[2] GCI designated its PDR as its opening brief.

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

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the

Stone Co., 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.[4]

Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *See Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998) (considering evidence of an operator's financial condition to determine whether the penalty would have an effect on the operator's ability to continue in business); *Spurlock Mining Co.*, 16 FMSHRC 697 (Apr. 1994) (same); *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997) (same).

One basis for the judge's refusal to consider GCI's financial evidence was his conclusion that the evidence was no longer relevant due to the passage of time. The evidence submitted by GCI covered its financial condition from 1996 up to the first quarter of 2000. The judge issued his decision on September 20, 2000, five months after the hearing. Notably, the Secretary does not attempt to defend the judge's refusal to consider the financial evidence submitted by GCI at the hearing or contend that the evidence is irrelevant. In fact, the Secretary appears to concede the relevance of GCI's financial evidence by arguing that even if the judge considered the evidence, it could not successfully prove that the penalties would affect GCI's ability to continue in business. We conclude that the passage of time did not make GCI's evidence of its financial condition irrelevant. It is not uncommon to have a gap in time between the hearing and the issuance of the judge's decision. However, this does not render irrelevant financial evidence

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> gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

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

introduced to support (or refute) an argument that the proposed penalty would affect the operator's ability to continue in business.[5]

We also reject the judge's reliance on the Secretary's post-hearing reduction of the proposed penalty assessments as support for his refusal to consider the evidence of GCI's financial condition. We find that the evidence of GCI's financial condition as of the time of the hearing consists of factual data which is unaffected by the Secretary's reduced proposed assessment. For example, GCI's expert witness, Paul Matlock, in summarizing the import of the financial documents it submitted, including audits and tax returns, testified that GCI was not "solvent." Tr. 39. Matlock stated that "[GCI] would be [insolvent] if the forbearance [on its debt payments] was not given," and that GCI has "no guarantee" that the forbearance will continue. Tr. 12-13, 39. He further testified that GCI was "behind on . . . production taxes, . . . royalties, . . . [and] utilities," and asserted that "anything we pay outside that are not considered critical production items, we would have to trade out for production items, which basically would cause us to have to shut down production." Tr. 25, 27-29. Under this view, it appears that a penalty assessed at $6000 would have the same impact on GCI as a penalty of $3000.

On the other hand, Matlock also testified, in response to the judge's questioning, that GCI could pay $100 per month over three years, but that GCI "would have to take $100 out of our production," which would affect "operations." Tr. 41. The Secretary characterizes Matlock's equivocal testimony as a concession that GCI could pay penalties totaling $3600. While we take no position on the Secretary's characterization, the financial evidence of record is clearly relevant to the reduced proposed assessments. Although it was appropriate for the judge to consider the reduced penalty when evaluating the ability to continue in business criterion, we conclude that the financial data submitted at the hearing is still relevant to consider in relation to the reduced proposed assessments.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Here, the judge failed to evaluate evidence of GCI's

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[5] The fact that the operator no longer operates the mine in question does not render the "ability to continue in business" criterion irrelevant. Even if the operator no longer operates the mine that is the subject of this proceeding, it will remain subject to a penalty if it is still in business, has not dissolved, and has assets. *See Spurlock Mining*, 16 FMSHRC at 699-700 (holding that the operator was still in business because it had not dissolved and planned to resume operations). Thus, the judge erred when he declined to consider GCI's evidence on this basis.

financial condition in making findings as to whether the proposed penalty would adversely affect its ability to continue in business.[6]

Accordingly, we conclude that the judge abused his discretion when he declined to consider GCI's evidence. We vacate the judge's penalty assessment and remand this proceeding to the judge for consideration of all relevant evidence of GCI's financial condition, including any evidence with which the judge may, in his discretion, allow the parties to supplement the record. *See Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1302 (Dec. 1998) ("it is within the province of the judge to ensure that the record contains sufficient information on all the statutory criteria").

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessments and remand this proceeding to the judge to reassess penalties consistent with this decision.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[6] We reject the Secretary's suggestion that the Commission consider the merits of whether GCI's financial evidence satisfies its claim that the penalty affects its ability to continue in business. That issue is for the judge, as the trier of fact, to consider in the first instance.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 2001

SECRETARY OF LABOR	:	
	:	
v.	:	Docket No. WEVA 98-39
	:	
EAGLE ENERGY INC.	:	

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

DECISION

BY: Riley and Beatty, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman determined that Eagle Energy Inc. ("Eagle Energy") committed a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.380(d)(1)[2] when water accumulations occurred in an escapeway. 21 FMSHRC 1235, 1244-46 (Nov. 1999) (ALJ). He found that the violation was not caused by the operator's unwarrantable failure. *Id.* at 1251. The judge assessed a penalty of $2,500. *Id.* The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's finding of no unwarrantable failure. For the following reasons, we vacate the judge's unwarrantable failure determination and penalty assessment, and remand for further consideration.

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[1] 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."

[2] Section 75.380(d)(1) provides, in pertinent part: "(d) Each escapeway shall be — (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons . . . ." 30 C.F.R. § 75.380(d)(1).

I.

Factual and Procedural Background

Eagle Energy owns and operates Mine No. 1, an underground coal mine in Boone County, West Virginia. 21 FMSHRC at 1238; Gov't Ex. 2. Mine No. 1 is an extremely wet mine with recurring water accumulation problems. 21 FMSHRC at 1236. Water flows down to the mine from the surface and seeps in from an adjacent abandoned mine which is inundated with water. *Id.* at 1238. Over 100 pumps have been used throughout the mine. *Id.* at 1236. Production director John Adkins testified that approximately 5 million gallons of water were pumped out every day and that water rapidly collected at locations of chronic accumulations. *Id.* at 1245; Tr. IV 141.[3]

Eagle Energy developed the 10 Left Section of the mine with three parallel entries using a continuous miner. 21 FMSHRC at 1238; Gov't Ex. 32. While the continuous miner was advancing in the section, the No. 1 entry was the return air entry, the No. 2 entry served as the beltline and track entry, and the No. 3 entry was the primary escapeway and intake air entry. 21 FMSHRC at 1238. The operator installed an incoming six-inch diameter fresh water line in the No. 2 belt/track entry to bring fresh water to the working face and to provide fire protection along the beltline. *Id.* The three entries were separated by stoppings. *Id.* While the 10 Left Section was in production, water was removed from the section by pumping it onto the beltline through discharge hoses. *Id.* The water was absorbed by the coal on the beltline and carried to the surface. *Id.*

On July 9, 1997, Eagle Energy completed mining in the 10 Left Section and temporarily suspended production in anticipation of bringing in the longwall from another section of the mine. *Id.* On that same day, the continuous miner in the 10 Left Section was removed and Eagle Energy began dismantling the beltline to move it from the No. 2 entry to the No. 1 entry of the 10 Left Section. *Id.* By dismantling the beltline, Eagle Energy could no longer use it to pump water out of the section. *Id.*

On July 10, 1997, Inspector Albert "Benny" Clark of the Department of Labor's Mine Safety and Health Administration ("MSHA") began an inspection of the mine. *Id.* He traveled to the No. 3 escapeway entry of the 10 Left Section to determine if Citation No. 7160006 issued by MSHA Inspector Andrew Nunnery on June 24, 1997, should be terminated. *Id.* Citation No. 7160006 had cited a non-S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left escapeway ranging "in depth from 1" to 14" with slick and muddy bottom at crosscut 49 to 48 for a distance of approx. 100 feet." *Id.*; Gov't Ex. 29. Nunnery had characterized Eagle Energy's degree of negligence as "moderate." 21 FMSHRC at 1238. When Nunnery issued the

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[3] The transcript contains a separate volume for each day of the six day hearing. Transcript references note the appropriate hearing day by Roman numeral I through VI followed by the page number of the transcript for that day's hearing.

citation, normal mining operations were in progress and the beltline was operational and available for removing water from the escapeway. *Id.*

During his inspection, Clark found there was water at the same location cited in Citation No. 7160006. *Id.* at 1239. Believing it was the same water cited by Nunnery, Clark issued 104(b) Order No. 7163178 on July 10, 1997, for Eagle Energy's alleged failure to abate Citation No. 7160006. *Id.* However, 104(b) Order No. 7163178 was subsequently vacated on procedural grounds by an MSHA conference officer. *Id.*; Tr. III 18.

Also on July 10, Inspector Clark found water accumulations between 1 and 24 inches in depth for a distance of 200 feet between the 69 and 71 crosscuts in the 10 Left escapeway. 21 FMSHRC at 1239. He issued Citation No. 7163177 for an S&S violation of section 75.380(d)(1) for the accumulations. *Id.* Clark testified that he believed the violation was due to Eagle Energy's unwarrantable failure because there were notations in the weekly examination book of similar water accumulations in the same area for the preceding five weeks. *Id.*; Tr. III 12-15. However, Clark testified that he was persuaded by safety director Jeffrey Bennett and then superintendent Stan Edwards to issue Citation No. 7163177 as a 104(a) citation rather than an unwarrantable 104(d) citation because of their assurances that future escapeway water problems would be prevented. 21 FMSHRC at 1239.

Despite Eagle Energy's assurances about improving its water problems, it was apparent that it could not abate Citation No. 7163177 because it had dismantled the beltline which it used to discharge water in the 10 Left escapeway. *Id.* At Inspector Clark's suggestion, Eagle Energy converted the section's fresh water line to a discharge line to deal with the water accumulations. *Id.* On July 11, Clark terminated Citation No. 7163177 after the cited water accumulations had been discharged through the newly converted discharge line. *Id.*

On August 13, while continuing his inspection, Clark found water accumulations in the 10 Left escapeway measuring 1 to 15 inches in depth with a slick and muddy bottom and extending for 220 feet between crosscuts 97 to 99. *Id.* at 1240. He issued Citation No. 7163218 for an S&S violation of section 75.380(d)(1) for the water accumulations. *Id.* He did not designate the violation unwarrantable. On August 14, the citation was terminated after the water was pumped and discharged through the converted discharge line. *Id.*

From August 30 through September 1 (Labor Day weekend), hourly workers did not work at the mine. *Id.* Instead, it was staffed by 20 to 30 management personnel who had decided to complete the longwall move on their own. *Id.* At approximately 4:00 p.m. on August 31, the converted discharge line was changed back to a fresh water line to facilitate the impending longwall operation. *Id.* According to Eagle Energy, the fresh water line was needed to power up the longwall's shields, for dust suppression, and could not be turned back to a discharge line without interfering with the longwall start-up schedule. *Id.*

On September 1, Eagle Energy started the beltline but it pulled apart at several locations and had to be repaired. *Id.* At approximately 7:00 a.m. on September 2, Eagle Energy again attempted to start the beltline but it again pulled apart at several locations. *Id.*

At approximately 8:30 a.m. on September 2, Inspector Clark arrived at the mine, accompanied by MSHA Supervisor Terry Price, to continue the inspection. *Id.* After reviewing the preshift and onshift books, Clark and Price traveled to the 10 Left Section, accompanied by safety director Bennett. *Id.* Upon arriving in the 10 Left Section, Clark and Price noted general damp and wet conditions and that the No. 1 belt entry had several water accumulations and was generally damp; the No. 2 track entry also contained several areas of water accumulations, soft ribs, and an uneven bottom in several places; and the No. 3 escapeway entry was damp to wet, had several water accumulations, loose ribs at different locations, and an uneven bottom in some locations. *Id.*; Tr. III 83-84.

At crosscut 70 in the No. 2 track entry, the inspection party found a large water accumulation, which extended into the crosscut right up to the stopping between the track entry and the No. 3 escapeway entry. 21 FMSHRC at 1241. Based on the amount of water he observed at the 70 crosscut in the track entry, Inspector Clark concluded that there would also be water at the 70 crosscut in the No. 3 escapeway entry. *Id.*

Using the nearest mandoor between the two entries, the inspection party traveled to the 70 crosscut in the No. 3 escapeway and Clark observed a water accumulation at the crosscut extending from rib to rib and approximately 110 feet long and up to at least 15 inches deep. *Id.* The inspection party started walking the No. 3 escapeway in an outby direction. *Id.* At crosscut 60, Clark observed another water accumulation extending from rib to rib that was approximately 90 feet long and up to at least 15 inches deep. *Id.* Between crosscuts 51 and 52, Clark observed a water accumulation extending from rib to rib that was approximately 40 feet long and up to at least 12 inches deep. *Id.* Finally, in the vicinity of crosscuts 48 and 49, Clark observed a water accumulation approximately 120 feet long and up to at least 15 inches deep. *Id.* at 1242. Clark found that all the water accumulations were characterized by muddy water, slick bottoms, and the presence of loose coal. *Id.*; Gov't Ex. 26.

Once the inspection party arrived on the surface, Clark checked the weekly examination books and found reports, dated August 15, 22, and 29, of water accumulations in the 10 Left escapeway. 21 FMSHRC at 1242. However, he did not find any indication in the examination reports that remedial action (i.e., pumping) had been taken to correct the hazardous conditions. *Id.* The judge credited Clark's testimony that he had previously warned Eagle Energy about failing to show remedial action in its weekly examination books. *Id.* at 1251 n.8. Clark concluded that no remedial action had been taken in the 10 Left escapeway since the water accumulations had been reported in the examination books on August 15, 22, and 29. *Id.* at 1242. His conclusion was based, in part, on his finding that, when water accumulations in other sections were reported in the weekly examination books, they were accompanied by reports of remedial action, such as "being pumped" or "pumped down." *Id.* Production director Adkins

and superintendent Harry Walker testified that pumps were used to discharge the water accumulations in the 10 Left escapeway until the discharge line was converted back to a fresh water line at 4:00 p.m. on August 31. *Id.* at 1243; Tr. IV 167-70; Tr. V 100-01.

Based on his observations, Inspector Clark issued a 104(d)(1) citation (No. 7163242), alleging an S&S violation of section 75.380(d)(1) due to the water accumulations in the 10 Left escapeway. 21 FMSHRC at 1243. He found that the violation resulted from Eagle Energy's unwarrantable failure because it was aware of the water accumulations, it had been warned previously about water accumulations in its escapeways, there was no evidence that remedial actions had been taken, and it had a history of previous violations for the same violative condition. *Id.* Eagle Energy contested the finding of the violation, the S&S and unwarrantable failure designations, and the proposed penalty.

Following a hearing, the judge found an S&S violation of section 75.380(d)(1) by Eagle Energy for the water accumulations in the 10 Left escapeway. *Id.* at 1244-46. He concluded that the violation was not unwarrantable because the Secretary did not demonstrate the operator's longstanding failure to eliminate the cited accumulations. *Id.* at 1247-48. The judge suggested that the MSHA inspector undercut his unwarrantable failure designation by attributing the violation to the operator's "high degree of negligence" rather than its "reckless disregard." *Id.* at 1248. He also determined that the operator's actions were mitigated because (1) it had no means of discharging the water at the time of the cited violation; (2) the Secretary had not found a similarly cited violation in the past to be unwarrantable; (3) the mine was only staffed by management personnel at the time of the cited violation (Labor Day Weekend); and (4) roof falls requiring the attention of mine management occurred at the mine prior to the cited violation. *Id.* at 1249-50.

II.

Disposition

The Secretary argues that the judge erred in determining that the operator's negligence was mitigated because there was no means for discharging water in the cited escapeway from August 31 to September 2. S. Br. at 11-18. She contends that the judge also erred in basing his negative unwarrantability conclusion on the ground that MSHA did not cite a similar violation as unwarrantable in the past. *Id.* at 18-19. The Secretary also contends that the judge erroneously grounded his conclusion of no unwarrantable failure on the fact that the inspector checked off the "high negligence" box instead of the "reckless disregard" box on the citation form. *Id.* at 19-20. Further, she argues that the judge improperly discounted the operator's history of similar violations because the mine was a wet mine. *Id.* at 21-24. In addition, the Secretary contends that the judge failed to properly consider the operator's prior discussions with MSHA about the need for greater compliance. *Id.* at 24-25. She further contends that the judge inadequately addressed evidence concerning whether the water accumulations were the same as accumulations noted previously in the operator's examination books. *Id.* at 25-28. The Secretary asserts that

the judge erred in concluding that the operator's negligence was mitigated because only management personnel worked on the Labor Day Weekend when the violation at issue occurred, and in determining that roof falls at the mine were a mitigating factor. *Id.* at 28-30. Finally, the Secretary contends that the judge failed to consider the various unwarrantable failure factors taken together. *Id.* at 30-32.

Eagle Energy responds that the judge's finding of no unwarrantable failure is supported by substantial evidence. EE Br. at 2. It contends that there are no regulatory requirements supporting the Secretary's assertion that Eagle Energy should have established an additional method for discharging water or determined that the beltline was fully operational before it disconnected its discharge water line. *Id.* at 12. It argues that substantial evidence supports the judge's determination that it had no reason to expect that the water would accumulate to hazardous depths before it planned to resume pumping. *Id.* The operator contends that, contrary to the Secretary's assertion, an unwarrantable failure finding requires more than a showing that the operator failed to avoid a violation about which it "knew or should have known." *Id.* at 12-13.

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. MSHA*, 52 F.3d 13, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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

A. Unwarrantable Failure Factors

1. Efforts to Abate the Violative Condition

We conclude that the judge failed to adequately consider whether, apart from pumping water on to the reassembled beltway or through the converted discharge line, there was another way of discharging water from the escapeway before the longwall was put into operation. Inspector Clark testified that the operator could have discharged water from the escapeway by running a discharge line, up to 1,000 feet in length, from the escapeway to a discharge source in the Mudlick Mains, another section of the mine. Tr. V 290-91. The judge found that, after discussing the possibility with management, the inspector concluded that 1,000 feet was too great a distance to run a discharge line. 21 FMSHRC at 1239. The judge quoted the inspector as testifying: "We discussed if we could run it over to Mudlick, and there was no way. It was too far." *Id.*; Tr. III 90. However, it is not clear from this testimony whether the inspector concluded that it was too far or whether he was only reporting management's response that it was too far. On a subsequent day of the hearing, the inspector testified that it was management that responded that it was too far to run a discharge line to the Mudlick Mains. Tr. V 291-92. He also testified that the operator should have run a discharge line from the escapeway to the Mudlick Mains when it converted the discharge line back into a fresh water line prior to restarting the beltway. Tr. V 295-99. Based on the evidence, it does not appear that substantial evidence[4] supports the judge's finding that it was impractical to run a discharge line from the escapeway to the Mudlick Mains.

We further conclude that the judge erred in finding that Eagle Energy's failure to pump water out of the escapeway from the afternoon of August 31 to the afternoon of September 2 was mitigated because it did not have a means for pumping out the water. 21 FMSHRC at 1250. The operator lacked a way to pump out water because it had disconnected both its primary and secondary means of discharging water in order to facilitate its longwall move.[5] There is no

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[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material*, 19 FMSHRC at 34 n.5 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[5] When Eagle Energy dismantled the beltline on July 9, 1997, it did so with no apparent thought to an alternative means of disposing of escapeway water until the beltline would be reassembled after the longwall move. When this oversight resulted in a citation, Eagle Energy was the fortuitous benefactor of an inspector's insightful suggestion to convert the fresh water

evidence why the operator could not have reassembled the beltline and had it in operating condition before it reconverted the discharge line back to a fresh water line. The record evidence also does not refute the possibility that the operator could have run an additional discharge line to the surface, as it did with the existing fresh water line.

Despite the chronic water accumulation problems in the escapeway,[6] the operator made no attempt to abate accumulations in the escapeway from the afternoon of August 31 to the morning of September 1, even though it knew in advance that the discharge line and the beltline would both be unavailable for pumping during this time. The operator attempted unsuccessfully to restart the beltline on the morning of September 1, which would have allowed it to pump water out on the beltline.[7] *Id.* at 1237. When its attempt to restart the beltline failed, it had no alternative means of pumping out the water until the beltline was restarted on the afternoon of September 2 because it had chosen to disconnect the converted discharge line in order to facilitate its longwall move and because it chose not to run a discharge line to the Mudlick Mains. Thus, the means to abate the water accumulations cited on September 2 were within the operator's control but it chose not to use them when it decided to have both the discharge line and the beltline unavailable for pumping starting on the afternoon of August 31.

Under Commission precedent, an operator's failure to take remedial action within its control to abate a known hazard is an aggravating circumstance that supports an unwarrantable failure conclusion. *See New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996) (holding operator's failure to abate known water accumulations was unwarrantable); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1562 (Sept. 1996) (finding unwarrantable failure due to foreman's failure to abate known brake defect); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992) (affirming unwarrantable violation where operator failed to abate known

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line into a discharge line for purposes of pumping out the water, which proved to be a cost-effective and simply solution. While the old adage "once burned, twice learned" comes to mind, such a lesson was apparently lost on Eagle Energy for they proceeded to reconvert the discharge line back to a fresh water line without a means to discharge escapeway water from an extremely wet mine.

[6] Production director Adkins testified that parts of the escapeway needed to be pumped at least three or four times a day and that, without pumping, the water would eventually reach the roof of the escapeway. Tr. IV 174, 274, 277. Because of the history of water accumulation problems in the escapeway and the need for frequent pumping, the record fails to support the operator's argument that it "had no reason to expect that water would accumulate in the escapeway to hazardous depths" between the time it disconnected the discharge line on August 31 and the time it planned to resume pumping water onto the beltline on September 1. EE Br. at 12.

[7] When operational, the beltline could be used to pump water out of the escapeway even when no coal was being produced on the section. Tr. V 141-42.

electrical hazard); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604,1607-08 (Aug. 1994) (affirming unwarrantable failure where operator aware of brake malfunction but failed to remedy problem). Accordingly, as a matter of law, the operator's elimination of all means of pumping water from the afternoon of August 31 to the afternoon of September 2 was an aggravating rather than mitigating circumstance for unwarrantable failure purposes.[8]

In addition, substantial evidence does not support the judge's conclusion that the operator's failure to abate the violative condition was mitigated by two roof falls at the mine. The roof falls were cleared by the evening of August 29, well before the operator decided to reconvert the discharge line back to a fresh water line on the afternoon of August 31. 21 FMSHRC at 1250. The record is void of any evidence indicating that the roof falls impeded the operator from addressing the cited water accumulations in the escapeway.

On remand, the judge must reconsider his negative unwarrantable failure determination in light of the operator's lack of abatement efforts, and consider as an aggravating factor that the operator did not run a discharge line to the Mudlick Mains. In his analysis, the judge should also consider the operator's lack of a means to pump water in the escapeway during the period in question as an aggravating, not a mitigating, factor, and take into account that the roof falls were not a mitigating circumstance.

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[8] Contrary to Chairman Verheggen's suggestion (slip op. at 19), we are not asking the judge to second guess the efforts of Eagle Energy to use the belt as a means of discharging water. Rather, we are asking the judge to consider whether the operator, knowing the mine would be understaffed over the Labor Day weekend, was reckless in deciding to rely solely on the yet to be assembled belt to remove well documented excess water accumulations in the escapeway. Apparently assuming that no problems would arise during the complex operation of reassembling the belt, Eagle Energy decided to forego any alternative means of water removal, such as an additional discharge line to the surface or to another section. But, as complicated endeavors often do, difficulties arose and a day and a half was lost (September 1 through the morning of September 2) while Eagle Energy struggled with numerous problems in reassembling and operating the belt. We find it significant that during this day-and-a-half period, Eagle Energy made no attempt to use other methods to remove the excess water from the escapeway, such as reconnecting the water discharge line or installing an additional discharge line. The question here is not whether the judge failed to consider as an aggravating factor the fact that Eagle Energy was unsuccessful in preventing hazardous water accumulations. The question is whether the judge failed to consider as aggravating Eagle Energy's failure to have an alternative method of discharging water readily available in case of problems in assembling the belt and, when such problems arose, its failure to use other methods to remove the excess water.

2. Other Factors

We conclude that the judge also erred by failing to consider the obviousness and danger[9] posed by the cited accumulations in his unwarrantable failure analysis. *See BethEnergy Mines*, 14 FMSHRC at 1243 (finding violation unwarrantable where unsaddled beams "presented a danger" to miners entering the area); *Windsor Coal Co.*, 21 FMSHRC 997, 1006-07 (Sept. 1999) ("The judge should . . . have addressed whether the accumulations were obvious."). On remand, the judge must explicitly consider these factors in his unwarrantability analysis.

Substantial evidence supports the judge's finding (21 FMSHRC at 1245, 1249) that the accumulations cited on September 2 were extensive. On review, Eagle Energy does not dispute the judge's finding in this regard. The four accumulations extended from 40 to 120 feet in length and from up to 15 inches or more in depth. *Id.* The judge's finding that the violative condition was extensive "fairly detracts" from his negative unwarrantable failure finding. *Midwest Material*, 19 FMSHRC at 34 n.5 (citation omitted).

The judge's finding (21 FMSHRC at 1249) that the operator was on notice of the need for greater compliance efforts is also supported by substantial evidence. On review, Eagle Energy does not dispute the judge's finding regarding notice. The record evidence shows that the mine had chronic water accumulation problems. The operator had received seven citations for water accumulations in the 10 Left escapeway between May and August 1997. Gov't Exs. 28-31, 38-40. The operator's weekly examination books showed water accumulations in the escapeway on August 15, 22, and 29. The operator was also warned by MSHA in July and August about its water accumulation problems. Tr. III 12-16, 25.

However, we conclude that the judge erred by considering as a mitigating factor that MSHA did not find unwarrantable failure when issuing previous citations for water accumulations in the same escapeway. 21 FMSHRC at 1249. Under Commission precedent, prior citations, even if not designated as unwarrantable, place operators on notice that greater compliance is required. *Peabody Coal*, 14 FMSHRC at 1263-64; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Accordingly, rather than being a mitigating factor, the judge should have treated Eagle Energy's previous citations as an aggravating factor for the purposes of notice of the need for greater compliance efforts. In light of this precedent, the judge's finding that the

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[9] We conclude that the judge erred in considering as a mitigating circumstance that only management personnel worked at the mine over the Labor Day Weekend, from August 30 through September 1. Under section 3(g) of the Mine Act, 30 U.S.C. § 803(g), a miner is defined as "any individual working in a coal or other mine" and includes both supervisory and non-supervisory employees. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1532 (Aug. 1990). Thus, the preeminent statutory concern of the Mine Act, the health and safety of miners (30 U.S.C. § 801(a)), covers both management personnel and rank-and-file employees. Accordingly, we conclude that a violation of section 75.380(d)(1) is not mitigated because it endangers management, as opposed to rank-and-file, personnel.

operator was on notice of the need for greater compliance efforts "fairly detracts" from his negative unwarrantable failure determination. On remand, the judge must reanalyze the unwarrantable failure issue, taking into consideration the operator's prior water accumulation citations as an aggravating factor.

We agree with the judge (21 FMSHRC at 1245) that the record is unclear on how long the water accumulations were in violation of section 75.380(d)(1) prior to being cited by the inspector on September 2.[10] Thus, it is not clear whether the duration of the violation was an aggravating factor. However, the Commission has found unwarrantable failure when the duration of the violation was unclear. *See Jim Walter Res., Inc.*, 19 FMSHRC 480, 487, 489 (Mar. 1997) (holding that unwarrantable failure can be found even when duration is in question).

B. Characterization of Conduct

We conclude that the judge erred in predicating his negative unwarrantable failure determination on the fact that, when recording the violation on the citation form, the MSHA inspector checked the "high negligence" box rather than the "reckless disregard" box. 21 FMSHRC at 1248. The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence," and has characterized such conduct not only as "reckless disregard" but also as "indifference" or a "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2003-04. Thus, contrary to the judge's analysis, a finding of unwarrantable failure does not require a finding of "reckless disregard." The Commission has also previously recognized that a finding of high negligence suggests unwarrantable failure. In *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), the Commission stated: "'Highly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." In addition, the Commission has found unwarrantable failure for violations, like the violation in the instant case, that were designated as "high negligence" on the citation form. *See Cyprus Emerald*, 20 FMSHRC at 793, 813-15 and 17 FMSHRC 2086, 2100, 2104 (Nov. 1995) (ALJ) (affirming unwarrantability finding for refuse pile violations checked as "high negligence" on citation form). On remand, the judge must reconsider, consistent with Commission precedent, whether the operator's highly negligent conduct in this case amounts to an unwarrantable failure.

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[10] Substantial evidence supports the judge's finding that the Secretary did not demonstrate that the water accumulations in the 10 Left escapeway noted in the weekly examination books during August were the same as the water accumulations in the escapeway cited on September 2. It is undisputed that water accumulations could occur rapidly in the mine. In addition, witnesses for the operator testified that pumping had occurred in the escapeway up to August 31. Tr. IV 167-70; Tr. V 100-01. In light of these facts, we do not think the operator's failure to note any remedial efforts in the weekly examination books conclusively shows that no pumping occurred or that the water accumulations before August 31 were the same as those found on September 2.

In sum, we remand this matter for reconsideration of the judge's negative unwarrantable failure finding. The judge must reconsider the operator's lack of abatement efforts, including his finding that it was impractical to run a discharge line to the Mudlick Mains, that the operator's lack of a means to pump water in the escapeway during the period in question was an aggravating factor, and taking into account that the roof falls were not a mitigating circumstance. The judge must also consider the danger factor, taking into account that the danger was not mitigated because only management personnel worked at the mine during the period in question. In addition, he must consider the obviousness of the cited accumulations. The judge must also explain how the operator's notice of the need for greater compliance efforts and the extensiveness of the violation affect the unwarrantable failure determination. Finally, the judge must reconsider the effect of the operator's highly negligent conduct on the unwarrantable failure issue.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Eagle Energy's violation of section 75.380(d)(1) was not the result of its unwarrantable failure, and the assessed civil penalty. We remand for further analysis consistent with this opinion, and reassessment of the civil penalty.

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring:

Although Eagle Energy was well aware that it had a longstanding water accumulation problem in its escapeway, it nonetheless made the deliberate decision to forego any means of discharging water in order to facilitate its longwall move. Its utter indifference to the safety concerns posed by the considerable accumulation of water that plagued the mine is a classic example of unwarrantable failure.

For the reasons stated below, I would reverse the judge's finding that the escapeway violation was not the result of Eagle Energy's unwarrantable failure. However, to avoid the effect of a divided decision, which would allow the judge's finding to stand, I join Commissioner Riley and Commissioner Beatty in remanding this case for further consideration.

Eagle Energy does not dispute the judge's finding that it had been on notice for a lengthy period of time regarding the water accumulation problem it faced in its mine. This finding is supported by substantial evidence. As Commissioner Riley and Commissioner Beatty acknowledge, it had received seven water accumulation citations in the escapeway between May and August 1997, which my colleagues correctly conclude constituted an aggravating factor in terms of the unwarrantable failure analysis. Slip op. at 10, citing Gov't Exs. 28-31, 38-40. Eagle Energy's own weekly examination books indicated water accumulations in the escapeway on August 15, 22, and 29. 21 FMSHRC 1235, 1242 (Nov. 1999) (ALJ). Its own witness, John Christopher Adkins, Eagle Energy past president and the director of production for Massey Coal Services (which had provided technical services to Eagle Energy), testified that "[t]his is a wet mine. This is the wettest mines [sic] I've ever been in." Tr. IV 275.

In addition, Inspector Albert "Benny" Clark had discussed the problem with mine officials on at least two occasions, July 10 and August 13. Tr. III 12-16, 25. Clark testified that during his conversation in July, Jeff Bennett, Eagle Energy's safety director, asked him not to issue a 104(d)(1) citation and Stanley Edwards, Eagle's superintendent, told Clark that "this would never happen again . . . if [he] changed it to a 104(a) citation." Tr. III 14. And yet, Edwards was wrong. The water accumulation problem was not dissipated, despite his promise, and the inspector found another accumulation in the escapeway when he returned on September 2.

Moreover, in his deposition, Edwards admitted that, because of other problems at the mine, the removal of water from the escapeway was "real low on [its] priority list." Gov't Ex. 45 at 92 (Dep. Tr. of Stanley Edwards). The Commission has made clear that when an operator has notice of a violation, the level of priority it places on abatement is a proper factor to consider in determining whether the violation was a result of unwarrantable failure. *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"). In fact, the attitude of the operator in the *Consol* case, in which we reversed the judge's finding that the violation was not the result of unwarrantable failure, is strikingly similar to the nonchalance displayed by Eagle Energy. In *Consol*, the operator failed to respond

effectively to rectify a violative condition (inadequate roof support) of which it was aware. *Id.* at 332. Our rationale for reversing the judge in *Consol* is apt in the instant case as well:

> [O]nce Consol became aware that it was in violation of the regulation and its roof control plan, it was under an obligation to expeditiously remedy the condition that gave rise to the citation. Relegating the request for additional posts to the routine supply system so as not to interfere with production was a conscious decision by mine management. Attaching no special significance to an order for materials necessary to bring the mine into compliance with a mandatory safety standard is an indication that this operator should reexamine its priorities. . . . Taken together, the company's actions reflect the kind of indifference to a violation that constitutes an unwarrantable failure to comply with the regulation.

Id. at 333.

Commissioners Riley and Beatty agree that the judge's finding that Eagle Energy was on notice of the need for greater compliance efforts is supported by substantial evidence. Slip op. at 10. Moreover, they agree that the Secretary has met her burden of proving some of the other *Mullins* factors. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). For instance, they agree that substantial evidence supports the judge's finding that the accumulations were extensive. Slip op at 9-10. Regarding abatement efforts, they recognize that Eagle Energy "had no alternative means of pumping out the water until the beltline was restarted . . . because it had chosen to disconnect the converted discharge line in order to facilitate its longwall move and because it chose not to run a discharge line to the Mudlick Mains. Thus, the means to abate the water accumulations . . . were within the operator's control but it chose not to use them . . . ." *Id.* at 8. And yet, despite this acknowledgment, my colleagues are reluctant to reverse the judge's determination that the violation was not the result of unwarrantable failure.

Reversal is warranted based upon the factors discussed above, and upon examination of the remaining *Mullins* factors. In discussing the issue of danger, for example, my two colleagues correctly conclude that the judge was wrong to consider as a mitigating circumstance the fact that only management personnel worked at the mine from August 30 through September 1. *Id.* at 10, n.9. Regarding this issue, the record compels only one conclusion – that the accumulations had created a dangerous condition. As the judge found, they were located in the primary escapeway by which miners would escape in an emergency. 21 FMSHRC at 1239-40, 1244. They were large, extending up to 120 feet in length (*id.* at 1242), and ranging up to 15 or more inches in depth (*id.*; Tr. III 209). They contained muddy water and had slick, uneven bottoms. 21 FMSHRC at 1239, 1240, 1243, 1246. There were pieces of wood floating in the water, and coal deposits and discharge lines sticking out of the water. 21 FMSHRC at 1242. Both Clark and MSHA supervisor Terry Price testified that the accumulations posed a tripping hazard (Tr. II 201;

Tr. III 218, 232), and Price stated repeatedly that "you couldn't see the bottom" (Tr. III 211, 218). The potential safety problems caused by these conditions were exacerbated, according to assistant superintendent Harry Walker, who testified (in agreement with Inspector Price), that there were greater safety concerns during a longwall move. Tr. V 96.

The record also compels the conclusion that the water accumulations were obvious. As I have noted, they were extensive and occurred several times along the escapeway. In addition, production director Adkins testified that he traveled along the escapeway on September 1, the day before the accumulations were cited. Tr. IV 177. Given that some of the accumulations were at least 15 inches deep on the morning of September 2, and given the rate of accumulation of approximately eight inches every 24 hours (21 FMSHRC at 1244-45), it should have been obvious to Adkins when he traveled the escapeway on September 1 that the accumulations were rapidly approaching hazardous conditions in an area known for its chronic accumulation problems.

Regarding duration, the judge credited testimony by production director Adkins, not challenged on review by Eagle Energy, that water accumulated in the escapeway at depths of approximately eight inches per day.[1] *Id.* Based on this testimony, the water in the escapeway must have been permitted to accumulate for approximately two days in order to have reached the 15 inches depth on September 2. The water must have reached several inches to a foot in depth on the previous day when production director Adkins traveled along the escapeway.[2] Tr. IV 177. Although it is not clear from the record when the cited accumulations became violative, given the chronic water problems in the escapeway and the rapidly growing accumulations on September 1, the evidence compels the conclusion that the operator knew for over a shift that the water accumulations were either hazardous or rapidly approaching hazardous conditions.

Despite this record evidence, my colleagues send the case back to the judge. But I see no need for a remand when there is agreement that the operator's conduct was highly negligent, that several of the *Mullins* factors were satisfied, and that the factors the judge found mitigating were either not mitigating or, as in the case of abatement, were aggravating. Slip op. at 7-11.

In *Jim Walter Resources, Inc.*, 19 FMSHRC 480 (Mar. 1997), a case in which the record evidence was similarly compelling, we reversed the judge's finding that three coal accumulation violations were not the result of unwarrantable failure, explaining that:

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[1] Later in the hearing, Adkins tried to recant this testimony by claiming the rate of accumulation was less than eight inches per day. Tr. IV 226. I find that the judge implicitly rejected his recantation by crediting his eight inches per day testimony. 21 FMSHRC at 1244-45.

[2] Adkins testified that the water in the escapeway on September 1 was not in excess of his boot height. Tr. IV 177.

> [o]ur review of this record as a whole - particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation - leads us to conclude that there is not substantial evidence to support the judge's finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

19 FMSHRC at 489 n.8.

Notwithstanding the well-recognized role of the trial judge as the initial finder of fact, the law is equally clear that when the evidence supports only one conclusion, a remand to the judge serves no purpose. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). There are simply instances when an appellate body, faced with a record as staggering as the one in this case, need not prolong litigation by insisting on a remand. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998) (court rejects operator's contention that the Commission erred in not remanding case when essential facts were not in dispute).[3]

The opinion of my colleagues Commissioners Beatty and Riley has correctly established that Eagle Energy was highly negligent and on notice of the need for greater compliance, that the accumulations were extensive, and that the operator's elimination of a way to pump water for three days was an aggravating factor. Since I concur with these determinations, this is now the law of the case. Given that the matter is currently in this posture, and taking into account the additional record evidence regarding danger, obviousness, and duration, a remand to the judge on the question of unwarrantable failure is simply not necessary. Looking at the record as a whole, there is not substantial evidence to support the judge's determination that no aggravated conduct occurred.

The use of the unwarrantable failure 104(d)(1) order as an enforcement tool was included in the Mine Act to remedy precisely the type of scenario that occurred at the Eagle Energy mine: an operator who is repeatedly warned, receives multiple citations, and yet is still not motivated to cure a safety problem. Eagle Energy's cavalier indifference to the water accumulations at its mine constitutes aggravated conduct.

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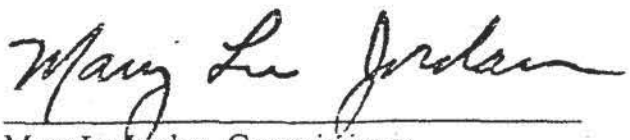
[3] In *Donovan v. Stafford Construction Co.*, 732 F.2d 954 (D.C. Cir. 1984), the court, in reversing the Commission's decision finding no discrimination, considered the issue of whether an operator had satisfied its burden of proving its affirmative defense in a discrimination case, when neither the judge nor the Commission had addressed the question. Explaining that "[s]ince all the evidence bearing upon the issue is contained in the record before us, . . . we believe that a remand on this issue would serve no purpose. This is particularly so in light of our ultimate holding that only one conclusion would be supportable." *Id.* at 961.

For the reasons stated above, I would reverse the decision of the judge and find that the violation was the result of the operator's unwarrantable failure. Nonetheless, to avoid a divided decision, I join in the opinion remanding the case for further consideration.



Mary Lu Jordan, Commissioner

Chairman Verheggen, dissenting:

For the reasons I set forth below, I would affirm Judge Feldman's finding that Eagle Energy's S&S violation of section 75.380(d)(1) was not the result of the operator's unwarrantable failure to comply with the standard. I therefore dissent from my colleagues decision to remand the unwarrantable failure question.

In determining that Judge Feldman properly found that the Secretary failed to prove that Eagle Energy's violation of section 75.380(d)(1) was unwarrantable, I am guided by several well established principles. First is the fundamental principle that the Mine Act imposes upon the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). A logical corollary to this rule of law is that if a judge finds such proof lacking, that is the end of the matter — the judge is under no obligation to go any further.

Second is the substantial evidence test by which the Commission is statutorily bound when reviewing an judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994). My colleagues state that "substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion,'" and that the Commission "must consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." Slip op. at 7 n.4 (citations omitted). I note further that under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). As the Fourth Circuit explained when overturning a Commission decision that had reversed a judge's findings in a discrimination case:

> The fact that evidence exists in the record to support [the complainant's] position is not determinative. Rather, the Commission's review was statutorily limited to whether the ALJ's findings of fact were supported by substantial evidence. The "'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'"

Wellmore Coal Corp. v. FMSHRC, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997) (citations omitted).

Turning to the issue presented here on appeal, for the reasons set forth below, I find that substantial evidence supports the judge's unwarrantable failure determination. Looking at all the relevant facts and circumstances of this case, first, I note that as to duration, I agree with my colleagues that the record does not support a finding one way or the other as to how long the cited water accumulations existed. *See* slip op. at 11. Thus, the Secretary failed to meet her

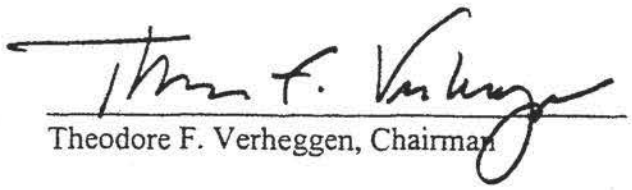
burden to show that the duration of the water accumulation was an aggravating factor. I also find, however, as do my colleagues, that substantial evidence supports the judge's findings that the accumulations were extensive and that Eagle Energy had notice of the need for greater compliance efforts. *See id.* at 10.

I differ from my colleagues, however, in my consideration of the judge's findings on mitigating factors. It is clear from the record that Eagle Energy's management personnel were anticipating using the belt to dewater the area of the mine where they were installing the longwall. *See* 21 FMSHRC at 1240. But they encountered serious problems with keeping the belt up and running. It pulled apart at several locations when started up on September 1. *Id.* Attempts to repair the belt that day were unsuccessful. *Id.* An attempt to start up the belt during the morning of September 2 was also unsuccessful. *Id.* It was not until the afternoon of September 2 that the belt was successfully repaired and available for use in dewatering the mine. *See* 21 FMSHRC at 1243.

I find the problems Eagle Energy encountered with its primary mode of dewatering the mine the single most important mitigating factor presented by this record, in addition to the fact that the operator was making every effort to repair the belt. With the benefit of hindsight, it is easy for my colleagues to speculate that "the operator could have run an additional discharge line to the surface" or "could . . . have reassembled the beltline and had it in operating condition before it reconverted the discharge line back to a fresh water line." Slip op. at 8. Certainly, in retrospect the operator's reliance on the belt to dewater the mine was misplaced. But this is clear *only* in retrospect. In light of the operator's efforts to get the belt running, it is hardly fair to ask the judge to second guess their efforts on remand. I find that Eagle Energy's efforts support the judge's conclusion that the operator's conduct, though negligent, did not rise to the level of reckless disregard.

Further, I find the judge's decision reasonable in light of the fact that the mine was understaffed at the time the water accumulated. I disagree with my colleagues' conclusion that "the judge erred in considering as a mitigating circumstance that only management personnel worked at the mine over the Labor Day Weekend" because the violation "is not mitigated because it endangers management, as opposed to rank-and-file [miners]." *Id.* at 10 n.9. I believe my colleagues miss the point, which is that at the time the water accumulated, there was a shortage of workers in the mine, and thus fewer miners available to bring up the belt. The shortage of workers could only have been exacerbated by the confusion and strain on resources created by the roof fall that occurred soon before the cited violation. 21 FMSHRC at 1249-50.

In sum, I conclude that a reasonable trier of fact could conclude from this record that Eagle Energy's violation of section 75.380(d)(1) was not the result of the operator's unwarrantable failure. I recognize, of course, that the operator's actions were negligent. But the record provides support for a finding — a judgment call — that its negligence was not aggravated. Our obligation is to uphold such judgment calls, not second guess them. Accordingly, I would affirm the judge's decision.



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2001-27
Petitioner	:	A. C. No. 01-00851-04092
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, on behalf of Petitioner;
S. Andrew Scharfenberg, Esq., Ford & Harrison, LLP, Birmingham, Alabama on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Co., LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges a single violation of the then applicable noise standard, 30 C.F.R. § 70.501,[1] and proposes a civil penalty of $399.00. A hearing was held in Hoover, Alabama on June 14, 2001. For the reasons set forth below, I affirm the citation and impose a civil penalty of $225.00.

Findings of Fact

On May 31 and June 1, 2000, John R. Craddock, an inspector and health specialist for the Secretary's Mine Safety and Health Administration (MSHA), conducted dust sampling and a noise survey during the midnight shift at U.S. Steel's Oak Grove Mine. The focus of his noise survey was the longwall mining operation.

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[1] The noise regulations applicable at the time were found in Title 30 C.F.R., Subpart F, §§ 75.000, et seq. Subpart F was removed from the regulations, effective September 13, 2000, and replaced with Subpart M, Part 62 — Occupational Noise Exposure. The original regulatory reference in the citation was to 30 C.F.R. § 70.510(a). Prior to the hearing, the citation was amended to cite a violation of 30 C.F.R. § 70.501.

The highest level of noise that a miner may be continuously exposed to for an entire 8 hour shift is 90 dB (decibels). Higher levels of noise, up to 115 dB, may be sustained for shorter durations. Exposures to varying levels of noise of 90 dB or higher over different time periods are computed using a formula set forth in 30 C.F.R. § 70.502. The result is a time weighted average (*TWA*) of exposure to noise expressed as a percentage of the maximum allowable exposure, with 100 being the equivalent of 8 hours of exposure to 90 dB. The standard is considered to have been violated if the *TWA* exposure exceeds 100. MSHA allows for an error reading of 2 dB. Consequently, the maximum allowable *TWA* used by health inspectors is 132, the equivalent of 8 hours of exposure at 92 dB. Under the regulatory scheme then applicable, if a miner wore some form of hearing protection, e.g., ear plugs, the *TWA* of the miner's noise exposure was multiplied by the device's noise reduction rating (*NRR*) to arrive at a final noise exposure level for that miner. For example, if a miner was exposed to noise with a measured *TWA* of 200, but wore ear plugs with a *NRR* of 0.25, his actual exposure would be only 50 (200 x 0.25 = 50), well below the allowable limit of 132.

MSHA inspectors use an electronic device called a dosimeter to measure noise levels. For this inspection, Quest model Q200, dosimeters were used. They had been approved as measuring devices and had been calibrated as required by regulation. Specific miners are designated to wear dosimeters for the entire shift. 30 C.F.R. § 70.500(f) described a dosimeter:

> (f) *Personal noise dosimeter* means equipment worn by an individual, which performs noise level measurements along with exposure time measurements. The circuitry of the instrument is such that it automatically performs the computation of the multiple noise exposure specified in § 70.502.

The dosimeter continually monitors the noise levels to which the miner is exposed and calculates the level of exposure as a function of the noise level and time of exposure. The results are reported on a digital display as a percentage of the *TWA* of the maximum allowable noise exposure. Taking into account the error factor used by MSHA, readings above 132, after taking into account the *NRR* of any hearing protection worn by the miner, indicate exposure to excessive noise in violation of the standard.

Inspector Craddock followed his normal procedure in conducting the dust and noise surveys. He arrived at the mine site at about 10:00 pm on May 31, 2000, about an hour before the midnight shift began. He met with the longwall shift foreman, Steve Hayes, and designated the miners who were to wear the dosimeters and dust pumps. Five miners were designated to wear dosimeters; B. Boyd, a stage loader; D. Ingle, the longwall shearer operator; S. Reed and A. William, two shield operators; and, S. Bartges, an electrician. Dosimeters and dust pumps were distributed at a table near the dressing area shortly before the miners went underground.

The measuring devices were activated about 10 minutes before the start of the shift and Craddock traveled underground with the men to monitor the testing. When they arrived below ground, he checked the dust pumps and dosimeters,[2] and walked approximately 1,000 feet with the longwall crew to the longwall operation. Before production began, parameters of dust control devices on the longwall mining machine had to be tested and the men were all in the relatively confined area at the head gate of the longwall while this was done. Craddock has extensive experience as a coal miner and over 30 years of experience as an inspector, including 15 years as a health inspector. He had inspected the mine in the past and knew many of the miners, including David Ingle. There was an ongoing exchange of conversation between Craddock and the miners, including considerable bantering and joking. Craddock recorded information necessary for the noise survey report, the miners' names, the serial numbers of the dosimeters, the miners' jobs and corresponding codes and the time the dosimeters were turned on. He asked each of the miners whether he wore hearing protection and, if so, he determined the type of hearing protection and its *NRR*, and also recorded that information. Whether the miner wears hearing protection is important information because noise exposure in a longwall operation will generally exceed allowable limits and the wearing of hearing protection with an adequate *NRR* would be essential to avoiding a violation of noise exposure regulations.

The light-hearted conversation and joking between Craddock and the miners continued throughout this process, including his efforts to obtain information about hearing protection. One miner stated in response to Craddock's inquiry that he just put tissue in his ears. Another responded that he had worms in his ears. Ingle responded that he didn't have any of that stuff in his ears, he just wore a "hood," an elastic neck warmer that he pulled up over his head. Despite the joking, the miners did eventually supply information about hearing protection to Craddock. As he explained, "they know you're serious and they will eventually give you a straight answer" about whether they wear hearing protection and what type it is. Craddock recorded their responses on his report form and examined the packaging of the ear plugs that the miners produced to obtain the *NRR* for that particular device. Notably, Ingle, the shearer operator, never provided Craddock with information different from his original response, to the effect that he did not wear hearing protection.[3] Ingle's foreman, Steve Hayes, was present during this banter, including Ingle's response to Craddock's inquiry about hearing protection, and did not contradict the information supplied by Ingle, although he may have smiled during the exchange.[4] After checking the parameters for dust control on the longwall shearer, e.g., the number and minimum

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[2] MSHA's policy manual specifies that miners wearing dosimeters are to be observed "frequently' during the shift. In practice, observations are made at the beginning of the shift and as other miners wearing dust pumps are checked.

[3] At some point, Ingle stated that he had ear plugs in his "bucket" in the "kitchen or dinner hole." Craddock questioned what good they were going to do him back there.

[4] There was testimony on cross-examination of Craddock that Hayes smiled. However, it is unclear whether Craddock was referring to Ingle or Hayes.

pressure of sprays, and gathering the information from the miners, production commenced with the longwall shearer making a pass toward the tailgate.

Craddock stayed near the head gate to record air and gas measurements. He then caught up with the shearer about half way to the tailgate and again made air and gas measurements. He caught up to the shearer again near the tailgate and again took air and gas readings. After the longwall shearer reached the tailgate, Ingle performed a cut out operation and backed the shearer up, preparing to make another pass toward the head gate. He was facing the coal face, holding the remote control for the shearer in his hands, when Craddock approached him from his left side. Craddock pulled the "hood" on Ingle's head back to look into his left ear. Craddock did that because he wanted to check to see if Ingle was wearing hearing protection. Because of the joking that had gone on earlier, he felt that there was a possibility that Ingle was kidding him when he said that he didn't wear hearing protection.

In addition to the "hood," which miners wear for warmth and to reduce the amount of coal dust on their heads, Ingle wore an "airstream" helmet and face shield. The helmet extended over, or around, his ears, but did not prevent someone from looking into his ears. Ingle did not see Craddock as he approached and the attempt to check Ingle's hearing protection surprised him somewhat.[5] He turned toward Craddock when he felt the tug on his "hood" and Craddock, thereafter, left the area and had no further contact with Ingle. Craddock did not observe ear plugs or any other form of hearing protection in Ingle's left ear.

Craddock collected the dust pumps, which are required to be operated for no more than 8 hours, and went to the surface about 7:00 am. He encountered Hayes on the way out and responded "no" when Hayes asked him if he had found anything. Dosimeters, which must be operated for the entire shift, were collected when the shift ended and the miners came into the bathhouse/dressing area. Craddock checked and recorded the results of the dosimeter survey from the readout display on the machines. B. Boyd's dosimeter provided a reading of 213.2. However, the *NRR* of his ear plugs was 0.125, which reduced that reading well below the allowable limit of 132. S. Reed's dosimeter displayed a reading of 164.1. Applying the 0.0719 *NRR* of his ear plugs also reduced his exposure below the allowable limit. Ingle's dosimeter displayed a reading of 324.0, the equivalent of 8 hours of exposure to noise in excess of 98 dB.[6]

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[5] Ingle testified that he thought Craddock was joking and that he "didn't think anymore about the situation."

[6] One of the dosimeters failed to record and the other, worn by the electrician, who likely did not spend a great deal of time in close proximity to the longwall shearer, displayed a reading of 102.6. A table showing the sound level which, if constant over 8 hours, would result in the same noise dose as measured and displayed by a dosimeter, is found in the Appendix to the current regulations, 30 C.F.R., Subchapter M, Part 62.

Because Ingle's dosimeter reading substantially exceeded the allowable limit of 132, and he had not worn hearing protection, Craddock issued Citation No. 7664187 for what he perceived to be a violation of noise standard regulations. He determined that it was highly likely that a miner exposed to that noise level over his "working life" would suffer permanent hearing loss, classified the violation as "significant and substantial" and the degree of operator negligence as moderate. He served the citation on Gary McGough, Respondent's midnight shift safety inspector. At no time, including during the post inspection conference, did anyone protest or contradict Craddock's determination that Ingle was exposed to excessive noise because he was not wearing hearing protection.

Conclusions of Law - Further Factual Findings

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

The determination of whether there was a violation in this instance turns upon the factual question of whether Ingle was wearing hearing protection. Ingle testified that he was, in fact, wearing hearing protection in the form of ear plugs issued by Respondent.[7] He confirmed that he told Craddock that he didn't wear anything in his ears, but explained that he knew Craddock quite well and was just joking with him, as the other miners were doing at the time. Respondent, also relying upon Ingle's testimony, challenges Craddock's determination that Ingle was not wearing ear plugs, arguing that the partial ear covering provided by Ingle's helmet and the "hood" he was wearing, as well as the angle at which Craddock had to look into Ingle's ear and the fact that the ear plugs Ingle was wearing, as well as Ingle's ear, were likely dirty from coal dust, would have made the ear plug difficult, if not impossible, to see in the brief opportunity provided by Craddock's pulling back of the "hood." Craddock, however, testified that he had an adequate opportunity to observe whether Ingle had an ear plug in his left ear and that he definitely did not.

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[7] After the citation was issued Ingle was questioned about it by James Bell, the union safety representative, and by Giovanni Buckarelli, Respondent's safety manager. Ingle told them that he put his ear plugs in before beginning production and would testify to that effect. Respondent issued hearing protection to its miners and its policy on hearing protection required that it be worn in noisy conditions, e.g., when the shearer or other loud mechanical equipment was operating. Respondent points out that the longwall miners were not obligated to wear hearing protection prior to beginning production and would not have had ear plugs in their ears when they were talking with Craddock. At the time Craddock looked into Ingle's ear, however, Ingle would have been required to wear hearing protection.

I find that Ingle was not wearing ear plugs at the time Craddock checked his ear during the operation of the shearer. I accept the testimony of Craddock, a highly experienced miner and inspector, that he was able to determine by looking into Ingle's left ear, that he was not wearing an ear plug. He had a brief, but adequate, opportunity to observe Ingle's left ear. While a longwall operation undoubtedly creates a lot of dust, less than one-quarter of a shift's production had occurred and the hood would have provided some barrier to the accumulation of dust in the area of Ingle's ear. Respondent contends that Ingle may have been wearing ear plugs he had used for as much as several weeks and that they may have been more black than orange.[8] Even if Ingle had been wearing dirty ear plugs, however, they would have been observable to Craddock. I also find it highly unlikely that Ingle, knowing the serious nature of a noise survey, would not have eventually given Craddock a "straight answer," if he was going to wear hearing protection that day.

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).

In *Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

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

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[8] Respondent also contends that the entire inspection was fraught with errors, questioning whether the dosimeters were approved devices and had been properly calibrated, the manner in which Craddock attempted to look into Ingle's ear and the failure to conduct a follow-up noise survey after submission of its hearing conservation plan. With the possible exception of the manner in which Craddock attempted to look into Ingle's ear, none of these criticisms are valid.

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

I find that the Secretary has not carried her burden of proving that the violation was S&S. One could hardly dispute Craddock's assessment that exposure to the equivalent of 98 dB of noise over the course of a miner's working life, would result in permanent hearing loss if no hearing protection was provided or used. Ingle's *TWA* exposure was the equivalent of 8 dB above the permissible limit for an 8 hour period. That is a significantly high exposure. However, MSHA allows 2 dB, to account for reading errors. While it is no doubt true, as explained by Judy McCormick, MSHA's supervisory health specialist, that the chance of hearing loss increases as the *TWA* increases, there was no evidence to quantify the degree to which the risk increased due to Ingle's actual exposure.

More significantly, assessments of the risk of hearing loss associated with levels of exposure in the range of 98 dB appear to be predicated on long-term exposure, e.g. working life.[9] The duration of the exposure is an important factor in the risk analysis. The violation established that Ingle was exposed to a *TWA* of 324, but only for one shift. While he would typically be exposed to that level of noise, it appears that his not wearing hearing protection was the exception, rather than the rule. In the absence of evidence tending to show that Ingle rarely wore hearing protection, the Secretary has failed to establish that the relatively short duration of the violation here was highly likely to result in permanent hearing loss, or that it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature.

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[9] See the background and related discussion included in the publication, as a final rule, of the current noise regulations. *Health Standards for Occupational Noise Exposure; Final Rule*, 64 Fed. Reg. 49548 (September 13, 1999).

The Appropriate Civil Penalty

U.S. Steel's Oak Grove Mine is a very large producer, over two million tons per year, and its controlling entity is also very large, producing from five to ten million tons per year. It has a relatively good history of violations, having paid 570 violations issued in the two years preceding the citation here. Those citations were largely single penalty assessments and were issued in 853 days of inspections, yielding a relatively low ratio of violations to inspection days of 0.67. As noted above, I do not find that the violation was S&S, and consequently, would reduce the gravity to reasonably likely to result in lost work days or restricted duty. I also find that Respondent's negligence was somewhat lower than "moderate." Had Respondent's hearing protection policy been complied with, there would not have been a violation. Ingle's foreman, at least to that time, had reason to believe that Ingle was "pretty good" about wearing his hearing protection. He could, perhaps, be faulted for tolerating the light-hearted banter and joking that occurred as Craddock inquired about hearing protection. However, the majority of the miners provided the information, and Hayes may have been unaware that Ingle had not eventually supplied the information. The violation was promptly abated.

Considering all of these factors, I assess a civil penalty of $225.00.

ORDER

Based upon the foregoing, Citation Number 7664187 is **AFFIRMED** and Respondent is **ORDERED** to pay a civil penalty in the amount of $225.00.

Michael E. Zielinski
Administrative Law Judge

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August 2, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-421-M
Petitioner	:	A. C. No. 04-04679-05511
	:	
	:	Docket No. WEST 2000-422-M
	:	A. C. No. 04-04679-05512
	:	
	:	Docket No. WEST 2000-423-M
	:	A. C. No. 04-04679-05513
	:	A. C. No. 04-04679-05515
	:	
v.	:	Mine: Montague Plant
	:	
	:	Docket No. WEST 2000-424-M
	:	A. C. No. 04-03404-05513
	:	
	:	Docket No. WEST 2000-425-M
	:	A. C. No. 04-03404-05514
	:	
	:	Docket No. WEST 2000-426-M
	:	A. C. No. 04-03404-05515
	:	
	:	Docket No. WEST 2000-427-M
	:	A. C. No. 04-03404-05516
CONTRACTORS SAND & GRAVEL,	:	A. C. No. 04-03404-05517
INCORPORATED,	:	A. C. No. 04-03404-05519
Respondent	:	A. C. No. 04-03404-05520
	:	
	:	Mine: Scott River Plant

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

These cases involve seven petitions for assessment of civil penalty. They arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d)). They are before me on remand from the Commission (23 FMSHRC 570 (June 2001)), and they concern proposed penalty assessments that became final orders of the Commission either when the Respondent failed to submit a hearing request to contest the alleged violations or when the Respondent failed to answer the Secretary's petitions. Several years after most of the defaults

were entered, the Respondent requested the Commission reopen the proposed assessments so it could contest them. The Commission remanded the matters and instructed me to determine whether relief from the final orders was warranted (23 FMSHRC at 577).

Following the remand, the parties conferred and reached a comprehensive settlement, which the Secretary moves that I approve. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. I especially note the Secretary's representations that the Respondent was a small operator and is no longer engaged in mining.

The settlement amounts are as follows:

WEST 2000-421-M

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05511				
3460096	05/26/93	56.12025	$ 102.00	$ 22.00
3638714	06/08/93	56.12008	50.00	22.00
3638715	06/08/93	56.14107(a)	81.00	22.00

WEST-2000-422-M

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05512				
3638716	06/08/93	56.14130(h)	$ 50.00	$ 22.00

WEST 2000-423-M

Citation/ Order Nos.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05513				
3911910	03/12/93	56.14103	$ 382.00	$ 22.00
A.C. No. 04-04679-05515				
3916592	06/07/95	56.5050	50.00	22.00

WEST 2000-424-M

Citation/ Order Nos.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05513				
3638707	06/07/93	56.14107(a)	$ 81.00	$ 22.00
3638708	06/07/93	56.14107(a)	81.00	22.00
3638709	06/07/93	56.12008	102.00	22.00
3638710	06/07/93	56.14107(a)	81.00	22.00
3911923	06/07/93	50.30	90.00	22.00

WEST 2000-425-M

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05514				
3638706	06/07/93	56.14130(h)	$ 50.00	$ 22.00

WEST 2000-426-M

Citation/ Order Nos.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05515				
3638705	06/07/93	56.14101(a)(2)	$ 240.00	22.00
3638713	06/07/93	56.14132(a)	50.00	22.00
3638541	08/18/93	56.141008	50.00	22.00
3638542	08/18/93	56.141008	50.00	22.00
3638544	08/18/93	56.14132(a)	50.00	22.00

WEST 2000-427-M[1]

Citation/ Order No.	Date	30 C.F.R	Assessment	Settlement
A.C. No. 04-04679-05516				

[1] Docket No. WEST 2000-427-M, originally contained Citation No. 4241113, which was issued on June 25, 1997 and which alleged a violation of 30 C.F.R. §56.12028. The Commission declined to remand the proposed assessment of $50.00 for this alleged violation and the proposed assessment became a final order. During the settlement negotiations, the Respondent recognized the finality of the order and agreed to pay the penalty in full.

3638712	06/07/93	56.14101(a)(3)	$ 50.00	$ 22.00
3638546	08/18/93	56.14101(a)(3)	50.00	22.00
3911940	08/18/93	56.14130(c)	50.00	22.00
A.C. No. 04-04679-05517				
3910093	05/03/94	56.12025	$ 81.00	$ 22.00
3910094	05/03/94	56.12013	50.00	22.00
A.C. No. 04-04679-05519				
4341197	03/05/96	56.12004	$ 102.00	$ 16.00
Total:			**$2,023.00**	**$500.00**

WHEREFORE, the motion for approval of settlement is **GRANTED,** and it is **ORDERED** that within 30 days of this order, the Respondent pay a penalty of $500.00 as specified above. In addition, within the same 30 days, the Respondent is **ORDERED** to pay a penalty of $50.00 for the violation of 56.12028, alleged in Citation No. 4341113 (Docket No. WEST 20000-427-M (A. C. No. 04-03404-05520)).[2] Upon receipt of payment, this matter is **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

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/wd

[2] Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 360250M, PITTSBURGH, PA 15251.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-148
Petitioner	:	A. C. No. 46-01433-04274
v.	:	
	:	Loveridge No. 22
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND APPROVING SETTLEMENT

Before: Judge Feldman

The initial decision in this matter held that Consolidation Coal Company's (Consol's) violations of the mandatory safety standards in 30 C.F.R. §§ 75.400 and 75.360(a)(1), prohibiting combustible coal dust accumulations in active workings and requiring adequate preshift examinations, respectively, were not attributable to Consol's unwarrantable failure. 22 FMSHRC 455 (Mar. 2000) (ALJ). On remand, the Commission reversed and reinstated 104(d)(2) Order No. 4889944 concerning Consol's violation of section 75.400 and reversed the negative unwarrantable failure determination with respect to 104(d) (2) Order No. 4889946 concerning the section 75.360(a)(1) violation. 23 FMSHRC 588 (June 2001). Thus, in light of its remand decision, the Commission directed me to reconsider the appropriate civil penalty to be assessed for Order No. 4889944, and to reevaluate whether Consol's violation of section 75.360(a)(1) was unwarrantable and to reconsider the appropriate civil penalty that should be imposed. *Id.* at 598.

As a result of a telephone conference with the parties, a settlement has been reached that resolves all outstanding issues. For settlement purposes, the parties have agreed to reinstatement of the unwarrantable failure with respect to 104(d)(2) Order No. 4889946. Consol has agreed to pay the $9,000.00 civil penalty initially proposed by the Secretary for Order No. 4889944. Consol has also agreed to a reduction in civil penalty, from $9,000.00 to $6,000.00, for Order No. 4889946. The reduction in civil penalty is based on a reduction in culpability, in that, having already decided to subordinate its coal dust accumulation cleanup efforts to its desire to complete construction, a decision that has been determined to be unwarrantable in nature, Consol elected not to note the accumulations in its preshift examination in contemplation of cleaning the accumulations prior to the resumption of coal production activities. The reduction in civil

penalty for Order No. 4889946 is a reflection that Consol's high degree of negligence has already been considered in the parties' settlement with respect to the unreduced penalty for Order No. 4889944.

I have considered the representations and documentation submitted in this matter, and I conclude that the proffered settlement is consistent with the Commission's remand instructions, and, that it is otherwise appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED,** and **IT IS ORDERED** that Consolidation Coal Company pay a civil penalty of $15,000.00 in satisfaction of 104(d)(2) Order Nos. 4889944 and 4889946 within 45 days of this Decision, and, upon receipt of timely payment, this case **IS DISMISSED**.[1]

Jerold Feldman
Administrative Law Judge

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[1] The agreed upon $15,000.00 civil penalty in satisfaction of 104(d)(2) Order Nos. 4889944 and 4889946 is in addition to the $4,500.00 settlement the parties reached at trial with respect to the remaining alleged violative conditions that were the subjects of this proceeding. 22 FMSHRC at 472. Thus, the total civil penalty to be paid by Consol in this case is $19,500.00.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 15, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-10-M
Petitioner	:	A.C. No. 44-06803-05515
v.	:	
	:	Adco Land Corp. No. 1
VIRGINIA SLATE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Samuel Waters, Conference and Litigation Representative, Warrendale, Pennsylvania and James Brooks Crawford, Esq., U.S. Department of Labor, Arlington, Virginia for Petitioner;
V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Richmond, Virginia, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Virginia Slate Company, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815. The Petition seeks a civil penalty of $600.00 for an alleged violation of section 56.9315, 30 U.S.C. § 56.9315.

A hearing on the merits was convened in Henrico County, Virginia. Prior to convening the hearing, the parties negotiated a settlement whereby Respondent agreed to pay $150.00 based on the fact that the mine has been permanently abandoned and Respondent does not intend to resume operations in the future. The settlement agreement was approved on the record, pending filing of the written agreement, and that determination is hereby confirmed.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ORDER

The settlement is appropriate and in the public interest. **WHEREFORE**, the motion for approval of settlement is **GRANTED**, it is **ORDERED** that the Respondent **PAY** a penalty of $150.00 within 30 days of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-8-M
Petitioner	:	A. C. No. 44-06803-05508
v.	:	
	:	
VIRGINIA SLATE COMPANY,	:	
Respondent	:	Adco Land Corp No. 1

DECISION ON REMAND

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Richmond, Virginia, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a decision by the Commission in this matter, 23 FMSHRC 482 (2001), wherein the Commission granted the Secretary of Labor's petition for discretionary review challenging various determinations made in a decision issued subsequent to an evidentiary hearing in this matter, 22 FMSHRC 378 (March 2000), and inter alia, remanded various unwarrantable failure and penalty assessment issues regarding a number of orders and citations at issue in this case.

A. Unwarrantable failure

1. Order No. 7711661 and Citation No. 7711663.

The Commission vacated my initial finding that the violations cited in Order No. 7711661 and Citation No. 7711663 were not the result of Virginia's unwarrantable failure finding that error was made when I applied my credibility determination concerning Williams' testimony about the belt violation in Citation No. 7711660 to [my] unwarrantability analysis of the belt violations in Order No. 7711661 and Citation No. 7711663, and failed to consider Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 were run without guards during production. 23 FMSHRC, supra at 486-487. Specifically, the Commission issued a remand "... for the Judge to properly consider testimony that fairly detracts from his decision on that issue." 23 FMSHRC supra at 487.

I take cognizance of Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 had both been run in an unguarded state during production. In contrast, Adamson testified that from May 10, 1998 through June 1, 1998 the plant was not in operation, was not producing any material and no belts were in operation because the conveyor was being worked on. He also testified that only late in the afternoon on June 1, did the plant operate in order to test the crusher, and only six buckets of material were processed. I carefully observed the demeanor of Adamson and Williams during their testimony, and found Adamson to be more credible than Williams, and accordingly accept Adamson's testimony. I also accept his uncontradicted testimony that Virginia had decided to make sure that all guards be in place prior to the start-up of normal operation, but before this task could be performed, Inspector Horn arrived at the site to commence his inspection.

Within this context I find that Virginia's actions regarding the violative conditions cited in Order No. 7711661 and Citation No. 7711663 did not reach the level of aggravated conduct, and hence did not constitute an unwarrantable failure (see, *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987)).

2. Order No. 7711667.

According to Horn, Adamson, III, told him that he was responsible for checking the area at issue, and that Virginia had started using a front-end loader the week prior to June 2. However, the Secretary did not call Adamson, III, as a witness, nor did it offer any excuse for its failure to do so. Williams testified that since February 9, 1998, a front-end loader had been used to load the hopper. Horn concluded that the violation was as a result of Virginia's unwarrantable failure since Virginia knew of the violative condition and did nothing about it.

On the other hand Adamson testified that from March 19, 1997, when operations commenced, until June 1, 1998, normally the excavator was used to load the hopper, but that on June 1 the front-end loader was used to load the hopper for about 10 minutes. I observed the demeanor of Williams and Adamson and found Adamson to be the more credible witness. Within the context of the above record, I find that the Secretary has failed to adduce sufficient evidence to establish that the violative condition, i.e. that berms, bumper-blocks, safety hooks, or similar impeding devices were not provided at the dumping location at issue, to have been so obvious, that the operator should have had knowledge of these conditions. I thus find that it has not been established that Virginia's negligence reached the level of aggravated conduct. Therefore, I find that it has not been established that the violation was as a result of its unwarrantable failure.

3. Order No. 7711681.

In vacating the initial determination that Order No. 7711681 was not due to unwarrantable failure, and remanding for reconsideration, the Commission concluded that "... the

Judge failed to examine such aggravating factors that may have been relevant to his unwarrantability analysis, such as the extent and duration of the operators failure to carry out preshift examinations or its knowledge that it was not adequately carrying out such examinations. The Judge also failed to consider the underlying violations which went undetected or uncorrected because of the operators inadequate preshift examination and conditions." 23 FMSHRC supra at 492. The Commission further noted that the obviousness posed by safety violations involving inoperable horns and defective seatbelts should have been considered as a relevant factor in the analysis of whether the operator's failure to carry out the examinations was unwarrantable. In its remand the Commission directed as follows: "The Judge must address all the relevant factors relating to the preshift examination violation, including the underlying violations that were not detected or corrected because of the inadequate examinations." Id. at 492.

The underlying violations, for which proper preshift examinations had not been performed, relate to safety defects on mobil equipment such as inoperable horns, and lack of seatbelts. The record does not contain any evidence as to how long these conditions were in existence. The only evidence of record relating to the extent and duration of Virginia's failure to carry out adequate preshift examinations, or its knowledge that it was not adequately carrying such examinations, consists of Horn's testimony that when he previously was at the mine he discussed with Terry and Adamson III, "the importance" of the cited standard. He indicated that his conclusion that the violation was unwarrantable was based upon his opinion that Terry, the foreman, knew of the regulation and failed to make preshift examinations, and that there was no reason that these hazards and safety defects should not have been found and corrected (Tr. 52, Oct. 14, 1999). There is nothing in the record to indicate how long the safety defects had been in existence prior to being cited. Nor is there anything to the record to indicate for how long a period of time Virginia had not been making preshift examinations or had knowledge that it was not carrying out such examinations. Within this context, and for the reasons previously cited in my initial decision, (22 FMSHRC supra, at 390), I find that the Secretary has failed to establish that this violation was as a result of Virginia's unwarrantable failure.

B. Penalty Assessment Issues

1. Citation No. 7711660.

I reiterate my earlier findings that inasmuch as the violative condition could have resulted in a permanently disabling injury or fatality, that the level of gravity of the violation was relatively high. For the reasons set forth in the initial decision, (22 FMSHRC supra, at 381 - 382), I conclude that the level of Virginia's negligence to have been only moderate, and thus less than that asserted by the Secretary. I also find that the violative condition was abated in a timely fashion. There is no evidence in the record that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed. Taking all of the factors set forth in Section 110(c) of the Act, into account, especially giving some weight to a reduction in the level

of negligence from that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

2. Order No. 771161.

I find that since the violative condition could have resulted in an injury to a miner, and that the level of gravity was relatively high. The condition was abated in a timely fashion and there is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. A penalty should not be mitigated or increased as the result of the history of violations.

I find, based upon Adamson's testimony, that I find credible that the guard at issue had been removed to clean the area. Accordingly, Virginia's negligence was no more than moderate. Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

3. Citation No. 7711665.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed..

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

4. Order No. 7711667.

Since, as a consequence of the violative condition there was a danger of over turning I find that the gravity of this violation to have been relatively high. According to Inspector Horn, Adamson, III, told him that he was responsible for checking the area at issue, and that Virginia had started using a front-end loader the week prior to June 2. However, the Secretary did not call Adamson, III, as a witness nor did it offer any excuse for its failure to do so. Williams testified that since February 9, 1998, a front-end loader had been used to load the hopper.

On the other hand Adamson testified that from March 19, 1997, when operations commenced, until June 1, 1998, normally the excavator was used to load the hopper, but that on June 1 the front-end loader was used to load the hopper for about 10 minutes. I observed the demeanor of Williams and Adamson and found Adamson to be the more credible witness. Within the context of the above record, I find that the Secretary has failed to adduce sufficient evidence to establish that the violative condition, i.e. that berms, bumper-blocks, safety hooks, or

similar impeding devices were not provided at the dumping location at issue, to have been so obvious, or that the operator had specific knowledge of these conditions, so as to raise the level of Virginia's negligence to more than moderate.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analyzes of the penalty to be imposed.

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $200.00 is appropriate.

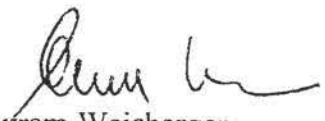
5. Order No. 7711681.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed.

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

Order

It is **Ordered** that if Virginia has not paid the penalties ordered in the original decision, 22 FMSHRC, supra, then Virginia shall pay a total civil penalty of **$4,400.00** for the violations found in the initial decision, 22 FMSHRC supra.



Avram Weisberger
Administrative Law Judge

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/sct

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 16, 2001

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

ORDER LIFTING STAY
DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Proceedings in the cases are currently stayed.[1] The petitions allege 42 violations of the Secretary's health and safety standards and seek penalties of $35,314.00. For the reasons set forth below, I find that the company is in default, affirm the citations and orders and assess penalties of $35,314.00.

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

On July 2, 2001, counsel for the Secretary filed a motion requesting that the stays be lifted and the cases set for hearing. In his motion, however, counsel noted that he had not been able to contact the Respondent by telephone and that the last letter he sent to the Respondent by certified mail was returned "unclaimed." Attempts by this office to set up a telephone conference call for the purpose of setting a hearing date met with the same results.

Permission was granted for Respondent's counsel to withdraw from the case on October 20, 2000. A copy of the order granting permission was sent to David F. Lapp, President, Hard Rock Mining Co., at the company's address of record and a green, "return receipt" card signed by what appears to be a "Karla Davis" was received back. Since that time, however, no return receipt cards have been received back from mail sent to the Hard Rock address of record. In addition, counsel for the Secretary stated in a December 28, 2000, pleading that he had been advised by Hard Rock's former counsel that both Lapp and the company had filed for bankruptcy. On the other hand, the March 27, 2001, order canceling the hearing and staying the proceedings in Docket No. WEST 2000-577-M was sent to Rosemary M. Short, Bookkeeper, Hard Rock Mining Co., in Tumwater, Washington, and the return receipt card, signed by "D. Lapp," was received back.[2]

Concluding that Hard Rock had not kept either the Commission or the Secretary apprized of its status,[3] that it was not clear what the company's position was with regard to these proceedings, or even if the company still existed,[4] I issued an Order to Show Cause to the company on July 11, 2001. The order ordered Hard Rock to show cause why it should not be held in default in these proceedings and ordered to pay penalties in the amount of $35,314.00 for failure to prosecute its case.

The order was sent to the company's two addresses of record by both certified mail-return receipt requested and regular mail and required a response within 21 days of its date. It provided that Hard Rock could respond to the order by furnishing both the Secretary and the Commission with an address and a telephone number at which it could be contacted. It further stated that:

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[2] This address was provided by the company in response to a telephone inquiry from this office.

[3] Commission Rule 5(c), 29 C.F.R. § 2700.5(c), requires, among other things, that: "Written notice of any change in address or telephone number shall be given promptly to the Commission or the Judge and all other parties."

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

"**Failure to respond to this order will result in the company being held in default and ordered to pay the $35,314.00 in proposed penalties in these cases.**" To date, no response has been received.[5]

Order

Based on these facts, I conclude that the Respondent is in **DEFAULT** in these matters. Accordingly, the stays are **LIFTED**, all of the orders and citations in these dockets are **AFFIRMED** and Hard Rock Mining Company of Olympia, Inc., is **ORDERED TO PAY** civil penalties of **$35,314.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail) (Regular Mail)

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

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

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

nt

[5] Both orders sent to Rosemary M. Short, Bookkeeper, Hard Rock Mining Co., 2827 29th Avenue SW, Tumwater, WA 98512, were returned marked "Undeliverable as addressed" and "No forward order on file." The certified order sent to David F. Lapp, President, Hard Rock Mining Company, 10145 Littlepage Road SW, Olympia, WA 98512, was returned marked "Unclaimed" after three attempts were made by the Postal Service to deliver it.

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

August 28, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-1-M
Petitioner	:	A.C. No. 39-01315-05512
	:	
v.	:	
	:	HM-2 Crusher
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Mine Act" charging Higman Sand & Gravel, Inc. (hereafter Higman) with a violation of Section 103(a).[1] of the Mine Act with respect to Inspector Sprague's inspection of the mine

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[1] Section 103(a) of the Mine Act provides, in pertinent part:

> Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (l) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines,...and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act .... for the purpose of making any inspection or investigation under this Act, ... any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine.

known as HM-2 Crusher Mine, I.D. No. 39-01315, which is located at the Volin Pit just outside the city limits of the town of Volin, South Dakota.

The primary issue presented in this case is whether or not Higman violated Section 103(a) of the Mine Act with respect to Inspector Sprague's April 30, 1998, inspection of the HM-2 Crusher Mine.

Section 103(a) of the Mine Act, in pertinent part, provides that for the purpose of making any inspections under the Mine Act, any authorized representative of the Secretary "shall have a right of entry to, upon or through any coal or other mine." All parties agree that an authorized inspector has that right of entry. The issue presented is whether Inspector Sprague's right of entry "to or upon or through" the HM-2 Crusher Mine was hindered in any way that constituted either a direct or indirect denial of his right to inspect the HM-2 Crusher Mine.

One aspect of this issue is the question of whether Higman's actions under the facts and circumstances of this case constituted a denial of Inspector Sprague's "right of entry to, upon or through" the mine designated as the HM-2 Crusher Mine. The Secretary has the burden of proof on this issue. Upon careful evaluation of all the evidence, I find that the preponderance of the evidence fails to establish a violation of 103(a) of the Act for the reason described below.

Citation No. 7916226, which is the sole citation challenged in the proceeding, identifies the HM-2 Crusher Mine, No. 39-01315, as the mine which Inspector Sprague was inspecting and the mine to which Sprague was denied entry. The citation reads as follows:

> Mr. Harold Higman, owner of Higman Sand & Gravel Inc. refuses to provide an authorized representative (sic) of the Secretary the information that he needs to locate the crushing unit. This refusal to provide this information constitutes (sic) a denial of right of entry and is a violation of the provisions of 103 of the Mine Act. Mr. Higman is engaging in aggravative conduct, inexcusable conduct consisting of more than ordinary negligence. (Emphasis added).

It is well established that it is a very serious violation of the Mine Act to prohibit an MSHA inspector from inspecting a mine to investigate or to determine compliance with the Mine Act and the safety regulations.

A denial of entry can include not only direct denials of entry but also indirect denials by action intended to prevent inspection of the mine by interference, delays, or harassment. MSHA's Program Policy Manual - Volume I - describes indirect denials of entry as follows:

> Indirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to

prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. However, a locked gate or other means of blockage, in and of itself, does not necessarily constitute a denial of entry. Mine management may have only closed the mine for the day and blocked the mine access road to prevent vandalism. However, when a locked gate if accompanied by continued production and deliberate avoidance of communication with the inspector, the mine operator is denying MSHA right of entry to the mine property. Other examples are listed below. The list is not meant to be all-inclusive, and reference is made only to some of the situations which may constitute an indirect denial.

a. Refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot;

b. Refusal to provide information regarding, or to accompany inspectors into areas considered unsafe to travel without specific knowledge of the subject mine (e.g., knowledge of on-shift blasting schedules in metal mines;

c. Withdrawing mine personnel when the inspector arrives;

d. Removing power from the mine or the mine ventilation system when an inspector arrives (before or after production);

e. Denying access to equipment or the immediate work area;

f. Deliberately withholding vital information (ownership, responsible person, name of operator, disposition of product, ownership of equipment, etc.); and

g. Denying entry for failure to have a search warrant. The Supreme Court, in the 1981 case of *Donovan v. Dewey and Waukesha Lime and Stone Company*, upheld the authority of MSHA to conduct warrantless inspections.

When the mine has an I.D. number and the operator is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain the particular actions which are

considered to be a denial of entry, and then should proceed in accordance with the above instructions pertaining to Section 103(a) of the Act, Denials of Entry.

The Program Manual also states with respect to inspection of small mines the following:

IV.G-7 Inspection of Small Mines

Small operations often do not have the resources normally available to larger mines. Time devoted to accompanying inspectors often must be subtracted from productive endeavors and may be a financial burden on the operator. In addition, while the Act entitles the operator to accompany the inspector there is no standard requiring the operator to do so. (Emphasis added).

Background

Higman operates three different sand and gravel surface mines. Each mine has a different location and Mine I.D. No. Each mine is located at a different well-known gravel pit. One mine I.D. No. 1300691 is located at Akron Pit in Akron, Iowa, where the company has its headquarters. A second mine I.D. No. 39-00993 designated as "Screener Pit No. 1" is located at the Grothe Pit in South Dakota and the third mine which is the mine we are specifically concerned with in this proceeding, has the designated name of "HM-2 Crusher" and is located at the Volin Pit next to the town of Volin, South Dakota. The evidence presented satisfactorily established that various MSHA inspectors have inspected the HM-2 Crusher Mine at that site since the 1980s. It is undisputed that the "HM-2 Crusher" Mine is properly registered with MSHA as an "intermittent mine."

It satisfactorily appears from the record that at least since the 1980s the HM-2 Crusher Mine has been operating at the Volin Pit located within one-half mile of the city limits of the town of Volin, South Dakota. It has been inspected by various MSHA inspectors at that location without any impediment.

Stipulations

The parties at the beginning of the hearing entered into the record the following stipulations:

1. Respondent is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the HM-2 Crusher Mine, I.D. No. 39-01315.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ et seq. ("the Mine Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The proposed penalties will not affect the Respondent's ability to continue in business.

Additional Stipulations

As the hearing progressed the parties made these significant additional stipulations.

The Respondent proposed and the Secretary's counsel, after conferring with MSHA Inspectors King and Sprague, stipulated that Colleen A. Olson and Mark Rasmussen, if called, would testify as follows:

Colleen Olson

A. Colleen Olson, if called, would testify that she is an employee of Higman Sand & Gravel; that she works at the Volin Pit in Volin, South Dakota. She started her employment at the Volin Pit on September of 1991 and has been there ever since. She still works there.

Ms. Olson lives in the town of Volin and is at the Volin Pit almost every day. On the days or the times during the day when she is not actually at the pit, she transfers the phone to her house or to whatever different phone number where she might be.

Ms. Olson would testify that the pit is open for business continuously; that customers come and go on a regular basis; that Higman trucks come and go on a regular basis; that the Higman trucks are driven by Higman employees. When there is not a loader operator on-site, the Higman driver will operate the loader to load his truck.

Olson will testify that her duties include weighing trucks and taking orders; that the scale house which serves as her work area is heated so that she can be there year-round.

Ms. Olson would testify it has been several years since they actually conducted any crushing operation at the plant at the Volin Pit; but that more often the most common activity at the Volin Pit is removing materials from the stockpiles.

Ms. Olson would testify she has not heard of a machine called "HM-2 Crusher;" she has been there when MSHA inspectors have come around -- that they are welcome to inspect the pit; and that, if asked, she would show them around the pit. More commonly, the loader operator, which might be Jim Abbott or Mark Rasmussen, would actually show the inspector around the pit. But if asked, she would be happy to do so, and would not require the approval of either Harold Higman or David Higman to allow the inspector to examine the pit or any of the equipment that is located there.

Mark Rasmussen

B. Mark Rasmussen, if called, would testify to the same things as Colleen Olson. Specifically, Mark Rasmussen, if called, would testify that he started with Higman in the spring of 1974. He has been a full-time Higman employee since that date; he has worked at all three of the pits — Volin, Richland, and Akron — from time to time.

He would testify that among the things he has done at the Volin Pit are operating a Grizzly, which is basically a machine with bars that allows the really big rocks to pass on through and the small ones to pass down the bars, and the smaller materials to fall through; he has frequently operated a loader at Volin and, on occasion, has operated a screen at Volin. He would testify that there hasn't been any actual crushing at the Volin site in the last few years; that at Volin they can and do pull material out of the bank with a loader; that material doesn't require anything significant by way of processing; he frequently operates the loader; and when he's not there, the loader, most of the time, is left behind so the drivers of Higman trucks can operate the loader themselves and load their material.

Inspector John R. King

Inspector John R. King did not issue the citation in question but was the first witness called by the Secretary. King testified he inspected the HM-2 Crusher operation in Volin, South Dakota, on September 18, 1996. Along with him was his supervisor Tyrone Goodspeed. King had no trouble finding the HM-2 Mine at the Volin Pit one-half mile from the town of Volin, South Dakota. He got the location of the mine from the report of the inspector who had previously inspected the HM-2 Mine at that same location. At the mine site King talked to three mine employees. In addition to talking to Colleen Olson who worked at the mine scale house, he talked to Jim Abbott the mine's foreman at the Volin Pit and to Mr. Bringman, the equipment operator. The sole citation King issued as a result of the inspection was for a seat-belt violation. King again stopped at the HM-2 Crusher Mine in July 1997. The only person he saw at the mine site on that visit was the scale house operator, Colleen Olson, who told him they were "not

running." King stated he concluded from that statement "they were just simply running out of their stockpiles." King testified that, in addition to seeing the employee Colleen Olson, he recalls seeing a front-end loader and the equipment listed in Ex.2B, Tr. 60.

He did not see a crusher machine on any of his visits to the Volin Pit mine site. On cross-examination King conceded that there is no list of equipment nor any equipment listed as being associated with the HM-2 Crusher Mine and that most operations similar to the HM-2 Mine bring different types of equipment in and out of the mine site. (Tr. 58). The Secretary through counsel stated that it is not the Secretary's or MSHA's position that a machine called the HM-2 Crusher existed at the HM-2 Crusher Mine site. (Tr. 62).

Olson's statement that they were "not running," in the context of the facts established at the hearing, obviously meant the mine, at that time was not engaged in production activity such as extracting sand or rock from the earth or engaged in actively processing such material. Respondent presented evidence that the mine was continuously open for mining activity needed to take care of customer orders for sand and rocks including loading and delivery of material from the mine's stockpiles. Cf Robert L. Weaver, Docket Nos. *YORK 93-25-M et al.*, 15 FMSHRC 2117 (Oct. 4, 1993) (ALJ Melick). Evidence was presented that the sand and rock taken from the Volin Pit needed very little processing other than segregating rocks by size. Respondent also presented evidence that rocks and sand at the mine were intermittently extracted from the earth to meet the demands of their customers and the necessary mining equipment to do that was kept at the mine site. Evidence was also presented that the rock at the Volin Pit was so hard it was not economically feasible to crush it. The mine screens out the larger boulders with a grizzly and generally sells these large boulders to the U.S. Army Corps. The smaller rocks only need segregation as to size.

Inspector Jeran Sprague and the Higmans

On April 30, 1998, Inspector Jeran Sprague, who issued the citation in question, drove to the HM-2 Crusher Mine site at the Volin Pit at Volin, South Dakota, for the purpose of inspecting the HM-2 Crusher Mine. He had no problem locating the mine site or entering the mine site. It is undisputed that he could have freely inspected any and every part of the 350 acre HM-2 Mine site if he wished to do so. He observed the scale house and testified he saw a limited amount of mining equipment. He saw a trap conveyor screener. He explained that a "trap" is the equipment in which the mined material is dumped. He saw the conveyor that conveys the mined material from the trap to a screen that screens the material out the top. He believes he saw a dump truck. He did not see any crushing machine. He did see some weeds that had grown up. It appeared to Inspector Sprague that the mine site at the Volin Pit may have been abandoned and might be operating at a new site that had not been reported to the MSHA office.

Not seeing anyone and seeing only a limited amount of equipment on his arrival at the HM-2 Crusher Mine site he drove to the Higman office located at the gravel pit in Akron, Iowa, even though it was outside his normal travel area. As he arrived at the Akron, Iowa, mine site he

saw a crushing plant behind the Higman office. On entering the office he first saw David Higman, who is the office man for the company. David Higman was talking to a customer. Sprague states he asked if they had someone who could go with him and look at the area out back of the office. Sprague testified that he was told that they did not. Later he talked to Harold Higman who is the field man for Higman. Harold, upon seeing the inspector, told him he appeared to be the inspector who on a prior occasion, on leaving the mine property, spun the wheels of his vehicle throwing rocks, one of which struck and injured his son's eye. Sprague denied he was the one who did that. Shortly thereafter Harold Higman left the office to keep a doctor's appointment.

Higman testified that they were bewildered when Sprague came into the office at the Akron pit at Akron, Iowa, and asked them where the HM-2 Crusher Mine was operating. They told him that the HM-2 Crusher Mine was where it always has been at the Volin Pit where he and other inspectors had always freely made their inspections. In essence, Higman told Inspector Sprague he could inspect the HM-2 Mine and Higman's other two mines without any restrictions just as he had done in the past.

There is ambiguity in Sprague's testimony as to what he was asking for when he entered the Higman office on April 30, 1998, and told Higman he wanted to see or inspect the HM-2 Crusher. They were bewildered because they were sure he knew where that mine was located. They told him that the HM-2 Crusher Mine was where it had always been, where he had inspected it before at the Volin Pit. Apparently, Sprague refused to accept that answer as to the location of the HM-2 Crusher Mine and insisted that they show him the crushing machine named or designated the HM-2 Crusher. Higman told Sprague that they had no crusher machine or other machine that was named, numbered, or designated HM-2 Crusher. Sprague apparently refused to accept that answer and, thereafter, told Higman he was going to issue a citation charging Higman with a violation of Section 103(a) of the Act if they did not show him the HM-2 Crusher machine. At that time Higman had in the area in back of the office at the Akron Pit all four of the crusher machines they owned. Three of the crushers were operational and a fourth, a blue crusher had a "For Sale" sign on it, was not operational. Inspector Sprague showed no interest in seeing or inspecting any crusher machine other than the one named or designated HM-2 Crusher. No proof of the existence of such a crusher was offered. Sprague told Higman he was going to issue a citation for a violation of 103(a) of the Mine Act for not showing him the HM-2 crushing machine. Higman told him to do whatever he had to do.

Sprague left Higman's office and phoned his supervisor. He then returned that afternoon to the Higman office and waited for the Higmans to return to their Akron office. When David Higman returned, Sprague served the citation at issue in this proceeding to David Higman and, in addition, gave Higman a deadline of 30 minutes to show him the HM-2 Crusher machine. Sprague told David Higman if you don't show me or tell me where the HM-2 Crusher is located within the next 30 minutes I'm going to close you down. David Higman testified he thought real hard on how he could keep the business from being shut down and decided that the blue crusher with the "For Sale" on it was as likely as any of their crushers to be one that may have been used

at the HM-2 Crusher Mine at the Volin Pit sometime in the past. He told Sprague that blue crusher with the "For Sale" sign on it was probably the one he was looking for. He did not tell Sprague the HM-2 Crusher Mine at Volin was for sale. That information apparently satisfied the inspector. He did not inspect or request to see the crusher with the "For Sale" on it or any of the three operable crushers that were "out back" of Higman's office at the Akron site. He did not issue an order closing the mine down.

The testimony of Inspector Sprague, as well as the citation itself, demonstrates Sprague issued the citation because he was not shown or told the location of a crushing machine named or designated HM-2 Crusher. Sprague wrote in his field notes, Pet. Ex. 4 top line of page 2, that when Higman asked which one of the crushers he was talking about he told them "whichever crusher is assigned that number" in obvious reference to the mine named HM-2 Crusher. The Higmans phoned the MSHA field office after Sprague left their office and to make sure there was no confusion informed Sprague's supervisor that they were not selling the HM-2 Crusher Mine operation at the Volin Pit.

Conclusion

I agree with counsel for the Secretary that "mine operators are required to supply relevant, available information pertaining to where operations are being conducted when it pertains to a particular mine I.D. number, irrespective of the equipment that's being operated at any given time." (Tr. 291). I also agree that consensual exchange of information between MSHA and operator is to be encouraged.

I find in this case, however, based on the record that the preponderance of the evidence presented fails to establish that Respondent materially impeded an inspection of the HM-2 Crusher Mine. It is elementary but important to not lose sight of the well-established fact that, in an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation; *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). In this case the Secretary failed to carry her burden of proof. The evidence presented fails to establish a violation of 103(a) of the Act. The citation must be vacated.

Finding of Facts

1. Higman Sand & Gravel, Inc., operates three gravel pits. "HM-2 Crusher" is just outside of Volin, South Dakota. "Iowa Portable No. 1 is at Akron, Iowa. The Grothe pit, otherwise known as "Screener Pit No. 1", is outside of Richland, South Dakota. (Tr. 202-204).

2. HM-2 Crusher in the context of this case refers to the HM-2 Crusher Mine located at the Volin Pit just outside the city limits of the town of Volin, South Dakota. (Tr. 211).

3. There has been no crushing done at the Volin pit in several years. (Tr. 210).

4. The Higmans told Inspector Sprague that the HM-2 Crusher Mine was at the Volin Pit, South Dakota, and that he could inspect it any time without any impediment just as he had done on prior occasions.

5. "HM-2 Crusher" is an intermittent operation for at least the last several years. There is mining equipment there, such as trucks, pay loader, conveyor, generally a grizzly, a scale house, and fuel storage. (Tr. 235-238).

6. There is no particular list of equipment associated with "HM-2 Crusher" (Tr. 58). and the Higman Sand & Gravel has not given names to any of its crushers or other machines. (Tr. 204-208).

7. Neither of the Secretary's two witnesses were aware of any instances that anyone had refused an MSHA inspector the opportunity to inspect the HM-2 Crusher Mine at Volin, South Dakota, pit or at the other two Higman pits. (Tr. 63, 69-72, 78, 136).

8. Inspector Sprague was mistaken when he assumed that the HM-2 Crusher Mine had moved its operation away from the Volin Pit site.

9. On April 30, 1998, MSHA Inspector Jeran Sprague entered upon Higman's Akron, Iowa pit and asked Harold Higman and David Higman, officers of Higman Sand & Gravel, Inc., to see a particular crusher assigned the name "HM-2 Crusher". (Tr. 222, 14-141).

10. Higman Sand & Gravel has no particular machine named or designated "HM-2 Crusher" and so informed Inspector Sprague. (Tr. 221, 269-270).

11. MSHA Inspector Jeran Sprague at all relevant times was afforded the opportunity to freely inspect the "HM-2 Crusher" which was the mine located just outside Volin, South Dakota as well as Higman's other two mines. (Tr. 136, 223, 272-273, 276).

ORDER

It is **ORDERED** that Citation No. 7916226 alleging a violation of 103(a) of the Act shall be and is hereby **VACATED** and the above-captioned case is **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

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August 29, 2001

BRIDGER COAL COMPANY., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2001-334-R
v.	:	Order No. 7636506
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, MSHA Respondent	:	Jim Bridger Mine

DECISION GRANTING CONTESTANT'S MOTION FOR SUMMARY DECISION

Before: Judge Weisberger

At issue before me, in this contest proceeding, is a motion to dismiss filed by the Contestant, Bridger Coal Company, ("Bridger").

Summary of the Facts[1]

Howard McCoy, Jr. has been employed by Bridger at its Jim Bridger Mine ("the Mine") continuously since January 1981. When hired, McCoy was already an experienced miner and was given "Newly Employed Experienced Miner" training pursuant to 30 C.F.R. Section 48.26. McCoy is currently classified as a Mine Service Operator and has been so continuously since November 1999. As a Mine Service Operator, McCoy's duties primarily have involved moving equipment around the Mine property. McCoy also helps out on occasion in the performance of additional jobs, as needed and as directed.

From time to time McCoy has assisted, as directed and under immediate supervision, in the operation of bridge cranes, such as the overhead shop crane and those in the draglines, by pressing the "up" or "down" button.

A bridge crane is a motorized indoor unit that runs on rails mounted near the ceiling and/or walls as the bridge crane operator positions it ("east" or "west" and "north" or "south") to lift loads too heavy to be safely lifted manually, by means of a hook that is raised or lowered from above with the push of a button ("up" or "down") on the control device (either a remote control or a control that hangs from the crane by a cable).

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[1]The facts that follow are adopted from Contestant's motion, as these specific facts have not been contested by the Secretary.

A task training program in bridge crane operation involves all aspects of using the bridge crane, including when and how to use the bridge crane, proper rigging of loads, planning the lift, operating the controls for directional positioning (north, south, east and west), load limitations, use of connecting devices, and lifting slings or chains. Pursuant to Bridger's MSHA-approved Part 48 Training Program, bridge crane task training is normally provided only to miners whose duties require use of the bridge crane, including all Heavy Equipment Mechanics, Welders, Electricians, Machinists, and HVAC Mechanics (there is no position of "bridge crane operator").

Other employees, whose duties may take them into one of the shops or the draglines on occasion, regardless of their classification or training, are called upon, from time to time, to press the button which raises or lowers the bridge crane (a practice known as "bumping"), under the direction and immediate supervision of a task-trained, experienced mechanic or other person experienced in bridge crane operation. Bridger has never considered it necessary to give task training to miners in bridge crane operation if they were only going to be bumping the crane.

On September 19, 2000, two of Bridger's experienced heavy equipment mechanics, Kevin Fletcher and Don Bakula, were assigned the job of changing the tracks on a bulldozer in the shop, removing the old track and installing a new one. To assist them, the mechanics asked McCoy to run the dozer, as part of the track changing process that Fletcher, Bakula, and McCoy had done together on previous occasions. Fletcher and Bakula asked McCoy, who was running the dozer, to raise it off the ground by using its blade and ripper (by lowering them against the floor, the body of the dozer was elevated). During the track-changing process on September 19, a chain linking the old and new tracks broke. In order to replace the broken chain, Fletcher used the overhead crane. Fletcher moved the overhead 15 ton crane into position at the right side of the bulldozer to lift the bogies off the track. He attached a chain sling and hook arrangement to two center bogies and hooked it to the overhead crane. The sling arrangement consisted of four chains and four hooks, and when used together, was rated at a 33,800 pound capacity. Fletcher instructed McCoy to raise the bogies to a near-horizontal position with the overhead crane.

In order the raise the bogies to this position, McCoy (who had left the dozer and was standing on the shop floor nearby) pressed the crane's control button momentarily (just as he had done on prior occasions), then stopped. McCoy then climbed back aboard the dozer to continue running it as needed by Fletcher and Bakula. Subsequently, one of the chains hooked to the bogie slipped off, fatally injuring Fletcher, and resulting in a pinched arm injury to Bakula.

On March 19, 2001, MSHA issued a 104(g)(1) Order alleging a violation of 30 C.F.R. Section 48.27(a). On April 23, 2001, MSHA modified the Order to instead allege a violation of Section 48.27(c), and to change it to non-S&S. The modification also states that "Mr. McCoy's operation of the crane was limited to 'bumping' to remove the slack in the rigging cables. The task took less than one minute and upon completion, he returned to his position on the dozer. There was no unsafe operations or acts committed by McCoy during his operation of the crane."

On June 25, 2001, Contestant Bridger filed a motion for summary decision, and the Secretary's response in opposition to this motion was filed on July 10, 2001. On July 19, 2001, Contestant filed a reply.

Discussion

At issue in this contest proceeding is the validity of Order No. 7636506 alleging, as modified, a violation of 30 C.F.R. Section 48.27(c) which provides that "[m]iners assigned a new task not covered in paragraph (a), [2] of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such tasks."

In its motion, Bridger sets forth three independent grounds for its motion as follows: (1) that bumping is not a separate task for which training is required; (2) that a miner does not have to be task trained before performing a task under the direct direction and supervision of an experienced person; and (3) that McCoy was not required to have task training as he had performed this task within the preceding twelve months.

In order for Bridger to prevail under 29 C.F.R. Section 2700.67(b) it must establish (1) that there is no genuine issue as to any material fact; and (2) that it is entitled to summary decision as a matter of law. Based on a review of the entire record in this proceeding, I find that Bridger has met this burden for the reasons that follow.

The record establishes that McCoy had not received any training in the safe work procedures of bumping prior to his having operated the overhead crane's control button on September 19. However, in order to prevail in establishing a violation under Section 48.27(c) supra, the Secretary must establish that McCoy was "assigned a new task". Neither counsel has cited any controlling case law on the issue of whether bumping constitutes a task. In resolving this issue, reference is made to 30 C.F.R. Section 48.22 which sets forth the definitions of various terms used in subpart B, which includes Section 48.27(c) supra, and which relate to the training of miners. In this connection, Section 48.22(f) supra, provides that the term task "means a work assignment that includes duties of the job that occur on a regular basis and which requires physical abilities and job knowledge." In essence, Bridger argues that the activity performed by McCoy, on September 19, did not constitute a new task. Bridger alleges that (1) McCoy was a mine service operator before he engaged in that activity and he remained a mine service operator after that without any reassignment to new tasks, and (2) that he occasionally bumped the bridge crane when requested to do so. The Secretary, in her opposition, does not raise any factual issue with regard to these facts asserted by Bridger. The Secretary's opposition is based solely upon assertions characterizing the nature of bumping as having significant safety implications, and that it is a "task" as it requires physical abilities and job knowledge.

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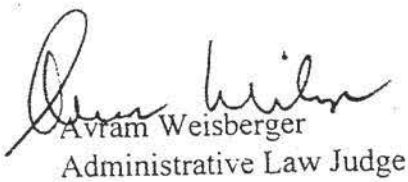
[2]The tasks covered in paragraph (a) of Section 48.27 refer to mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, and ground control machine operators.

In order to prevail the Secretary must establish that McCoy, in bumping, was "assigned a new task", (Section 48.27(c), supra). According to the clear unequivocal language of Section 48.22(f) a work assignment is considered a task only if the assignment to perform that task includes duties that not only require physical abilities and job knowledge and that "occur on a regular basis" (Emphasis added). Bridger asserts, in essence, that there is a lack of evidence for the Secretary regarding the existence of this material fact, which is necessary for the Secretary to establish in order to prevail herein. It is Bridger's specific factual assertion that the assignment to bump by pressing a button was assigned to McCoy "occasionally", and thus not on a "regular basis". The Secretary has not asserted either in its brief or in affidavits filed along with its brief, that McCoy performed bumping on "a regular basis".

I find, based on the record before me, that there is no issue as to a material fact, i.e., that McCoy's [3] assignment to bump did not occur on a regular basis. Hence, based on the clear language of Section 48.22(f), I find that the assignment of McCoy to bump on September 19 did not constitute a task. Accordingly, since Bridger's training obligation under Section 48.27(c) is required only when miners are assigned a new task, and McCoy's assignment did not fall within this category as it did not meet the definition in Section 48.22(f) supra, Bridger was not required to provide him with training under Section 48.27(c). Thus, considering the record before me, Bridger is entitled to a decision finding that it did not violate Section 48.27(c) supra. Accordingly Bridger's motion to dismiss is granted.[4]

ORDER

It is **Ordered** that Bridger's motion to dismiss is granted, and it is **further Ordered** that Order No. 7636506 be vacated, and this case be dismissed.



Avram Weisberger
Administrative Law Judge

[3]The Secretary does not assert that other miners were assigned this task on a "regular basis".

[4]In light of this decision, which disposes of Bridger's motion, it is not necessary to discuss the alternate grounds raised by Bridger.

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August 31, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2001-22-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	BR&D #3 Mine
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Associate Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant:
J. P. Cline, III, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of Dewayne York pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order declaring that Respondent, BR&D Enterprises, Inc. (BR&D), discriminated against York and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of $7,000.00. A hearing was held in Pineville, Kentucky on April 17, 2001 and the parties submitted briefs following receipt of the transcript. The Secretary had previously filed an Application for Temporary Reinstatement on behalf of York. A hearing was held on the application and on August 29, 2000, an order was issued directing that York be temporarily reinstated pending completion of the investigation of his allegations and final decision on any formal complaint that might be filed.[1] The parties have stipulated that the record of proceedings from the temporary reinstatement hearing be included in the record of this case. For the reasons set forth below, I find that Respondent did not discriminate against York in violation of the Act.

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[1] The Order was subsequently amended, at the request of the parties, to provide for York's economic reinstatement. The Temporary Reinstatement Proceeding was conducted under Commission Docket No. KENT 2000-255-D.

Findings of Fact

Dewayne York had been employed by BR&D for approximately seven of his ten years as a miner. He worked at the #3 mine for 12-14 months prior to being terminated on May 25, 2000, and held the position of roof bolter operator on the #1 shift at the time of his discharge. By all accounts, York was a good worker and there were no complaints about his work performance.

The work crew in a section of the mine consisted of twelve men, four of whom operated two roof bolting machines, or "pinners", referred to as the "intake" and "return" pinners. The power cables of the "intake" pinner ran along the right, or intake, side of the mine entries, and those of the "return" pinner ran along the left or "return" side. York and Charlie Price operated the "intake" pinner. John Simpson and George Black operated the "return" pinner. After the continuous mining machine had driven an entry past where a crosscut would be made and the area had been bolted, the miner would then make a 32 foot deep cut at the face, back away from the face into the previously mined area and make another cut by turning right and starting the crosscut. Even though roof bolts had been installed in that area of the entry, the newly created intersection was considered unsupported and BR&D's approved roof control plan specified that no miners were allowed to enter it until temporary supports, or two rows of bolts, had been installed in the newly created crosscut.[2] Under the plan, the intake pinner would proceed up the entry and install the required two rows of bolts. It would then be backed out of the entry and allow the return pinner to proceed up the entry past the crosscut to bolt the new cut at the face. The intake pinner would then return to finish bolting the crosscut. It would take approximately 15 minutes for the intake pinner operators to install the two rows of bolts and back the machine out of the entry to allow the return pinner access to the face.

At least since the beginning of York's most recent employment at the #3 mine, BR&D followed a mining procedure that violated its approved roof control plan. Rather than wait for the intake pinner to install two rows of bolts in the crosscut, the return pinner and its crew would travel through the unsupported intersection to bolt the new cut at the face. York himself also entered the unsupported intersection to help hang the power cable for the return pinner. The intake pinner would then be brought into the entry to bolt the new crosscut. With the possible exception of York, the roof bolter operators preferred this "illegal" procedure. It allowed both roof bolters to finish sooner because the return pinner could immediately begin to bolt the entry and the intake pinner would not have to stop bolting to back out of the entry and allow the return pinner access to the heading. This resulted in more break time for pinner operators, particularly the return pinners, who did not feel that the "illegal" procedure was hazardous, because they did not believe that the stability of the roof in the intersection would be significantly enhanced by the addition of two rows of roof bolts in the crosscut and the additional time required to install the bolts could result in sagging and deterioration of the roof in the newly cut heading.

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[2] The roof control plan provided that: "Openings that create an intersection will be supported by permanent supports or be supported with two rows of temporary supports on 5-foot centers across the opening before any work or travel in the intersection."

This deviation from the roof control plan was not the result of instruction or directives by management. In fact, the miners were aware that they were not permitted to enter the unsupported intersection and had signed acknowledgments to that effect at annual training sessions. Despite this knowledge and training, however, the "illegal" method was the practice preferred by the roof bolter operators and was accepted by Jackie Jaggers, the foreman. Jaggers had a fairly contentious relationship with the miners, particularly York. There was a good deal of give and take and the miners generally felt free to raise issues with Jaggers and inform him of conditions that affected their safety and the mining operation.

The miners typically encountered draw rock. Draw rock, or "draw slate" is "soft slate, shale, or rock approx. 2 in. (5.08 cm) to 2 ft. (0.61 m) in thickness, above the coal, and which falls with the coal or soon after the coal is removed."[3] During a period of several weeks in late March and early April, 2000, however, the draw rock was unusually thick and unstable. Virtually all of the roof bolters called this problem to the attention of Jaggers, who instructed the continuous miner operator to try and cut down some of the draw rock.[4] While the miner operator was able to cut some of it down, he could not get it all and would let the bolter operators know if conditions were particularly bad. The presence and location of draw rock at the mine was highly variable, and it was not always possible, or advisable, to cut it down. Sometimes, the preferred procedure was to allow some draw rock to remain, rather than cut down significant good roof to try and remove it. In such cases, the roof bolters were to pry the loose rock down with a bar, or make sure that it was securely bolted.[5]

Around April 1, 2000, York, who had experienced roof falls attributable to draw rock, decided that he would not continue with the "illegal" bolting procedure. He told Jaggers that he would not do so, which dictated that the procedure called for by the roof control plan be followed. The other pinner operators did not feel strongly about the draw rock conditions but did not object to the change in procedure, feeling that York was within his rights to take the position that he did. Jaggers did not verbally respond to York. He just shrugged and walked away. The roof bolters then proceeded to bolt in conformance with the roof control plan.

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[3] American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 168 (2d ed. 1996).

[4] In addition to his complaints about draw rock, which were also voiced by other bolter operators, York had complained on occasion to Jaggers about excessive dust attributable to a failure to install line curtain and excessively wide and deep cuts made by the continuous miner. He did not attempt to bring any of his safety concerns to MSHA officials and did not speak to any other management officials about them.

[5] The roof control plan also provided that when adverse roof conditions were encountered, extended cuts of 32 feet were to be reduced to the standard 20 feet. While there may have been some reduction in the depth of cuts, generally, mining proceeded with the extended 32 foot cuts.

Jaggers, who was somewhat temperamental, sulked for a while after York insisted on bolting in conformance with the plan. However, he did not treat York any differently than any of the other miners. The effect of the change was minimal. By operating the two roof bolting machines, rather than just one, BR&D had ample roof bolting capacity. Consequently, the 15 or so minutes that the return pinner had to wait while the crosscut intersections were bolted did not interfere with production. The return pinner operators were not particularly happy about the procedure, because they were unable to take breaks later in the day.

On May 25, 2000, there was an unusually heavy rainstorm that caused flooding and power outages at the #3 mine and the adjacent #4 mine. York and the other miners arrived about 6:00 a.m., and waited at the mine site. York rode to work in Black's vehicle, along with Wendell Fuson, the continuous miner operator. Stanley Ditty, BR&D's president and owner, was intent on producing coal that day as soon as power was restored because customers were in need of coal at that time. He had informed his superintendent, Randy Phelps, that the miners should remain at the site and they were so instructed. The men were periodically advised that the power would likely be restored in a few minutes, predictions that proved unfounded. By 8:30 or 9:00 a.m., the power had not been restored, and the miners tired of waiting. It was York's and the other miners' understanding from prior experience that they would not be paid until they actually started working. Despite the instructions to stay, some of the miners decided to leave the mine site. Black, York and Fuson left in Black's vehicle. York left because he believed he would not be paid for waiting and because Black and Fuson were leaving. They went to Fuson's home and remained in the driveway, where they could observe the road to the mine and see whether other miners also left. In all, some thirteen miners, including York, left the site.

Ditty arrived at the mine site about 9:30 a.m., after the power had been restored. When he was told that some of the men had left the mine, he determined that he would discipline the absent miners by suspending them for three days, until the following Tuesday. Ditty did not consult with Phelps or Jaggers about his decision to discipline the men, but did inform Phelps what he had decided and began to call the homes of the miners who had left. He spoke to York's wife, Dejuana,[6] and inquired about York's whereabouts. Mrs. York thought her husband was at work. Ditty informed her that he, and other miners, had left the mine. She asked what was going on and Ditty informed her of the flooding and power outage and stated that her husband was being suspended. She remarked that York, who had been aggravated about the draw rock condition, was not happy working at that mine and Ditty responded that York could find another job. Ditty intended only to note the obvious, i.e., that York was free to find a different job if he was unhappy working at BR&D. His comment apparently was misinterpreted by Mrs. York.

Mrs. York called Black's wife, Lori, and Fuson's wife, Jennifer, to see if they knew where the men were. Jennifer Fuson called her neighbor to see if the men were outside of Fuson's home, and the neighbor called Fuson to the phone. She informed him that the miners

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[6] Mrs. York was at work that morning and received a call from her son, who advised that Ditty was looking for York. She then called the mine site and spoke to Ditty.

who had left were being suspended and that York was being fired. Fuson told Black and York what his wife had said and then used his phone to call the mine and talked to Ditty, who informed him that he was being suspended for three days. York called his wife, who repeated what she had told Mrs. Fuson, and told him he needed to talk to Ditty.

York called Ditty, who asked why he had left the mine. York explained that he didn't think he was being paid. Ditty questioned how York could believe that, asked him to cite an example to support his belief. York replied that he couldn't cite a specific example, but there were times when he hadn't been paid. Ditty disagreed and told York that he was suspended. York protested that other miners had left the site and Ditty stated that they were also being suspended. York protested the suspensions as unfair and then cursed Ditty. Ditty told him to find another job and York responded that he would see him in court. Ditty spoke to Phelps around noon that day and told him that he had fired York for insubordination, that York had cursed him. York later called the mine and spoke to Phelps and asked him why he had been fired. Phelps responded that he needed to talk to Ditty.

York filed a complaint of discrimination with MSHA on May 26, 2000, alleging that he had been discharged for making safety complaints. The Secretary filed an Application for Temporary Reinstatement on his behalf, which was granted following a hearing. The Secretary subsequently filed this discrimination action.

Conclusions of Law - Further Factual Findings

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

York has clearly established two of the three elements of his prima facie case, i.e., that he engaged in protected activity and suffered adverse action, i.e., he was discharged. His expressions of concern about adverse roof conditions, as well as concerns about dust and deep cuts, all qualify as protected activity. More significantly, his refusal to continue to bolt in a manner violative of the roof control plan, clearly was protected activity under the Act.

Respondent argues that York failed to establish that he engaged in protected activity because he failed to prove that his concerns about safety issues were not properly addressed by Jaggers. The manner in which York's concerns were addressed may be relevant to other issues, but it has no bearing on whether he engaged in protected activity. A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act and it is clear that York engaged in protected activity prior to his discharge.

Unlawful Motivation

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

Here there is no direct evidence of unlawful motivation for York's discharge. There is also no direct evidence that Ditty was aware of York's protected activity. York confirmed that, in general, communications followed the chain of command and that he voiced his concerns to Jaggers, not to Phelps or to Ditty. York suspected that Ditty had been told of his protected activity and was hostile toward it. His suspicion was based solely on the fact that Jaggers had spoken to Ditty one day when he was at the mine and that Ditty did not come out and speak with the men that day. However, there is nothing to suggest that it would have been unusual for Jaggers to have conversed with Ditty when he visited the mine and Black testified that there were many times when Ditty was at the mine that he didn't speak to the men. Jaggers, Phelps and Ditty all testified that York's concerns were not passed up the chain of command. Because Ditty came into contact with Jaggers on his visits to the mine, it would be permissible to infer that Jaggers told Ditty of York's protected activity. I decline to make such an inference here and find that during the events of May 25, 2000, Ditty was not aware that York had engaged in protected activity and that his decision to discharge York was not motivated in any way by York's protected activity.

York presented a considerably more compelling case at the Temporary Reinstatement Proceeding. He portrayed himself as somewhat of a spokesman for the other miners on a variety of issues, including dust and deep cuts. Most significantly, however, he claimed that his insistence on compliance with the roof control plan resulted in a 10-15% reduction in coal production, which reflected adversely on Jaggers and Phelps and which Ditty was sure to have known about. He claimed that the miners didn't like it because it interfered with their running coal, that Jaggers showed hostility toward him by largely refusing to talk with him and that Phelps, too, no longer initiated conversations with him. Had these facts been proven, they would have easily justified an inference that Ditty was aware of York's protected activity and that it

may have been a motivating factor in his reaction to the events of May 25, 2000.

Unfortunately for claimant, the evidence materialized on the opposite side of those claims. The miners who testified uniformly stated that York was not regarded as a spokesman for them and that they all complained to Jaggers about issues that concerned them, including the troublesome draw rock they were encountering in March and April, 2000. While York was the only one who insisted on bolting in conformance with the roof control plan, that action was less significant than originally claimed in light of the other miners' complaints and the nature of their relationship with Jaggers. The other miners also testified that there was no noticeable change in Jaggers' or Phelps' attitude toward York after he took his stand, and that York was not treated any differently than other miners by Jaggers, Phelps or Ditty, either before or after April 1, 2000.

Most significantly, however, production reports introduced into evidence at the hearing in this case established that there was no fall-off in production on or around April 1, 2000, which was substantiated by virtually every witness. York, forced to abandon his contention that production was adversely affected, testified that roof bolting and other functions, such as scooping, were slowed, but failed to explain, or to introduce evidence to establish, why such developments would have adversely affected mining operations in a manner to be of concern to Jaggers, or to an extent that Ditty would likely have been aware of them. The most significant result of the change in bolting procedure appears to be that the return pinner operators essentially lost some free time they had used for breaks,[7] an issue unlikely to have been of particular import to Jaggers or one that he would have felt compelled to bring to Phelps' or Ditty's attention.

The Secretary argues that unlawful motivation should be found because "[t]here is a reasonable inference that Jaggers discussed the safety complaints by York and his refusal to bolt illegally with Ditty," the discharge was "so close" in time to the protected activity, there was demonstrated hostility toward it and BR&D's justification was pretextual.[8] The facts of the cases relied upon by the Secretary, however, are substantially different than those proven here. As noted above, the facts of this case do not justify an inference that Ditty was made aware of York's protected activity. I found Ditty to be a credible witness, whose position at the Temporary Reinstatement Proceeding hearing was largely substantiated by the evidence

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[7] One of the roof bolters, George Black, testified that they went back to bolting illegally because he and John Simpson "got tired" of the loss of their break time. Others denied that they had returned to the illegal roof bolting practice. York testified that they returned to the illegal practice several weeks before his termination, at his request, because he was concerned about loss of his job. I reject that testimony, which was not consistent with any other miner's. If there was a return to the illegal practice, which likely happened, at least on occasion, it was a result of the bolters' desire to get their additional break time and not at the request or urging of York.

[8] Brief for the Secretary, at pp. 34-36, citing, *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) and *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

introduced at the hearing of this case and I credit his testimony, which was consistent with other witnesses', that as of May 25, 2000, he had not been advised of and had no knowledge or information of any protected activity by York.[9]

York's discharge was not particularly close in time to his protected activity. Nor is there any evidence of animus toward his protected activity by Phelps or Ditty. Ditty, himself, was properly concerned about safety issues, including roof control. He operated two roof bolting machines, when he likely could have operated one. More significantly, he directed that the bolters install 5 bolts per row, though the roof control requires only 4. As he explained, the extra bolts were installed to provide additional roof support and the cost of installing them came "out of [his] pocket." Ditty also had no personal animosity toward York. He had loaned York money in the past and had accommodated a limited work schedule when York had suffered an injury and gave him a couple of days off to attend to a child's illness. Jaggers did evidence some animosity after the change in bolting procedures, sulking for a few days. However, that animosity was directed toward all of the miners and was not significantly different than his normal demeanor. As Simpson stated: "Jackie is just Jackie."

The Secretary's "pretext" argument is based upon her crediting of testimony to the effect that York did not curse Ditty during the phone conversation. I reached a different conclusion. The evidence as to both the substance and timing of the various phone conversations on May 25, 2000, was conflicting. I have credited Ditty's testimony regarding the conversations because I find them reasonable and because of my overall assessment of his credibility. As to the critical issue, York testified that he did not curse Ditty and Ditty testified that he did, using just one or two common curse words. Black and Fuson, friends of York, both overheard York's end of the conversation and testified that they did not hear him curse or raise his voice. However, Black was on the porch some 25 feet away from York and admitted that it was "possible that [he] missed something," though he did not believe that he had. Fuson also admitted that he was momentarily distracted by a neighbor's yelling, but also did not believe that he missed anything. Accepting the Secretary's argument that a pretextual justification can support an inference of unlawful motivation, I find no pretext in Ditty's explanation of his decision to discharge York.

ORDER

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[9] Jaggers denied that he had ever advised Phelps or Ditty of any of York's protected activity. Phelps testified that he had no knowledge of any complaints made by York and that he had never discussed any complaints by York with Jagger or Ditty. Ditty testified that he had no knowledge or information that York had made safety complaints. As the Secretary points out, Jaggers also testified that York never complained to him and that the roof control plan had always been followed, which was contradicted by virtually every other witness with knowledge of those facts. While Jaggers' credibility is certainly questionable, it does not reflect adversely on Phelps' and Ditty's credibility. Their testimony is consistent with that of other witnesses' on significant issues.

For the reasons stated above, I find that Ditty's decision to discharge York was not motivated in any part by York's protected activity. Accordingly, the complaint of discrimination is hereby **DISMISSED**.[10]

Michael E. Zielinski
Administrative Law Judge

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[10] The Decision and Order of Temporary Reinstatement, as amended, remains in effect until there is a final Commission decision on the complaint. *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999).

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 6, 2001

DANIEL C. HOWELL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2000-80-DM
v.	:	NE MD 00-03
	:	
CAPITOL CEMENT CORPORATION,	:	Martinsburg Plant
Respondent	:	Mine ID 00-03

ORDER

Capital Cement filed a Motion to Dismiss the above-captioned discrimination complaint on August 1, 2001, on the grounds that "Complainant failed to file a charge of discrimination ... almost four months after the time period for filing such a charge had expired."

Section 105(c) sets forth the time limitation applicable to filing a complaint under the Mine Act by requiring that "Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against in violation of this subsection may within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The Commission has held that the 60-day time limitation in section 105(c) is not jurisdictional and that justifiable circumstances may excuse non-compliance. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). In *Herman*, the Commission found a "prolonged hesitation" of nine months to constitute "extraordinary delay" in filing, and explained the primary objective of imposing time limitations for instituting legal proceedings as assuring fairness to the opposing party by:

> ... preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Id. at 2138-39, *quoting Bennett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1995), *quoting R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

There are several cases that examine whether untimely filing is excusable, by considering factors such as: Complainant's capacity or ability to initiate and pursue such a remedy, *see William T. Sinnott, II v. Jim Walters Resources, Inc.*, 6 FMSHRC 2445 (1994) (ALJ); Complainant's awareness of his rights under the Act, *id.*; *Hollis, supra; Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996) (ALJ) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act, filing of substantially identical allegations in workman's compensation and employment discrimination claims, and absence of prejudice to Respondent); *Secretary of Labor on behalf of Smith v. Jim Walters Resources, Inc.*, 21 FMSHRC 359 (1999) (ALJ) (ten month delay excused by filing within 61 days of first learning of section 105(c) and no claim of prejudice by Respondent); *Secretary of Labor on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996) (ALJ) (three month delay excused by filing one day after first learning of section 105(c) rights and no claim of prejudice); and the length of delay and whether it has resulted in prejudice to a Respondent, *see Sinnitt, supra* (delay of over three years "inherently prejudicial"). Consequently, the lengthier the delay, the more substantial the justification required to overcome it. *See Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997) (ALJ) ("very special circumstances" required to justify delay of over two years). Concrete demonstrable prejudice may also occur, e.g., unavailability of witnesses or documents. Factors such as these, pertinent to the particular circumstances of each case, must be weighed in order to determine whether delay has been justified. *Hollis, supra; Herman, supra.*

In the instant matter, Howell was discharged on October 19, 1999 and filed his discrimination complaint on April 17, 2000, almost four months past the December 20, 1999 deadline for filing. Howell seeks to have delayed filing excused by stating that he lacked knowledge of the procedure by which discrimination complaints are filed, sought information from Capitol Cement and the Department of Labor to no avail, and was not directed to MSHA until he contacted the National Labor Relations Board in March 2000. Crediting Howell's statement that he became aware of his right to file with MSHA in March, filing his complaint on April 17 does not constitute inordinate delay. Moreover, Capitol Cement's claim of prejudice does not appear to amount to any more time and expense than that which would have been required in defending against this action had it been timely filed.

Accordingly, Daniel C. Howell's delay in filing his complaint of discrimination with MSHA was justified and is, therefore, excused, and Capitol Cement's Motion to Dismiss is hereby **DENIED**.

Jacqueline Bulluck
Administrative Law Judge
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August 10, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-203
Petitioner	:	A. C. No. 36-06990-03526
	:	
v.	:	
HARRIMAN COAL CORPORATION,	:	
Respondent.	:	Mine: Lincoln Stripping

ORDER REQUIRING SUPPORTING DOCUMENTATION

Before: Judge Barbour

This case concerns a proposal for assessment of civil penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)), seeking the assessment of three alleged violations of mandatory safety hazards found in Part 77, Title 30, Code of Federal Regulations.

On August 6, 2001, the Commission received the Secretary's Motion for Decision and Order Approving Settlement. In her motion, the Secretary states that the parties propose to reduce the $150,000.00 total assessment to $40,000.00 based upon confidential financial documentation showing Respondent's inability to pay its debts as they come due and Respondent's serious financial difficulty. The parties further contend that Respondent is no longer mining and has no source of income. The parties have not submitted the documentation necessary to support these assertions.

When deciding whether to grant or deny a settlement motion, the administrative law judge must take into consideration not only the situation of the parties at hand but also the public interest. As former Chief Administrative Law Judge Paul Merlin stated:

> Under the Mine Safety Act unlike most statutes, the administrative law judge has the affirmative duty to approve a settlement, even if the parties themselves have agreed upon its terms. Under this law *the judge does not have to approve a settlement, if he determines it is not in the public's interest.* In other words, the judge is here to guarantee the public interest ... *Explo-Tech Inc.*, 16 FMSHRC 931, 933 (April 1994) (emphasis added).

The public interest requires the judge to verify a settlement's merits. However, the judge cannot do so when the parties do not document their assertions. In a previous case, I denied a motion to approve a settlement where the parties failed to provide adequate support for their contention that the proposed penalty would adversely affect the company's ability to continue in business. *Bailey's Limestone Quarry*, 19 FMSHRC 1855, 1856 (November 1997). As in that case, I must also deny the subject motion unless the parties supplement it with adequate supporting documents.

I am mindful that the parties may desire to keep sensitive financial information confidential. If so, the parties may submit the documents to me for in-camera review and may request that they be placed under seal subject to further review only by the Commission or a higher appellate body.

THEREFORE, it is **ORDERED** that the parties submit the required supporting documentation within 15 days of the date of this order. Failure to comply with this order will result in the denial of the settlement motion.

David F. Barbour
Chief Administrative Law Judge

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