SEPTEMBER AND OCTOBER 2006

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

SEPTEMBER AND OCTOBER 2006

No cases were filed in which Review was granted during the months of September and October:

Review was denied in the following case during the months of September and October:

Secretary of Labor, MSHA v. Summit Anthracite, Inc., Docket No. PENN 2006-191. (Judge Melick, August 21, 2006)

Secretary of Labor, MSHA v. Hosea O. Weaver & Sons, Inc., Docket No. SE 2005-301-M, et al. Denial of Weaver's Petition for Interlocutory Review. (Judge Barbour, July 13, 2006)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2006

SECRETARY OF LABOR,	:	Docket Nos. WEVA 2005-20-R
MINE SAFETY AND HEALTH	:	WEVA 2005-21-R
ADMINISTRATION (MSHA)	:	WEVA 2005-22-R
	:	WEVA 2005-23-R
v.	:	WEVA 2005-24-R
	:	WEVA 2005-25-R
SPEED MINING, INC.	:	WEVA 2005-97

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY: Jordan and Young, Commissioners

On January 10, 2006, the Commission granted the petition for discretionary review filed by the Secretary of Labor in the above-captioned proceeding. The Secretary's appeal raised the issue of the responsibility of the mine operator, Speed Mining, Inc. ("Speed"), for violations committed by an independent contractor. The administrative law judge had dismissed the citations and the associated civil penalty proceeding against Speed, relying on the Commission's decision in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005).

The Court of Appeals for the D.C. Circuit has reversed the decision of the Commission in *Twentymile Coal Co.*, holding that the Secretary's decision to cite the owner-operator of a mine, as well as its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006).[1] In light

[1] Commissioner Young shares the Chairman's concerns regarding the D.C. Circuit Court's decision in *Twentymile* and agrees with the Chairman's thoughtful analysis of the Mine Act in his concurrence. Regrettably, the Circuit Court has consistently maintained a different view of this Commission and has repeatedly applied *Martin v. OSHRC*, 499 U.S. 144 (1991), to cases arising under the Mine Act, in spite of the differences the Chairman has noted in the respective organic statutes and the "available indicia of legislative intent," *Martin*, 499 U.S. at 157, reflecting Congress' will to empower the Commission to provide meaningful review of all issues brought before it. Commissioner Young nevertheless declines to join the Chairman's

of the court's decision, we remand the case to the judge for reconsideration of his dismissal of the citations and the civil penalty proceeding.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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concurring opinion because the *Twentymile* decision is in accord with precedent in the D.C. Circuit and the principle of *stare decisis* controls our decision in the instant case.

Chairman Duffy, concurring:

I join with my colleagues in remanding this matter to the judge for further proceedings consistent with the Court's decision in *Secretary of Labor v. Twentymile Coal Co. and Federal Mine Safety and Health Review Commission*, 456 F.3d 151 (D.C. Cir. 2006). Nevertheless, I respectfully take issue with several of the Court's assumptions used to support its view that, under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), this Review Commission lacks "authority to determine policy issues," 456 F.3d at 160, and "is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion." *Id.* at 161.

Indeed, the Court appears to have expansively addressed issues that were not before it. On the perennially disputed issue of whether a blameless mine owner-operator can be held liable for violations committed by its independent contractor, the Court could simply have cited the relevant precedents, found the Commission's reasoning in this case insufficient to overcome those precedents, and have been done with it. Instead, the Court has inappropriately applied the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991).

The D.C. Circuit, at first blush, correctly renders the view of the Supreme Court in *Martin*:

> *Martin* involved review under the Occupational Safety and Health Act ("OSH Act"), in which, like the Mine Act, "Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities." Under the OSH Act, the former functions are assigned to the Secretary of Labor and the latter to the Occupational Safety and Health Review Commission (OSHRC); under the Mine Act, the former are again assigned to the Secretary of Labor and the latter to the Federal Mine Safety and Health Review Commission (FMSHRC). Under this "split enforcement" structure, the Court held, "enforcement of the Act is the sole responsibility of the Secretary." Moreover, since "Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role."[1]

456 F.3d. at 160-61 (citations omitted).

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[1] For reasons that will be made clear below, it is important to note that, in the quote from *Martin*, the only "Commission" to which the Supreme Court is referring is the Occupational Safety and Health Review Commission ("OSHRC"), not this Commission.

The D.C. Circuit goes on to extrapolate from the Supreme Court's decision in *Martin* a severe limitation on this Commission's separate authority under the Mine Act:

> We have previously, and repeatedly, applied *Martin*'s analysis to the Mine Act. We do so here as well. As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," and the Commission has no "policymaking role." Instead, "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

456 F.3d at 161 (citations omitted; alteration in original).

However, the Court ignores the fundamental caveat expressed by the Supreme Court in *Martin*, i.e., that its decision was limited strictly to the split enforcement structure adopted in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSH Act"):

> *We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act.* We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and *we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.*

499 U.S. at 157-58 (emphases added).

Seven years after passage of the OSH Act, Congress did, indeed, divide the respective powers of the Secretary and *this* Commission, and it did so along lines far different from and

much clearer than those set forth in the earlier statute. A simple side-by-side comparison of the statutory provisions establishing the two Commissions is most instructive:[2]

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION	**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
Section 113. (a) The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.	Section 12. (a) Establishment; membership; appointment; Chairman The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.
* * *	* * *
(c) The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.	(f) Quorum; official action For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.
* * *	* * *
(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law	(j) Administrative law judges; determinations; report as final order of Commission An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any

[2] For the sake of brevity, non-germane, "housekeeping" sections dealing with such matters as location of offices, authority to hire or transfer administrative law judges, etc., have been deleted from the comparison. Certain provisions of section 12 of the OSH Act have been rearranged to coincide with their counterparts in the Mine Act.

judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period of the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

* * *

* * *

(d)(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act which shall meet the following standards for review:

(g) Hearings and records open to public; promulgation of rules; applicability of Federal Rules of Civil Procedure
Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

* * *

* * *

(d)(2)(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

[No comparable provision]

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.
(II) A necessary legal conclusion is erroneous.
(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
(IV) A substantial question of law, policy or discretion is involved.
(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, ***the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved.*** If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings

[No comparable provision]

except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of title 5, United States Code, with regard to the review authority of the Commission are hereby expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

* * *

(e) In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony

(h) Depositions and production of documentary evidence; fees
The Commission may order testimony to be taken by deposition in any proceeding pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books,

to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. § 823 (emphases added).

papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) Investigatory powers
For the purpose of any proceeding before the Commission, the provisions of section 161 of this title are hereby made applicable to the jurisdiction and powers of the Commission.

29 U.S.C. § 661.

Quoting its prior decision in *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 464 (D.C. Cir. 1994), the D.C. Circuit iterates in *Twentymile* that section 113 of the Mine Act, 30 U.S.C. § 823, "merely states" the grounds upon which a "petitioner may call upon the Commission's power of discretionary review over a decision of an administrative law judge." 456 F.3d at 160. To which petitioner is the court referring? If the Secretary loses on a matter of law, policy or discretion before the administrative law judge, by the court's logic she can appeal to the Commission, which is then bound to vindicate her position. If the Secretary wins on a matter of law, policy or discretion before the administrative law judge, and the mine operator appeals, the Commission is, by the court's logic, likewise bound to vindicate the Secretary's position. Thus,

the court's opinion can be read as having the Commission engage in a kind of adjudicative bait-and-switch whereby mine operators are encouraged to appeal matters of law, policy or discretion even though the Commission is powerless to do anything but side with the Secretary. Under such a reading of the opinion, there is little or no difference between the D.C. Circuit's concept of the split enforcement structure under the Mine Act and the unitary structure of mine safety and health enforcement and adjudication established within the Department of the Interior under the Mine Act's predecessor statutes.[3]

Contrary to the D.C. Circuit's apparent position, the language of section 113 cannot be read to limit the scope of this Commission's oversight to the judge's decision — a sort of in-house quality control function. Section 113(d)(2)(A)(ii), which states that parties may petition for review of administrative law judge decisions, does indeed provide for Commission oversight of an administrative law judge if his decision is "contrary to law, or to the duly promulgated rules or decisions of the Commission." 30 U.S.C. § 823(d)(2)(A)(ii). But, significantly, the subsection also goes on to establish that the Commission is authorized to grant a petition when "[a] substantial question of law, policy or discretion is involved." *Id.* It is particularly noteworthy that there are no statutory limitations on the types of "law, policy or discretion" questions that the Commission is authorized to review in granting parties' petitions. This strongly indicates that Congress intended for the Commission to have broad interpretive and policy-making powers. The D.C. Circuit simply does not directly address the significance of this specific language chosen by Congress. Instead, it glosses over the language in its effort to fit the Mine Act scheme within the split-enforcement mold created for the OSH Act under the *Martin* decision.

The error in the D.C. Circuit's reasoning is made even more apparent by the language in section 113(d)(2)(B) of the Act, which addresses the Commission's authority to grant review of administrative law judge decisions *sua sponte*. That provision authorizes the Commission to grant review *sua sponte* only if "the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented." 30 U.S.C. § 823(d)(2)(B). If the Commission is confined to reviewing only its own internal policies, why is "policy" used twice in the same sentence — once in connection with the Commission and then, again, without qualification? The only reasonable answer is that Congress intended that the Commission be authorized not only to review decisions where established "Commission policy" is being contravened but also decisions involving novel, general policy questions under the Mine Act itself.[4] Otherwise, one must assume

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[3] The D.C. Circuit's position also conflicts with the Senate Committee on Human Resources' view that "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program." S. Rep. No. 95-181 at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 635 (1978).

[4] The very same distinction between "Commission policy" and "policy" in general is contained in the next sentence of section 113(d)(2)(B): "The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved."

that Congress was unable to choose the correct words to describe the Commission's review authority and limit it to purely internal policy matters. Section 113(d)(2)(B) unmistakably demonstrates that Congress intended for the Commission to have a substantial policy-making role under the Mine Act.

Aside from the obviously expanded role of this Commission evident in the enabling provisions of the Mine Act as compared to those of the OSH Act, the legislative history of the Mine Act underscores the conclusion that Congress intended this Commission to have a significant policy-making function:

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility of assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res., 95th Cong., 1 (1978).

The above statement by Senator Williams, Chairman of the Human Resources Committee, carries considerable weight with respect to the Commission's policy role under the Mine Act. Senator Williams was the Mine Act's principal author. Senator Williams' statement that the Commission is to "develop a uniform and comprehensive interpretation of the law," "provide guidance to the Secretary in enforcing the [Act]," and ensure that "the Secretary and mine operators understand precisely what the law expects of them" strongly indicates that the Commission is to play a significant interpretive and policy-making role.

Quite importantly, Senator Williams' statement also carried considerable weight with the Supreme Court. In *Thunder Basin Coal Co. v Reich,* 510 U.S. 200 (1994), decided three years after *Martin*, the Supreme Court, citing with approval Senator Williams' statement, held that a mine operator could not circumvent the adjudicative procedures set forth in the Mine Act by

seeking a pre-enforcement injunction against MSHA in a case involving whether non-employee union organizers could represent employees in a non-union mine for purposes of asserting rights under the Mine Act. The Supreme Court rejected the operator's attempt at injunctive relief by emphasizing strongly that the Commission, as an independent review body, could and should decide the merits of the case:

> Petitioner's statutory claims at root require interpretation of the parties' rights and duties under § 813(f) and 30 CFR pt. 40, and as such arise under the Mine Act and fall squarely within the Commission's expertise. *The Commission, which was established as an independent-review body to "develop a uniform and comprehensive interpretation" of the Mine Act, Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience interpreting the walk-around rights and recently addressed the precise NLRA claims presented here.* Although the Commission has no particular expertise in construing statutes other than the Mine Act, we conclude that exclusive review before the Commission is appropriate since "agency expertise [could] be brought to bear on" the statutory questions presented here.
>
> As for petitioner's constitutional claim, we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes. The Commission has addressed constitutional questions in previous enforcement proceedings.

Id. at 214-15 (footnotes and citations omitted; emphasis added.)

Thus, contrary to the D.C. Circuit's version of Mine Act history, the Supreme Court *has* had occasion to opine specifically on the "division of enforcement" model adopted by Congress in the Mine Act. The Supreme court emphasized the Commission's duty to "develop a uniform and comprehensive interpretation" of the Mine Act and the "agency expertise" of the Commission in interpreting the Mine Act. The contrast between the Supreme Court's characterization of the relationship between MSHA and this Commission on the one hand, and OSHA and OSHRC on the other, is compelling.

The D.C. Circuit's contention that the Commission is not authorized to review the Secretary's exercise of her prosecutorial discretion is further belied by section 105(c) of the Mine Act, 30 U.S.C. § 815(c). There, Congress authorizes the Commission to entertain discrimination complaints brought by miners when the Secretary has declined to do so. Under section 105(c), a miner is allowed to file a discrimination complaint if he believes an operator has retaliated against him for the exercise of his safety rights under the Act. The miner first files the complaint with the Secretary who, upon finding discriminatory conduct, files a complaint for relief with the Commission. If, however, on preliminary investigation, the Secretary determines that no discriminatory practice has occurred, the miner retains the right to bring a complaint on his own behalf before the Commission. If the Commission concludes that the complaint is meritorious, it can order appropriate remedies, including directing the Secretary to propose a civil penalty.

Section 105(c) demonstrates clearly the Congressional intent that the Commission is authorized to second guess the enforcement choices made by the Secretary. No such authority resides with OSHRC under the OSH Act, underscoring the view that Congress overtly intended to expand the policy-making and discretionary powers of FMSHRC beyond those granted to OSHRC under the OSH Act.

Moreover, Congress recently confirmed the interpretive and policy-making role of the Commission in the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), Pub. L. No. 109-236, 120 Stat. 493 (June 15, 2006), which amended the Mine Act in certain key respects. Section 2 of the MINER Act amends section 316 of the Mine Act, 30 U.S.C. § 876, by adding a new section (b), entitled "Accident Preparedness and Response." Section 316(b)(2)(G), which is entitled "Plan Dispute Resolution," provides for Commission review of disputes involving accident response plans, which are to be submitted by operators for approval by the Secretary. The provision gives the Commission broad authority to resolve "[a]ny dispute between the Secretary and an operator with respect to the content of the operator's plan or any refusal by the Secretary to approve such a plan . . . ." 120 Stat. at 496. Because such disputes will ordinarily involve issues of legal interpretation and issues of policy regarding how such disputes should be resolved and what plan contents are acceptable, Congress clearly intended that the Commission should exercise a significant degree of independent interpretive and policy-making authority to resolve such disputes. Otherwise, there would be no reason to provide for Commission review. In the absence of a significant interpretive and policy-making role for the Commission, the Secretary could adopt a particular policy with regard to the contents of mine plans, and the Commission would be bound to uphold the Secretary's policy in every instance. Certainly, Congress did not intend that the "plan dispute resolution" process would become a meaningless exercise in which the Commission essentially rubber-stamps the Secretary's policy judgments in each case.

By ignoring the unequivocal caveat expressed by the Supreme Court that its holding in *Martin* should not be applied in the Mine Act context, the D.C. Circuit hears its own "sounds in the [self-imposed] silence" of the Supreme Court. 456 F.3d at 158. Moreover, the D.C. Circuit ignores the obvious expansion of authority granted to this Commission by Congress in the Mine

Act well beyond that granted OSHRC under the OSH Act. Section 113 of the Mine Act allocates resolution of matters of law, policy and discretion to the Review Commission in keeping with the view of Senator Williams, quoted above, and as applied by the Supreme Court in *Thunder Basin*.

Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2005-236-M
IMERYS PIGMENTS, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY: Jordan and Young, Commissioners:

On April 21, 2006, the Commission granted the petition for discretionary review filed by the Secretary of Labor in the above-captioned proceeding. The Secretary's appeal was limited to the issue of the responsibility of the mine operator, Imerys Pigments, LLC ("Imerys"), for the violation committed by the employee of an independent contractor in Citation No. 6095226. The administrative law judge had dismissed the citation against Imerys, relying on the Commission's decision in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005). In addition, the Commission further directed review, on its own motion, on the issue of whether the administrative law judge adequately explained his action in increasing the proposed penalty for Citation No. 6095227.

The Court of Appeals for the D.C. Circuit has reversed the decision of the Commission in *Twentymile Coal Co.*, holding that the Secretary's decision to cite the owner-operator of a mine, as well as its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006).[1] In light

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of the court's decision, we remand the case to the judge for reconsideration of his dismissal of Citation No. 6095226. The judge shall also further consider on remand his increase in the proposed penalty of $305 to $800, for Citation 6095227, analyzing the penalty criteria in section 110(i), 30 U.S.C. § 810(i), consistent with the Commission's decision in *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

157, reflecting Congress' will to empower the Commission to provide meaningful review of all issues brought before it. Commissioner Young nevertheless declines to join the Chairman's concurring opinion because the *Twentymile* decision is in accord with precedent in the D.C. Circuit and the principle of *stare decisis* controls our decision in the instant case.

Chairman Duffy, concurring:

I join with my colleagues in remanding this matter to the judge for further proceedings consistent with the Court's decision in *Secretary of Labor v. Twentymile Coal Co. and Federal Mine Safety and Health Review Commission*, 456 F.3d 151 (D.C. Cir. 2006). The judge should also reconsider his assessment of a penalty in excess of the Secretary's recommendation. Nevertheless, I respectfully take issue with several of the Court's assumptions used to support its view that, under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), this Review Commission lacks "authority to determine policy issues," 456 F.3d at 160, and "is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion." *Id.* at 161.

Indeed, the Court appears to have expansively addressed issues that were not before it. On the perennially disputed issue of whether a blameless mine owner-operator can be held liable for violations committed by its independent contractor, the Court could simply have cited the relevant precedents, found the Commission's reasoning in this case insufficient to overcome those precedents, and have been done with it. Instead, the Court has inappropriately applied the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991).

The D.C. Circuit, at first blush, correctly renders the view of the Supreme Court in *Martin*:

> *Martin* involved review under the Occupational Safety and Health Act ("OSH Act"), in which, like the Mine Act, "Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities." Under the OSH Act, the former functions are assigned to the Secretary of Labor and the latter to the Occupational Safety and Health Review Commission (OSHRC); under the Mine Act, the former are again assigned to the Secretary of Labor and the latter to the Federal Mine Safety and Health Review Commission (FMSHRC). Under this "split enforcement" structure, the Court held, "enforcement of the Act is the sole responsibility of the Secretary." Moreover, since "Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role."[1]

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[1] For reasons that will be made clear below, it is important to note that, in the quote from *Martin*, the only "Commission" to which the Supreme Court is referring is the Occupational Safety and Health Review Commission ("OSHRC"), not this Commission.

456 F.3d. at 160-61 (citations omitted).

The D.C. Circuit goes on to extrapolate from the Supreme Court's decision in *Martin* a severe limitation on this Commission's separate authority under the Mine Act:

> We have previously, and repeatedly, applied *Martin*'s analysis to the Mine Act. We do so here as well. As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," and the Commission has no "policymaking role." Instead, "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

456 F.3d at 161 (citations omitted; alteration in original).

However, the Court ignores the fundamental caveat expressed by the Supreme Court in *Martin*, i.e., that its decision was limited strictly to the split enforcement structure adopted in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSH Act"):

> *We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act.* We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and *we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.*

499 U.S. at 157-58 (emphases added).

Seven years after passage of the OSH Act, Congress did, indeed, divide the respective powers of the Secretary and *this* Commission, and it did so along lines far different from and

much clearer than those set forth in the earlier statute. A simple side-by-side comparison of the statutory provisions establishing the two Commissions is most instructive:[2]

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION	**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
Section 113. (a) The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.	Section 12. (a) Establishment; membership; appointment; Chairman The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.
* * *	* * *
(c) The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.	(f) Quorum; official action For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.
* * *	* * *
(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law	(j) Administrative law judges; determinations; report as final order of Commission An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any

[2] For the sake of brevity, non-germane, "housekeeping" sections dealing with such matters as location of offices, authority to hire or transfer administrative law judges, etc., have been deleted from the comparison. Certain provisions of section 12 of the OSH Act have been rearranged to coincide with their counterparts in the Mine Act.

judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period of the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

* * *

(d)(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act which shall meet the following standards for review:

* * *

(d)(2)(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

* * *

(g) Hearings and records open to public; promulgation of rules; applicability of Federal Rules of Civil Procedure
Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

* * *

[No comparable provision]

(I) A finding or conclusion of material fact is not supported by substantial evidence.
(II) A necessary legal conclusion is erroneous.
(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
(IV) A substantial question of law, policy or discretion is involved.
(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, ***the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved.*** If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings

[No comparable provision]

except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of title 5, United States Code, with regard to the review authority of the Commission are hereby expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

* * *

(e) In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony

(h) Depositions and production of documentary evidence; fees
The Commission may order testimony to be taken by deposition in any proceeding pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books,

to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. § 823 (emphases added).

papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) Investigatory powers
For the purpose of any proceeding before the Commission, the provisions of section 161 of this title are hereby made applicable to the jurisdiction and powers of the Commission.

29 U.S.C. § 661.

Quoting its prior decision in *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 464 (D.C. Cir. 1994), the D.C. Circuit iterates in *Twentymile* that section 113 of the Mine Act, 30 U.S.C. § 823, "merely states" the grounds upon which a "petitioner may call upon the Commission's power of discretionary review over a decision of an administrative law judge." 456 F.3d at 160. To which petitioner is the court referring? If the Secretary loses on a matter of law, policy or discretion before the administrative law judge, by the court's logic she can appeal to the Commission, which is then bound to vindicate her position. If the Secretary wins on a matter of law, policy or discretion before the administrative law judge, and the mine operator appeals, the Commission is, by the court's logic, likewise bound to vindicate the Secretary's position. Thus,

the court's opinion can be read as having the Commission engage in a kind of adjudicative bait-and-switch whereby mine operators are encouraged to appeal matters of law, policy or discretion even though the Commission is powerless to do anything but side with the Secretary. Under such a reading of the opinion, there is little or no difference between the D.C. Circuit's concept of the split enforcement structure under the Mine Act and the unitary structure of mine safety and health enforcement and adjudication established within the Department of the Interior under the Mine Act's predecessor statutes.[3]

Contrary to the D.C. Circuit's apparent position, the language of section 113 cannot be read to limit the scope of this Commission's oversight to the judge's decision — a sort of in-house quality control function. Section 113(d)(2)(A)(ii), which states that parties may petition for review of administrative law judge decisions, does indeed provide for Commission oversight of an administrative law judge if his decision is "contrary to law, or to the duly promulgated rules or decisions of the Commission." 30 U.S.C. § 823(d)(2)(A)(ii). But, significantly, the subsection also goes on to establish that the Commission is authorized to grant a petition when "[a] substantial question of law, policy or discretion is involved." *Id.* It is particularly noteworthy that there are no statutory limitations on the types of "law, policy or discretion" questions that the Commission is authorized to review in granting parties' petitions. This strongly indicates that Congress intended for the Commission to have broad interpretive and policy-making powers. The D.C. Circuit simply does not directly address the significance of this specific language chosen by Congress. Instead, it glosses over the language in its effort to fit the Mine Act scheme within the split-enforcement mold created for the OSH Act under the *Martin* decision.

The error in the D.C. Circuit's reasoning is made even more apparent by the language in section 113(d)(2)(B) of the Act, which addresses the Commission's authority to grant review of administrative law judge decisions *sua sponte*. That provision authorizes the Commission to grant review *sua sponte* only if "the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented." 30 U.S.C. § 823(d)(2)(B). If the Commission is confined to reviewing only its own internal policies, why is "policy" used twice in the same sentence — once in connection with the Commission and then, again, without qualification? The only reasonable answer is that Congress intended that the Commission be authorized not only to review decisions where established "Commission policy" is being contravened but also decisions involving novel, general policy questions under the Mine Act itself.[4] Otherwise, one must assume

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[3] The D.C. Circuit's position also conflicts with the Senate Committee on Human Resources' view that "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program." S. Rep. No. 95-181 at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 635 (1978).

[4] The very same distinction between "Commission policy" and "policy" in general is contained in the next sentence of section 113(d)(2)(B): "The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved."

that Congress was unable to choose the correct words to describe the Commission's review authority and limit it to purely internal policy matters. Section 113(d)(2)(B) unmistakably demonstrates that Congress intended for the Commission to have a substantial policy-making role under the Mine Act.

Aside from the obviously expanded role of this Commission evident in the enabling provisions of the Mine Act as compared to those of the OSH Act, the legislative history of the Mine Act underscores the conclusion that Congress intended this Commission to have a significant policy-making function:

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility of assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res., 95th Cong., 1 (1978).

The above statement by Senator Williams, Chairman of the Human Resources Committee, carries considerable weight with respect to the Commission's policy role under the Mine Act. Senator Williams was the Mine Act's principal author. Senator Williams' statement that the Commission is to "develop a uniform and comprehensive interpretation of the law," "provide guidance to the Secretary in enforcing the [Act]," and ensure that "the Secretary and mine operators understand precisely what the law expects of them" strongly indicates that the Commission is to play a significant interpretive and policy-making role.

Quite importantly, Senator Williams' statement also carried considerable weight with the Supreme Court. In *Thunder Basin Coal Co. v Reich,* 510 U.S. 200 (1994), decided three years after *Martin*, the Supreme Court, citing with approval Senator Williams' statement, held that a mine operator could not circumvent the adjudicative procedures set forth in the Mine Act by

seeking a pre-enforcement injunction against MSHA in a case involving whether non-employee union organizers could represent employees in a non-union mine for purposes of asserting rights under the Mine Act. The Supreme Court rejected the operator's attempt at injunctive relief by emphasizing strongly that the Commission, as an independent review body, could and should decide the merits of the case:

> Petitioner's statutory claims at root require interpretation of the parties' rights and duties under § 813(f) and 30 CFR pt. 40, and as such arise under the Mine Act and fall squarely within the Commission's expertise. *The Commission, which was established as an independent-review body to "develop a uniform and comprehensive interpretation" of the Mine Act, Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience interpreting the walk-around rights and recently addressed the precise NLRA claims presented here.* Although the Commission has no particular expertise in construing statutes other than the Mine Act, we conclude that exclusive review before the Commission is appropriate since "agency expertise [could] be brought to bear on" the statutory questions presented here.
>
> As for petitioner's constitutional claim, we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes. The Commission has addressed constitutional questions in previous enforcement proceedings.

Id. at 214-15 (footnotes and citations omitted; emphasis added.)

Thus, contrary to the D.C. Circuit's version of Mine Act history, the Supreme Court *has* had occasion to opine specifically on the "division of enforcement" model adopted by Congress in the Mine Act. The Supreme court emphasized the Commission's duty to "develop a uniform and comprehensive interpretation" of the Mine Act and the "agency expertise" of the Commission in interpreting the Mine Act. The contrast between the Supreme Court's characterization of the relationship between MSHA and this Commission on the one hand, and OSHA and OSHRC on the other, is compelling.

The D.C. Circuit's contention that the Commission is not authorized to review the Secretary's exercise of her prosecutorial discretion is further belied by section 105(c) of the Mine Act, 30 U.S.C. § 815(c). There, Congress authorizes the Commission to entertain discrimination complaints brought by miners when the Secretary has declined to do so. Under section 105(c), a miner is allowed to file a discrimination complaint if he believes an operator has retaliated against him for the exercise of his safety rights under the Act. The miner first files the complaint with the Secretary who, upon finding discriminatory conduct, files a complaint for relief with the Commission. If, however, on preliminary investigation, the Secretary determines that no discriminatory practice has occurred, the miner retains the right to bring a complaint on his own behalf before the Commission. If the Commission concludes that the complaint is meritorious, it can order appropriate remedies, including directing the Secretary to propose a civil penalty.

Section 105(c) demonstrates clearly the Congressional intent that the Commission is authorized to second guess the enforcement choices made by the Secretary. No such authority resides with OSHRC under the OSH Act, underscoring the view that Congress overtly intended to expand the policy-making and discretionary powers of FMSHRC beyond those granted to OSHRC under the OSH Act.

Moreover, Congress recently confirmed the interpretive and policy-making role of the Commission in the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), Pub. L. No. 109-236, 120 Stat. 493 (June 15, 2006), which amended the Mine Act in certain key respects. Section 2 of the MINER Act amends section 316 of the Mine Act, 30 U.S.C. § 876, by adding a new section (b), entitled "Accident Preparedness and Response." Section 316(b)(2)(G), which is entitled "Plan Dispute Resolution," provides for Commission review of disputes involving accident response plans, which are to be submitted by operators for approval by the Secretary. The provision gives the Commission broad authority to resolve "[a]ny dispute between the Secretary and an operator with respect to the content of the operator's plan or any refusal by the Secretary to approve such a plan . . . ." 120 Stat. at 496. Because such disputes will ordinarily involve issues of legal interpretation and issues of policy regarding how such disputes should be resolved and what plan contents are acceptable, Congress clearly intended that the Commission should exercise a significant degree of independent interpretive and policy-making authority to resolve such disputes. Otherwise, there would be no reason to provide for Commission review. In the absence of a significant interpretive and policy-making role for the Commission, the Secretary could adopt a particular policy with regard to the contents of mine plans, and the Commission would be bound to uphold the Secretary's policy in every instance. Certainly, Congress did not intend that the "plan dispute resolution" process would become a meaningless exercise in which the Commission essentially rubber-stamps the Secretary's policy judgments in each case.

By ignoring the unequivocal caveat expressed by the Supreme Court that its holding in *Martin* should not be applied in the Mine Act context, the D.C. Circuit hears its own "sounds in the [self-imposed] silence" of the Supreme Court. 456 F.3d at 158. Moreover, the D.C. Circuit ignores the obvious expansion of authority granted to this Commission by Congress in the Mine

Act well beyond that granted OSHRC under the OSH Act. Section 113 of the Mine Act allocates resolution of matters of law, policy and discretion to the Review Commission in keeping with the view of Senator Williams, quoted above, and as applied by the Supreme Court in *Thunder Basin*.

Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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October 10, 2006

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2005-301-M
v.	:	SE 2006-131-M
	:	SE 2006-167-M
HOSEA O. WEAVER & SONS, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000). On September 15, 2006, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, Hosea O. Weaver & Sons, Inc. ("Weaver") filed with the Commission a petition for interlocutory review of an order issued by Administrative Law Judge David F. Barbour granting the Secretary of Labor's motion for summary decision and denying Weaver's motion for summary decision. 28 FMSHRC 688, 692 (July 2006) (ALJ). Judge Barbour also denied Weaver's motion to certify this ruling to the Commission for interlocutory review. 28 FMSHRC 751, 752 (Aug. 2006) (ALJ).[1] On September 25, 2006, the Secretary filed an opposition to Weaver's petition for interlocutory review.

[1] On August 29, 2006, the Commission granted the Secretary's motion to dismiss Weaver's Petition for Discretionary Review, or in the Alternative, Petition for Interlocutory Review, which Weaver filed concurrently with its motion to certify the judge's ruling, on the grounds that it was prematurely filed. 28 FMSHRC 542, 543 (Aug. 2006).

Upon consideration of the pleadings filed by Weaver and the Secretary, we have determined that Weaver has failed to establish that the order denying its motion for summary decision involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. *See* 29 C.F.R. § 2700.76(a)(2). We therefore deny the petition.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

October 17, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2004-37-M
	:	A.C. No. 15-05484-11598
v.	:	
GEORGE P. REINTJES COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) ("Mine Act"). On August 7, 2006, the Commission received a motion from the Secretary of Labor requesting that the Commission reopen the judgment in this proceeding and dismiss the proceeding as moot.

This proceeding arose when the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to George P. Reintjes Company, Inc. ("Reintjes") on July 28, 2003. Mot. at 1. On October 23, 2003, MSHA sent to Reintjes a proposed penalty assessment for the citation, which the company timely contested. *Id.* at 2. In January 2004, MSHA vacated the citation. *Id.* When the Secretary moved to dismiss the case, however, the motion was captioned Docket No. SE 2004-37-M, instead of KENT 2004-37-M. *Id.* On March 4, 2004, Chief Administrative Law Judge Robert J. Lesnick, apparently unaware that the Secretary had vacated the citation and moved to dismiss this proceeding, issued an order directing Reintjes to file an answer to the Secretary's penalty petition. *Id.* When the company failed to respond to the judge's order, he entered a default judgment against Reintjes on May 13, 2004. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued. 29 C.F.R. § 2700.69(b). It became a final decision of the Commission on June 22, 2004. 30 U.S.C. § 823(d)(1) (if the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission).

The Secretary argues in her motion that "[b]ecause the citation in Case No. KENT 2004-37-M was vacated in January 2004, the default judgment entered . . . on May 13, 2004, was invalid." Mot. at 3. The Secretary "requests that the Commission reopen the default judgment on the ground that, under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the judgment is 'void.'" *Id.* Finally, the Secretary requests that the Commission dismiss this proceeding because, "inasmuch as the citation has been vacated, the proceeding is moot." *Id.*

We have held that in appropriate circumstances, we possess jurisdiction to reopen final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order that is "void." Fed. R. Civ. P. 60(b)(4); *see* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

We agree with the Secretary that vacating the citation rendered the judge's default order void. *See Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 200, 203 (Feb. 1985) ("[V]acation of the underlying citation requires vacation of the judge's decision affirming the citation.").

Having reviewed the Secretary's motion, in the interest of justice, we hereby reopen this proceeding, vacate the judge's default order, and dismiss this matter as moot.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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October 30, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. SE 2005-250
	:	SE 2005-251
v.	:	SE 2005-252
	:	
OAK GROVE RESOURCES, LLC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) ("Mine Act").[1] On October 12, 2005, Chief Administrative Law Judge Robert J. Lesnick issued to Oak Grove Resources, LLC. ("Oak Grove") three Orders to Show Cause for failure to answer the Secretary of Labor's petitions for assessment of civil penalty. On January 19, 2006, Chief Judge Lesnick entered Orders of Default against Oak Grove in each of the three cases.

On August 22, 2006, the Commission received motions from Oak Grove requesting that the Commission reopen the penalty assessment proceedings and relieve Oak Grove from the orders of default. Oak Grove states that, in all three cases, a notice of appearance was filed by Oak Grove's Safety Director within 30 days of receiving the Petition for Assessment of Penalty from the Department of Labor's Mine Safety and Health Administration ("MSHA"). The notice of appearance, which is not contained in the file or attached to the motion, allegedly listed the appropriate contact as an address in Pennsylvania. However, the orders to show cause and the default orders were sent to the General Manager of Oak Grove at the mine site in Adger, Alabama. Oak Grove alleges that its Safety Director did not timely receive the orders to show

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. SE 2005-250, SE 2005-251, and SE 2005-252, all captioned *Oak Grove Resources, LLC.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

cause and default orders because they were not sent to the designated address.

The judge's jurisdiction in this matter terminated when his decision was issued on January 19, 2006. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The judge's orders became final decisions of the Commission on February 28, 2006.

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

Upon review of the record, we have determined that the wording of the Orders to Show Cause did not conform with the Commission's Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Orders of Default and remand this matter to the Chief Judge for further appropriate proceedings. *See Paul F. Becker Coal Co.*, 28 FMSHRC 237, 238 (May 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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October 30, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2007-1
	:	A.C. No. 01-02901-40618
DRUMMOND COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) ("Mine Act"). On October 2, 2006, the Commission received from Drummond Company, Inc. ("Drummond") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On October 13, the Secretary of Labor filed a response to Drummond's motion to reopen.

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

On October 15, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Drummond for Citation No. 7669699. Mot. at 1-2 & Attach. A, 1-2. Drummond intended to contest the penalty but mistakenly failed to do so. Mot. at 1. Drummond did not realize its mistake in failing to contest the penalty until it received a delinquency notice for that and other citations. *Id.* at 2. On September 13, 2006, Drummond mailed to MSHA a check and a cover letter stating that the payment did not include the penalty associated with Citation No. 7669699. *Id.* at 2 & Attach. D. Drummond requests

that the Commission reopen the penalty assessment associated with Citation No. 7669699 and be relieved of any penalties or interest as a result of its mistake. Mot. at 2.[1]

The Secretary states in her response that she opposes the Commission granting Drummond's motion under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment at issue became a final Commission order. S. Resp. at 1-2 (citing *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004)). The Secretary notes here that Drummond did not file its request to reopen until more than one year and ten months after a final Commission order. S. Resp. at 2. Therefore, the Secretary concludes that the Commission should deny Drummond's request.[2] *Id.*

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

We have been presented with Drummond's unexplained failure to timely contest the proposed penalty assessment. This is the type of error that falls squarely within the ambit of Rule 60(b)(1). However, under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b).

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[1] Drummond also requests that it be relieved of interest and penalties in two other cases, A.C. 000040162 and A.C. 000052560, which were paid on September 13, 2006, because those cases were "a result of the same mistake" as in the proceeding at bar. Mot. at 2.

[2] The Secretary also states that she opposes Drummond's request to be relieved of any interest and fees with respect to penalty assessments in A.C. Nos. 000040162 and 000052560, which is comparable to a request to reopen a penalty assessment, because that request was filed more than one year and five months after final Commission orders. S. Resp. at 2-3.

Because Drummond waited well over a year to request relief, its motion is untimely. *J S Sand & Gravel*, 26 FMSHRC at 796. Accordingly, Drummond's motion is denied.[3]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[3] We do not reach Drummond's request to be relieved of interest and penalties in A.C. 000040162 and A.C. 000052560 because the underlying penalty assessments constitute final Commission orders and Drummond has not made a motion to reopen those proceedings. In any event, if it had, we see no material difference between those proceedings and the instant one, in terms of whether relief from the final orders is warranted.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 11, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2005-139-M A.C. No. 39-01328-52100
v.	:	Docket No. CENT 2005-162-M A.C. No. 39-01328-39719
BOB BAK CONSTRUCTION, Respondent	:	Docket No. CENT 2006-009-M A.C. No. 39-01328-67942 Crusher #3

DECISION

Appearances: Jennifer Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Bob Bak Construction ("Bak Construction"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve seven citations and one order issued by MSHA at the No. 3 crusher operated by Bak Construction. An evidentiary hearing was held in Pierre, South Dakota. The parties presented testimony and documentary evidence and filed post-hearing briefs.

At all pertinent times, Bak Construction operated the No. 3 Crusher ("crusher") on an intermittent basis at different locations in central South Dakota. The citations and order at issue in these cases were issued by MSHA Inspector John King on August 26, 2004.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 7915395

On August 26, 2004, MSHA Inspector John King inspected the crusher. The mine was operating with two end loaders and a dozer. The shaker and screener/crusher were operating. (Tr. 17). The inspector issued Citation No. 7915395 under section 104(a) of the Mine Act alleging a violation of section 57.14130(g) as follows, in part:

> The operator of the Michigan Clark 175A front end loader was observed not wearing his seatbelt as required. He stated that he had been trained to wear it and had heard the mine operator state that it was a requirement to do so at all times. There was a potential for the front end loader operator to sustain severe or even fatal injuries were he to be thrown from his loader.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Bak Construction's negligence was moderate. The safety standard provides, in part, that "[s]eat belts shall be worn by the equipment operator except when operating graders from a standing position . . . ." The standard applies to various types of self-propelled mobile equipment including "wheel loaders." 30 C.F.R. § 57.14130(a)(3). The Secretary proposes a penalty of $275.00 for this citation.

When Inspector King began his inspection, he observed David Spider in the operator's compartment of the Clark Michigan 175A front end loader. King signaled with his hand for Spider to drive the loader over to where he was standing. (Tr. 22). King testified that when he climbed up into the operator's compartment he saw that Spider was not wearing a seatbelt. (Tr. 22-23). The inspector testified that Spider told him that he had been wearing the seatbelt most of the day but that he "had been in and out of his piece of equipment a couple of times and just didn't put it back on at that time." (Tr. 23).

Spider testified that when the inspector arrived he was parked without the engine running. (Tr. 134, 141). Spider said that he was sitting in the loader watching the hopper to determine when he should get more clay to mix with the gravel. *Id.* When the hopper needed more clay, he would start up the engine, build up air for the brakes, and put on his seatbelt before operating the loader. (Tr. 135). He testified that he needed to get more clay about every 20 minutes. (Tr. 134). Spider testified that, although he was not wearing a seatbelt, he was not operating the front end loader at the time of King's inspection of the loader. (Tr. 134-36, 141-42). He further testified that he had been trained to use his seatbelt and was aware of the MSHA requirement. (Tr. 138).

In rebuttal, Inspector King testified that when he first arrived at the crusher, he observed Spider operating the loader feeding clay into the hopper. (Tr. 23, 224-25). King testified that, while he is not certain, he believes that the loader was moving at the time he signaled Spider to drive toward him. (Tr. 223-34). King also doubted if a loader operator would kill the engine while waiting to load more clay because turning the engine on and off would not be good for the engine or the hydraulic system. (Tr. 224, 228). Although Spider may not have been moving the loader at the precise instant that he called him over, King believes that the engine was running.

During discovery, Bak Construction responded in the affirmative to the following request for admission served by the Secretary: "Please admit that, on or about August 26, 2004, Respondent violated 30 C.F.R. § 56.14130(g) when the operator of the Clark Michigan 175A front end loader was observed not wearing his seatbelt as required." Following the hearing, Bak Construction filed a motion to withdraw this admission because the testimony of Spider demonstrates that he was just sitting in the loader at the time he was observed by Inspector King and the engine was not running. The Secretary opposes the motion. Under the authority granted me under Commission Procedural Rule 58(b), I grant Bak Construction's motion to withdraw the admission. I find that there will be no prejudice to the Secretary in granting the motion. My holding in this regard is limited to the facts in this case.

Based on the testimony of Inspector King, I find that a violation of the safety standard has been established. I credit Inspector King's testimony concerning these events over the testimony of Mr. Spider. Spider's testimony was neither persuasive nor convincing. Specifically, I find that, although Spider may have been wearing his seatbelt during part of his shift, he was not wearing it while operating the loader prior to the time the inspector entered the operator's compartment. I credit King's testimony that Spider told him, at the time of his inspection, that he forgot to put on the seatbelt the last time he got back into the loader.

Inspector King testified that the violation was S&S because the loader operator must make sharp turns when operating the equipment. (Tr. 24). Some of these turns must be made in reverse gear and some must be made with the bucket in a raised position. He also testified that he believed that, although the ground was level, soft spots could develop on the ground which could turn into ruts over time. In addition, the ground is likely to become slippery when wet. (Tr. 25). The door on the operator's compartment was pinned open. As a consequence, Spider could have fallen out of the loader to the ground 12 feet below. (Tr. 30). Another loader was operating in close proximity to Spider's loader. It was reasonably likely that Spider would be ejected from the cab if he encountered heavy ruts or if he collided with another piece of equipment. (Tr. 29-31, 59-60). The Secretary argues that, based on potential ground conditions and the specific use and condition of the loader, it was reasonably likely that a serious injury would occur, assuming continued mining operations.

Bob Bak testified that the area was very well maintained, without holes or ruts, and that the area was not dangerous to equipment. (Tr. 148). Darrell Dawson, another loader operator at the crusher, testified that the area was fairly smooth. (Tr. 124). Bak Construction argues that,

because the working surfaces were mostly flat and the loader never travels faster than five miles per hour, the possibility of a serious injury was unlikely. Bak Construction also maintains that the potential hazards that were of concern to Inspector King were highly speculative and did not create a potential for a serious injury.

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established that the violation was serious and S&S. A discrete safety hazard was created by the violation. Although the loader traveled at a very low rate of speed, the door on the operator's side of the loader was open. I credit the testimony of Inspector King with respect to the hazards that were present, as summarized above. Although the ground was fairly smooth at the time of the inspection, there was a slight slope in the area. In addition, with the door to the operator's compartment pinned open, there was a risk that the equipment operator would fall from the loader in the event of an accident or other unexpected event. I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

Some of the evidence suggests that Bak Construction's negligence was less than moderate. Nevertheless, it is significant that, of the three pieces of mobile equipment operating on August 26, two were cited for seat belt violations. In addition, Bak Construction has been cited for seat belt violations in the past. *Bob Bak Construction*, 19 FMSHRC 582, 585-86 (March 1997) (ALJ); *Bob Bak Construction*, 19 FMSHRC 1791, 1793-94 (Nov. 1997) (ALJ). Consequently, I find that the violation was the result of Bak Construction's moderate negligence. The Secretary's proposed penalty of $275.00 is appropriate.

B. Citation No. 7938404

Inspector King also issued Citation No. 7938404 under section 104(a) of the Mine Act alleging a violation of section 57.14130(i) as follows, in part:

> The operator of the Clark Michigan 175B front end loader had not properly attached his seat belt to the unit when he replaced the seat on this day. He stated that he had failed to complete bolting the female end of the seat belt to the unit as required. He went on to state that he had received training in seat belt use, was aware of the written company policy on seat belt use, and was told by the operator to wear his seat belt when in self-propelled mobile equipment at the beginning of the shift that day. There was a potential for the front end loader operator to be thrown from the unit were an accident to occur and sustain fatal injuries.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, that "[s]eat belts shall be maintained in functional condition and replaced when necessary to assure proper performance." The Secretary proposes a penalty of $275.00 for this citation.

Inspector King testified that when he climbed up onto the loader to inspect it, he noticed that the seatbelt was not properly attached to the loader. It was draped across Jeremy Heron's lap. (Tr. 35-37; Exs G-4, G-5). The inspector testified that the doors of the loader had been propped open and Heron was operating in close proximity to Spider's loader. (Tr. 29, 38). Huron told the inspector that he had replaced the seat in the cab that morning and he did not secure the seatbelt to the floor of the cab. (Tr. 37). He told the inspector that Mr. Bak had told him to attach the seatbelt before operating the loader. *Id.* Bak Construction contends that because it has policies in place regarding seatbelt use and he instructed Heron to reattach the seatbelt before operating the loader, the citation should be vacated.

The Secretary argues that the evidence establishes that Mr. Bak failed to effectively enforce its seatbelt policies. Two of the three pieces of mobile equipment in operation on the day of the inspection were in violation of the seatbelt standard. In addition, the Secretary argues that Bak Construction's history of previous violations shows that it has violated the seatbelt standard a number of times in the past. Given this history, the Secretary contends that Bak Construction had a heightened responsibility to ensure that functioning seatbelts were installed in all of its mobile equipment and that the operators use these belts.

I find that the Secretary established a violation. There is no question that the seatbelt in the loader operated by Heron was not functional. Bak Construction argues that the Secretary did not establish that the violation was S&S. Its arguments are the same as for the previous citation. For the same reasons discussed above, I find that the violation was serious and S&S. The operator's door for this loader was also pinned back creating a similar hazard.

I also find that Bak Construction's negligence was moderate for the reasons discussed with respect to the previous citation. The Secretary's proposed penalty of $275.00 is appropriate.

C. Order No. 7915397

Inspector King also issued Order No. 7915397 under section 104(g)(1) of the Mine Act alleging a violation of section 46.6(a) as follows, in part:

> Jack Sumners was operating a Dresser TD-25 bulldozer and pushing base material to the pit for loading by front end loaders .... He had not received the safety training required by Part 46 of the Mine Safety and Health Act. Mr. Sumners is a newly hired experienced miner who has been working since August 23 at this location.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Bak Construction's negligence was high. The safety standard provides, in part, that training must be provided to newly hired experienced miners. The Secretary proposes a penalty of $500.00 for this order.

Near the end of his inspection, Inspector King asked for the training records for Bak Construction's employees. Inspector King testified that the training records for Jack Sumners could not be located. (Tr. 41-42, 78, 82). Sumners started working at the crusher on August 23, 2004. Sumners had worked in the construction industry for at least 20 years operating heavy equipment and he had also previously worked at a quarry. (Tr. 42, 45, 69, 191, 200). The inspector believed that Bob Bak called his wife, Elsie Bak, at the office to determine if a certificate of training was there. (Tr. 41). King testified that it appeared that Sumner had not been trained because Mr. Bak believed that his wife had trained him while Ms. Bak believed that Mr. Bak had trained him. (Tr. 42). Elsie Bak is authorized to provide experienced miner training. Inspector King recalls that Bob Bak told his wife to come to the crusher to complete Sumner's training. (Tr. 46). MSHA Supervisory Inspector Joe Steichen, who accompanied King on the inspection, also testified that Bak asked his wife to come to the mine site. (Tr. 108, 119). Nevertheless, Sumner told Inspector King, on the day of the inspection, that he had been trained. (Tr. 78). The training certificate that was subsequently provided to Inspector King shows that Sumners received his training on August 23, 2004. (Tr. 47-48; Ex. G-7). Sumners had initialed the form at the time he was given the training. Inspector Steichen testified that Mr. Bak never told him that Sumners had actually been trained. (Tr. 109).

The Secretary contends that the preponderance of the evidence shows that Sumners did not receive the mandatory training. In the alternative, the Secretary moved at the hearing to plead, in the alternative, that Bak Construction violated section 46.9(c)(2)(i). That section provides that a record of the newly-hired experienced miner's training must be made and given to the miner. As grounds for the motion, the Secretary states that the Commission's procedural rules authorize pleading in the alternative through the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b). The Commission and its judges have allowed the Secretary to plead in the

alternative. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076 (10th Cir. 1998); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *CDK Contracting, Inc.*, 23 FMSHRC 783 (July 2001) (ALJ). The Commission has analogized the modification of a citation to an amendment of a pleading under rule 15(a) of the Federal Rules of Civil Procedure. The Commission put forth the following standard with regard to the amendment of a citation:

> In Federal Civil proceedings, leave for amendment 'shall be freely given when justice so requires.' The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed.

Wyoming Fuel Co., 14 FMSHRC 1282, 1289-90 (Aug. 1992) (citations omitted). The Secretary also points to cases in which the Commission has recognized that citations may be amended during the course of the hearing. *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997); *Higman Sand & Gravel*, 18 FMSHRC 951, 958-59 (June 1996) (ALJ). Finally, she reasons that, because the motion to leave was made at hearing, Bak was given ample opportunity to cross examine the Secretary's witnesses and to question its own witnesses on this issue. The Secretary contends that the record reveals that Bak Construction failed to complete the necessary training record and provide it to Inspector King upon request.

Mr. Sumners testified that he received his required training on August 23, 2004. (Tr. 192-94; Ex. R-103). The training record shows that Bob Bak provided the training. *Id.* Elsie Bak testified that she was never asked to take part in Sumners' training. (Tr. 205). Instead, she was merely asked to sign all of the training certificates, including Sumners', when Mr. Bak returned to the office later on April 26. (Tr. 208, 211-12). She testified that the certificates had been in Mr. Bak's pickup truck at the crusher on August 26. (Tr. 208). Bak Construction also contends that Inspector King was initially confused at the hearing but that he eventually admitted that the training certificate for Sumners was at the mine, but that it wasn't signed at the bottom of the form. (Tr. 85). King admitted that the training certificate was initialed by Sumners. (Tr. 86, Exs. G-7, R-103). He also admitted that if he had noticed Sumners' initials on the certificate, he probably would have vacated the order. (Tr. 72-73). Inspector King vacated other section 104(g)(1) orders that he issued with respect to the training of other miners when he realized that each miner had initialed the form. (Tr. 85-86). He also admitted that Sumners told him that he had been trained. (Tr. 88).

I find that the Secretary did not establish a violation of section 46.6(a). Inspector King based his conclusion that Sumners had not received the required training in large part on the telephone conversation he overheard when Mr. Bak called Elsie Bak. King could only hear one side of the conversation. Specifically, Inspector King testified that "there was no reason for me to believe that Mr. Sumners had, in fact, received his training other than his statement to me that he had; otherwise I was listening in on the conversation of which I was made privy to between Mr. and Mrs. Bak, and it led me to believe that Mr. Sumners had not received the required 4

hours of the seven core subject training." (Tr. 89). I cannot affirm a citation on the basis of testimony concerning one side of a phone conversation, especially where the training certificate shows that training was provided on August 23 and Elsie Bak denies that she was asked to provide any additional training.

Bak Construction opposes the Secretary's motion to amend the citation to include, in the alternative, a charge that it violated section 46.9(c)(2)(i). Bak Construction conceded that the Commission has the power to allow such an amendment; however, it argues that such an amendment is only appropriate when it will not prejudice the opposing party. It contends that it will be prejudiced by such an amendment.

I grant the Secretary's motion to amend the order to also allege a violation of section 46.9(c)(2)(i). There will be no prejudice to the Bak Construction in granting the motion. I find that the Secretary did not meet her burden of proving a violation of section 46.9(c)(2)(i). The record is extremely murky as to what training records were available to Inspector King on the day of the inspection. Inspector King issued similar orders for other employees at the crusher but he vacated them when he discovered that they were initialed by the individual employees. Ms. Bak testified that all of the certificates were in Bob Bak's pickup truck at the crusher on August 26. I find that there was genuine confusion about what training records were available at the crusher on August 26 because there was a lack of communication between Inspector King and Bob Bak concerning the training that was given and the training records that were available. The Secretary, who has the burden of proof, failed to establish a violation of either of the two cited training regulations. Consequently, Order No. 7915397 is vacated.

D. Citation No. 7915396

Inspector King also issued Citation No. 7915396 under section 104(a) of the Mine Act alleging a violation of section 56.14132(a) as follows:

> The Clark Michigan 175A front end loader did not have a manually operated horn. The manually operated horn was originally provided by the manufacturer as a safety feature and is used to signal when starting up and in emergency situations. There was a potential for a person in the area to not know the loader was placed into motion.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, "[m]anually operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $60.00 for this citation.

Inspector King testified that section 56.14200 requires equipment operators to sound a warning before starting such equipment. (Tr. 238-39). He stated that it appeared to him that the horn had been removed at some point prior to the inspection. (Tr. 237-38; Ex. G-9). He also testified that he believes that the loader was originally equipped with a horn. (Tr. 266-67). He contends that Mr. Bak should have recognized that the horn was missing. *Id.*

Bob Bak testified that, although all of the company's other mobile equipment were equipped with horns, this particular loader had never been so equipped. (Tr. 325-26). He stated that he bought the loader used about 20 years ago. He testified that the company has never been cited by MSHA for the absence of a horn on this equipment.

The Secretary argues that she established a violation of the safety standard because Inspector King testified that the loader was once equipped with a horn and that it had been removed. He stated that, if the loader had never been equipped with a horn, previous MSHA inspectors would have noticed this fact. He also stated that Mr. Bak seemed surprised to learn that the loader was not equipped with a horn since all other loaders at the site had horns. (Tr. 242). Bak also testified that the cited loader was not equipped with a horn because he did not believe that the loader needed one. (Tr. 326). The Secretary argues that Bak's inconsistent statements make his testimony less than credible.

Bak Construction argues that the evidence establishes that the cited loader had never been equipped with a horn. This safety standard does not require that a mine operator install a horn on mobile equipment that was never provided with a horn; it only requires that horns that are so provided must be maintained in working order. Inspector King's testimony makes clear that he was not really sure that this particular loader had ever been equipped with a horn. Bob Bak credibly testified that this particular loader never had a horn on it. (Tr. 308). Bak Construction also maintains that, in the previous 20 years that it has been using this loader, it has not been cited by MSHA for the failure to have a horn. It argues that, if the Secretary believes that a horn were required, she would have cited the loader years ago. Bak Construction contends if it is now required to install a horn on equipment that was never provided with one, the Secretary failed to provide fair notice of her change in the interpretation of the standard. *Alan Lee Good* , 23 FMSHRC 995 (Sept. 2001). As a consequence, Bak Construction argues that the citation should be vacated.

It is clear that the Secretary intended that this safety standard require that horns installed on mobile equipment be maintained in operating condition. The standard does not require the installation of a horn on a piece of equipment that was never equipped with a horn. The Secretary's Program Policy Manual provides:

> Standard 56/57.14132(a) sets a *maintenance standard* for manually operated horns or other audible warning devices that are provided as safety features on self-propelled mobile equipment. . . . This standard should be cited if any audible warning device *that was*

> *provided on the equipment* as a safety feature is not functional. This includes manually-operated horns, automatic reverse-activated signal alarms, wheel-mounted bell alarms and discriminating backup alarms.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56, at 61 (2003) *(emphasis added)*. As stated above, Bak Construction presented credible evidence that this loader was never provided with a horn. (Tr. 308, 325). Bak Construction abated the citation by removing an air horn from a "salvage truck" and installing it on the cab of the loader. (Tr. 325). Thus, Mr. Bak did not repair an existing horn. I find that the Secretary failed to establish a violation of the standard. There has been no credible showing that this loader, which Mr. Bak bought used over 20 years ago, had ever been equipped with a horn. The standard does not require the installation of a horn on a loader that had never been equipped with one. Consequently, Citation No. 7915396 is vacated.

E. Citation No. 7915400

Inspector King also issued Citation No. 7915400 under section 104(a) of the Mine Act alleging a violation of section 56.11002 as follows, in part:

> The steps leading into the power generation van were not provided with handrails. The unit is accessed daily to service, start, and shut it down. The steps were clean and in good state of repair. . . . There was a potential for a slip and/or fall resulting in an injury.

Inspector King originally determined that an injury was unlikely and that any injury could reasonably be expected result in lost workdays or restricted duty. Inspector King amended the citation on September 7, 2004, to add the following language:

> After a review of the photo taken and discussion, it was determined that a significant and substantial violation occurred. It was noted that the interior floor of the power generation van was wet with spilled lubrication oil, the steps were steep and 53" off the ground, and there was oil on the steps.

He determined Bak Construction's negligence was moderate. The safety standard provides, in part, "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $72.00 for this citation.

Inspector King testified that the van was a standard cargo trailer that was about 40 feet long and 8 feet wide. (Tr. 243). The van was used to house the generator and to store diesel fuel, grease, and oil. (Tr. 244, 269-70; Ex. G-10). The inspector also testified that the stairs had

previously been equipped with a handrail but, when the crusher was moved earlier in the year, the handrail was not reinstalled. (Tr. 243, 249; Ex. G-11).

As to the S&S allegation, Inspector King testified that miners were exposed to a trip and fall hazard when entering and leaving the generator van to start it up in the morning and to shut it down at the end of the shift. (Tr. 244-45). In addition, miners would occasionally enter the van at other times of the day. Inspector King noted that the stairs were steep and the steps were stained with oil. As a consequence, he believed that the stairs could become slippery at times. (Tr. 246, 248, 289). In addition, the inspector testified that the floor of the van was covered with accumulated oil from years of use. (Tr. 246). Without a handrail, a miner would not be able to brace himself if he slipped while carrying tools or other materials. If a miner were to fall, he could suffer broken bones or sprains. The side supports for the steps extended slightly above the floor of the van, which created a tripping hazard for anyone entering or exiting the van. Supervisor Steichen also observed fresh oil and grease on the floor of the van as well as oil stains on the stairs. (Tr. 299-300). He noted that the ground at the bottom of the stairs was uneven and scattered with rocks.

Mr. Bak testified that there was not any spilled oil or grease within 15 feet of the door of the van. (Tr. 310). Any oil on the floor was by the generator at the back of the van. He also testified that there was no oil on the steps. (Tr. 311). Mr. Back stated that if someone carrying a five gallon pail walked up the steps, he could grab the side of the van with his other hand and safely walk up. Finally, Mr. Bak testified that he had to fabricate a handrail to abate the citation. (Tr. 310). He stated that a handrail had never existed on these stairs.

Bak Construction contends that the testimony of King and Steichen is not credible. For example, it points out that Inspector King did not make any reference to oil on the stairs in his inspection notes. (Tr. 270). Indeed, his notes stated that the steps were clean and in good repair, as did his original citation. (Tr. 271-72). His notes also do not mention the presence of grease or oil on the floor of the van. (Tr. 273). Inspector King acknowledged that a person walking up the stairs can hold on to the doorway for the van to steady himself. (Tr. 274). Bak Construction also argues that, because these stairs have never been equipped with a handrail and the generator van has been inspected many times by MSHA, it did not receive fair notice that a handrail was required at that location.

Bak Construction maintains that the evidence shows that King changed the citation to include the S&S allegation because Supervisory Inspector Steichen required him to do so. (Tr. 274-75). It further maintains that MSHA changed the inspector's notes relating to this citation to support this S&S finding. For example, King originally believed that the steps were 48 inches high, but the modified citation states that the steps were 53 inches high. While this difference is not significant, Bak Construction argues that it shows that King and Steichen's testimony should not be credited. Inspector King admitted that he changed some of his notes concerning the citation. (Tr. 270). Supervisory Mine Inspector Steichen admitted at the hearing that his notes

did not document any concern about oil on the steps and that he also did not document any tripping hazards. (Tr. 306).

I find that the Secretary established the violation. The cited area was a stairway that was required to be equipped with a handrail under the safety standard. The photograph clearly shows that the stairs were equipped with a bracket to hold a handrail. (G-11). Inspector King credibly testified that Mr. Bak told him that he forgot to replace the handrail when the crusher was moved. (Tr. 243). To abate the citation, Mr. Bak found the handrail that had been used at the previous location. (Tr. 243, 249). I credit the testimony of Inspector King over the testimony of Mr. Bak on this issue.

I also find that the Secretary established that the violation was S&S. It must be remembered that, when considering whether a violation is S&S, the judge must assume continued normal mining operations. In addition, the Secretary is not required to establish that it is more probable than not that an injury will result from the violation. The stairway to the generator van was rather steep and it was about four feet high. The steps on the stairs were not non-skid metal treads but were wooden boards that were secured to the metal frame. Although there was no fresh oil or grease on the steps, they were stained with oil. Thus, the evidence establishes that oil is sometimes spilled on the stairway. The ground at the bottom of the stairs was uneven. The frame for the stairs extended above the floor of the van. I find that these conditions created a tripping and stumbling hazard to anyone entering or exiting the van. As a consequence, it was reasonably likely that someone would stumble and injure themselves, assuming continued mining operations. The hazard contributed to by the violation would likely result in a reasonably serious injury. As Inspector King testified, the types of injuries that can reasonably be expected include broken bones or sprains.

I do not accept Bak Construction's argument that I should not credit the testimony of King and Steichen because the citation was modified to include an S&S determination or because some of the details of their testimony were not documented in their notes. MSHA inspectors frequently modify citations after consulting with their supervisor and other inspectors and after reflecting on the conditions observed. I do not agree with Bak Construction's statement that "[t]he whole process of amending the citation to make it an S&S is suspect." (Bak Br. 23). Both King and Steichen freely admitted that the citation was amended based in part on subsequent discussions between the two of them.

I also find that Bak Construction's negligence was moderate. A penalty of $80.00 is appropriate for this violation.

F. <u>Citation No. 7938402</u>

Inspector King also issued Citation No. 7938402 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows:

> The side discharge conveyor located on the underside of the Pioneer 212 screen plant was not provided with adequate guards at the drive motor v-belts and the head and tail pulleys. There is normally no foot traffic in this area while the plant is running. However, there was a potential for a person to become entangled were they to come in contact with a pinch point.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $60.00 for this citation.

Upon inspection of the Pioneer 212 Screen Plant, King determined that three areas of the side discharge conveyor were not properly guarded. (Tr. 250-52). The existing guards on the head pulley and drive motor v-belts, only four feet off the ground, were inadequately constructed to keep an employee from coming into contact with either the head pulley or v-belt. Tr. 251. In addition, the tail pulley on the conveyer was not guarded at all. (Tr. 250; Ex. G-13). King acknowledged that the only employees who would enter into the area surrounding the conveyor were the skid steer operator, or possibly the front end loader operator. (Tr. 252). He also conceded that he did not have notes regarding employees being in the area and that he did not see any footprints in the area. (Tr. 282).

Bak Construction's witnesses testified that employees rarely walked or worked near the screen plant while it was operating. Darrell Dawson testified that the tail pulley was too high for any employee to trip into it. (Tr. 334). He admitted, however, that both Bob Bak and Spider walk around the conveyor area while it is in operation. (Tr. 333). Bob Bak testified that no maintenance is done on the equipment while it is in operation and that cleaning is performed with a loader or skid steer, with no possibility of physical contact with the machinery. (Tr. 314). He also opined that the guard covering the v-belt drive and pulley was adequate enough to prevent injury if someone were to stumble or fall in the vicinity. (Tr. 315).

The Secretary maintains that the use of machines for cleanup does not exclude Bak from complying with mandatory safety regulations. Sec'y Br. 30. She concludes that "[t]he fact that exposure to guarding hazards was limited does not negate the existence of a violation – it merely reflects on the gravity of the violation." (S. Br. 30). The guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thomson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Therefore, with regard to the few employees who enter the conveyor area, there is a possibility of inadvertent contact with moving machinery and the standard should apply.

Bak Construction contends that, because the guards on the head pulley and v-belts met minimal standards and the tail pulley was too high for any employee to make accidental contact, there was no chance for injury. (Bak Br. 24-26; Tr. 280, 313). This fact, coupled with the fact that the few employees who enter the area do so in machinery, leads Bak Construction to conclude that there is no violation of the guarding standard and that, if a violation is found, its negligence was low.

I find that the Secretary established a violation. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros.*, 6 FMSHRC at 2097. In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. There is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Although the evidence reveals that foot traffic around the screen plant was low, people do walk through the area from time to time. (Tr. 333, 340). An employee may attempt to clean up small accumulations of material with a shovel while the plant is operating. A well-constructed guard provides a physical barrier that prevents accidental contact with moving machine parts.

I find that the violation was not serious because the hazard contributed to by the violation is unlikely to result to an injury. Bak Construction's negligence was relatively low because Mr. Bak did not believe that the cited conditions created a safety hazard. The Secretary's proposed penalty of $60.00 is appropriate.

G. Citation No. 7938403

Inspector King issued Citation No. 7938403 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The smooth tail pulley under the clay hopper was not provided with a guard. The pinch point is approximately one foot off the ground and the belt travels at approximately 32 feet per minute. Normally, there is no foot traffic in this area while the plant is running. Were a person to become entangled, a debilitating injury could occur.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that

Bak Construction's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector King issued the citation because the smooth tail pulley on the clay hopper was not provided with a guard. (Exs. G-15, G-15). Inspector King testified that the clay hopper is used to feed the clay binding material into the mined product to meet customer specifications. (Tr. 257). King also stated that the clay in the hopper readily absorbs moisture with the result that the hopper often becomes clogged. Tr. 258. The inspector believed that, as a result, an employee was required to monitor the area and clean up clogged material. (Tr. 258-59). King testified that the smooth tail pulley was previously guarded, but that Bak Construction removed the guard at some point in time. (Tr. 255-56).

Bob Bak first testified that, in the 20 years in which he has operated the hopper, the pulley has never been guarded. (Tr. 324). He also testified that, when the clay sticks in the hopper, a 12-volt vibrator shakes the clay loose. (Tr. 319-21). The conveyor belt is normally not running when the vibrator is in use. (Tr. 321). As with the previous citation, only those responsible for cleanup would come into the area surrounding the tail pulley and those employees would do so using machinery. (Tr. 283). Additionally, Mr. Bak testified that, because the pinch point on the conveyor is extremely low, it is not likely that anyone would come into contact with the pulley. (Tr. 318). In fact, he stated that if someone were to approach the conveyer on foot, he would likely hit his head on one of the hopper braces before reaching the pulley. (Tr. 319, 337-38). Finally, he testified that Bak Construction had not received any citations in the past for failing to guard the pulley. (Tr. 324).

The Secretary makes the same arguments with respect to this citation as she did with respect to the previous citation. She maintains that the guarding standard is not dependent on a high likelihood of injury, but rather on any possibility of inadvertent contact with moving machinery. She concludes that Bak Construction failed to guard moving parts and is therefore in violation of the standard.

Bak Construction also makes similar arguments with respect to this citation. The company states that, because of location of the pulley, it is not possible for any employee to make accidental contact with the moving machinery. (Bak Br. 26-27). Therefore, it concludes that there is no violation of the relevant machine guarding standard. Finally, Bak Construction maintains that it was not provided with fair notice that a guard was required at this location because it was never cited during MSHA's previous inspections.

I find that the possibility that anyone would come in contact with the cited smooth tail pulley was extremely remote. The pulley was at ground level and it was located at the bottom of a chute that narrowed at the bottom. Someone walking in the area would hit his head on the side of the chute or on the structure supporting the chute before he could reach the pulley. In *Thompson Bros*, the Commission made clear that citations issued under this standard must be "resolved on a case-by-[case] basis." *Id.* I find that the Secretary did not establish that there was

a reasonable possibility of contact because of the location of the pulley. A miner would be unable to get close enough to the pulley for it to pose a hazard in the event he stumbled and fell down. Consequently there was no realistic possibility that anyone stumbling or falling would come into contact with the moving parts or that anyone would make contact due to inattention or careless behavior. In addition, the belt moves at a low speed and the pinch point is located on the underside of the pulley next to the ground. (Tr. 318; Ex. G-15). Other Commission administrative law judges have vacated citations where the Secretary did not establish a reasonable possibility of contact with the moving machine parts. *See Hamilton Pipeline, Inc.*, 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.*, 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ). Consequently, this citation is vacated.

H. Citation No. 7938407

Bak Construction withdrew its contest of this citation at the hearing and agreed to pay the Secretary's proposed $60.00 penalty. (Tr. 344).

II. APPROPRIATE CIVIL PENALTIES

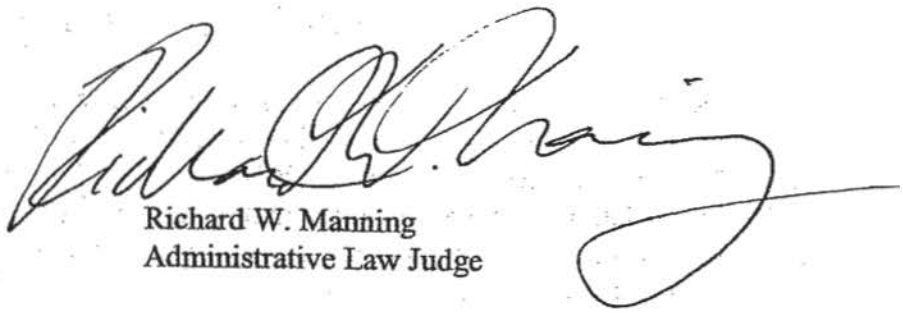
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Crusher No. 3 was not issued any citation in the 24 months preceding August 26, 2004. Bob Bak Construction is a small mine operator. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Bak Construction's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
CENT 2005-139-M		
7915395	56.14130(g)	$275.00
7938404	56.14130(i)	275.00
CENT 2005-162-M		
7915400	56.11002	80.00
7915396	56.14132(a)	Vacated
7938402	56.14107(a)	60.00
7938403	56.14107(a)	Vacated
7938407	56.4402	60.00
CENT 2006-009-M		
7915397	46.6(a)/46.9(c)(2)(i)	Vacated
	TOTAL PENALTY	$750.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **VACATED**, as set forth above. Bob Bak Construction is **ORDERED TO PAY** the Secretary of Labor the sum of $750.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

September 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-68-M
Petitioner	:	A. C. No. 54-00297-11648
v.	:	
	:	
MASTER AGGREGATES TOA BAJA CORP.,	:	Cantera Master Aggregates Mine
Respondent	:	

DECISION

Appearances: Suzanne Demetrio, Esq. and Donyell Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of the Petitioner;
Willa Perlmutter, Esq. and Mark Savit, Esq., Patton Boggs, LLP, Washington, D.C., on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Master Aggregates Toa Baja Incorporated (Master Aggregates) with two violations of mandatory standards and proposing civil penalties of $70,000.00 for the violations. The general issue before me is whether Master Aggregates violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

Master Aggregates owns and operates Cantera Isabela, a crushed limestone quarry located in Isabela, Puerto Rico. The quarry operates two overlapping shifts with a total of twenty employees. The first shift is from 6:00 a.m. to 3:00 p.m. and the second is from 8:00 a.m. to 5:00 p.m. In November 2002, the daily operations of this facility were directed by Plant Manager Jeffrey Albrecht and Plant Supervisor Otoniel Acevedo. Messrs. Albrecht and Acevedo were also responsible for the mine inspections.

On November 13, 2002, Mr. Acevedo arrived at 6:00 a.m. At approximately 7:00 a.m., Acevedo assigned Julio Rios-Beauchamp, along with three others, to work near a highwall approximately 27 feet high. Mr. Rios-Beauchamp was assigned the task of operating a bulldozer parallel to the highwall. He was piling and pushing shot material along the face of the highwall to be picked up by a front-end loader. Mr. Rios-Beauchamp performed this assigned task from 7:00 a.m. to 11:00 a.m. before he left to relieve the dispatcher.

At approximately 1:00 p.m., Acevedo drove Rios-Beauchamp back to the highwall and told him to resume the work he had been performing in the morning. At approximately 1:45 p.m., part of the highwall collapsed onto the bulldozer, crushing Mr. Rios-Beauchamp to death.

Citation No. 7798760

Citation No. 7798760, as modified, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3401 and charges as follows:

> On November 13, 2002, a bulldozer operator was fatally injured when he was stockpilling [sic] material from a previously blasted area in the quarry. Unconslidated [sic] material containing large boulders struck the bulldozer causing two columns of the ROPS structure and roof of the dozer to collapse crushing the victim. Persons experience [sic] in examining and testing for loose ground had not adequately inspected the area prior to work being performed.
>
> The cited standard provides as follows:
>
> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

The Secretary's argument is straightforward. She contends that Plant Manager Jeffrey Albrecht and Plant Supervisor Otoniel Acevedo, the persons responsible for conducting inspections on November 13, 2002, simply failed to do so (Secty. Brief p. 10).

In this regard it is undisputed that work commenced at the highwall at 7:00 a.m. on November 13, 2002, when the deceased, Mr. Rios-Beauchamp, began pushing material with the bulldozer at the highwall base. Plant Manager Albrecht admitted in a taped interview given on November 14, 2002, the day after the fatal accident, that he did not perform the mine inspection on November 13 (Gov't. Exh.30 p.5). He thought that Plant Supervisor Acevedo had performed that inspection, that they kept documents of such inspections and that Acevedo had documented it (Gov't. Exh. 30 p.5).

In a taped statement also given on November 14, 2002, Plant Supervisor Acevedo disputed Albrecht's claim that they documented their inspections and also admitted that he did not conduct the mine inspection on the morning of November 13 (Gov't. Ext. 31 pp.7-8). He also claimed, at one point in the interview, that he could not then remember whether he had conducted an inspection even later that day (Gov't. Exh. 31 pp. 7-8). He later acknowledged that he "did not look at the walls" that day (Gov't. Exh. 31 p.12).

While the Respondent attempts to discredit its witnesses' statements, noted above, by citing their subsequent testimony in depositions taken two and one-half years later, in May 2005, and more than three years later at trial on March 9, 2006, it is clear that the best recollection of the witnesses and their most credible testimony would come on the day after the highwall failure rather than years later and after the witnesses have become aware of the consequences of their prior admissions. Under the circumstances, I find the subsequent deposition and trial testimony of these witnesses unpersuasive.

Within the framework of the witnesses' admissions in their November 14, 2002, statements, I have no difficulty in concluding (1) that Plant Manager Jeffrey Albrecht did not conduct an inspection of the ground conditions at the highwall, prior to the accident before work commenced at that location on November 13, 2002, and (2) that Plant Supervisor Otoniel Acevedo failed to conduct an inspection of the ground conditions at the highwall before work commenced at that location on the morning of November 13, 2002. Based on Acevedo's statement of November 14, 2002, I also conclude that, in fact, he also failed to conduct any inspection of the highwall on November 13, 2002, before the accident. Under the circumstances, and considering that Messrs. Albrecht and Acevedo were the persons responsible for performing the inspection, I find that the violation is proven as charged.

In reaching these conclusions, I have not disregarded the somewhat confused trial testimony of Mr. Torres-Aponte, an investigator for the Department of Labor's Mine Safety and Health Administration, that, in his deposition he stated that, in his notes, he reported that Mr. Acevedo had in fact "made these inspections" and that "[h]e did the inspection but in an inadequate manner" (Tr. I-104-105). Mr. Torres-Aponte also testified however that Mr. Acevedo told him in his "deposition" that he did not make an inspection on the day of the accident (Tr. I-105). [1] Under all the circumstances, I give the direct recorded statement of Mr. Acevedo himself the persuasive weight (Gov't . Exh. 31).

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

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

---

[1] Mr. Torres-Aponte is presumably here referring to Mr. Acevedo's taped statement of November 14, 2002 (Gov't. Exh. 31).

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

The Secretary argues in this regard that if Master Aggregates had inspected the highwall as required, it would have reduced or eliminated the hazard of the rock fall which killed Mr. Rios-Beauchamp. While it is certainly speculative that even a thorough inspection of the highwall in this case would have prevented this particular rock fall, it is clear that the failure to conduct appropriate highwall inspections, particularly following the observation of cracks after blasting the week before, is reasonably likely to result in serious and fatal injuries. Accordingly, the violation was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of high operator negligence. She notes in this regard that Plant Manager Albrecht had knowledge that cracks were on top of the highwall a week before the accident (Tr. II-64-65). Clearly, knowledge on the part of the operator's agent that the area above the highwall indeed showed some cracking, combined with his failure to have inspected the highwall before work commenced on the day of the accident, constitutes gross negligence.

Even assuming, *arguendo*, that credit could be given to Mr. Acevedo's testimony at hearing that he did conduct an inspection of the highwall after lunch on November 13, 2002, but before the accident, the evidence is clear from his statement of November 14, 2002, that he failed to conduct an inspection before work commenced that morning and I would nevertheless find that there was still a violation which was "significant and substantial", of high gravity and the result of gross negligence even though not perhaps a direct causative factor in the fatality in this case.

Citation No. 7798761

Citation No. 7798761 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3200 and charges as follows:

> On November 13, 2002, a bulldozer operator was fatally injured when he was stockpilling [sic] material from a previously blasted area in the quarry. Unconslidated [sic] material containing large boulders struck the bulldozer causing two columns of the ROPS structure and roof of the dozer to collapse crushing the victim. Loose ground had not been taken down or supported before work was permitted in the area.

The cited standard, 30 C.F.R. § 56.3200, provides as follows:

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

In her post-hearing brief the Secretary alleges that the citation was issued "because Respondent failed to address the cracks that appeared on the top of the highwall prior to the fatal accident" (Secty. Brief p. 15).[2] That allegation does not however, in itself charge a violation of the cited standard. Within the framework of the cited standard, the issue is whether the Secretary has sustained her burden of proving that the ground conditions on the highwall before work was permitted adjacent to the highwall on November 13, 2002, created a hazard to persons.

The Secretary relies in this regard, on the contradictory statements of Plant Manager Albrecht that the cracks he had seen on top of the highwall a week before the accident were similar to the cracks he saw in that area after the accident and that "if" he had seen the cracks before the accident he "probably would have taken some corrective action" (Secty. Brief p. 15; Tr. II-64,65,77-80). The Secretary herself acknowledges that this contradictory testimony is curious. In any event, because of this contradiction, I find that I cannot give the testimony in this context any probative weight.

Under the circumstances, there is no probative direct evidence in this case that the ground conditions on the highwall before the work of bulldozer operator Rios-Beauchamp was permitted on November 13, 2002, were hazardous to persons. Significantly, the credible testimony from the Secretary's expert, Donald Kirkwood, a licensed professional civil engineer and expert in soil and rock mechanics, is that cracks appearing above a highwall do not necessarily indicate that a highwall is about to fail and that Mr. Rios-Beauchamp may have caused the ground failure himself by undercutting the highwall (Tr. I-181, 182).

Both Kirkwood and Plant Manager, Albrecht, testified that the cracks they observed following the fatal rock fall were likely the same as before the rock fall (Tr. I-148, Tr. II-78-80). In addition, according to the Respondent's, witness, David West, an expert in rock mechanics and the micro seismic monitoring of mine sites, three "catastrophic" events (i.e. the ground fall itself, rainfall that occurred in the area of the rock fall on the evening of November 13, and an earthquake measuring 4.7 on the Richter scale 190 miles from the mine site) occurred after the rock fall and before Mr. Kirkwood observed cracks on November 15th, which affected the ground and influenced the presence, or visual size, of the cracks (Tr. II-152). I find Mr. West highly credentialed and his testimony entitled to persuasive weight. Accordingly, I find that the cracks observed after the rock fall, if anything, would likely have appeared larger than before the rock fall and, would therefore have appeared more hazardous after the rock fall.

In light of the credible evidence, cited below, that the cracks above the highwall after the

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[2] The Secretary does not assert that the failure of the highwall *per se* establishes a violation of the cited standard.

accident did not, in fact, present a hazard to persons, it may reasonably be inferred that the cracks appearing before the rock fall likewise did not appear to present a hazard to persons. In this regard I have again considered the testimony of the Secretary's expert, Donald Kirkwood, that cracks appearing above a highwall do not necessarily indicate that a highwall is about to fail, that the cracks he observed after the accident on November 15, 2002, did not present a danger of imminent failure and that Mr. Rios might have caused the ground failure himself by undercutting the highwall (Tr. I-159-160,172, 181).

In addition, MSHA inspector Armondo Peña testified that, after the accident, he examined the highwall and that once the boulder was taken off the bulldozer there was, in essence, no danger to persons working below the highwall. MSHA investigator Torres-Aponte also acknowledged that, after the accident, he observed Mr. Albrecht standing one or two feet from the edge of the highwall, between a crack and the edge of the highwall without being in any kind of danger. Finally, Messrs. Albrecht and Acevedo testified that when they inspected the top of the highwall after blasting (apparently a week before the accident) they, in effect, saw nothing hazardous (Tr. II-65, 100).

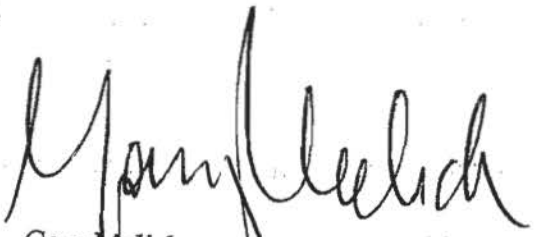
Under all the circumstances then, I cannot find that the Secretary has proven by a preponderance of the evidence that there has been a violation of the cited standard as alleged.

Civil Penalties - Citation No. 779860

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the operator is small in size with a not insignificant history of violations. There is no dispute that the violation was abated in a timely and good faith manner and no evidence has been presented as to the effect the penalty would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision. Under the circumstances, I find that the Secretary's proposed penalty of $35,000.00 is appropriate for the violation found in Citation No. 779860.

ORDER

Citation No. 779861 is vacated. Citation No. 779860 is affirmed and Master Aggregates Toa Baja Corporation is directed to pay a civil penalty of $35,000.00 for the violation charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-788-R
	:	Citation No. 7257574; 06/27/2006
v.	:	Docket No. WEVA 2006-789-R
	:	Citation No. 7257575;06/27/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-790-R
	:	Citation No. 7257568;06/27/2006
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID No. 46-09048

ORDER OF DISMISSAL

Before: Judge Feldman

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission by Marfork Coal Company, Inc. (Marfork) on July 10, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d).

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation. In addition, as discussed below, postponing a contest until after the proposed civil penalty provides the opportunity for informal settlement conferences between mine operators and MSHA personnel wherein citations frequently are vacated by MSHA without the need for litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested.

In its contests, Marfork denies each and every allegation contained in the contested citations. Marfork identifies the relief sought in its contest as "issuance of an Order directing that all the subject Citations be vacated and dismissed." (*Marfork Contest*, p.3). The Order sought can only be issued after a hearing on the merits. Thus, the relief requested by Marfork is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

The Secretary filed an answer to Marfork's contests on July 27, 2006, in which she moved to stay these matters pending the related civil penalty cases. The Secretary's answer noted that "*counsel for the Contestant has indicated . . . that he has no objection to this motion.*" (*Sec'y Mot.*, p.2). (Emphasis added). The Secretary's answer was accompanied by a cover letter stating:

> [Marfork's] Counsel has also indicated that it is the operator's intention to file notices of contest of all significant and substantial citations and orders but will agree to continuances of those cases involving 104(a) citations. While it is the Contestant's prerogative to file duplicative contest and civil penalty proceedings pursuant to the Commission's rules, the Contestant's policy of always filing a notice of contest and then agreeing to a stay seems to be a needless use of the Commission's and Secretary's resources. This is especially true when the operator can contest both the civil penalty and the underlying citation when the civil penalty is proposed.

By filing a contest on July 10, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, Marfork apparently does not want a disposition on the merits *before* the civil penalty is proposed. In other words, Marfork's contest does not adequately articulate the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

Accordingly, on August 11, 2006, Marfork was ordered to show cause why its contest of the subject citations should not be dismissed because of its apparent disinterest in a Commission hearing in contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. 28 FMSHRC 745. The Secretary was provided the opportunity to reply to Marfork's response to the Order to Show Cause.

Marfork responded to the show cause order on September 1, 2006. In its response Marfork does not even express a pretense that it seeks an early adjudication on the merits. Rather, Marfork asserts it is contesting all citations, with the exception of those designated as non-significant and substantial, for the purpose of initiating discovery and informal negotiations with the Secretary. (*Marfork resp.*, p.5)

The Secretary replied to Marfork's response in correspondence dated September 7, 2006. While the Secretary opined that there was "no discernable reason" served by Marfork's contest, and that discovery cannot properly be characterized as "relief sought" by a contestant, the Secretary did not provide any meaningful analysis of Commission case law, or relevant statutory and Commission Rule provisions. (Letter from Glenn Loos, Esq., to Judge Feldman of 9/7/06). Nor did the Secretary articulate whether or not Marfork's contest should be dismissed.

Consequently, on September 11, 2006, the Secretary was ordered to state in writing, with specificity, whether she believes the subject Notice of Contest should be dismissed. The Secretary was requested to provide the relevant statutory and rule provisions and/or case law in support of her position. The Secretary responded on September 19, 2006. Without providing the analysis requested by the September 11 Order, the Secretary stated she "is unaware of any statutory provision, any procedural rule, or any case law that requires dismissal of the operator's contest in the circumstances [of this case]." To the extent that there is no case law involving frivolous operator requests for over 600 contests,[1] with contemporaneous expressions by the contestants that they are not really interested in prosecuting their contests, I agree with the Secretary's perfunctory analysis. However, the analysis must not stop here.

As noted, Marfork's contest has not even been filed under the guise of pursuing its contest prior to the Secretary's civil penalty proposal. Thus, Marfork has removed all genuine issues of fact. Fundamental questions of law concerning defective filings that are tantamount to an abuse of process cannot be ignored. Although the Commission long ago recognized an operator's right to an early hearing under section 105(d), the right to an early hearing must be accompanied by an operator's desire for an early hearing - - a desire Marfork admittedly does not possess. *Energy Fuels, supra.* Although the Commission noted in *Energy Fuels* that it saw no

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[1] The law firm representing Marfork has recently filed approximately 250 section 105(d) contests on behalf of its clients. This law firm is not alone. For example, another law firm has filed more than 375 contests on behalf Aracoma Coal Company (Aracoma). All of these contestants have agreed to stay their contests immediately after filing them. An Order to Show Cause has been issued to Aracoma.

reason why operators that filed *bona fide* contests seeking early hearings could not be persuaded to postpone their contests until the civil penalty is proposed, surely *Energy Fuels* did not sanction, or even contemplate, the current folly that is being thrust on this Commission. 1 FMSHRC at 308. The unprecedented filing of voluminous contests under these circumstances results in the needless expense and wasted effort associated with extensive photocopying, meaningless assignment, pre-hearing and stay orders, and the preparation and storage of contest docket files for no legitimate reason.[2]

As a threshold matter, Marfork's policy of contesting all significant and substantial citations, regardless of the underlying facts, lacks any considered thought. Thus, there is no consideration of the underlying facts of a particular citation to support a need for an early hearing.

Moreover, Marfork's contest is defective. Commission Rule 20(e)(1)(ii) requires a contestant to state the relief requested. The desire to start discovery is not relief and does not provide a basis for a 105(d) contest. In addition, discovery during a 105(d) stay is counterproductive because it can result in needless interrogatories and depositions of MSHA inspectors concerning citations that the operator may not contest after the Secretary proposes her penalty. Unnecessary deposition of mine inspectors interferes with their primary responsibility of inspecting the nation's mines. In this regard, I am no longer inclined to allow discovery during a stay in light of the multitude of unnecessary 105(d) contests. Thus, absent a request for a hearing, Marfork's contest serves no purpose.

I am not persuaded by Marfork's assertion that its contests are remedial in nature in that they alleviate harm caused by any delay in the Secretary's proposal of civil penalties by initiating the discovery and settlement negotiations process. (*Marfork resp.*, p.5). In fact, Marfork's contest is an impediment to the settlement negotiations process. Informal MSHA safety conferences offer operators the best opportunity for expeditious and simple resolution of operator concerns. However, as the Secretary explained, contests place citations in litigation under the exclusive direction of the solicitor and preclude the availability of informal MSHA safety settlement conferences. (Letter from Glenn Loos, Esq., to Judge Feldman of 9/7/06, p.2). As noted by the D.C. Court of Appeals, although the statutory provision in section 104(a) of the Mine Act requires the Secretary to propose a civil penalty within a "reasonable time," this

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[2] I am not suggesting that administrative burden provides a basis for denying an operator the right to file a *bona fide* 105(d) contest. However, administrative expenditures incurred as a result of frivolous filings are wasteful and must not be ignored.

provision is intended to "spur the Secretary to action" rather than confer rights on mine operators. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). Tardiness by the Secretary does not justify the filing of an avalanche of meaningless contests with the Office of the Secretary and with this Commission. In the final analysis, section 105 of the Mine Act does not confer on Marfork the right to be frivolous.

Finally, dismissal of Marfork's contest is consistent with the classic tenets of statutory construction. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Section 105(d) provides:

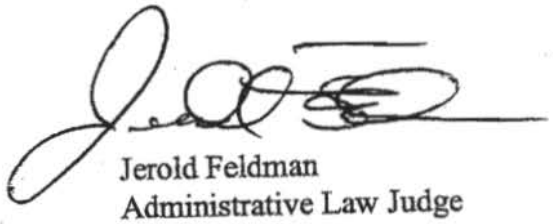
> *If, within 30 days of receipt thereof, an operator of a . . . mine notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 104, or citation* or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation . . . Issued under section 104, . . . *the Commission shall afford an opportunity for a hearing . . . And thereafter shall issue an order . . . affirming, modifying, or vacating the Secretary's citation,* order, or proposed penalty, or directing other appropriate relief.

(Emphasis added.)

The plain meaning of section 105(d) provides an operator with the right to contest a citation within 30 days of its issuance, rather than wait for the Secretary's civil penalty proposal, if the operator wants an expeditious Commission hearing. In other words, section 105(d) affords an operator with a right to an early hearing that should be given priority by this Commission. The abuse of section 105(d) by filing disingenuous contests interferes with the Commission's orderly processes. In other words, if everything is a priority, nothing is a priority.

Moreover, statutes must be interpreted reasonably when Congress has not spoken on the matter in issue. *See, eg., Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). Congress has not directly spoken on, nor could it contemplate, the precise question in issue - - does a mine operator have an unfettered right to contest a citation even if it does not want an early hearing? Put another way, can any reasonable statutory interpretation of section 105(d) confer on an operator the absolute right to file a contest for no apparent reason? Surely, the answer is no.

Even in the absence of an articulated opposition by the Secretary, I cannot ignore the fact that Marfork's contest is contrary to section 105(d) as well as Commission Rule 20(e)(1)(ii) because it is devoid of relief sought, notwithstanding the abuse of process it creates. In other words, I decline to be a patron of the theater of the absurd. Accordingly, **IT IS ORDERED** that Marfork's contest **IS DISMISSED**.[3]



Jerold Feldman
Administrative Law Judge

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/mh

[3] On September 13, 2006, Massey Energy Company (Massey), of which Marfork is a subsidiary, reached an informal agreement with the Secretary that all subsidiaries "agree to refrain from filing Notices of Contest on 104(a) Significant and Substantial citations until the proposed penalty is assessed unless there is something particular to be immediately addressed with an individual citation." In recognition of Massey's restraint, I will stay all other pending contests that Massey has agreed to stay without formal discovery being authorized during the pendency of the stay. I have dismissed this contest on the merits because of the important issues raised, and the effect of this decision on similar contests that do not involve Massey.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2003-451-M
	:	A. C. No. 02-01691-05844
	:	
	:	Docket No. WEST 2004-76-M
	:	A. C. No. 02-01691-10445
v.	:	
	:	Docket No. WEST 2004-103-M
	:	A. C. No. 02-01691-12689
	:	
	:	Docket No. WEST 2004-196-M
QMAX COMPANY, Respondent	:	A. C. No. 02-01691-17038
	:	
	:	Portable Plant for Qmax Co.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2005-61-M
	:	A. C. No. 02-01691-27590A
v.	:	
	:	
JAMES L. FANN, Employed by QMAX COMPANY, Respondent	:	Portable Plant for Qmax Co.

DECISION

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Secretary of Labor;
James L. Fann, Elaine P. Fann, Williams, Arizona, on behalf of Qmax Company and James L. Fann.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petitions allege that Qmax Company ("Qmax") is liable for twelve violations of the Secretary's regulations applicable to surface metal

and non-metal mines, and propose the imposition of civil penalties totaling $1,539.00. The petition in Docket No. WEST 2005-61-M alleges that James L. Fann, Qmax's president at the time, is liable, in his individual capacity, for one such violation, and proposes a civil penalty in the amount of $500.00. A hearing was held in Flagstaff, Arizona. After receipt of the transcript, the Secretary submitted her post-hearing brief. Shortly thereafter, James Fann died after suffering a spontaneous intra cerebral hemorrhage. He is survived by his wife, Elaine P. Fann, who is also the personal representative of Mr. Fann's estate. Further settlement negotiations proved unsuccessful and Respondents' brief was then filed. For the reasons set forth below, I find that Respondent, Qmax, committed six of the alleged violations and impose civil penalties totaling $333.00. I also find that the action against James L. Fann did not survive his death, and dismiss the petition filed against him.

The Record

The record in these actions consists of the transcript of the hearing and the exhibits admitted into evidence. During the course of the hearing, Respondents requested leave to supplement the record with an amended affidavit and a statement pointing out portions of MSHA video tape training materials, exhibits R-5 and R-6 (103-M), that they contend are particularly relevant.[1] The amended affidavit of Scott Langstaff was submitted by facsimile on February 17, 2006, and a letter dated February 22, 2006, addressed the contents of the video tapes and other issues. The Secretary objected to the amended affidavit, and agreed with the proposal advanced by the undersigned Administrative Law Judge, that the letter be treated as part of Respondents' brief. Respondents' request to supplement the record with the amended affidavit of Scott Langstaff is hereby denied. The amendment to the original affidavit, exhibit R-14 (103-M), adds nothing of relevance. The letter, which was intended to highlight portions of video tapes that Respondents contended were particularly relevant, goes well beyond that stated purpose. It will not be considered as part of the evidentiary record, but as part of Respondents' brief.

Findings of Fact - Conclusions of Law

Qmax operates a small portable crushing and screening plant near Williams, Arizona. On June 17 and 18, 2003, Jerry Kissell, an Inspector employed with the Department of Labor's Mine Safety & Health Administration ("MSHA"), conducted an inspection of the Qmax plant. He issued four citations charging Qmax with violations of safety and health standards. On August 20 and 21, 2003, he returned to the plant to investigate a complaint regarding safety violations that had been reported telephonically to MSHA. In the course of that investigation, he issued seven citations for various alleged violations. When he returned on August 25, 2003, to deliver copies of the citations, he observed what he believed to be a serious safety violation and issued another citation. Following a special investigation, that citation was also issued to James L. Fann, charging him in his individual capacity as a "director, officer, or agent of [Qmax] who

[1] Respondents submitted separate sets of exhibits for each docket number. The information provided in parentheses refers to the docket number of the penalty proceeding.

knowingly authorized, ordered, or carried out" the violation. 30 U.S.C. § 820(c).

The relationship between Qmax and MSHA was clearly strained, and became increasingly so during Kissell's inspections. James Fann had requested a Compliance Assistance Visit ("CAV") when he was setting up the operation in the summer of 2002.[2] Tr. 414. Although he had had substantial experience in the industry, he was restarting operations that had been dormant since 1996. MSHA denied the request. Fann believed that many of the citations issued during Kissell's inspections could have been avoided if a CAV had been provided. He repeatedly protested the denial of the CAV request in response to the issuance of the citations. Ex. R-19 (451-M), R-10 (196-M), R-12 (196-M). He raised it with Kissell at the beginning of the inspection and, according to Kissell, appeared agitated with MSHA and complained of inconsistency during the inspection. Ex. R-11 (451-M) at 5, 15. Fann testified that Kissell made disparaging comments to the effect that, as a mine operator with millions of dollars worth of equipment, all he was interested in was profits, not the safety of miners. Fann defended Qmax's prior safety record, and countered that the equipment was worth considerably less than Kissell thought and that much of it was rented at a cost of about $2,500.00 per day. Tr. 419, 507-08. Fann was concerned that Kissell's multiple inspection days resulted in a virtual shut-down of operations, and considerable expense to Qmax.[3] Tr. 601-03. Fann reacted angrily when advised of some of the citations, and claimed that Kissell "threatened" excessive enforcement actions.[4] Fann also raised other issues, including not being properly advised of conference rights and not getting a copy of the hazard complaint that prompted the second inspection. Most of the arguments were premised upon Fann's view that under the Act and MSHA's published policy, MSHA should have been more helpful in providing technical assistance rather than emphasizing enforcement action, particularly as to small operators whose operations experienced more disruption by inspections. *See* 30 U.S.C. § 952(b).

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[2] As explained in MSHA's Program Policy Manual ("PPM"), a Compliance Assistance Visit is conducted like a regular inspection, except that citations issued for potential violations are marked "CAV-NONPENALTY." Inspectors assure that appropriate corrective action had been taken during subsequent regular inspections. PPM, IV, § G-3.

[3] See n. 5, *infra*.

[4] Citation No. 6292706, issued on June 17, 2003, the first day of Kissell's inspection, particularly angered Fann. It alleged a violation of a rollover protection labeling requirement on an excavator. Based upon consultations with the manufacturer and others, Qmax protested that the citation had been issued in error. The conflict was not immediately resolved, and Kissell threatened to red-tag the excavator on a subsequent visit, which would have significantly impaired Qmax's operation. As Fann explained at the hearing, "there are suggestions in here that I became irritated, that is right, I did, and what I thought was good reason." Tr. 415-16; ex. R-19 (451-M). That citation is not at issue in these proceedings, apparently because MSHA eventually agreed with Fann's position. Ex. R-10 (196-M) at 3.

As explained in a January 30, 2004, letter, manpower limitations in the Mesa, Arizona field office dictated that MSHA be "very selective" in providing CAVs and, since Qmax had previously been in the industry for many years, its request was denied. Ex. R-14 (196-M). While the question of whether a CAV should have been provided is not an issue in these cases, the denial of the request appears to have been reasonable. In addition, with one possible exception, it is difficult to perceive how a CAV could have avoided the citations at issue. The other issues, e.g., the alleged failure to fully advise Fann of conference rights, are also irrelevant to the disposition of the particular violations alleged in these cases.

Fortunately, overtly adversarial behavior was not exhibited in the course of the hearing. All parties, representatives and witnesses conducted themselves with a high degree of professionalism throughout the proceedings. It is unnecessary to decide exactly when or how the strained relationship was initiated or escalated, and no attempt will be made to do so. However, it does appear that a more civil and cooperative relationship may have resulted in fewer or less serious enforcement actions and/or a significantly higher chance of resolution short of a decision by an Administrative Law Judge after a three-day hearing. MSHA's policies recognize that enforcement actions can have a disproportionate adverse impact on small operators and, under the circumstances, Fann's reaction is at least somewhat understandable.[5]

Fann and Qmax timely contested the citations and the assessed penalties. The citations are discussed below in the order that they were presented at the hearing.

Citation No. 6292707

Citation No. 6292707 alleges a violation of 30 C.F.R. § 56.4230, which provides:

> (a)(1) Whenever a fire or its effects could impede escape from self-propelled equipment, a fire extinguisher shall be on the equipment.
>
> (2) Whenever a fire or its effects would not impede escape from the equipment but could affect the escape of other persons in the area, a fire extinguisher shall be on the equipment or within 100 feet of the equipment.

The citation specifically alleges a violation of section 56.4230(a)(2). Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A fire extinguisher was not provided on or within 100 feet of the Caterpillar 225-DLC track-hoe (excavator), Unit # EX-10. The track-hoe is used to break rocks

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[5] MSHA's PPM recognizes that inspections of small mines often dictate that "time devoted to accompanying an inspector be subtracted from productive endeavors and may be a financial burden on the operator." It further specifies that "all issues should be addressed during a single inspection so that the number of follow-up inspections for compliance purposes can be reduced to an absolute minimum." PPM, IV, § G-7.

with a hydraulic hammer. No visible oil leaks or fire hazard potentials were observed.

Ex. P-4.

Kissell determined that it was unlikely that the violation would result in an injury resulting in lost work days or restricted duty, that the violation was not significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

The excavator in question operated in the quarry and near the primary crusher. It had a two-piece mobile boom, on which was mounted a hydraulic hammer that was used for breaking large rocks. When not in the quarry, it was parked on the side of the feed ramp to the primary crusher, where it was available to break rocks that were too large to pass through the crusher's grizzly. In order to break such rocks, the excavator was maneuvered so that the arm with the hammer swung out over the feed hopper. Because the operator could not see into the hopper, a person climbed up to the crusher operator's platform and used hand signals to guide the excavator operator to position the hammer on a rock. The crusher operator's platform had a railing around it, and was accessed by ladder from the rear. A piece of conveyor belt was attached to the railing on the side nearest the hopper and the two adjacent sides, to deflect pieces of rock that might be impelled by the hammer. The crusher operator's platform is shown on the left side of photographs introduced by Respondent, in which a portion of the yellow-painted excavator, located on the feed ramp, is also visible. Ex. R-2, R-2A (451-M). Normally, the excavator was operated by the miner who operated the front-end loader that fed the hopper.

The citation, as written, alleges a violation of section 56.4230(a)(2), which concerns the ability of *persons other than the equipment operator* to escape a fire. However, it is apparent that Kissell was more concerned about the excavator operator. His justification for the gravity of the violation, as recorded at the time he decided to issue a citation, reads "persons caught in fire with no extinguisher on mobile equipment could receive lost time from work due to injuries." Ex. P-5. Kissell readily admitted that he wanted to write the citation under subsection (a)(1), because he was more concerned about the excavator operator, but was convinced by "someone" not to do so. Tr. 230-31. He believed that he could have better supported such a violation.

Kissell had difficulty explaining how someone other than the excavator operator might have his ability to escape impeded by a fire on the excavator. The "persons" referenced in his documentation are not identified. He speculated that a laborer or another loader operator might be in the vicinity, but was unable to explain why either of those persons couldn't have simply walked or driven away. Fann explained that, because of space limitations, no loader could use the feed ramp while the excavator was operating, and that no other individual would be in the area. Tr. 431-33. At the hearing, Kissell focused upon a fire impairing the escape of the person on the

crusher operator's platform. However, at the time he wrote the citation, he did not know that a person would be in that position. Tr. 61-62, 222-24. His recollection was also affected by the lengthy passage of time between the issuance of the citation and his testimony, and he testified that he may have "mixed a few of the ideas between each inspection to a certain extent." Tr. 223. Also troubling is an inconsistency in his testimony regarding input from other MSHA officials. He testified on cross-examination that, as to all of the citations issued during the June 17 inspection, including specifically this one, he received "no input from the field office" and that all of the citations were "my decisions and based upon my observations." Tr. 68-69. However, as noted above, there was significant input from the field office, in that "someone" convinced him to base the charge on section 56.4230(a)(2), rather than sub-section (a)(1). Tr. 230-33.

Kissell finally conceded, that "it would be difficult in this case" to conjure up a situation where the ability of a person other than the excavator operator to escape would be impaired by a fire on the excavator. Tr. 230-31. In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of 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, Sec'y 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).

I find that the Secretary has failed to carry her burden of proof on this violation. Specifically, it has not been established by a preponderance the evidence that a fire on the excavator could affect the escape of other persons in the area. In addition, I find that there was a fire extinguisher located within 100 feet of the excavator. Mrs. Fann, who I found highly credible, described the location of a fire extinguisher that was present on the day in question, located within 100 feet of the subject area. Tr. 446-48; ex. R-2, R2-A (451-M). Mr. Fann also testified that that fire extinguisher was present at that location on the day in question. Tr. 433-35. Kissell testified that the fire extinguisher was not present. Tr. 65. However, his testimony was based upon the absence of any notation of it in his field notes. Mrs. Fann was responsible for placement and maintenance of the fire extinguishers and I accept her testimony. Kissell may well have failed to note the presence of the fire extinguisher, which was partially hidden behind a tire.

Citation No. 6292708

Citation No. 6292708 alleges a violation of 30 C.F.R. § 56.12016, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who

installed them or by authorized personnel.

Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The jaw-crusher under feed belt was not locked or tagged out by persons who had been doing repair work on a torn belt on this conveyor. The generator supplying electrical power to this conveyor was running and the main disconnect was in the on position. Persons who were to finish the repair work on this belt were exposed to the equipment being inadvertently started while working on the conveyor belt. Persons could be entangled in the equipment causing permanently disabling injuries.

Ex. P-7.

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that two employees were affected, and that the operator's negligence was low. A civil penalty in the amount of $75.00 has been proposed for this violation.

The Violation

Two miners were engaged in repairing tears in the conveyor belt. Despite the presence of suitable devices, they had failed to lock-out and tag-out the electrical controls to the conveyor while they performed the work, and had not placed any warning notices at the power switch. They explained that they felt secure and safe, apparently because they were the only individuals present on the site that were authorized to operate controls starting and stopping equipment, such as the conveyor. Tr. 90, 483. It is clear that the regulation was violated.[6]

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).

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[6] Respondent appears to argue that the circumstances amount to sufficient "other measures" having been taken. However, the regulation, when read in its entirety, makes clear that use of physical devices that would prevent energizing of the equipment is required.

The Commission has explained that:

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

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

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

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *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 2007 (Dec. 1987).

Because electrical power to the conveyor was not positively disconnected, the conveyor could have been started by activation of a switch located in the plant's control room. There was no clear view of the work area from the control room. There were also other persons on the site who could have entered the unlocked control room and inadvertently activated the switch. Tr. 8, 83-84, 90-91. Based upon those facts, Kissell concluded that it was reasonably likely that the conveyor could have been started while the men were working on it. As to the mechanism and severity of any possible injury, he believed that rivets that had been used to repair the belt, some of which had not yet been cut off, could have caught the clothing of one of the men and dragged him to the wiper blade of the self-cleaning belt, resulting in serious injury. Tr. 86. Although he

also thought it possible that a person could get pulled over the self-cleaner blade to the tail pulley and suffer a fatal injury, he did not believe that was reasonably likely to happen. Tr. 75-76, 86-87.

Qmax contends that there was no realistic possibility that the conveyor would be started while the men were working on it. The men doing the work were the only persons on the mine site that were authorized to operate the equipment. Tr. 488. While there were other persons on the site, i.e., a laborer and two loader operators, it was unlikely that they would enter the control trailer, which was posted with appropriate signage, and even more unlikely that they would activate any equipment because, they were not authorized to do so. Tr. 101; ex. R-10(B) (451-M). Moreover, the conveyor switch was not mounted on the control panel. It was located in the Northwest corner of the control room, in a location that was hard to access. Tr. 93, 485.

A failure to lock-out and tag-out electrically powered equipment while work is being performed is normally a very serious violation. Mistaken, or inadvertent activation of the equipment can often result in serious, even fatal, injuries. On the particular facts of this case, however, I find that the Secretary has failed to carry her burden of proving that the violation was S&S. The violative condition was of relatively short duration. Because of the limited number of people who could have entered the control room and the relative inaccessibility of the switch, the risk of inadvertent start-up was small, and the possibility that a serious injury would have occurred if the equipment were started, was also small.

The citation was issued at 8:50 a.m., and the work on the belt had been partially completed. There is limited evidence in the record as to when the work had been started and how long it would have continued. However, from the facts available, it appears that it most likely started at the beginning of the work day and would have been completed that morning. Consequently, the condition would have existed for no more than a few hours, during which time the men would have periodically stopped working on the belt, and re-positioned it so that another tear could be repaired.[7] While it is possible that other persons working at the site could have entered the control room during that time, there is virtually no evidence of the likelihood of that happening, and it remains little more than a theoretical possibility. It appears that there were only two or three other persons who may have been working, and there is limited evidence as to their locations and assignments. None of them were authorized to operate the equipment, and it is unlikely that they would have volitionally attempted to do so. When combined with the relative inaccessibility of the switch, making the possibility of inadvertent contact unlikely, the possibility that the conveyor would have been started while the men were working on it was highly remote.

Also remote was the possibility that either of the men would have suffered a serious injury if the conveyor had been started while they were working on the belt. The specific work site is depicted in photographs taken by Kissell. Ex. P-8, P-9. The men were working under the belt,

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[7] The men were repairing several tears, and had to re-position the belt to move the tears to a location where they could be worked on. The need to periodically re-position the belt may have been a consideration in their decision not to lock-out and tag-out the equipment.

which, if started, would have moved from left to right as seen in the photographs. That would, no doubt, have been a startling occurrence. However, it does not pose an obvious threat of serious injury. Kissell postulated that un-cut rivets protruding about one inch from the belt could have snagged one of the men's clothing and dragged him into the self-cleaning wiper blade. Like his analysis of whether the conveyor could have been started, however, his injury assessment appears to be focused on a theoretical possibility and did not progress to any realistic assessment of the likelihood of a serious injury occurring. The process by which repairs were being made to the belt was not explained, other than the fact that rivets were being used. The positions that the men would have been in at various points in the process, the type of clothing that they were wearing, whether or how often they would have been positioned such that an uncut rivet could have caught that clothing if the belt had moved, are all questions left unanswered on the record.

On consideration of all of these factors, I find that the Secretary has not proven by a preponderance of the evidence that an injury was reasonably likely to occur because of the hazard contributed to, or that any injury would have been of a reasonably serious nature. The violation was not S&S. I agree that the operator's negligence was low and that two persons were affected by the violation.

Citation No. 6292709

Citation No. 6292709 alleges a violation of 30 C.F.R. § 56.14132(a), which provides: "Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The back-up alarm on the International S-1900 welding truck, Unit # TM-08, was not maintained in functional condition. Employees in the mine plant are exposed to being struck by this truck when it is backing up. Mobile equipment and foot traffic work in the same areas that this truck is used daily. The truck is used as needed throughout the mine for repair work.

Ex. P-14.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $91.00 has been proposed for this violation.

The Violation – S&S

Respondent admitted that the welding truck in question was equipped with a back-up alarm and that the alarm did not work when tested by Kissell. Tr. 494; ex. P-2, P-3. Therefore, the specific portion of the regulation cited in the citation was violated. The truck was used

occasionally throughout the plant on an as-needed basis. The alarm had been working when last checked, but a wire had become disconnected shortly before the inspection. Tr. 492. In Fann's experience, noise levels near the plant were typically so high that audible alarms were hard to hear, and men tended to get used to them, such that they were of marginal effectiveness. Tr. 493. For that reason, a written policy was in effect at Qmax requiring that a spotter or observer be present to assure that the intended backward path of "mechanic or service trucks" was clear of persons and objects. Tr. 493, 496; ex. R-6. At the time of the violation, two men were working from the truck, and one was available to perform the observer's duties. Qmax's policy was consistent with the standard in question, which provides that a back-up alarm is not required when there is an "observer to signal when it is safe to back up." 30 C.F.R. § 56.14132(b)(1)(iv).[8]

There is no evidence that the miners who were using the truck were unaware of Qmax's policy, or otherwise not complying or intending to comply with it. While the failure to maintain the back-up alarm in functional condition was a violation of the regulation, the violation was purely technical. Use of an observer would be, as the regulation contemplates, at least as effective as an audible back-up alarm. Consequently, the malfunctioning alarm did not constitute a hazard, or present any risk of injury to miners. The violation was not S&S. I agree that the operator's negligence was low and that one person was affected by the violation.

Citation No. 6292710

Citation No. 6292710 alleges a violation of 30 C.F.R. § 56.14107(a), which provides: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The Svedala under-cone feed belt head pulley shaft was not guarded to prevent contact with the moving machine parts. The exposed shaft opening measured 4.5 inches wide, for the entire diameter of the pulley. The exposed shaft measured 61 inches above ground level. Persons do clean-up in this area 1-2 times weekly. Persons are exposed to entanglement injuries.

Ex. P-16.

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[8] (b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have –
(i) An automatic reverse-activated signal alarm;
. . . .
. . . ; or
(iv) An observer to signal when it is safe to back up.

30 C.F.R. § 56.14132(b)

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one employee was affected and that the operator's negligence was moderate. Qmax protested the issuance of this citation at an MSHA health and safety conference. As a result, another MSHA official modified the citation on September 30, 2003, to allege that an injury was unlikely and that the violation was not S&S. A civil penalty in the amount of $106.00 had been proposed for this violation on August 7, 2003. The assessment was not amended to reflect the modification of the citation.

The Violation

The cited condition is depicted in a series of photographs. Ex. P-17 thru P-20. The first photo shows the right side of the head pulley. Ex. P-17. The pinch point, where the conveyor belt contacts the drum of the pulley, is protected by the framing of the conveyor and an approximately 6-inch by 18-inch steel plate that appears to be a factory installed guard. The area that was the focus of the violation, according to Kissell, was the approximately 2.5-inch diameter shaft of the pulley that extends about 4.5 inches from a bearing mounted on the conveyor frame to the drum of the pulley. That shaft would spin at a high rate of speed, as would the drum of the pulley, which was also unguarded. Kissell's concern was that workers, who cleaned the area 1-2 times per week, might become entangled in the rotating shaft.

The modification to the citation cites the reason for changing the violation to non-S&S as "Person would have to reach up into the shaft and head pulley during operation, and only if maintenance was done during operation. Practice is to conduct maintenance when equipment is locked down." Ex. P-16. The cited reason for changing the probability of injury to "Unlikely" was "Equipment is locked out prior to conducting maintenance at the head pulley. In addition, person would have to reach up into this pulley and shaft during operation."

The location of the condition relative to the surrounding area is depicted in two photographs. Ex. P-19, P-20. The shaft was 61 inches above ground level. However, it was not directly accessible, because the tail pulley of another conveyor was located underneath the head pulley, and the guard for that pulley extended beyond the end of the bearing of the head pulley's shaft. Ex. P-19, P-20. In order to reach the shaft, a person would have had to stand against the lower guard and reach up over it to the pulley shaft. While the distance from any potential walking or working surface to the shaft had both vertical and horizontal components, Kissell measured only the vertical component. Tr. 145.

In construing an analogous standard[9] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

I find that under the standard, additional guarding was not required for the cited condition because there was no possibility of injury. While miners did clean around the area one to two times per week, they would have been located down the slope shown in the left-foreground of exhibit P-19, below the level Kissell used for his measurement, and some distance away from it. Tr. 775-76. They would have used shovels to move loose material away from the conveyor, and would have been unable to reach the head pulley's shaft, even if they had tried. Kissell believed that miners worked in the area directly adjacent to the guard, where he took his measurement. Tr. 145. He also took particular note of footprints in the area, as shown in the photographs. Tr. 132; ex. P-19, P-20. However, the footprints may well have been made by maintenance workers greasing the pulley bearing before operations began. Tr. 518. In addition, Kissell himself and/or his accompanying trainee may have walked in the area before the photo was taken. Tr. 133. Both Mr. Fann and Mrs. Fann testified that Kissell's impression that miners would stand in close proximity to the belt and clean the area by shoveling the spillage onto the belt was erroneous. Tr. 520, 775-76. They explained that spilled material was "never" shoveled onto the belt because it would be unsafe and would contaminate the end product. Tr. 520-22, 775-76. Kissell testified that his contrary understanding was based upon a conversation with one of Qmax's employees. Tr. 724-25. However, neither the conversation nor the information is reflected in his field notes or the citation documentation. Ex. R-4 (196-M); P-21. As previously noted, Kissell's recollection of events that had occurred over two years prior to his testimony was understandably not crystal clear. I accept Respondent's description of the process, and find that

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[9] 30 C.F.R. § 77.400

(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

there was no walking or working surface within seven feet of the pulley shaft.[10] Even if miners occasionally worked closer to the conveyors and guards, I find that because of its nature, location, height, and the interference presented by the guard for the tail pulley, there was no risk of inadvertent contact, and that the pulley shaft did not present a hazard.[11]

The August 20-21, 2003, Hazard Complaint Inspection

On August 18, 2003, MSHA received a complaint alleging unsafe work practices and conditions, and violations of training and accident reporting regulations at Qmax's plant. Ex. R-7 (103-M) at 1. The complainant was Charles Manke, a miner who had recently been fired by James Fann for taking an unannounced two-week vacation. The complaint focused on three incidents, one of which did not lead to any enforcement action. On August 20 and 21, 2003, Kissell visited Qmax's plant to conduct an inspection regarding the complaint. He issued seven citations alleging violations related to two of the incidents. One had occurred on July 30 and involved Manke, and the second had occurred on August 4 and involved an injury to Mrs. Fann.

The July 30 Incident

On July 30, 2003, Manke was standing on a conveyor belt and jumped off as it was started. He suffered no reportable injury and did not seek medical attention. The conveyor in question was referred to as SP04A. Ex. P-6. It transported material being discharged from the "El-Jay Screen," located near the center of the plant. Occasionally, material falling onto the belt would cause it to stick. Tr. 558-60. Qmax's miners had developed an escalating set of responses to that problem. Initially, the belt was struck with a piece of wood or another available implement. If that didn't work, a miner stepped up onto the belt and jumped up and down. Tr. 275, 558-60.

On July 30, James Fann was about to start the conveyor. He asked Manke to watch the belt to make sure it started. There was considerable noise in the area, so Fann mouthed the words to Manke and motioned with his hand and fingers to convey his message, and Manke nodded indicating that he understood what he was being asked to do. Tr. 567. Fann then walked over to

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[10] In addition to cleaning, maintenance was performed on the pulley, presumably greasing of the shaft bearing. However, Kissell did not identify exposure of maintenance workers as a reason for citing the condition or evaluating its gravity, most likely because, as noted in the modification, maintenance was performed while the equipment was not operating.

[11] Respondent also claimed lack of fair notice of the Secretary's interpretation that additional guarding was required. While the Secretary argues that the notice defense was not raised, I find that it was sufficiently raised by Respondent's repeated protests of denial of its CAV request, and in its responses to discovery. However, Respondent's inference that the equipment must have been inspected by MSHA at other facilities, while it was in the same configuration, is too speculative to establish a fair notice defense to this citation.

the control trailer, and started the conveyor. In the interim, Manke mounted the conveyor. As it started, he jumped off and scraped his right leg and knee.

Kissell interviewed Manke, although not at the Qmax plant, and concluded that Manke had been about 12 feet from the lower end of the belt and had jumped or fallen a distance of about 56 inches. On August 21, Kissell issued three citations with respect to the incident, charging Qmax with failure to sound a warning before starting the conveyor, failure to provide safe access to the position where the jumping occurred, and Manke's failure to wear fall protection.

Citation No. 6292733

Citation No. 6292733 alleges a violation of 30 C.F.R. § 56.15005, which provides, in pertinent part: "Safety belts and lines shall be worn when persons work where there is danger of falling." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> During a hazard complaint inspection, the company confirmed an employee had climbed onto a conveyor belt where a fall hazard existed without wearing fall protection. A fall of 56 inches existed at the time of the inspection. The owner did not direct the employee to climb on the belt. Employees had climbed on the conveyor belt to use their weight to break loose mud materials which would cause the belt to seize and not turn when started.

Ex. P-36.

Kissell determined that it was reasonably likely that the violation would result in an injury resulting in lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $72.00 has been proposed for this violation.

The Violation

There is no dispute that Manke was on the belt and jumped off as it was started. The major controversy is over his position on the belt when the incident occurred. Kissell concluded, from his interview with Manke three weeks after the incident, that he had been approximately 12 feet from the tail pulley, i.e., about half-way up the 24-foot conveyor, at which point he measured its height at 56 inches. Qmax contends that Manke was much closer to the tail pulley, and no more than two to three feet above the ground surface at the time. Its position is based upon the practice that the miners followed in breaking the belt loose, and Mrs. Fann's interview of Manke the day after the incident.

Unbeknownst to Kissell, Manke had reported the incident. Qmax's daily time cards provide space for recording accidents. Manke reported on his time card for July 30, 2003, that he

had experienced a personal accident, which he described as "breaking belt loose Jim started belt and I got throw[n] off – scrape[d] right leg and knee." Ex. R-9 (103-M). Elaine Fann (then Moffitt) noted the report and investigated it the next day. She spoke to James Fann and Manke, and prepared an "Accident/Incident Investigation Report."[12] Ex. R-8 (103-M). Her description of the incident noted that when the belt started "Manke jumped off to the ground, approx. 3ft." Her comments noted that Manke didn't want to go to a doctor and that: "He said he climbed on conveyor to look at belt but didn't get off before warning buzzer because he wanted to make sure belt was [moving]." Ex. R-8 (103-M). That note is followed by a question mark, because Manke's explanation of why he was on the belt did not make sense to her. Tr. 577; ex. R-8 (103-M).

The place where the belt became stuck was at its lower end, near the tail pulley, where material dropped onto it. Tr. 558, 593; ex. P-37. There was no reason for Manke or any other miner intent on freeing the belt to have gone more than a few feet from the tail pulley. Tr. 586.

The incident report is a critical piece of evidence in resolving the dispute about where Manke was when the belt started. It was prepared in the normal course of business by Elaine Fann, Qmax's safety officer, whose interest was assuring that Manke was healthy and ascertaining what had occurred so that future incidents could be avoided. There was no citation pending – no MSHA investigation – Manke had not been discharged – and no complaint had been filed with MSHA. Moreover, Mrs. Fann's investigation occurred less than 24 hours after, and at the scene of, the incident. Mrs. Fann went with Manke to the conveyor, and he pointed out to her where he was when the incident occurred. Tr. 575. It was at a point about six feet from the tail pulley, which she estimated to have been about three feet above the ground. Tr. 575. The comment about the buzzer sound was from Manke. Tr. 576.

Kissell's assessment of Manke's position is unreliable for a number of reasons. It was based upon an interview that did not occur until three weeks after the incident, and was not held at the mine site where the equipment was located. The complaint and interview followed Manke's termination.[13] Manke's verbal description left Kissell with conflicting information, i.e., that Manke was about halfway up the belt and at a height of six and one-half feet. Tr. 274. Kissell's

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[12] Because Manke had indicated that he hadn't lost time from work or gone to a doctor, Kissell knew that the incident was not reportable as an injury under MSHA regulations. Tr. 335-45. Consequently, he did not ask if there was a report of the incident, and did not review the report during his investigation. Tr. 335-45. He was uncertain as to whether he had reviewed Manke's time card, although there is nothing in his notes to indicate that he had. Tr. 344-45; ex. R-7 (103-M).

[13] Kissell stated that the fact that Manke had been discharged had "no effect" on his evaluation of what Manke told him, but then added that he "considered the possibility of a disgruntled employee and tried to keep in mind that some of the allegations could be just made because of anger and disappointment." Tr. 363-64.

measurements confirmed that, even at halfway up the belt, the height at the time of the inspection was 56 inches, and it may have been approximately one foot lower when the incident occurred.[14]

Kissell claimed to have confirmed Manke's approximate position in an interview with another miner. Tr. 290-91. However, there is no indication in any of his discussions with Fann or in Fann's testimony that anyone else was present or observed the incident. There is also nothing in those parts of his field notes that were introduced into evidence to confirm that such an interview occurred.[15] Ex. R-7 (103-M). In any event, whether or not he was able to confirm the somewhat vague description of "about half way up the belt" with another employee, it would do little to undermine the on-the-scene assessment made by Mrs. Fann.[16] In addition, other miners present during Kissell's discussion of the use of fall protection while on the conveyor questioned how a four-foot safety line would have helped "as the conveyor that Manke was on was only 2 to 3 foot off the ground at that point."[17] Ex. R-14 (103-M); tr. 624.

I find, as Manke explained to Mrs. Fann, that he stepped up onto the belt, in order to "unstick it." Using the procedure that had been developed at the mine, he was positioned at the lower end of the belt, near the tail pulley. There was no reason for Manke to have gone more than a few feet from the tail pulley, and I find that he did not do so. At the time of the July 30 incident, he was no more than three feet above the ground. His post-discharge claims to have gone up to a

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[14] Kissell noted in the body of the citation that: "A fall of 56 inches existed *at the time of the inspection*." The measurement is qualified because, as he noted in his field notes, the area had been "cleaned down approx. [one] foot." Ex. R-7 (103-M) at 15. At the time of the July 30 incident, the distance from the top-midpoint of the conveyor to the uncleaned ground surface would have been about 44 inches.

[15] There is a reference in Citation No. 6292737 to "another" person being in the area. That person has never been identified, and his location at the time is unknown. It is apparent that, whoever that person was, he played no part in the incident.

[16] The accuracy of Mrs. Fann's estimate is supported by a sketch depicting the slope of the 24-foot long conveyor, with its tail pulley at a height of 22 inches and its head pulley at a height of seven feet, nine inches. Ex. R-20 (103-M). While the conveyor had been relocated before those measurements were taken, it was in essentially the same configuration, and was blocked and supported, as it was on July 30. Tr. 587-89, 596-97, 632-33. The sketch shows that at 12 feet from the tail pulley, the height was 57 inches, nearly identical to Kissell's measurement. At six feet or less from the tail pulley, the height would have been no more than 37.5 inches, and with one foot of spilled material, it would have been only about two feet.

[17] There was conflicting testimony about what Mr. Fann saw from the control trailer. It was focused upon whether he saw, or could see, Manke's feet when he was on the belt, while in the air, or after he had landed. Tr. 283, 285-86, 292, 327, 580, 585-86. The uncertainties associated with this evidence render it unhelpful in determining Manke's position.

height of six and one-half feet, which would have been close to the head pulley, were obviously prompted by a desire to retaliate for his discharge. The failure to wear fall protection under such circumstances is not a violation of the regulation. The Secretary has failed to carry her burden of proof on this allegation.

Citation No. 6292734

Citation No. 6292734 alleges a violation of 30 C.F.R. § 56.11001, which provides: "Safe means of access shall be provided and maintained to all working places." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A means of safe access was not provided to the SPo4A conveyor belt. Persons are exposed to slip and fall hazards when they climb over the frame to gain access to the elevated conveyor belt. Persons perform this task as necessary during the shift.

Ex. P-40.

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $106.00 has been proposed for this violation.

The Violation - S&S

This citation is related to the previous one, in that it is the practice of "climbing" or stepping up onto the SP04A belt and moving to a location to jump up and down to free the belt that gave rise to the alleged violation. This practice made the top of the belt a work place, according to Kissell. Tr. 322. As noted in a photograph of the conveyor, since there was "no ladder or stairs, or handrails provided to access the conveyor or walk on the belt," he determined that there was a hazard presented to miners who accessed that area. Ex. P-42.

Respondent's defense is that ladders were readily accessible to miners at Qmax and that the tail pulley end of the conveyor was only about two feet off the ground, allowing miners to simply step up onto the conveyor. As evidenced by photographs introduced by Respondent, there were several ladders available for use by miners at Qmax. Tr. 630; ex. R-4(e) and (f) (103-M). Kissell acknowledged that there were ladders present, but noted that ladders were not immediately adjacent to the belt. Tr. 323-24. Mr. Fann testified that miners simply stepped up onto the belt to access the area, and that Manke, who had had significant medical problems, had no trouble getting onto the conveyor.[18] Tr. 594.

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[18] Fann stated that Manke had undergone two knee replacements and major back surgery, and did not have full movement. Tr. 594.

It appears that, in assessing the safe access issue, Kissell was operating on the erroneous premise that the "work place" in question was the top of the belt about half way between the head and tail pulleys, a height of close to five feet above the ground. In fact, as decided above, the work place was close to the tail pulley, at a height of two to three feet above the ground. Kissell was concerned that a miner could fall while climbing onto the belt, and could suffer permanent injury "because they could fall from a distance depending where they chose to climb on." Tr. 324.

I find that ladders were available for miners to use, but that there was no requirement that they be used, and they were not used by miners accessing the belt to "unstick it." While miners simply stepped up onto the belt at the tail pulley end, they had to step first onto a relatively narrow part of the conveyor frame that typically had some spilled material on it, as shown in a photograph. Ex. P-42. They also had to negotiate the spillage guard plates, approximately one foot in height, that were erected around the bottom of the conveyor. A slip and fall hazard was presented by these obstacles, and a safe means of access was not provided to that work place. However, the heights involved were considerably lower than Kissell had believed. There would have been no reason for any miner to have climbed onto the conveyor at the 56-inch height that Kissell mistakenly believed the work place to be. While it might have been reasonably likely for an injury to occur, because of the lower height involved, it was not reasonably likely that any injury would have been reasonably serious. Consequently, the violation was not significant and substantial. I agree with the assessment of the operator's negligence as moderate.

Citation No. 6292737

Citation No. 6292737 alleges a violation of 30 C.F.R. § 56.14201(b), which provides:

> When the entire length of a conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The audible warning system for conveyor belt start-up was not sounded to warn persons of a conveyor belt start-up. One person was on the conveyor belt and another in the area when the conveyor was started. The entire length of the conveyor belt was not in sight from the start switch location. Persons unaware of equipment starting are exposed to serious injuries.

Ex. P-44.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $91.00 has been proposed for

this violation.

The Violation - S&S

There is no dispute that the entire length of the SP04A conveyor belt was not visible from the starting switch location in the control trailer. Photographs of the scene show that only a few feet of the conveyor near the tail pulley could be seen from the window in the control trailer. In one photograph, a portion of the window is visible behind a ladder in the center of the picture. Ex. P-42. There is also no dispute that Mr. Fann advised Manke, both verbally and through hand signals, that he should watch the belt, and that Fann proceeded directly to the control trailer to start the conveyor. [19] There is a question as to whether Manke understood Fann's communication, and whether it occurred within 30 seconds of his starting the belt. There is also a question as to whether Fann activated a warning buzzer prior to starting the conveyor.

When questioned by Kissell three weeks after the incident, and after having been fired, Manke reported that he did not hear Fann's verbal instruction and that he interpreted the hand signals as instructions to climb on the belt to unstick it. Tr. 349. He also said that he could not recall hearing the warning buzzer prior to the conveyer being started. However, Manke had reported to Mrs. Fann, the day after the incident, that he understood that he was supposed to watch the belt, and also mentioned the sounding of a warning buzzer. Tr. 574-75; ex. R-8 (103-M). He decided to climb on the belt to try and unstick it, believing that it would only take "just a second." Tr. 574-75. I find that Manke was effectively advised, both visibly and audibly, that Mr. Fann was going to start the conveyor, and that he made a personal decision to try and unstick it before the conveyor was started.

The Secretary's position appears to be that if Fann's warnings were effective, they did not occur within 30 seconds of his starting the conveyor, and that the functional and available audible warning buzzer system was not activated prior to starting the conveyor. There was considerable dispute at the hearing about the amount of time that elapsed between Fann's verbal and visual warnings and when he started the conveyor. Kissell testified that a "small test" was conducted and it took 25 to 29 seconds to move from where Fann gave the warnings to where he could activate the conveyor, "if he was moving fairly fast." Tr. 347. He also testified that the test showed that it could have been done in "approximately 28 seconds," but that a person "would have had to nearly been running." Tr. 726-27. Fann testified that he had demonstrated to Kissell that he, at age 72, could cover the distance in less than 30 seconds. Tr. 739-40. He also testified that there was no doubt in his mind that he covered the distance and activated the conveyor within 30 seconds, and opined that "If somebody is going to watch us any closer than that . . . then I need to get out of the business." Tr. 569.

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[19] Even the unknown third person, *see* n. 15, *supra*, confirmed that verbal and visual signals were given by Mr. Fann. Tr. 359.

Kissell's citation documentation for this alleged violation includes the following language:

> The owner directed the employee to watch the conveyor belt, not climb on it, and told the employee that he was going to start the belt and then within approx. 10-15 seconds, started the belt. Employee was on the belt at the time and did not hear the warning horns.

Ex. R-7 (103-M) at 40. The Secretary had listed Kissell's citation documentation as an exhibit, but did not attempt to introduce it into evidence. Qmax introduced the document as part of Kissell's field notes.

Upon consideration of the above, I find that Mr. Fann provided a visual and audible warning that the conveyor was going to start within 30 seconds of its being started, effectively complying with the regulation.

Although it is not necessary to reach the issue, I also find that the warning buzzer system was sounded before the belt was started. This is a much closer question. At one point Kissell testified that Fann said he did not sound the buzzer. Tr. 359. However, he initially stated that Fann "hadn't said" that he sounded the buzzer. Tr. 349. His field notes reflect that the latter statement is more accurate. In response to Kissell's inquiry about the buzzer, Fann replied that he had made hand signals to Manke that he was going to start the conveyor. Ex. R-7 at 26. Kissell apparently did not follow-up on this indirect reply. Fann testified that he did not recall whether or not he sounded the buzzer, because "it's a natural thing." Tr. 570, 607. In contending that the buzzer was sounded, Qmax places great significance on the notation in the nearly contemporaneous incident report which, according to Mrs. Fann, reflects that Manke mentioned that a warning buzzer sounded. Tr. 576; ex. R- 8 (103-M). Kissell, as previously noted, was unaware of the incident report until the time of the hearing.

On balance, I find that the warning buzzer was sounded and that the Secretary failed to carry her burden of proving otherwise. It is understandable that witnesses would not be able to recall whether a routine practice, i.e., sounding the warning buzzer, actually occurred on a given occasion some three weeks in the past. This is especially so when it was not a focal point of any inquiry, because the persons involved understood that the conveyor was about to be started. I accept Mrs. Fann's testimony that the mention of the warning buzzer came from Manke when she interviewed him at the scene the morning after the incident. This is a strong indication that Mr. Fann followed his routine practice of sounding the buzzer prior to starting the conveyor. The Secretary's evidence that those present did not later recall hearing a buzzer, when considered in light of the Manke statement, is insufficient to establish by a preponderance of the evidence that an audible warning was not sounded.

The August 4, 2003, incident

On August 4, 2003, Elaine Fann was assisting at the quarry because of the absence of the subject complaining miner. She was positioned on the crusher operator's platform and was guiding James Fann as he operated the excavator and positioned its hydraulic hammer to break rocks in the crusher's grizzly. Mrs. Fann had her hands on the railing of the platform. The hammer slipped off a rock and moved suddenly over to the platform crushing Mrs. Fann's left hand against the railing. In the course of investigating this incident Kissell issued four citations.

Citation No. 6292735

Citation No. 6292735 alleges a violation of 30 C.F.R. § 50.20(a), which requires that operators "mail completed [accident report] forms to MSHA within ten working days after an accident occurs. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to submit the MSHA 7000-1 Accident, Injury Report on time. The accident occurred on August 4th, 2003. The 7000-1 report was completed on August 19, 2003, one day late, and then mailed on August 20th, 2003, two days late.

Ex. P-22.

Kissell determined that there was no possibility of injury attributable to the violation, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

Mrs. Fann was hospitalized for five days, and multiple surgeries were eventually performed on her hand. Ex. R-3, R-4 (76-M). Because of a risk of infection, she was advised not to perform work. Mrs. Fann served as Qmax's administrative officer. She handled payroll and the bulk of office paperwork. The office consisted of a room in a ranch house, which was not a particularly sanitary environment. Acting on the advice of her doctor, she did not go to the office for several days. Tr. 525-26. She finally did go in, to handle payroll and prepare and file the required MSHA report of injury, which she deposited in the mail on August 19, the eleventh working day after the injury. Respondent readily admitted that the report was not mailed timely. Tr. 525; ex. P-29, P-30.

Mrs. Fann's testimony explains why the report was not timely submitted, but it does not raise a legal defense to the citation. Qmax, through its president and chief operating officer, James Fann, was obligated to comply with the regulation. It is understandable that Elaine Fann

was not able to timely prepare and submit the report. However, James Fann should have been aware of the requirement and obtained necessary information and documentation from Elaine Fann, MSHA, the regulations, or any other source available to him, and complied with the injury reporting requirement within the two-week deadline. His explanation that he wouldn't have known where to find a copy of the form in Qmax's files is unavailing. Tr. 529.

I find that the regulation was violated, as alleged, and concur with Kissell's evaluation of the gravity and operator's negligence.

Citation No. 6292736

Citation No. 6292736 alleges a violation of 30 C.F.R. § 46.9(a), which requires that operators "record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each miner has received training required under this part." Subparagraph (b) describes the requirements of the certification, and subparagraph (c) provides that "new task training" shall be recorded and certified upon completion. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to record and certify that each miner had received the required training.

Ex. P-24.

Kissell determined that it was unlikely that the violation would result in an injury resulting in lost work days or restricted duty, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

This citation, and the one discussed immediately hereafter, No. 6292738, are related and there is some overlap in Kissell's citation documentation. Tr. 177. Citation No. 6292736 addresses Qmax's failure to document training given to Mrs. Fann. Kissell's understanding of Mrs. Fann's responsibilities when he conducted the June 17 inspection was that she was the administrative officer, who performed office duties and occasionally made deliveries to the mine. As such, she was not working as a miner and was not required to have been trained as a miner. Tr. 178-79. In fact, Mrs. Fann was an experienced miner, and had attained that status prior to the effective date of the training regulations. Tr. 532. As a result of the complaint investigation, Kissell became aware that, at the time of her injury, Mrs. Fann had been performing duties as a miner, including guiding the excavator operator from the crusher operator's platform. James Fann had given her new task training on operation of the crusher on the morning of the accident. Tr. 533. However, that training had not been recorded and certified, as required by section 46.9(a) and (c)(3). Tr. 533. Qmax admitted that it did not have documentation for Mrs. Fann's training at

the time of the August 20 -21 inspection. Ex. P-29, P-30. Mrs. Fann explained that the training she had received had not been recorded because she had been injured. Tr. 533.

Although admitting that the documentation did not exist, Qmax raises several arguments in its brief in defense of this citation. It argues that the citation is ambiguous, in that it does not specifically identify the training records at issue. However, the records in question must have been sufficiently identified by Kissell, because he terminated the citation upon his return to the mine on August 25 and 26. Ex. P-24. Qmax also argues that certification of new task training is not required upon completion, citing 30 C.F.R. § 46.9(d)(3). However, that provision applies to ensuring that records are certified and that a copy is provided to the miner. Section 46.9(c)(3) requires that a record of new task training be made upon completion of the training. In addition, Qmax contends that the training had not been completed. However, it apparently has not advanced this contention previously. The regulation requires that new task training be completed before the miner performs the task, and it has not been disputed that Mrs. Fann had been trained in the new task she was performing at the time of her injury. 30 C.F.R. § 46.7(a).

I find that the regulation was violated, as alleged. Kissell testified that the citation mistakenly noted that the probability of an injury occurring was "Unlikely" that a "Lost Workdays" injury could result from the violation. In fact, as noted on his citation documentation, there was no likelihood of injury created by the violation. Tr. 183; ex. P-25. I agree with his assessment of gravity and operator negligence.

Citation No. 6292738

Citation No. 6292738 alleges a violation of 30 C.F.R. § 46.9(h), which requires, with exceptions not pertinent here, that operators maintain copies of training certificates and training records for each currently employed miner. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to maintain records of training for two miners at the mine. Training had been done on 10/29/2002.

Ex. P-26.

Kissell determined that it was unlikely that the violation would result in an injury, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

As evidenced by the citation documentation for Citation No. 6292736, the records in question were for annual refresher training of James Fann and Arillio Soto that had been

administered on October 29, 2002. Ex. P-25. Kissell had actually reviewed those records during the June inspection, but requested that they again be produced during the August hazard complaint inspection. Tr. 187, 536. At the time, he knew that the training had been done, and that Qmax had recorded and certified it, as required by the regulation. Tr. 187, 537. However, the records had been moved, Elaine Fann was unable to locate them, and they were not produced at the time of the request. Tr. 184, 536. She did locate them shortly after Kissell departed, and was prepared to provide them if he returned on August 22. Tr. 536; ex. R-7 (76-M). However, Kissell did not return until August 25, at which time the records were produced and the citation was terminated. Ex. P-26.

There is no dispute that Qmax had maintained the required records. The cited portion of the regulation, 30 C.F.R. § 46.9(h), requires only that the records be maintained. The preceding subsection, 46.9(g), provides that "If training certificates are not maintained at the mine, you must be able to provide the certificates upon request by us, miners, or their representatives." Kissell cited an MSHA policy and procedure letter that apparently provided compliance guidance, which indicated that the records should be produced within 24 hours of a request. Tr. 188-89. He further testified that he allowed "more than one day" for the records to be produced, but they were not. Tr. 189. Qmax maintains that the records were not requested until August 21, and that they were available later that day and the following day. Ex. P-29, P-30.

I find that the Secretary has failed to carry her burden of proof on this allegation. The cited portion of the regulation requires only that the records be maintained, and it is clear that they had been maintained. Moreover, Kissell knew that the records had been maintained because he had seen them two months earlier. There is no specific requirement that the records be kept at the mine site, or that they be produced within a specific time after a request is made. MSHA's guidance letter is not a binding regulation. In any event, I also find that the specific records in question were not requested until August 21. Kissell's field notes indicate that on August 20 he called Mrs. Fann and made arrangements to meet with her on August 21 and review records. Ex. R-7 (103-M) at 18. I accept Mrs. Fann's testimony that the specific records were not requested until August 21, were located that day shortly after Kissell left, and were available at that time and thereafter. Tr. 536.

Citation No. 6292739

Citation No. 6292739 alleges a violation of 30 C.F.R. § 56.11012, which provides: "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> An approx. 20 inch wide opening at the top of the elevated jaw crusher operator platform was not barricaded to prevent persons from falling. Persons are exposed to a fall hazard of approx. 16 feet above ground level. Persons access the jaw

crusher operator platform 2-3 times daily to do work.

Ex. P-28.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $133.00 has been proposed for this violation.

The Violation

The crusher operator's platform is rectangular, approximately four by six feet, and is accessed by a fixed ladder that extends down approximately nine feet to the base of the equipment. The platform is surrounded by a railing, and there is a twenty-inch-wide opening in the railing where the ladder is located. The platform, ladder and opening in the railing are depicted in photographs taken by Kissell. Ex. P-31, P-32, P-33, P-34. The distance from the platform to the ground is 16 feet. Ex. P-32. Kissell did not cite the condition during his June 17 inspection because it was his understanding at that time that the crusher operator's platform was accessed only temporarily to activate the switch providing power to the crusher. Tr. 200. On August 21, however, he became aware that a miner accessed the platform two or three times daily to guide the excavator operator while rocks were broken on the grizzly. Tr. 201-09. Mrs. Fann had been injured while performing that function. He determined that a miner engaged in that activity could fall through the unprotected opening while attempting to avoid the rock breaking device being maneuvered by the excavator operator, or that a miner might get "knocked through" the opening by the excavator's boom. Tr. 193. Kissell determined that a person falling from the platform would land on the base of the crusher, or fall all the way to the ground, and could sustain fatal injuries.

Respondent's defense to this citation is based upon lack of fair notice and conflict with other safety regulations. Tr. 550-51. However, Kissell explained why he did not cite the condition during the June 17 inspection, and I find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the regulations would have realized that the regulation required that the opening be protected while a miner worked on the platform.[20] Qmax's argument that a person on the ladder would be required to use his hands to hook and un-hook the protective chain, thereby violating 30 C.F.R. § 56.11011, is nonsensical. Tr. 555.

The unguarded opening in the railing of the crusher operator's platform presented a hazzard to a miner working on the platform, especially because the miner's attention would be directed to guiding the excavator operator, and he might have to move quickly back from the railing toward the opening to avoid the excavator's boom. I find that the regulation was violated, and that the violation was S&S. It was reasonably likely that the hazard contributed to would

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[20] *See* discussion of the due process, "fair notice," defense, *infra*.

result in an injury and that any injury would be serious, possibly even fatal. Further, I agree with Kissell's assessment of operator negligence and the number of persons affected.

The August 25, 2003, visit and citation.

Kissell returned to Qmax on August 25, 2003, to deliver copies of the citations issued on August 20 and 21. He was accompanied by Larry Nelson, an inspector in training. As they were driving into the plant, they observed a person later identified as Frank Rhodes, on top of the Svedala screen, handing a tool to Mr. Fann, who was located on the catwalk surrounding the screen box. As Rhodes climbed down from the screen, Nelson took a photograph. Ex. P-49, P-50. Kissell determined that Rhodes should have worn fall protection while on the screen, and that Mr. Fann's allowing him to be in that position without fall protection rose to the level of an unwarrantable failure to comply with a mandatory safety standard. He issued Citation No. 6292740. Following a special investigation, Mr. Fann was also charged with the violation in his individual capacity.

Citation No. 6292740

Citation No. 6292740 alleges a violation of 30 C.F.R. § 56.15005, the fall protection standard. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A miner was observed standing on top of a Svedala screen, over the screen feed head pulley (belt #EQ-204), without the required safety line or harness for fall protection. The employee was exposed to a fall of approx. 14 feet to ground level. Jim Fann, mine owner, was on the Svedala screen walkway receiving hand tools from the employee on top of the Svedala screen. A citation, #629733, was issued to the company on 08/21/2003, for a violation of this same standard and MSHA had discussed CFR-30 standard 56.15005 with Jim Fann and employees at that time. Mr. Fann stated the employee was only up here for a minute. Fall protection was available for use at the mine. Mine owner, Jim Fann, engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the employee was working where a fall hazard existed and did not require the employee to wear fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-48.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was high. As noted in the citation, it was issued pursuant to section

104(d) of the Act, because of the unwarrantable failure allegation.[21] Civil penalties for this violation were proposed against the operator and against James L. Fann, in his individual capacity. A civil penalty in the amount of $625.00 has been proposed for the operator, and a penalty of $500.00 has been proposed against Mr. Fann.

Survivability of the Claim Against James L. Fann

The allegation against James L. Fann, in his individual capacity, was brought pursuant to section 110(c) of the Act, which provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

On August 24, 2006, Mrs. Fann filed a paper titled Suggestion of Death of a Party, formally noting the death of James L. Fann on the record, presenting the issue of whether the claim against him survived. In general, the survival of a federal cause of action upon the death of a party is, in the absence of an expression of contrary intent, a question of federal common law. Actions that are remedial generally survive, and actions that are penal generally do not. *U.S. v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1993); *Smith v. Dept. of Human Services, State of Okl.*, 876 F.2d 832, 834 (10th Cir. 1989); *International Cablevision, Inc., v. Sykes,* 172 F.R.D. 63 (W.D.N.Y. 1997); *and see Sinito v. U.S. Dept. of Justice*, 176 F.3d 512 (D.C.Cir. 1999).

There is nothing in the Act addressing the survivability of claims arising thereunder, or suggesting that established rules governing the abatement of actions upon the death of a party should not apply to claims under the Act. While the determination of whether a particular claim is

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[21] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Lopke Quarries, Inc., 23 FMSHRC 705, 711 (July 2001).

"penal" or "remedial" for purposes of survivability can present difficult issues,[22] it appears that a claim under section 110(c) of the Act, seeking imposition of a civil penalty against an individual corporate director, officer or agent, is clearly penal in nature. Accordingly, under federal common law, the action against Mr. Fann abated upon his death and will be dismissed.[23]

The Violation as to Qmax

The Svedala screen stands about 14 feet high. The screen box, which holds three layers of screens, is approximately 6 feet wide by 20 feet long. A catwalk at the base of the screen box extends around the box. The catwalk is about 30 inches wide on the sides of the box, and about 36 inches wide on the end where the feed conveyor is located. Tr. 670. There is a railing around the perimeter of the catwalk. The top of the railing is about one foot below the uppermost edge of the screen box. Photographs taken by MSHA on the day in question show the end of the screen and catwalk where Mr. Fann was located and indicate the location of Rhodes. Ex. P-51, P-52. Photographs taken by Qmax also depict the screen box, catwalk and railing. Ex. R-19A, B and C (196-M).

Rhodes was an employee of Fann Contracting, Inc., which operated an asphalt plant at the Red Lake Quarry site. Tr. 673; ex. R-23 (196-M). He noticed Mr. Fann engaged in replacing drive belts on the feed conveyor to the Svedala screen. Rhodes climbed up onto the screen to offer assistance. When Rhodes approached, Fann was almost finished with the job. He noticed a tool on the belt, and handed it to Fann. They then saw Kissell and Nelson, who had stopped their vehicle near the screen, and had exited it in order to take a picture of them. Tr. 671-73. They wondered what the MSHA inspectors were interested in, and Rhodes mentioned the possibility of fall protection. Fann told him that, if that were the case, he should get down off the screen. Nelson's photograph depicted Rhodes as he was climbing down from the screen. Kissell informed Fann that he was going to issue an unwarrantable failure citation for Rhodes' failure to

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[22] *See NEC, supra; Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 414 (7th Cir. 1980) (overruled, in part, on other grounds, *Pridegon v. Gates Credit Union*, 883 F.2d 182, 193-94 (7th. Cir. 1982)). In determining whether a particular claim is penal or remedial, courts typically consider three factors: (a) whether the purpose of the statutory claim was to redress individual wrongs or wrongs to the public; (b) whether the recovery goes to the individual or the public; and (c) whether the recovery is disproportionate to the harm suffered. *NEC*, 11 F.3d at 137; *Smith*, 876 F.2d at 835; *Sykes*, 172 F.R.D. at 67.

[23] In response to an order directing the Secretary to advise of her position on the claim against Mr. Fann in light of his death, she initially took the position that the claim would be pursued, as filed. By order dated August 14, 2006, citing the above precedent, Respondent was directed to file a formal Suggestion of Death, and the Secretary was directed to show cause why the action as to Mr. Fann should not be dismissed. The Secretary responded by advising that a decision had been made to vacate the citation as to Mr. Fann. Because the action against Mr. Fann abated upon his death, the Secretary's belated decision is a legal nullity.

use fall protection.

The parties' positions on whether use of fall protection is required while standing on top of the screen box, and the advisability of such use, are diametrically opposed. MSHA maintains that use of fall protection is required under the regulation because there is a danger of falling 14 feet to the ground. As Kissell explained his decision, the handrails around the catwalk did not provide fall protection because Rhodes could have fallen beyond them if he fell "straight out." Tr. 380. In his and the Secretary's view, the need for fall protection was so obvious, especially in light of the prior citation and discussion concerning fall protection, that Mr. Fann was grossly negligent or acting recklessly in allowing Rhodes to be in that position.

Qmax contends that requiring the use of fall protection by persons who mount a screen box is a completely unrealistic and unheard of interpretation of the regulation, and that the use of fall protection under such circumstances would, itself, present a far greater hazard. The basis for Respondent's position is that miners routinely climb onto screens in the process of changing them, and that the use of fall protection during that process has never been required by MSHA at Qmax or anywhere else in the industry. Neither Fann, nor Qmax's miners could envision a fall protection system that could safely be used by miners engaged in changing screens. Qmax contends that Rhodes' conduct was not in violation of the regulation and, if it were, it did not have fair notice of the Secretary's interpretation of the regulation.

While Qmax contends that there was no violation, the thrust of its argument is that MSHA's tacit approval of miners standing and working on screens without using fall protection, i.e., its inconsistent enforcement of the regulation, deprived it of fair notice of the Secretary's interpretation of the regulation. The Secretary denies any inconsistency. She also argues that Qmax's fair notice argument was not specifically raised, and that Qmax was on notice that the conduct violated the regulation. However, as discussed below, the Secretary's attempts to distinguish the cited conduct from the screen changing process are unavailing, and her arguments on fair notice are easily disposed of.

The Secretary maintains that: "This citation is not related to the question of whether fall protection is required while changing screens." Sec'y. Br. at 10. However, her attempts to distinguish the cited conduct fail to address the evidence, and are belied by her own descriptions of the conduct. Moreover, it is clear that Kissell and MSHA were well aware that the citation implicated the screen changing process from the day it was issued.

The conduct cited, as stated in the body of the citation, was a miner "standing on top of a Svedala screen." Ex. P-48. That same description was recorded by Kissell in his contemporaneous field notes, i.e., "miner was observed on top of a Svedala screen." Ex. R-7 (103-M) at 27. The Secretary's arguments in her brief reflect the same nature of the conduct charged. "The miner . . . should not have been *allowed on top of the screen* without wearing fall protection equipment." Sec'y. Br. at 9 (emphasis added). "Mr. Fann's conduct, *in allowing the miner to climb onto the screen* without being tied off, constitutes more than ordinary negligence . .

. ." Sec'y. Br. at 13. (emphasis added).

Miners changing screens engage in the same conduct, i.e., climb onto, stand on, and work on top of screens. Mr. Fann testified that throughout his many years of experience, miners mounted the screen box every time the screens were changed, about once a month. Tr. 682-84. The brackets that clamp the screens in place get wedged-in tightly and miners generally stand on the screen deck and break them lose with a hammer and bar. Tr. 757-58. They then traverse the screen, carrying screen sections to a location where they can be removed. Tr. 679-80. It is not an uncommon event at Qmax or within the industry. Tr. 865-86. Kissell, who had 20 years of mining experience, most of it in operations similar to Qmax's, and had inspected roughly 200 to 500 screens, eventually agreed. Tr. 18, 34-35; ex. P-1. He related that he had heard of other methods that might be used, describing miners using "J-hooks" from the catwalk, and was aware that some newer designs allowed screens to be removed through the end of the screen box.[24] Tr. 731-32. But, Kissell agreed that Qmax's screens had to be accessed from the top, which was true for about 90% of the screens in the industry. Tr. 753-54. He also agreed that, although he's seen it done differently, Mr. Fann's description of the process was "for the most part . . . accurate." Tr. 760.

There is nothing in the record to indicate that Rhodes' conduct was unusually hazardous. In fact, his position, as pointed out in the Secretary's photograph, was at the end of the screen box next to the conveyor that fed the screen. Ex. P-52. At that location, there was a three-foot wide catwalk occupied by Mr. Fann, with a railing around its perimeter, and the end of the conveyor was two to three feet above the screen box. Ex. R-19C (196-M). The probability of Rhodes falling to the ground from that position was, if anything, less than that of a miner standing elsewhere on the screen. There is no evidence that Rhodes was walking around or doing anything that would have increased the likelihood of his tripping or falling. The Secretary's suggestion that Rhodes' having a wrench in his hand made a fall more likely is unconvincing. Sec'y. Br. at 10-11. Miners engaged in changing screens use a hammer and bar, i.e., they have tools in both of their hands, and four of them lift and carry segments of screens weighing approximately 85 pounds. Tr. 679-82. If anything, miners working on top of the screens during the screen changing process would have a higher risk of falling than Rhodes.

Because miners engaged in changing screens mount and stand on the screens, precisely the conduct cited by Kissell, it is little wonder that the discussion of the impact of his determination that miners on the screen had to use fall protection, triggered a discussion of how fall protection

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[24] Mr. Fann had never seen anyone replace screens from the catwalk, and it would appear to be an extremely difficult, if not impossible, task. Tr. 684-85. Respondent's photographs of the Svedala screen reveal that miners would have to reach over the approximately five-foot high lip of the screen box, lift the heavy screen, and maneuver down the catwalk around the screen's machinery. Ex. R-19C (196-M).

could safely be used during the screen changing process.[25] Qmax's miners, joined by Fann, directly raised concerns about using fall protection while changing screens when meeting with Kissell on August 25. Tr. 376, 676-82, 686-87; ex. R-23 (196-M). In fact, use of fall protection while changing screens was the exclusive focus of Qmax/MSHA discussions from the day the citation was issued, and there is no evidence that Kissell or anyone else at MSHA ever advised Qmax that its concerns were unwarranted, because the requirement to use fall protection while on a screen had no application to the process of changing screens.

The Secretary claims to have been surprised by Respondent's screen changing argument, asserting that: "During the hearing, Respondent raised, *for the first time*, the issue of the feasibility of using fall protection when changing screens on the Svedala screen." Sec'y. Br. at 9 (emphasis added). It would be hard to imagine a more erroneous statement. In fact, as noted above, from the day that the citation was issued, the discussion of its validity and the feasibility of abatement efforts centered exclusively on the use of fall protection while changing screens. These concerns were reiterated several times by Qmax in correspondence with MSHA officials. One example is a letter dated November 25, 2003, to Andrew Lowe, an MSHA special investigator, wherein problems with the use of fall protection while changing screens were discussed. Ex. R-10 (196-M) at 12-15. The issue was also raised in subsequent letters. Ex. R-12 (196-M) at 4, R-15 (196-M) at 3.

Qmax certainly raised the fair notice issue. As early as November 25, 2003, Qmax asserted in the letter to Lowe: "Based on information that I had on August 25, 2003[,] and instructions that Mr. Kissell had given to miners earlier, it was impossible for me or any Qmax miners to know that Kissell's interpretation would be that a miner must wear a harness and lanyard tied off on a screen of any size . . . ." Ex. R-10 (196-M), at 15. Respondent asserted in its Prehearing Report, "no tie off systems existed and neither Kissell nor Nelson brought this to the attention of the miners or the operator, on any of the 4 previous days at the Qmax plant. Fair Notice." Resp. Prehr. Rpt. (196-M) at 1.[26] (emphasis in original). The Secretary did not object to Respondent's inclusion of the fair notice argument in its prehearing report. At the hearing, Mr. Fann testified that he had never been advised that fall protection was required for a person on a screen and, even at the time of the hearing, he had "no knowledge of fall protection having been used or required on a screen." Tr. 665. Qmax's actions were more than adequate to raise the fair notice defense, even without taking into account the less stringent standards typically applied to those "untutored in the law." *See Marin v. ASARCO, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992).

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[25] Rhodes' approach, as Fann replaced the conveyor's drive belts, appears to have been purely coincidental. Fann had not requested assistance, or directed any of his employees to help in the process. Tr. 667-74; ex. R-23 (196-M). Consequently, Kissell's interpretation of the regulation to require use of fall protection for a miner standing on the screen had no implications for the belt changing process. It had major, still unresolved, implications for the screen changing process.

[26] Respondents filed separate prehearing reports in each docket.

When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). The issue arises frequently in the enforcement of standards like that addressing fall protection, which must be written in simple terms in order to be broadly adaptable to myriad circumstances. *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). To determine whether an operator received fair notice of the agency's interpretation, the Commission has applied an objective standard, the reasonably prudent person test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In applying this standard, a wide variety of factors are considered, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question, and whether the practice at issue affected safety. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Ideal Cement Co.*, 12 FMSHRC at 2416.

The overriding factor affecting the fair notice issue, with respect to this citation, is the consistency of the Secretary's enforcement. It is clear that the vast majority of screens in use in the industry were designed so that the screens must be replaced from the top. This requires miners, when removing worn screens, to mount and stand on the screen box to break the screens' retaining brackets loose and carry the screen sections to a location where they can be lowered to the ground by machinery. The process is repeated, in reverse, when installing new screens. MSHA inspectors, like Kissell, typically have had considerable experience in the industry before being employed by MSHA. Kissell, himself, had worked with screens for several years and had seen from 200 to 500 screens. MSHA clearly had been aware of this practice for a considerable period of time. From the evidence of record, it is apparent that MSHA has almost never taken the position that a miner standing and working on top of a screen is in danger of falling, such that the use of fall protection is required by the standard. That was the case in August of 2003, and apparently remains the case today.

Neither the Svedala, nor any other screens, were designed or built, such that fall protection devices could be used by a person on top of the screen box. Mr. Fann visited similar mining operations and did not find screens with fall protection structures. Tr. 703. He found only one exception, where a structure had been added, but the safety director of that operation told him that the structure was merely for show, and the men didn't use it because they were afraid of it.[27] Tr. 703-05. Pictures of some of the other screens observed by Fann that lacked fall protection

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[27] Kissell testified that he had seen a "couple" of screens with fall protection structures prior to issuing the citation to Qmax, and several since. Tr. 383-84. However, he identified only one location, and it appears to be the same location that Fann identified, where the safety director told him that the structure was not used. Tr. 383-84, 703-05.

structures were introduced into evidence. Tr. 703; ex. R-19D (196-M). Fann contacted screen manufactures and suppliers, who informed him that the issue of fall protection structures for screens had never been raised, and that an operator's addition of fall protection structures, at least to the screen box, would void the warranties. Tr. 693-94. Fann's own view, and that of his miners, was that attempting to use fall protection while changing screens posed a number of serious practical and safety issues. Tr. 676-82. He unsuccessfully sought design assistance from MSHA.[28] Tr. 691-97.

Respondent introduced an MSHA training module addressing safety practices for changing screens. Although only a guideline, it does not mention the use of fall protection, except for dealing with a special type of screen. Tr. 699-700; ex. R-6 (176M). There is no evidence that the Secretary has published any notices informing the regulated community of the position taken here, i.e., that a miner standing on a screen is in "danger of falling" within the meaning of 30 C.F.R. § 15005, such that safety belts and lines must be worn. In fact, from the evidence introduced by Respondent, it appears that she has consistently taken the position that the catwalks and handrails surrounding screen boxes are sufficient to ensure that miners standing and working on screens are not in danger of falling, within the meaning of the regulation, and is not prepared to change her interpretation of the standard without undertaking a "separate investigation with regard to the changing of screens." Sec'y. Br. at 10.

The Secretary has, over the course of years, consistently and knowingly declined to enforce the subject regulation with respect to the screen changing process. Miners have routinely climbed on, stood on, and worked on top of screens, without using fall protection, all with the Secretary's at least tacit approval. Respondent's fair notice argument was timely raised, and precludes enforcement of the regulation with respect to the conduct cited here. If the Secretary intends to take the position that a miner on top of a screen is required to use fall protection under the regulation, absent some unusually hazardous behavior by the miner, she would be well-advised to conduct the investigation noted in her brief, and engage in notice and comment rulemaking prior to initiating such enforcement action.

The Appropriate Civil Penalties

Qmax is a small operator, as is its controlling entity. Kissell's inspection was the first by MSHA since Qmax had reopened after several years. Consequently, for penalty purposes, Qmax has no history of violations. Qmax does not contend that payment of the penalties would impair its ability to continue in business. All of the violations were promptly abated in good faith. The gravity, negligence, and other penalty factors required to be addressed by section 110(i) of the Act have been discussed, above, with respect to each alleged violation.

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[28] For the hearing, Kissell prepared diagrams of structures that might be mounted on a screen that would allow miners wearing harnesses and lanyards to tie-off. Ex. P-54, P-55, P-56. However, these were simple concept depictions, similar to a rough sketch he had prepared while talking with Qmax's miners.

Citation No. 6292708 is affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury, and any injury would have been minor. The operator's negligence was found to have been low. A civil penalty of $75.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292709 is affirmed. However, it was found not to have been S&S. The violation was purely technical and did not constitute a hazard. A civil penalty of $91.00 was proposed by the Secretary. I impose a penalty in the amount of $15.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292734 is affirmed. However, it was found not to have been S&S. The violation contributed to created a reasonable possibility of a minor injury. A civil penalty of $106.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292735 is affirmed. The injury report was mailed one day late, because of Mrs. Fann's injury. A civil penalty of $60.00 was proposed by the Secretary. In light of the *de minimis* nature of the violation, and the mitigating circumstances, I impose a penalty in the amount of $20.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

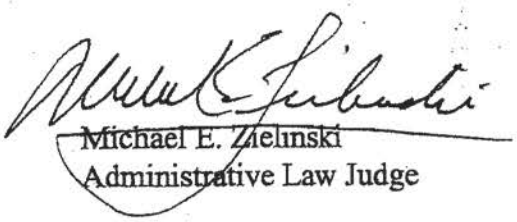
Citation No. 6292736 is affirmed. Mrs. Fann's task training was not recorded and certified, as required. However, the citation was corrected to reflect that no injury was likely to be caused by the violation, rather than that a lost workdays injury was unlikely. A civil penalty of $60.00 was proposed by the Secretary. In light of the reduced gravity, and the mitigating factors presented by Mrs. Fann's serious injury, I impose a penalty in the amount of $45.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292739 is affirmed as an S&S violation. A civil penalty of $133.00 was proposed by the Secretary. I impose a penalty in the amount of $133.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation Nos. 6292707, 6292710, 6292733, 6292737, 6292738 and 6292740 are hereby **VACATED**, and the petitions as to those citations, including the petition lodged against James Fann, in his individual capacity, are hereby **DISMISSED**.

Citation Nos. 6292735 and 6292739 are hereby **AFFIRMED**. Citation Nos. 6292708, 6292709, 6292734 and 6292736 are hereby **AFFIRMED**, as modified. Respondent, Qmax, is directed to pay civil penalties totaling $333.00 for those violations. Payment shall be made within 45 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 6, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MARY JANE OSBON, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2006-319-DM SE MD 2006-07
v.	:	
R. E. GRILLS CONSTRUCTION CO., Respondents	:	Ragland Quarry Mine ID 01-00027- 2XL

DISMISSAL OF APPLICATION FOR TEMPORARY REINSTATEMENT

Before: Judge Feldman

This case is before me based on an Application For Temporary Reinstatement filed on September 1, 2006, by the Secretary of Labor on behalf of Mary Jane Osbon pursuant to section 105(c)(2) of the Federal Mine and Safety Health Act of 1977, 30 U.S.C. § 815(c)(2). On October 4, 2006, the Secretary filed a Motion to Withdraw her application for the temporary reinstatement of Ms. Osbon. As grounds for her Motion, the Secretary represents that:

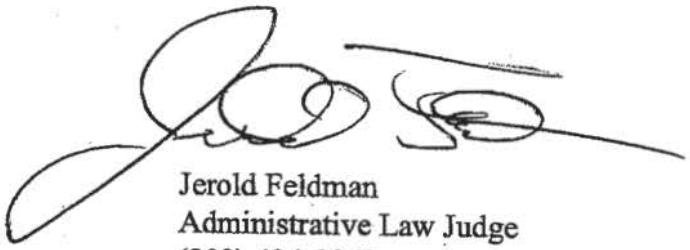
1. On Friday, September 29, 2006, R.E. Grills Constructions Company, Inc. ("Respondent") voluntarily agreed to temporarily reinstate Ms. Osbon to the position she held as a haul truck operator, immediately prior to her discharge on June 6, 2006, at the same rate of pay, the same benefits, same number of hours worked and with the same duties assigned to her.

2. Respondent will temporarily reinstate Ms. Osbon at the Old Castle-Tiftonia Quarry in Tiftonia, Hamilton County, Tennessee, on October 9, 2006.

3. The Secretary's Motion for Temporary Reinstatement is withdrawn without prejudice to the Secretary to bring a discrimination action against the Respondent in this matter.

4. Each party agrees to bear its own attorney's fees, costs and other expenses incurred by such party in connection with any stage of these proceedings including, but not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

In view of the above, **IT IS ORDERED** that the Secretary's Motion to Withdraw **IS GRANTED**. **IT IS FURTHER ORDERED** that the subject temporary reinstatement application **IS DISMISSED** without prejudice to refile if the above terms are not satisfied, and without prejudice to the Secretary's subsequent filing of a related discrimination case on behalf of Ms. Osbon.



Jerold Feldman
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 18, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2002-111 A.C. No. 01-01247-03501 VAD
v.	:	Docket No. SE 2003-69 A.C. No. 01-01247-03502
SEDGMAN and DAVID GILL, employed by SEDGMAN Respondent.	:	Docket No. SE 2003-189 A.C. No. 01-01247-06606 Mine No. 4 Mine

DECISION ON REMAND

On June 30, 2006, the Commission issued a decision, Secretary v. Sedgman, 28 FMSHRC 322, which, *inter alia* affirmed the initial decision in this matter, 26 FMSHRC 873 (November, 2004), regarding the violations at issue, but vacated the decision regarding the penalty to be assessed for the violation of 30 C.F.R. § 77.200, and remanded the case for reassessment of the penalty.

Subsequent to telephone conference calls, the parties were ordered to file briefs relating to the issues raised by the Commission's decision and remand, 28 FMSHRC, *supra*. The Secretary filed her brief on September 1, 2006.

Thereafter, the parties filed a Joint Motion to Approve Settlement and to Dismiss the civil penalty proceeding. The Secretary had initially proposed a penalty of $35,000 for the violation of Section 77.200, *supra*. The parties seek approval of a proposed settlement of $19,000. Based on the assertions set forth in the motion, and the record in this case, including the testimony and documentary evidence adduced at the initial hearing, I find that the settlement is appropriate, and in compliance with the terms of the Federal Mine Safety and Health Act of 1977. Accordingly, the settlement is approved.

It is **Ordered** that, within 30 days of this decision, Respondent shall pay a civil penalty of $19,000 for the violation cited in Citation No. 7676881, and that these cases be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

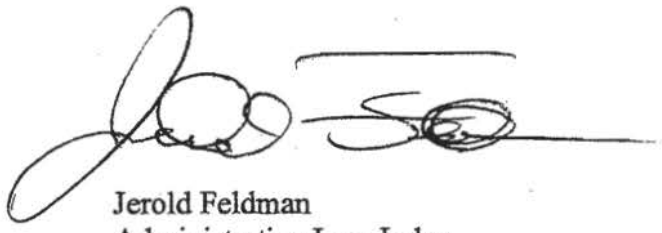
October 23, 2006

ANKER WEST VIRGINIA MINING CO., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2005-221-R
	:	Order No. 7098153; 08/16/2005
	:	Docket No. WEVA 2005-222-R
v.	:	Order No. 7098154; 08/16/2005
	:	Docket No. WEVA 2005-223-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 7098158; 08/16/2005
	:	Docket No. WEVA 2005-224-R
	:	Order No. 7098159; 08/16/2005
	:	Docket No. WEVA 2006-4-R
	:	Order No. 4890534; 09/12/2005
	:	Docket No. WEVA 2006-5-R
	:	Order No. 4890535; 09/12/2005
	:	Docket No. WEVA 2006-6-R
	:	Order No. 4890536; 09/12/2005
	:	Docket No. WEVA 2006-7-R
	:	Order No. 4890537; 09/12/2005
	:	Docket No. WEVA 2006-8-R
	:	Order No. 4890539; 09/12/2005
	:	Docket No. WEVA 2006-80-R
	:	Order No. 7098644; 12/14/2005
	:	Sago Mine
	:	Mine ID 46-08791

ORDER LIFTING STAY
AND
DISMISSAL ORDER

Before: Judge Feldman

These contestant proceedings were stayed pending the docketing and assignment of the related civil penalty matter. The civil penalty case has been docketed as WEVA 2006-296 under the respondent name of Wolf Run Mining Company (Wolf Run).[1] The captioned contests have now been superceded by Wolf Run's contest of the Secretary's proposed civil penalties for the captioned citations and orders. Accordingly, **IT IS ORDERED** that the captioned contest matters **ARE DISMISSED** as moot.



Jerold Feldman
Administrative Law Judge

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/mh

[1] On December 13, 2005, Anker West Virginia changed its name to Wolf Run Mining Company. Ownership and operation of the Sago Mine did not change. Anker West Virginia merely changed its corporate name. The caption reflects Anker West Virginia as the contestant to avoid confusion.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 11, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-788-R
	:	Citation No. 7257574; 06/27/2006
v.	:	Docket No. WEVA 2006-789-R
	:	Citation No. 7257575;06/27/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-790-R
	:	Citation No. 7257568;06/27/2006
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID 46-09048

ORDER REQUESTING CLARIFICATION

On August 11, 2006, I issued an Order requiring Marfork Coal Company, Inc., (Marfork) to show cause why its Notice of Contest of the subject citations should not be dismissed. 28 FMSHRC 745 (Aug. 2006). The Order was issued after the Secretary, as part of her July 27, 2006, response to Marfork's Notice of Contest, alleged that Marfork's counsel was contesting all significant and substantial 104(a) citations. *Id.*

The Order to Show Cause noted that Marfork's contest may be contrary to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d), as well as Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii). *Id.* at 746. The Order also noted that Marfork's contest may be contrary to the Commission's decision in *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). *Id.* Finally, the Order asked Marfork to address whether its contest was duplicative and a needless consumption of the Commission's resources. *Id.* at 747. The August 11 Order provided the Secretary the opportunity to reply to Marfork's response to the Order to Show Cause.

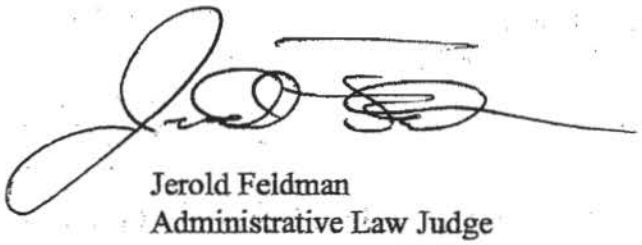
Marfork filed its response on September 1, 2006, contending that its contest should not be dismissed. Marfork admits it is not seeking a Commission hearing of its contest. Rather, Marfork contends the relief it seeks is discovery while its contest is stayed.[1] Consequently, the

[1] Marfork refers to the delay as a continuance without date. (*Marfork resp.* p.4). If the contest is not dismissed, I am inclined to stay this matter rather than continue the contest without date.

central issue is the propriety of a request for discovery as the sole basis for a contest.

The Secretary replied to Marfork's response in correspondence dated September 7, 2006. While the Secretary opined that there was "no discernable reason" served by Marfork's contest, and that discovery cannot properly be characterized as "relief sought" by a contestant, the Secretary did not provide any meaningful analysis of Commission case law, or relevant statutory and Commission Rule provisions. (Letter from Glenn Loos, Esq., to Judge Feldman of 9/7/06). Nor did the Secretary articulate whether or not Marfork's contest should be dismissed.

Accordingly, **IT IS ORDERED** that the Secretary, within 10 days of the date of this Order, state in writing, with specificity, whether she believes the subject Notice of Contest should be dismissed. The Secretary's response should provide the relevant statutory and rule provisions and/or case law in support of her position.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 28, 2006

SPARTAN MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEVA 2006-629-R
	:	Citation No. 7062296; 05/15/2006
	:	
	:	Docket No. WEVA 2006-630-R
	:	Citation No. 7062297; 05/15/2006
	:	
	:	Docket No. WEVA 2006-631-R
	:	Citation No. 7062298; 05/15/2006
	:	
	:	Docket No. WEVA 2006-632-R
	:	Citation No. 7062299; 05/15/2006
	:	
	:	Docket No. WEVA 2006-633-R
	:	Citation No. 7062300; 05/15/2006
	:	
	:	Docket No. WEVA 2006-634-R
	:	Citation No. 6601519; 05/15/2006
v.	:	
	:	Docket No. WEVA 2006-635-R
	:	Citation No. 6601515; 05/15/2006
	:	
	:	Docket No. WEVA 2006-636-R
	:	Citation No. 6601518; 05/15/2006
	:	
	:	Docket No. WEVA 2006-637-R
	:	Citation No. 6601521; 05/15/2006
	:	
	:	Docket No. WEVA 2006-638-R
	:	Citation No. 6601523; 05/15/2006
	:	
	:	Docket No. WEVA 2006-639-R
	:	Citation No. 6601524; 05/15/2006
	:	
	:	Docket No. WEVA 2006-640-R
	:	Citation No. 6601526; 05/15/2006
	:	
	:	Docket No. WEVA 2006-681-R
	:	Citation No. 6601530; 05/16/2006

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

: Docket No. WEVA 2006-682-R
: Citation No. 6601532; 05/16/2006
:
: Docket No. WEVA 2006-683-R
: Citation No. 6601533; 05/16/2006
:
: Docket No. WEVA 2006-684-R
: Citation No. 6601534; 05/16/2006
:
: Docket No. WEVA 2006-685-R
: Citation No. 6601535; 05/16/2006
:
: Docket No. WEVA 2006-686-R
: Citation No. 7062302; 05/16/2006
:
: Docket No. WEVA 2006-687-R
: Citation No. 7458067; 05/16/2006
:
: Docket No. WEVA 2006-688-R
: Citation No. 7458068; 05/16/2006
:
: Docket No. WEVA 2006-689-R
: Citation No. 7458069; 05/16/2006
:
: Docket No. WEVA 2006-690-R
: Citation No. 7458070; 05/16/2006
:
: Docket No. WEVA 2006-691-R
: Citation No. 7458071; 05/16/2006
:
: Docket No. WEVA 2006-692-R
: Order No. 7458072; 05/16/2006
:
: Docket No. WEVA 2006-693-R
: Citation No. 7458073; 05/16/2006
:
: Docket No. WEVA 2006-694-R
: Citation No. 7458074; 05/16/2006
:
: Docket No. WEVA 2006-695-R
: Citation No. 7458075; 05/16/2006
:

: Docket No. WEVA 2006-696-R
: Citation No. 7460800; 05/16/2006

: Laurel Creek/Spirit Mine
: Mine ID 46-08387

ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to stay the cases pending assessment of civil penalties on the contested citations so that the contest and civil penalty proceedings can be consolidated for hearing. The motion states that the Contestant does not object to it.

Because the Commission was being inundated with notices of contest in which the contestant immediately acquiesced in the proceedings being stayed, I issued an order to show cause in these 28 Notices of Contest requesting the Contestant to show cause why the contests should not be dismissed. The Contestant's response was that the Act permits it. The Secretary, while asserting "that such 'pre-penalty' notices of contest are not an appropriate or reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation," agreed.

Certainly, section 105(d), which permits filing a notice of contest within 30 days of receipt of a citation or an order, does not state that filing a notice of contest even though the party does not desire a hearing is prohibited. Further, early in its existence, the Commission held that when a party had an interest in "immediately" challenging an allegation, filing a notice of contest was proper. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). It also opined that if the party lacked an urgent need for a hearing, the contest proceeding could be continued to be tried with the penalty proceeding. (*Id.*) It went on to state, however, that if there were no need for an immediate hearing, "we would expect [the operator] to postpone his contest of the entire citation until a penalty is proposed." (*Id.*) For almost 30 years that is the way things have proceeded, notices of contest were the exception, not the rule.

However, neither Congress, in drafting section 105(d), nor the Commission, in *Energy Fuels,* could have anticipated the current routine filing of literally hundreds of notices of contest when the operator had no interest in an immediate hearing. Such filings clog up the system. While they may not violate the letter of the law, they clearly violate its spirit. Unlike the Secretary, I am not of the opinion that the Commission is without recourse to remedy this abuse of its processes.

Nevertheless, I am aware that the attorneys for Massey Energy subsidiaries have agreed with the Secretary to refrain from filing notices of contest on section 104(a), 30 U.S.C. § 814(a), citations until a penalty is assessed, unless there is an immediate need for a hearing. Since that

reaches the practical result sought by the order to show cause, I see no need to dismiss these cases.

Accordingly, the motion of the Secretary is **GRANTED** and further proceedings in the above captioned cases are **STAYED** pending the filing of the corresponding civil penalty proceedings in these matters. Counsel for the Secretary is directed to inform the judge, in writing, of the status of the civil penalty cases on **December 29, 2006**, and on the last working day of each quarter thereafter until all of the cases have been docketed.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 29, 2006

HIGHLAND MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-712-R
v.	:	Citation No. 7244885; 05/25/2006
	:	
	:	Docket No. WEVA 2006-713-R
	:	Citation No. 7244889; 05/25/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Highland Coal Handling Mine ID: 46-06558

ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to stay the cases pending assessment of civil penalties on the contested citations so that the contest and civil penalty proceedings can be consolidated for hearing. The motion states that the Contestant does not object to it.

Because the Commission was being inundated with notices of contest in which the contestant immediately acquiesced in the proceedings being stayed, I issued an order to show cause in these Notices of Contest requesting the Contestant to show cause why the contests should not be dismissed. The Contestant's response was that the Act permits it. The Secretary, while asserting "that such 'pre-penalty' notices of contest are not an appropriate or reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation," agreed.

Certainly, section 105(d), which permits filing a notice of contest within 30 days of receipt of a citation or an order, does not state that filing a notice of contest even though the party does not desire a hearing is prohibited. Further, early in its existence, the Commission held that when a party had an interest in "immediately" challenging an allegation, filing a notice of contest was proper. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). It also opined that if the party lacked an urgent need for a hearing, the contest proceeding could be continued to be tried with the penalty proceeding. (*Id.*) It went on to state, however, that if there were no need for an immediate hearing, "we would expect [the operator] to postpone his contest of the entire citation until a penalty is proposed." (*Id.*) For almost 30 years that is the way things have proceeded, notices of contest were the exception, not the rule.

However, neither Congress, in drafting section 105(d), nor the Commission, in *Energy Fuels,* could have anticipated the current routine filing of literally hundreds of notices of contest when the operator had no interest in an immediate hearing. Such filings clog up the system. While they may not violate the letter of the law, they clearly violate its spirit. Unlike the Secretary, I am not of the opinion that the Commission is without recourse to remedy this abuse of its processes.

Nevertheless, I am aware that the attorneys for Massey Energy subsidiaries have agreed with the Secretary to refrain from filing notices of contest on section 104(a), 30 U.S.C. § 814(a), citations until a penalty is assessed, unless there is an immediate need for a hearing. Since that reaches the practical result sought by the order to show cause, I see no need to dismiss these cases.

Accordingly, the motion of the Secretary is **GRANTED** and further proceedings in the above captioned cases are **STAYED** pending the filing of the corresponding civil penalty proceedings in these matters. Counsel for the Secretary is directed to inform the judge, in writing, of the status of the civil penalty cases on **December 29, 2006**, and on the last working day of each quarter thereafter until all of the cases have been docketed.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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Peter B. Silvain, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2006

ARACOMA COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-824-R
	:	Citation No. 7253529; 07/13/2006
v.	:	Docket No. WEVA 2006-825-R
	:	Order No. 7253530; 07/14/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Aracoma Alma Mine #1
	:	Mine ID 46-08801

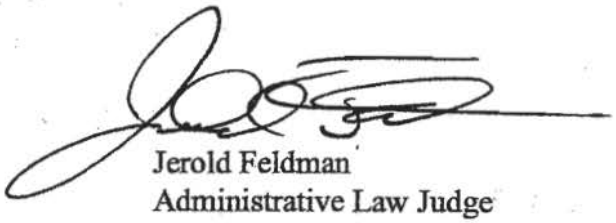
ORDER TO RESPOND TO ORDER TO SHOW CAUSE

To date, Aracoma has filed more than 350 Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d), that it has contemporaneously agreed to stay pending its contest of the Secretary's proposed civil penalties. On August 25, 2006, Aracoma was ordered to show cause why its contest of the captioned citations should not be dismissed as a result of its apparent contravention of Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii) because it fails to adequately specify the relief requested, and because it is a duplicative and needless consumption of the Commission's resources. 29 FMSHRC 763. The August 25, 2006, Order to Show Cause issued to Aracoma is incorporated by reference.

During a subsequent telephone conference, Aracoma was advised to hold its response to the August 25 Order in abeyance pending the disposition of a similar Order to Show Cause in *Marfork Coal Company, Inc. (Marfork)*, Docket Nos. WEVA 2006- 788-R through WEVA 2006-790-R. 29 FMSHRC 745 (Aug. 2006). Marfork's 105(d) contest was dismissed on September 27, 2006. *Order of Dismissal,* 29 FMSHRC ___ (Sept. 2006).[1]

[1] A copy of the recent Marfork *Order of Dismissal* has been provided for the Aracoma's reference.

The *Marfork* matter now having been resolved, **IT IS ORDERED** that Aracoma **SHOW CAUSE**, within fifteen (15) days of this Order, why its contest of the captioned cases should not be dismissed. Aracoma's response should include a statement of the facts, if any, that distinguish its contest from the underlying facts in *Marfork*. Aracoma's response should specifically address the applicability of the statutory and Commission Rule provisions, and the case law cited in *Marfork* that support its contests. In addition, using traditional methods of statutory construction, Aracoma should state why it believes its contest satisfies the provisions of section 105(d).



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

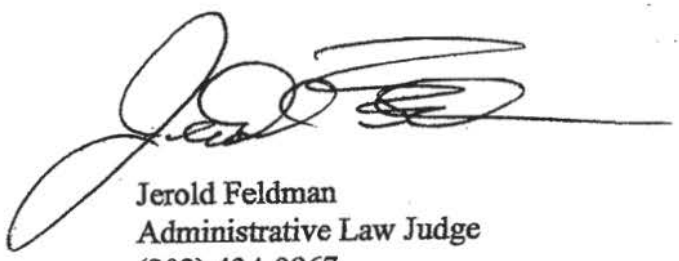
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 11, 2006

RAW SALES & PROCESSING CO., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 2006-716-R
	:	Citation No. 7248006; 05/18/2006
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Preparation Plant Mine ID: 46-02515 GTQ

STAY ORDER

The Secretary has filed a motion to stay the above contest matter pending the docketing and assignment of the related civil penalty case. The respondent does not oppose the Secretary's motion. Accordingly, this proceeding **IS STAYED**.[1] Discovery is not authorized during the pendency of the stay. **IT IS ORDERED** that the parties initiate a conference call with the undersigned within 21 days of the docketing and assignment of the pertinent civil penalty case to lift this stay and to schedule these matters for a consolidated hearing.



Jerold Feldman
Administrative Law Judge
(202) 434-9967

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[1] On September 27, 2006, contestant's counsel was advised that a contest prior to the Secretary's civil penalty proposal that lacked a request for an early hearing was defective. *Marfork Coal Company, Inc., Order of Dismissal,* 28 FMSHRC ___ (Sept. 2006). Contests filed after September 27, 2006, that do not reflect a request for an early hearing will be dismissed.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

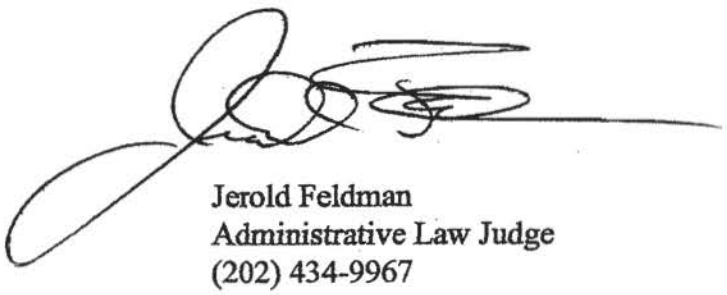
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 11, 2006

STIRRAT COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2006-737-R
	:	Citation No. 7248007; 05/18/2006
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Preparation Plant
Respondent	:	Mine ID: 46-02515

STAY ORDER

The Secretary has filed a motion to stay the above contest matter pending the docketing and assignment of the related civil penalty case. The respondent does not oppose the Secretary's motion. Accordingly, this proceeding **IS STAYED.**[1] Discovery is not authorized during the pendency of the stay. **IT IS ORDERED** that the parties initiate a conference call with the undersigned within 21 days of the docketing and assignment of the pertinent civil penalty case to lift this stay and to schedule these matters for a consolidated hearing.



Jerold Feldman
Administrative Law Judge
(202) 434-9967

[1] On September 27, 2006, contestant's counsel was advised that a contest prior to the Secretary's civil penalty proposal that lacked a request for an early hearing was defective. *Marfork Coal Company, Inc., Order of Dismissal,* 28 FMSHRC ___ (Sept. 2006). Contests filed after September 27, 2006, that do not reflect a request for an early hearing will be dismissed.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 24, 2006

UNITED MINE WORKERS OF AMERICA, LOCAL 1248, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 2002-23-C
v.	:	
MAPLE CREEK MINING, INC., Respondent	:	Maple Creek Mine
	:	Mine ID 36-00970

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. By Order dated May 4, 2006, Respondent's motion for summary decision was denied, on grounds that the section 104(b) withdrawal order upon which the compensation claim is predicated became final for purposes of section 111. Respondent has moved for reconsideration of that ruling, and the UMWA has opposed the motion. The Secretary of Labor was invited to appear as *amicus curiae*, and submitted a brief addressing three issues. As explained more fully below, Respondent's motion to reconsider is denied.

Pertinent Facts

A more detailed recital of facts is set forth in the May 6, 2006, order. On July 30, 2001, an MSHA inspector found that the bleeder system was not effectively ventilating a section of Maple Creek's mine. He issued Citation No. 7082157, alleging a violation of 30 C.F.R. § 75-334(b)(1), and directed that the violation be abated the following day. He returned to the mine on July 31, 2001, found that virtually no steps had been taken to abate the violation, and issued Order No. 7060223 pursuant to section 104(b) of the Act, which required the withdrawal of miners from the affected area. Complainant seeks compensation for miners idled by that order.

Maple Creek did not contest Order No. 7060223 pursuant to section 105(d) of the Act. On February 25, 2002, MSHA proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Citation No. 7082157, for which a penalty of $9,000.00 was proposed. Maple Creek contested the proposed penalties, and the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission

Docket No. PENN 2002-116. No civil penalty was assessed for Order No. 7060223, and it was not specifically identified in the assessment, the petition or Maple Creek's answer to the petition. The Secretary subsequently filed a Motion for Decision and Order Approving Partial Settlement, which sought Commission approval of a settlement that included a proposed reduction in the civil penalty assessed with respect to Citation No. 7082157. The motion described the citation and added the following discussion:

> A § 104(b) Order Number 7060223 was issued on July 31, 2003 [sic], for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of $9,000.00 was specially assessed based on the high negligence rating and the § 104(b) Order.
>
> After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 7060223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to $2,000.00 is warranted.

On August 11, 2003, a Decision Approving Partial Settlement was entered, granting the Secretary's motion and approving the proposed reduction of the civil penalty assessed for Citation No. 7082157.

Discussion

Based upon the representations in the Secretary's motion in PENN 2002-116, and the fact that the motion was granted, Respondent argued that Order No. 7060223 was vacated, i.e., never became final, and could not form the basis for an award of up to one week's compensation under section 111. Respondent's arguments were rejected based upon findings that the 104(b) order was not at issue in the civil penalty proceeding and, since Respondent had not contested the order within 30 days of its issuance pursuant to section 105(d), it had become final for purposes of section 111. Maple Creek now seeks reconsideration of that ruling, reasserting its argument that the ALJ's "decision approving the settlement was effective in vacating [Order No. 7060223]."

I hereby reaffirm the earlier holding that the 104(b) withdrawal order was not at issue in the civil penalty proceeding, i.e., the Administrative Law Judge did not have jurisdiction to entertain a challenge or grant relief with respect to that order. Section 104(b) orders, like the one at issue here, typically do not allege a separate violation. Consequently, no civil penalty can be assessed for the order under the mandatory language of section 110(a) of the Act. It appears that a penalty could be assessed for a section 104(b) order under section 110(b), which provides that a civil penalty of up to $5,000.00 *may* be assessed for each day that a violation continues beyond the specified abatement date. However, the Secretary has rarely sought to impose that

considerably more severe sanction.[1] Of course, a penalty must be assessed for the violation charged in the underlying citation. The assessment typically describes the "Type of Action" of the citation as "104A - 104B," as was done with respect to the citation relevant to this case.

Maple Creek argues that the description on the assessment form "must be presumed to include the 104(b) order within the civil penalty proceedings," or else it would have had no opportunity "to a civil penalty proceeding on the 104(b) order." Res. Mot. at 2. The Secretary takes the position that, since there are no specific requirements as to the form or content of a notice of contest, "as long as the operator has indicated, and MSHA understands, which citations and orders [the operator] wishes to contest . . ., the contest(s) will be accepted and forwarded to the Commission. In this case, the operator returned a proposed assessment card which contained the notation '104A – 104B' in the 'Type of Action' column. MSHA proceeded with the understanding that the operator had contested both the Order issued under section 104(b) and the underlying 104(a) citation." Sec'y. Br. at 3.

The Commission's jurisdiction to entertain a challenge to or grant relief from a section 104(b) withdrawal order must be determined by the authority bestowed upon it in the Act, not by "presumptions" or by "understandings" between mine operators and MSHA. The Act provides two potential opportunities for an operator to contest before the Commission an order issued under section 104. Section 105(d) provides an operator a right to contest an order issued under section 104 within 30 days of receipt of the order. Maple Creek did not exercise its right to contest Order No. 7060223 within the 30-day period.

Where a proposed civil penalty is assessed under section 110(a) for a cited violation, section 105(a) provides that an operator has a right to contest the alleged violation or the proposed assessment of penalty within 30 days of receipt of notice of the proposed assessment. However, no opportunity to contest the 104(b) order was provided under section 105(a) because there was no violation alleged in the 104(b) order, and there was no proposed assessment of a penalty for it.[2] Maple Creek was not entitled to have a penalty assessed for the 104(b) order, or to a second opportunity to contest it.

---

[1] See *Thunder Basin Coal Co.*, 19 FMSHRC 1495 (Sept. 1997), for an example of assessment of penalties under section 110(b) of the Act.

[2] Because no penalty was assessed for the 104(b) order, the notation "104A – 104B" on the assessment form was nothing more than a shorthand reference to the operator's lack of good faith in attempting to achieve rapid compliance after notification of a violation, one of the factors that the Commission must consider in fixing the amount of a civil penalty. 30 U.S.C. § 820(i). The operator's good faith is only one of several factors that might be addressed in determining the reasonableness of an inspector's decision to issue a 104(b) order. *See Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (Mar. 1986) (*citing Consolidation Coal Co.*, BARB 76-143 (1976)).

Similarly, the Secretary's "jurisdiction by agreement of the parties" argument must be rejected because it is inconsistent with the statute. Moreover, it appears that the Secretary has taken a contrary position in cases before the Commission.

In *Consolidation Coal Co.*, 20 FMSHRC 988 (Sept. 1998), an operator sought to challenge a section 104(b) order in a penalty proceeding on the underlying citation. The ALJ held that he lacked jurisdiction over the section 104(b) order because it was not attached to the Secretary's petition for assessment of a civil penalty. It is not clear how the jurisdictional issue was raised, or what position the Secretary took with respect to it. However, when the operator filed a notice of contest of the order, the Secretary moved to dismiss, claiming it had not been timely filed. The Judge denied the motion, and eventually vacated the order. On review, the Commission affirmed the ALJ's decision, and did not comment on the earlier jurisdictional ruling or the ALJ's decision to accept the late-filed notice of contest.

More recently, the Secretary argued that section 104(b) orders that are not immediately contested pursuant to section 105(d) are not subject to challenge in a civil penalty proceeding under section 105(a) for the underlying citation because they do not contain special findings. *Nelson Brothers Quarries*, 24 FMSHRC 980, 982 (Nov. 2002) (ALJ).[3] Maple Creek has cited several ALJ decisions approving settlements of civil penalty actions, in which related section 104(b) orders were also addressed. However, it is unclear whether the subject orders had been properly contested in those cases. In any event, the jurisdictional issue was not raised or discussed, and ALJ decisions are not binding.

As noted above, Commission ALJ's have reached different conclusions on the issue of whether a 104(b) order can be challenged in a civil penalty proceeding on the underlying citation. In *Mid-Continent Resources, Inc.*, 11 FMSHRC 505 (April 1989), the operator had also challenged a 104(b) order in a penalty proceeding on the underlying citation. In affirming the ALJ's decision vacating the order, the Commission identified the jurisdictional issue presented by the operator's failure to contest the order pursuant to section 105(d), but declined to address the issue because it was not argued to the judge or raised on review. *Id.* n. 5 at 508.

Because the 104(b) order was not contested pursuant to section 105(d) and could not be contested pursuant to section 105(a) because there was no civil penalty assessed, the order was not at issue in the civil penalty proceeding and the ALJ in that case did not have jurisdiction to entertain a challenge to it or grant relief from it.

As the Secretary points out in her submission, she has the sole discretion to decide whether to prosecute or vacate a citation or order, at least one that has not become a final order of the Commission, and that discretion is unreviewable by either the Commission or its ALJs.

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[3] The Judge in that case held that the section 104(b) orders could be challenged in the civil penalty proceeding involving the underlying citations, finding that they were related and that neither the Act nor the Commission's Procedural Rules precluded the challenge.

RBK Construction, Inc., 15 FMSHRC 2099 (Oct. [check] 1993); *Eastern Associated Coal Corp.*, 19 FMSHRC 659, 669 (1997). However, aside from the fact that there is no evidence in the record establishing that the Secretary took steps to vacate the order, e.g., by issuing a continuation sheet stating that the order was vacated, it is not clear that the Secretary would have had the authority to vacate the uncontested order.[4]

In any event, a belated agreement by the Secretary to vacate a 104(b), which had little or no continuing legal significance and was not at issue in a contest proceeding before the Commission, would not render the order invalid for purposes of section 111. Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. *Local Union 1889, District 17 UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1323 (Sept. 1986). The compensation claimed here is available only "after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after [the subject] order is final." 30 U.S.C. § 821. For a 104(b) withdrawal order for which no civil penalty was assessed, the proceeding in which the opportunity for a public hearing would be presented would be a section 105(d) contest proceeding. There was no such proceeding for Order No. 7060223, because it was not contested within 30 days of its receipt. The onus of that failure must fall on Maple Creek, the only party that had an interest in challenging the order.[5]

I find that resolution of the limited issue presented by Maple Creek's renewed motion is governed by *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990) and *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). Because Maple Creek did not contest the issuance of Order No. 7060223 within 30 days of receipt, it became final for purposes of section 111. The validity of the order was not at issue in PENN 2002-116, and it was not affected by the settlement of the related citation.

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[4] The question of the Secretary's authority was suggested as an issue upon which the Secretary might wish to comment in the June 13, 2006, Invitation to the Secretary of Labor to Appear as Amicus Curiae. The Secretary's brief did not specifically address that issue.

[5] While miners or their representatives may also contest the issuance of a 104(b) order under section 105(d), it would be an unreasonable interpretation of the Act's compensation provisions to require them to challenge the very order they rely upon for their claim.

ORDER

Upon consideration of the above, Respondent's Motion for Reconsideration of the Denial of its Motion for Summary Decision is hereby **DENIED**.

Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 24, 2006

ARACOMA COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-824-R
	:	Citation No. 7253529; 07/13/2006
v.	:	Docket No. WEVA 2006-825-R
	:	Order No. 7253530; 07/14/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Aracoma Alma Mine #1
	:	Mine ID 46-08801

ORDER DENYING REQUEST TO HOLD RESPONSE TO ORDER TO SHOW CAUSE IN ABEYANCE

To date, Aracoma has filed more than 350 Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d), that it has contemporaneously agreed to stay pending its contest of the Secretary's proposed civil penalties. On August 25, 2006, Aracoma was ordered to show cause why its contest of the captioned citations should not be dismissed as a result of its apparent contravention of Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii) because it fails to adequately specify the relief requested, and because it is a duplicative and needless consumption of the Commission's resources. 29 FMSHRC 763. The August 25, 2006, Order to Show Cause issued to Aracoma is incorporated by reference.

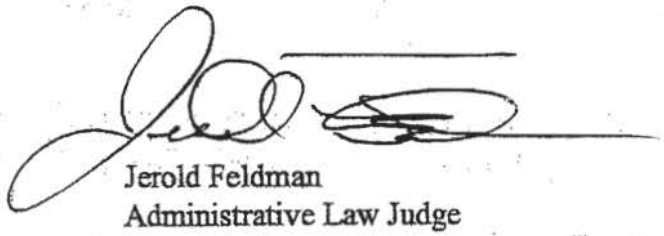
During a subsequent telephone conference, Aracoma was advised to hold its response to the August 25 Order in abeyance pending the disposition of a similar Order to Show Cause in *Marfork Coal Company, Inc. (Marfork)*, Docket Nos. WEVA 2006- 788-R through WEVA 2006-790-R. 29 FMSHRC 745 (Aug. 2006). Marfork's 105(d) contest was dismissed on September 27, 2006. *Order of Dismissal,* 29 FMSHRC ___ (Sept. 2006).[1]

The *Marfork* matter having been resolved, on September 29, 2006, Aracoma was ordered to respond to the Order to Show Cause within fifteen (15) days. On October 11, 2006, Aracoma requested a fourteen (14) day extension, until October 27, 2006, to respond because of the "complex" issues raised in the Order to Show Cause.

[1] Aracoma has been provided with a copy of the recent Marfork *Order of Dismissal.*

During an October 20, 2006, telephone conference with the parties, Aracoma stated that it was contesting virtually all citations to document its ultimate intention to contest all proposed civil penalties in the event Aracoma seeks to reopen a civil penalty because it was paid in error. During the course of the telephone conference, Aracoma requested that its response to the Show Cause Order be held in abeyance pending the disposition of an anticipated appeal of the Marfork dismissal order. Aracoma's request **IS DENIED**.

Once again, Aracoma is requested to analyze the circumstances that it believes distinguish its situation from *Marfork*. Aracoma should also explain why one written correspondence to the Secretary and/or to this Commission evidencing its intention to contest all civil penalties, in lieu of the multitude of contests it has and continues to file, would not serve the same purpose it purportedly seeks to achieve. Accordingly, **IT IS ORDERED** that Aracoma respond to the Show Cause Order on or before November 8, 2006. Further requests for extensions to respond will not be favorably entertained.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2006

LAUREL AGGREGATES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 2006-217-RM
	:	Citation No. 6038673; 06/07/2006
	:	
	:	Docket No. PENN 2006-218-RM
	:	Citation No. 6038638; 06/07/2006
	:	
	:	Docket No. PENN 2006-219-RM
	:	Citation No. 6038639; 06/07/2006
	:	
	:	Docket No. PENN 2006-220-RM
	:	Citation No. 6038641; 06/07/2006
	:	
	:	Docket No. PENN 2006-221-RM
	:	Citation No. 6038643; 05/30/2006
	:	
	:	Docket No. PENN 2006-222-RM
	:	Citation No. 6038644; 05/30/2006
v.	:	
	:	Docket No. PENN 2006-223-RM
	:	Citation No. 6038645; 05/30/2006
	:	
	:	Docket No. PENN 2006-224-RM
	:	Citation No. 6038646; 05/30/2006
	:	
	:	Docket No. PENN 2006-225-RM
	:	Citation No. 6038647; 05/30/2006
	:	
	:	Docket No. PENN 2006-226-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Citation No. 6038648; 05/30/2006
	:	
	:	Docket No. PENN 2006-227-RM
	:	Citation No. 6038649; 05/30/2006
	:	
	:	Docket No. PENN 2006-228-RM
	:	Citation No. 6038650; 05/30/2006

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: Docket No. PENN 2006-229-RM
: Citation No. 6038651; 05/30/2006
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: Docket No. PENN 2006-230-RM
: Citation No. 6038652; 05/30/2006
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: Docket No. PENN 2006-231-RM
: Citation No. 6038653; 06/07/2006
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: Docket No. PENN 2006-232-RM
: Citation No. 6038654; 05/30/2006
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: Docket No. PENN 2006-233-RM
: Citation No. 6038655; 05/30/2006
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: Docket No. PENN 2006-234-RM
: Citation No. 6038657; 05/30/2006
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: Docket No. PENN 2006-235-RM
: Citation No. 6038658; 05/30/2006
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: Docket No. PENN 2006-236-RM
: Citation No. 6038659; 05/30/2006
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: Docket No. PENN 2006-237-RM
: Citation No. 6038660; 05/30/2006
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: Docket No. PENN 2006-238-RM
: Citation No. 6038661; 05/30/2006
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: Docket No. PENN 2006-239-RM
: Citation No. 6038662; 05/30/2006
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: Docket No. PENN 2006-240-RM
: Citation No. 6038663; 05/30/2006
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: Docket No. PENN 2006-241-RM
: Citation No. 6038664; 05/30/2006
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: Docket No. PENN 2006-242-RM
: Citation No. 6038665; 05/31/2006
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: Docket No. PENN 2006-243-RM
: Citation No. 6038666; 05/31/2006
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:	Docket No. PENN 2006-244-RM
:	Citation No. 6038667; 05/31/2006
:	
:	Docket No. PENN 2006-245-RM
:	Citation No. 6038668; 05/31/2006
:	
:	Docket No. PENN 2006-246-RM
:	Citation No. 6038669; 06/01/2006
:	
:	Docket No. PENN 2006-247-RM
:	Citation No. 6038670; 06/07/2006
:	
:	Lake Lynn Quarry
:	Mine ID 36-08891

ORDER TO SHOW CAUSE

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission on June 26, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). In its contests, Laurel Aggregates, Inc. (Laurel) denies each and every allegation contained in the contested citations. Laurel identifies the relief sought as a Commission review and declaration that the contested citations are invalid and void. (*Laurel Contest*, p.18). Such a declaration can only be rendered after a hearing on the merits of the contested citations.

The Secretary filed an answer to Laurel's contest on July 17, 2006, at which time the Secretary moved to stay these matters pending the related civil penalty case. Laurel did not oppose the Secretary's motion.

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is

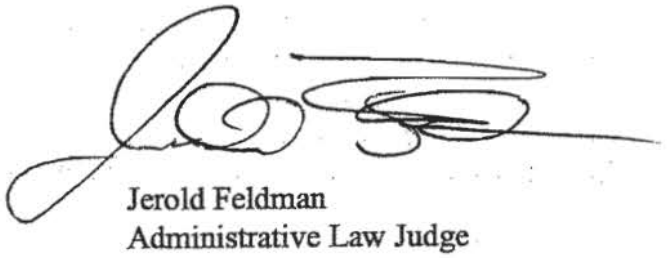
proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested. The relief requested by Laurel is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

By filing a contest on June 26, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, it appears that Laurel is, in substance, waiting for a disposition on the merits *after* the civil penalty is proposed. In other words, Laurel has not adequately articulated the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

The Commission's processing of Laurel's 105(d) contests requires the duplication of docket files with incidental copying and storage for both the contest dockets and the ultimate civil penalty docket. Moreover, Laurel's 105(d) Notice of Contest requires *pro forma* rulings on stay motions that are lacking in substance. I am also cognizant of the Secretary's burden of answering multitudes of 105(d) contests, only to await duplication of her answers in the ultimate civil penalty proceedings. Simply put, a stay order postpones the pre-civil penalty hearing requested by Laurel; a hearing that Laurel implicitly concedes it does not want.

In view of the above, Laurel **IS ORDERED TO SHOW CAUSE**, in writing, **within 15 days from the date of this Order**, why its 105(d) Notice of Contest of the subject citations should not be dismissed because of its apparent contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. Laurel's response should include a statement of the facts, if any, that distinguish its contest from the underlying facts in *Marfork Coal Company, Inc. (Marfork)*, Docket Nos. WEVA 2006- 788-R through WEVA 2006-790-R. *Order of Dismissal,* 29 FMSHRC ___ (September 27, 2006).[1] Laurel's response should specifically address whether the statutory and Commission Rule provisions, and the case law cited in *Marfork* support its contest. In addition, using traditional methods of statutory construction, Laurel should state why it believes its contest satisfies the provisions of section 105(d).



Jerold Feldman
Administrative Law Judge

[1] A copy of the recent Marfork *Order of Dismissal* has been provided to the parties.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

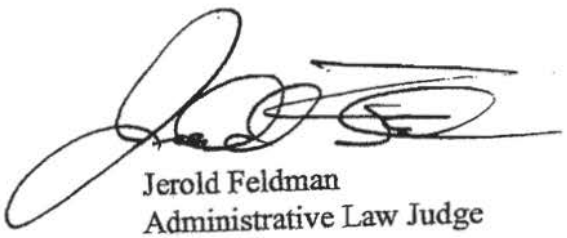
October 31, 2006

AUSTIN POWDER COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2006-328-RM
v.	:	Citation No. 7784642; 09/07/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Rock Hill
Respondent	:	Mine ID 38–00026 E24

ORDER TO CONFER ON HEARING DATE

This proceeding is before me based on a Notice of Contest of Citation No. 7784642, designated as non-significant and substantial, filed with the Commission on September 27, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (Mine Act), 30 C.F.R. § 815(d). In its contest, Austin Powder Company (Austin) ". . . requests that a hearing on the merits [for the purpose of vacating the citation] be held at a date, place, and time to be mutually agreed upon by the parties." (*Austin Contest*, p.2).

Accordingly, **IT IS ORDERED** that the parties confer for the purpose of agreeing on a suitable hearing date within the next six weeks, as well as a suitable hearing location. The parties should advise me, **in writing**, within fifteen (15) days of this Order of the mutually satisfactory hearing date and location. **IT IS FURTHER ORDERED** that if the parties do not agree on a hearing date in furtherance of the prosecution of Austin's contest, Austin should state, **in writing**, within fifteen (15) days of the date of this Order, why its contest should not be dismissed. If it is the Secretary who is unwilling to agree to a timely hearing, the Secretary should state, **in writing**, within fifteen (15) days, why Austin's contest should not be granted.



Jerold Feldman
Administrative Law Judge

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