SEPTEMBER 2001

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

SEPTEMBER 2001

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

Secretary of Labor, MSHA v. Central Mountain Materials, Docket No. WEST 2001-260-M.
(Chief Judge Barbour, unpublished Default Decision, August 1, 2001)

Secretary of Labor, MSHA v. Virginia Slate Company, Docket No. VA 99-8-M.
(Judge Weisberger, August 16, 2001)

There were no cases filed in which Review was denied during the month of September

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 10, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2001-260-M
CENTRAL MOUNTAIN MATERIALS	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 1, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") received from Central Mountain Materials ("Central Mountain") the "green card" notice that the operator was requesting a hearing on eight alleged violations for which MSHA had proposed penalties. On April 16, 2001, the Secretary of Labor filed a Petition for Assessment of Penalty. The operator failed to answer the Secretary's petition as required by 29 C.F.R. § 2700.29. On June 5, 2001, Chief Administrative Law Judge David F. Barbour issued an Order to Respondent to Show Cause, directing Central Mountain to file an answer within 30 days. On August 1, 2001, noting that no answer had been filed, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering Central Mountain to pay civil penalties in the sum of $777 proposed by the Secretary.

On August 27, 2001, the Commission received from Central Mountain a request for relief from the judge's default order. Mot. Central Mountain, appearing pro se, asserts that, upon receiving the citations, it sent in a response on a form, disputing all of the pending citations. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on August 1, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Central Mountain's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). It appears that Central Mountain may have mistakenly believed that, after having returned the green card, it was not required to file an answer to the Secretary's petition for assessment of penalty. *See* 29 C.F.R. §§ 2700.26 and 2700.29. On the basis of the present record, we are unable to evaluate the merits of Central Mountain's position. In the interest of justice, we vacate the default order and remand this matter to the judge to determine whether relief from default is appropriate. *See Gen. Rd. Trucking Corp.*, 17 FMSHRC 2165, 2165-66 (Dec. 1995) (deeming letter as timely filed petition for discretionary review, vacating default, and remanding where pro se operator confused about Commission's procedural rules). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

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

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

Gary Mortimer, President
Central Mountain Materials LLC
3166 Willow Creek Road
Prescott, AZ 86301

Alan Raznick, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, CA 94105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 14, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2000-101-M
ALCOA ALUMINA & CHEMICALS, L.L.C.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge Jacqueline R. Bulluck correctly determined that Alcoa Alumina & Chemicals, L.L.C. ("Alcoa") violated 30 C.F.R. §§ 48.28(a)[1] and 48.31(b).[2] 22 FMSHRC 1484, 1486-92 (Dec. 2000) (ALJ). For the following reasons, we affirm the judge's decision in result.

I.

Factual and Procedural Background

Located in Point Comfort, Texas, Alcoa's Bayer Alumina Plant ("Point Comfort") produces alumina from bauxite. 22 FMSHRC at 1485. At the plant, the bauxite is ground and

---

[1] Section 48.28(a), entitled "Annual Refresher Training of Miners," provides in part: "Each miner shall receive a minimum of 8 hours of annual refresher training."

[2] Section 48.31, entitled "Hazard Training," provides in part: "(a) Operators shall provide to . . . miners . . . a training program before such miners commence their work duties. . . . (b) Miners shall receive the instruction required by this section at least once every 12 months."

mixed with sodium hydroxide to form a slurry. *Id.* The slurry is combined with steam under high heat and pressure, producing sodium aluminate. *Id.* The sodium aluminate is then clarified, which removes mud solids from the solution. *Id.*; Tr. 173. The solution next undergoes precipitation, which produces hydrated alumina. Tr. 173. After a drying process called calcination, alumina is produced. 22 FMSHRC at 1485; Tr. 173.

On July 13, 1999, the San Antonio Field Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") received a complaint from a Point Comfort employee that certain supervisors had not received refresher training. 22 FMSHRC at 1485. On that same day, MSHA Inspector Larry Parks responded to the complaint and conducted an inspection of Point Comfort. *Id.* Inspector Parks met with Alcoa safety specialist Richard Ripley and union representative Mike Monroy and discussed the particulars of the complaint. *Id.* He also interviewed several employees and reviewed Alcoa's training records for the previous year. *Id.* Parks discovered that over 80 supervisors had not received annual refresher training and six salaried employees had not received hazard training. *Id.* at 1486.

As a result, the inspector issued Order Nos. 7879697 and 7879698 under Mine Act section 104(g)(1), 30 U.S.C. § 814(g)(1),[3] for violations of sections 48.28(a) and 48.31(b). *Id.* Alcoa contested the orders and a hearing was held. The judge found that Point Comfort's processing of bauxite was a milling operation, subject to the jurisdiction of the Mine Act. *Id.* at 1485. She rejected Alcoa's position that, because the plant was neither a surface mine nor a surface area of an underground mine, but a milling operation, it was not subject to MSHA's Part 48 training regulations. *Id.* at 1487. The judge concluded that 30 C.F.R. § 48.21, the scope provision for both sections 48.28(a) and 48.31(b), was plain and that the term "mine" as used in the provision included any operation that constituted a mine under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). *Id.* She determined that Alcoa violated section 48.28(a) because supervisory and salaried miners had not received annual refresher training. *Id.* The judge concluded that the violation was significant and substantial ("S&S") as there was a reasonable likelihood that supervisory and salaried miners, not updated periodically on safe plant

---

[3] Section 104(g)(1) provides in pertinent part:

> If, upon any inspection or investigation . . . , the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

procedures, could be seriously injured by machinery or chemicals. *Id.* at 1488. Likewise, the judge determined that Alcoa committed an S&S violation of section 48.31(b) because six salaried employees had not received hazard training. *Id.* at 1491-92.

Alcoa filed a petition for discretionary review, challenging the judge's finding that 30 C.F.R. Part 48 applied to Point Comfort, which the Commission granted.

II.

Disposition

Alcoa argues that the training requirements contained in Part 48 do not pertain to Point Comfort, which is a mill. PDR at 1-2, 5-6. It contends that Part 48 plainly applies to underground or surface mines or surface areas of underground mines and, as MSHA Inspector Parks admitted, Point Comfort does not fall within any of those mining categories. *Id.* at 2-4, 6; A. Br. at 5. The operator also argues that MSHA expressly includes "mills" and "milling operations" in other standards and consequently the omission of mills and milling operations from Part 48 implies that it does not apply to a milling operation like Point Comfort. A. Br. at 7-8; A. Reply Br. at 9-12. Accordingly, Alcoa requests that the Commission vacate the orders and proposed penalty assessments. A. Br. at 9; A. Reply Br. at 12.

The Secretary responds that the judge correctly determined that Part 48 plainly applies to Point Comfort. S. Br. at 4-8. She asserts that the judge's determination is supported by the Mine Act, the purpose of Part 48, and the preamble to the final rule, which states that milling operations are subject to Part 48's requirements. *Id.* at 8-9, 11. The Secretary contends that, in standards such as Part 48 where MSHA does not specify milling operations for special treatment, milling operations are to be treated the same as other facilities covered under the standard. *Id.* at 10 n.5. In the alternative, the Secretary argues that, if the Commission determines that the applicability of Part 48 is not clear, it should accept the Secretary's reasonable interpretation of Part 48, i.e., that the standard applies to milling operations. *Id.* at 16 n.9.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory

function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable). Additionally, "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Sections 48.28(a) and 48.31(b) are contained in subpart B of the Secretary's Part 48 standards. The scope of subpart B is set forth in section 48.21. That section states in pertinent part:

> The provisions of this subpart B set forth the mandatory requirements for submitting and obtaining approval of programs for *training and retraining miners working at surface mines* and surface areas of underground mines. . . . The requirements for training and retraining miners working in underground mines are set forth in subpart A of this part. This part does not apply to training and retraining of miners at shell dredging, sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines, which are covered under 30 C.F.R. Part 46.

30 C.F.R. § 48.21 (emphasis added). Additionally, "miner" is defined in pertinent part for purposes of both standards at issue by 30 C.F.R. § 48.22(a)(1) & (a)(2) as a person working in a "surface mine." We must therefore decide whether Point Comfort is a "surface mine" for purposes of the training requirements contained in Part 48, subpart B.

Our first inquiry is whether the text of section 48.21 is plain. Both parties advance plain language interpretations of the standard to support their respective positions. Under the strict literal approach, advocated by the Secretary, a mill is a "mine," as defined in Mine Act section 3(h)(1), and because it is located on the surface of the earth, the mill must be a "surface mine." However, the statutory definition of a mine was not expressly incorporated into the Secretary's Part 48 regulations. *Compare* 30 C.F.R. § 50.2(a) (applying Mine Act definition of mine to Part 50). Additionally, neither section 48.21, nor the definitional provision for Part 48, subpart B, contained in section 48.22, define the terms "surface mine," "surface," or "mine." Without sufficient definition, confusion may result because "surface mining" is a term of art in the mining industry that refers to excavation of a mineral on the surface as opposed to underground. *See* Am. Geological Inst., *Dictionary of Mining, Mineral and Related Terms* 554 (2d ed. 1997) (defining surface mining as the "mining in surface excavations"). Indeed, the inspector alluded to this term of art when he testified on cross-examination that surface mining consisted of the removal of metal or mineral from the surface of the earth and that Point Comfort was not a surface mine. Tr. 40-44. Ambiguity is also possible because, as Alcoa points out, section 48.21 does not expressly include mills or milling operations within its scope, whereas other standards

explicitly apply to them. *See* 30 C.F.R. §§ 50.30-1(g) and 56.20012 (specifying requirements for "mill operations" and "milling," respectively). However, we are not convinced by Alcoa's plain language interpretation, particularly given its failure to address the statutory definition of a mine, which includes milling operations.

Because Part 48, subpart B is silent on whether a milling operation constitutes a surface mine and the term surface mine is open to a number of interpretations, we disagree with the judge and the parties that section 48.21 is plain. We conclude that the scope provision of subpart B is ambiguous on this issue. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1081 (10th Cir. 1998) (providing that regulatory standard was ambiguous when neither of the proffered "plain" language interpretations was clearly required or prohibited by the standard's language).

We turn next to the question whether the Secretary's interpretation of section 48.21 is reasonable. The Secretary's interpretation (that a milling operation is a surface mine under Part 48) is consistent with the preamble to the regulations. The preamble to Part 48 explains the coverage of the rules:

> *These rules are applicable to all facilities which are covered under the Mine Act.* MSHA does not have the authority to exempt or exclude operations otherwise covered by the Act from the training requirements. Thus, *milling,* dredging and clay winning operations are subject to these requirements.

43 Fed. Reg. 47,454, 47,456 (Oct. 13, 1978) (emphases added). Thus, the preamble explicitly states that milling is subject to Part 48 training requirements.[4] Since the preamble was issued when Part 48 was first promulgated, the Secretary has historically and consistently applied her interpretation. *Id.*[5]

We must also examine whether the Secretary's interpretation of Part 48 is consistent with Mine Act section 115, 30 U.S.C. § 825, the statutory section that Part 48 implements. *See* 43 Fed. Reg. at 47,454 (preamble indicating that Part 48 implements Mine Act section 115); *Emery*, 744 F.2d at 1414 (construing Part 48 in light of Mine Act section 115). Section 115(a) states: "Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary." 30 U.S.C. § 825(a). The section requires that "all miners" are to receive annual refresher training. 30 U.S.C. § 825(a)(3). Miners are defined in section

---

[4] The preamble's explicit inclusion of milling contradicts Alcoa's arguments in its PDR and opening brief that the preamble should be read to exclude milling. PDR at 4-6; A. Br at 6-8. In its reply, Alcoa asserts, inconsistently with its prior argument, that the preamble should not in fact be considered. A. Reply Br. at 4-6.

[5] Additionally, the Secretary's construction is not inconsistent with the literal terms of section 48.21.

3(g) of the Act as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Because mills are included in the definition of "mine" under Mine Act section 3(h)(1), the Secretary's interpretation, i.e, that the phrase "surface mines" should be read to include mills, is consistent with the Mine Act.

On the other hand, Alcoa's construction, which excludes mills from Part 48's coverage, would permit operators to deny training to miners at milling operations. This construction directly contravenes the Mine Act's mandate that all miners receive training. 30 U.S.C. § 825(a). We find problematic Alcoa's assertion that, under its interpretation, miners who work in milling operations located as part of surface mines or underground mines would be subject to Part 48 training requirements, but miners who work at stand-alone milling operations, like Point Comfort, would not receive Part 48 training. A. Reply Br. at 3, 11-12. Alcoa's interpretation would result in piecemeal protection for miners at milling operations, a result at odds with the Mine Act and the Congressional intent in enacting the Act.[6]

Because the Secretary's interpretation that a milling operation qualifies as a surface mine under Part 48 is reasonable, logically consistent with the language of the regulation, and serves a permissible regulatory function in furtherance of the Mine Act's safety goals, we defer to it.[7] *Rock of Ages Corp.*, 20 FMSHRC 106, 112 (Feb. 1998), *aff'd in part*, 170 F.3d 148 (2d Cir. 1999); *Cannelton*, 867 F.2d at 1435. Accordingly, we affirm the judge's decision that Part 48, subpart B applies to Point Comfort, and that Alcoa committed S&S violations of sections

---

[6] The legislative history reveals that Congress was aware of and concerned about the health and safety hazards for miners in mills. H. Rep. No. 95-312, at 6-9, 11-13 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 362-65, 367-369 (1978) ("*Legis. Hist.*") (bringing mills specifically under the jurisdiction of the Mine Act and discussing the potential hazards of mills including toxic exposure to iron oxide, radon, mercury and manganese). Congress also considered training of miners to be of paramount importance for mine safety. *See Legis. Hist.* at 362 (citing one of the causes for the Sunshine Silver Mine fire, in which 91 miners lost their lives, to be the failure to train miners in self-rescue and survival techniques); *id.* at 637-638 (stating that "the Committee considers the presence of miners in a dangerous mine environment who have not had even the rudimentary training of self-preservation and safety practices inexcusable."). In fact, Congress provided MSHA with one of the most potent tools under the Act — a withdrawal order — for training violations. 30 U.S.C. § 814(g).

[7] Chairman Verheggen states: For the reasons stated in my dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999), *appeal docketed sub nom. RAG Cumberland LP v. FMSHRC*, No. 00-1438 (D.C. Cir. Oct. 10, 2000), I would "accord special weight," rather than defer, to the Secretary's interpretation of the regulations at issue here. *See Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979).

48.28(a) and 48.31(b) by failing to provide the requisite training.[8]

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision in result.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[8] In cases involving ambiguous standards, the issue of whether the operator had adequate notice of the regulatory requirements at issue may arise. An agency's interpretation may be permissible but nevertheless may fail to provide the notice needed to support imposition of a civil penalty. *Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Alcoa has not raised the issue of notice on this appeal. 30 U.S.C. § 823(d)(2)(A)(iii). Nevertheless, even if it had, the record reveals that at least since 1992, Alcoa had actual notice of the Secretary's interpretation of Part 48, including that the training requirements applied to salaried and supervisory employees. 22 FMSHRC at 1490. Moreover, with regard to its hourly employees, Alcoa has complied with Part 48 for many years. Tr. 92-93, 99, 155; *see also* S. Ex. 6 (Part 48 training plan in force at Alcoa's Point Comfort Plant).

Distribution

Harold J. Engel, Esq.
Arant, Fox, Kintner, Plotkin & Kahn, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Tina Peruzzi, Esq.
W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 17, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2001-230 A.C. No. 15-17717-03536 A
VESTER OSBORNE	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 9, 2001, the Commission received from Vester Osborne ("Osborne") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Osborne was cited for three violations under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), and failed to file a timely request for a hearing. Proposed Penalty Assessment (June 12, 2000). He states that at the time of the cited violations, he was working as the supervisor of Stanley Osborne's Sister Bear Mine. Mot. He asserts that, when he received the proposed penalty assessment for the cited violations, he gave it to Stanley Osborne, the owner of his former place of employment, who said he would "take care of it." *Id.* Osborne contends that he

is unable to pay the $5825.67 penalty and should not be responsible for paying it because Stanley Osborne agreed to pay it. *Id.* He requests that the Commission reopen this matter. *Id.*

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

The Commission has previously remanded a request to reopen where a defaulting party has claimed that another party is responsible for paying the penalties at issue, but the defaulting party also alleges an intention to contest those penalties. *See JEN Inc.*, 16 FMSHRC 2402 (Dec. 1994) (remanding a request to reopen where JEN indicated that it intended to contest the penalties at issue although it contended that the owner of the mine, and not JEN, was responsible for paying the penalty). The Commission has denied such a request, however, when a company has alleged that another party is responsible for paying the penalty, but fails to allege an intention to contest the penalty at issue. *See Sterling Sand & Gravel Co.*, 22 FMSHRC 935 (Aug. 2000) (denying request to reopen because the operator did not allege its intention to contest the penalty at issue but only asserted that it was not responsible for paying the penalty).

Here, Osborne appears to indicate that he would contest the penalty by stating that he is unable to pay it. Mot. Further, by asserting that he thought Stanley Osborne was handling the penalty matter, Osborne has provided a reason for not filing a timely request for a hearing. *Id.* Finally, because Osborne is apparently proceeding without the benefit of counsel, his request may be held to a less stringent standard than pleadings filed by counsel. *See Dykhoff v. U.S. Borax, Inc.*, 21 FMSHRC 1279, 1280-81 (Dec. 1999) (recognizing that Commission has held pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys); *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 (Oct. 1999) (same).

On the basis of the present record, we are unable to evaluate the merits of Osborne's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See JEN*, 16 FMSHRC at 2402-03. If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here. As our colleagues state so convincingly: "Here Osborne appears to indicate that he would contest the penalty by stating that he is unable to pay it. Further, by asserting that he thought Stanley Osborne was handling the penalty matter, Osborne provided a reason for not filing a timely request for a hearing." Slip op. at 2. Our colleagues also correctly point out that Osborne is appearing pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Id.*; *see Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Moreover, the Secretary does not oppose Osborne's motion.[1] We are thus mystified that our colleagues are "unable to evaluate the merits of Osborne's position." Slip op. at 3.

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

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

[1] The Secretary does contend, and we agree, that if Osborne does not contest the penalty after it is presumably reopened, or contests the penalty but loses his contest, he will be legally responsible for paying whatever penalty is finally assessed. *See* Sec'y Letter (Apr. 13, 2001). We also agree with the Secretary that any agreement by Stanley Osborne to pay the penalty is a matter between Vester Osborne and Stanley Osborne and does not affect Vester Osborne's ultimate responsibility for ensuring that any penalty, if assessed, is paid. *See id.*

Distribution

Vester Osborne
1139 Lizzie Fork Road
Pikeville, KY 41501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 19, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of LEONARD BERNARDYN	:	
v.	:	Docket Nos. PENN 99-158-D
	:	PENN 99-129-D
READING ANTHRACITE COMPANY	:	

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

DECISION

BY: Verheggen, Chairman, and Riley, Commissioner

This discrimination proceeding, before us for a second time, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) ("Mine Act" or "Act"). In his original decision, Administrative Law Judge Avram Weisberger concluded that Reading Anthracite Company ("Reading") did not violate section 105(c)(1) of the Act when it discharged miner Leonard Bernardyn on November 10, 1998. 21 FMSHRC 819, 824 (July 1999) (ALJ). The Commission vacated Judge Weisberger's decision and remanded the matter for further analysis. 22 FMSHRC 298 (Mar. 2000) ("*Bernardyn I*"). On remand, the judge again concluded that Reading's discharge of Bernardyn did not violate section 105(c)(1). 22 FMSHRC 951, 955 (Aug. 2000) (ALJ). The Commission granted the Secretary's petition for discretionary review ("PDR") of the judge's remand decision. For the following reasons, we vacate that decision and remand for further analysis.

I.

Factual and Procedural Background

A. Facts and Initial ALJ Decision

Bernardyn had worked for Reading for nineteen years, including working as a haulage truck driver at Reading's Pit 33, a coal mine in Wadesville, Pennsylvania, for approximately four

and a half to five years before his discharge. 22 FMSHRC at 299. Around 7:00 a.m. on November 10, 1998, Bernardyn began driving his 190-ton Titan haulage truck on his usual route. *Id.* Overall, the road has a grade of approximately 8%, and parts of it are as steep as 10.3%. *Id.* When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. *Id.*

After prompting from Reading's general manager Frank Derrick, who had seen the Titan driving slowly, mine superintendent Stanley Wapinski stopped Bernardyn and asked him why he was driving slowly. *Id.* Bernardyn responded that the roads were getting slippery. *Id.* Wapinski told Bernardyn to drive faster. *Id.* Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. *Id.* When Wapinski answered yes and identified Bernardyn as the driver, Derrick told him to remove Bernardyn from the haulage run. T. Tr. at 85-86.[1] Wapinski met Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. 22 FMSHRC at 299.

After the second conversation with Wapinski, Bernardyn used the C.B. radio in his truck to call Thomas Dodds, the United Mine Workers of America ("UMWA") safety committeeman. *Id.* Dodds was driving a truck on the same shift as Bernardyn. *Id.* Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. *Id.* During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said "I'll get the little f----r." *Id.* Derrick overheard Bernardyn's complaints and profanity on the C.B. radio, but he testified that "it never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116. Derrick fired Bernardyn after he had dumped the load in his truck, assertedly for profanity and threatening a supervisor over the C.B. radio. 22 FMSHRC at 299-300.

Within 30 minutes after Bernardyn's termination, road conditions worsened, and a layer of ice had formed on the road. *Id.* at 300 n.2. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. *Id.*

On November 12, 1998, Bernardyn filed a discrimination complaint with MSHA alleging that he was discharged unlawfully. *Id.* at 300. The Secretary's application for temporary reinstatement was granted, and Bernardyn was ordered temporarily reinstated to his former position on March 19, 1999. 21 FMSHRC 339, 342 (Mar. 1999) (ALJ).

---

[1] Hearings on Bernardyn's temporary reinstatement application and on the merits of his discrimination complaint were held on March 16 and May 18, 1999, respectively. References to the transcript of the temporary reinstatement hearing are in the form "T. Tr." References to the transcript of the merits hearing are in the form "M. Tr." The judge incorporated the transcript and exhibits from the temporary reinstatement hearing into the record of the merits proceeding. M. Tr. 9-10.

On the merits of the complaint, the judge found that Bernardyn engaged in protected activity when he drove at a speed consistent with the road conditions, that Reading's discharge of Bernardyn constituted adverse action, and that, based on the coincidence in time between Derrick's order to Wapinski to stop Bernardyn twice for driving too slowly, and Derrick's discharge of Bernardyn, the Secretary established a prima facie case of discrimination. 21 FMSHRC at 822. However, the judge determined that Reading would have fired Bernardyn in any event for the 8-10 minute cursing episode over the CB radio and his threatening language directed towards Wapinski. *Id.* at 823. The judge rejected the Secretary's argument that in discharging Bernardyn, Reading treated him disparately when compared with other employees who had cursed but had only received warnings. *Id.* at 822-23. The Secretary petitioned the Commission for review of the judge's decision.

B. *Bernardyn I*

On review, the Commission concluded that the judge failed to properly analyze evidence relevant to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed. 22 FMSHRC at 302-03 (citing *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984)). The Commission also ordered the judge to resolve the issue of which of two different disciplinary policies was in effect at the time of Bernardyn's discharge.[2] 22 FMSHRC at 303-04. The Commission further instructed the judge to resolve the inconsistency between his finding that Bernardyn did not believe he threatened Wapinski, and his statement that Derrick terminated Bernardyn because he threatened Wapinski. *Id.* at 304-05. The Commission also ordered the judge to analyze "how Bernardyn's words could constitute a threat when Wapinski . . . did not hear Bernardyn's supposedly threatening language;" "whether Wapinski perceived any threat at all — let alone a threat of physical harm;" and "whether the general words Bernardyn used, which named no person in particular, constituted a threat against Wapinski." *Id.* at 305. Finally, the Commission instructed the judge to determine whether Bernardyn's cursing and alleged threat were provoked by Reading's response to his protected refusal to drive faster, and, if so, "whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" *Id.* at 307-08.

C. The ALJ's Remand Decision

In his remand decision, the judge found that the 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. 22 FMSHRC at 952-53. Although taking "cognizance" of,

---

[2] Reading's 1987 disciplinary policy established a system of progressive discipline for most offenses, and did not include cursing or insubordination among the four offenses subjecting employees to "immediate suspension subject to discharge." Gov't Ex. B at 1. Its 1998 disciplinary policy provided for immediate discharge for insubordination. R. Ex. 2 at 1.

and briefly discussing, four other incidents of miners cursing without being discharged, the judge concluded that, "based on Derrick's testimony, . . . I find credible, inasmuch as it was not impeached or contradicted, that, in contrast to these individuals who just received warnings, Bernardyn used threatening language over the C.B. radio . . . ." *Id.* at 953 (emphasis in original). The judge also found that "the other individuals made a profane remark only once, whereas Bernardyn used profanity 'non-stop' for approximately 8 to 10 minutes," and that Bernardyn's conduct was "more egregious, and thus not in the same category as the others who were merely warned." *Id.* (citations omitted).

In finding that Bernardyn threatened Wapinski, the judge found Bernardyn's "general statement [that he had never threatened anybody in his life] insufficient to contradict or impeach Derrick' testimony regarding the specific language used by Bernardyn." *Id.* at 952 (emphasis in original). The judge found Bernardyn's state of mind was not dispositive of whether Bernardyn threatened Wapinski. *Id.* Rather, he stated that he relied on "the objective context in which Bernardyn uttered the statement at issue" — namely that Bernardyn made the statement over the C.B. radio in an attempt to contact his union representative, and that he admitted he cursed, thereby exhibiting a degree of animus. *Id.* (emphasis in original). The judge concluded that Bernardyn's statement "constituted a threat, i.e., an expression of an intent to inflict harm on another." *Id.*

The judge also found that the record does not contain "any actions or conduct on the part of any of Reading's agents that might constitute an act of provocation," and concluded that "the Secretary has failed to establish that Reading provoked Bernardyn into using profanity and issuing a threat over a C.B. radio." *Id.* at 953 (emphasis in original). He also found that Wapinski's statements to Bernardyn "are devoid of any threat or expression of animus toward Bernardyn or his protected activity." *Id.* Finally, the judge also determined that Bernardyn's unprotected activities were "out of proportion to the one-time, brief statements Wapinski made to him." *Id.* at 953-54.

II.

Disposition

The Secretary submits that the judge erred in finding that Reading would have discharged Bernardyn for using profanity and making a threat even if Bernardyn had not engaged in protected activity. PDR at 8.[3] She argues that the judge failed to give any consideration to the fact that, in discharging Bernardyn, Reading departed from the plain terms of its 1987 disciplinary policy. *Id.* at 15. She also asserts that the judge's conclusion is erroneous because Bernardyn did not make a threat, cursing was prevalent among employees and management at Reading, and Bernardyn's 8-10 minute cursing episode was not more serious than other employees' histories of cursing. *Id.* at 18-19. The Secretary also argues that the judge erred in basing his conclusion that

[3] The Secretary designated her PDR as her opening brief.

there was no provocation on his finding that Reading's actions did not contain a threat or expression of animus. *Id.* at 23-24. The Secretary also maintains that Bernardyn's utterance of his statement that he would "get" a member of management is outweighed by Reading's provocative act of ignoring Bernardyn's expression of legitimate safety concerns. *Id.* at 25. The Secretary characterizes as without legal or logical basis the judge's finding that Reading did not provoke Bernardyn's cursing and alleged threat because Reading's allegedly provocative behavior consisted only of statements and not actions. *Id.* at 23.

Reading responds that the judge correctly found that Bernardyn's conduct was distinguishable from the conduct of Reading employees who had only received warnings for cursing in that Bernardyn's statements were broadcast over the C.B. radio, continued for eight to ten minutes, and contained a threat aimed at Wapinski, and that the operator would have discharged Bernardyn even if he had not engaged in protected activity. R. Br. at 6, 12. Reading disagrees with the judge's conclusion that the 1987 policy was in effect at the time of Bernardyn's discharge. *Id.* at 12. Reading submits that substantial evidence supports the judge's finding that Bernardyn threatened Wapinski. *Id.* at 11. Reading argues that none of Bernardyn's testimony supports the Secretary's assertion that his outburst was provoked by Reading or that he believed he was in danger of being disciplined. *Id.* at 15-19. Finally, Reading claims that, even though Bernardyn's statements arguably expressed a feeling that he was not comfortable driving as fast as Reading officials asked him to drive, his "extreme" and "disproportionate" response stripped him of the protection of the Mine Act. *Id.* at 17.

A. The *Pasula-Robinette* Framework

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

Here, Reading does not dispute the judge's finding that the Secretary established a prima facie case. The analysis therefore shifts to whether substantial evidence[4] supports the judge's conclusion that Reading would have terminated Bernardyn even if he had not engaged in protected activity. To make out its affirmative defense, the operator must prove by a preponderance of the evidence that it would have taken the adverse action in any event because of unprotected activity alone. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992) (citing *E. Assoc. Coal Corp.*, 813 F.2d at 642).

The affirmative defense may be challenged on the ground that it is pretextual. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has stated that, in considering an employer's business justification, "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)). The Commission held in *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997) that, "[i]n reviewing affirmative defenses, the judge must determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.* at 838 (citation omitted). The Commission has cautioned that this affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro*, 4 FMSHRC at 1938. However, "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC at 2516.

B. Disparate Treatment

In *Chacon*, the Commission indicated that disparate treatment, in addition to serving as one of the possible bases of a prima facie case, may also be established by a complainant to refute an operator's affirmative defense. 3 FMSHRC at 2512-13, 2517. In analyzing whether a complainant was disparately treated in the context of termination for using offensive language, the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated

---

[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

other miners who had cursed. *See Cooley*, 6 FMSHRC at 521; *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991).

Notwithstanding the Commission's conclusion in *Bernardyn I* that the judge "failed to adequately analyze the evidence relevant to the *Cooley* factors," 22 FMSHRC at 303, on remand the judge did not rely on *Cooley* and again failed to correctly apply the *Cooley* factors. Accordingly, we are constrained once more to vacate the judge's decision and remand for application of Commission precedent. On remand, the judge must reconsider his reiteration of his initial determination that Bernardyn did not suffer disparate treatment and discrimination under section 105(c), according to the principles set forth below.

1. Complainant's Prior Use of Profanity

In concluding in *Bernardyn I* that the judge had failed to adequately analyze evidence relating to the *Cooley* factors, we found that "the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing." 22 FMSHRC at 303. Yet in the two paragraphs he devoted to the disparate treatment issue on remand, the judge made no reference to this finding, which was dispositive of one of the *Cooley* factors and weighs against a finding that Reading established its affirmative defense. On remand, we direct the judge to apply this prong of the *Cooley* test in determining whether Reading treated Bernardyn disparately and would have terminated him solely for his unprotected conduct.

2. Disciplinary Policy on Cursing

The judge found that Reading's 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. As the judge pointed out, an August 4, 1998 letter from Reading's attorney to a UMWA executive board member states that "the Company will implement the attached Code of Conduct following the conclusion of the current negotiations and ratification of the new collective bargaining agreement." 22 FMSHRC at 952. At the hearing, the UMWA District Executive Board Member testified that the new collective bargaining agreement was not ratified until November 16, 1998, after Bernardyn's November 10 discharge. M. Tr. 45-46. Moreover, a November 17, 1998 letter from Reading's attorney stated that Reading accepted the terms of the new 1998 code of conduct proposed by the UMWA, subject to a handful of new provisions described in the letter. Gov't Ex. A. Accordingly, we conclude that substantial evidence supports the judge's finding that the 1987 policy was in effect at the time of Bernardyn's discharge.

Having found that the 1987 disciplinary policy was in effect, however, the judge inexplicably failed to apply this finding to the issue of disparate treatment. In remanding this proceeding to the judge, we stated:

> Determining which disciplinary policy was in effect on November 10 *is a crucial factor to consider in deciding whether Bernardyn's discharge subjected him to disparate treatment and, more broadly, whether Reading established that it would have terminated Bernardyn for his unprotected activity alone.*

22 FMSHRC at 303 (emphasis supplied).

There is simply no provision in Reading's 1987 code of conduct establishing either cursing or threatening language as an offense warranting immediate termination. Gov't Ex. B. The 1987 policy classifies offenses into three groups. *Id.* Misconduct falling under the heading "Discharge for Just Cause" subjected employees to "immediate suspension subject to discharge." *Id.* at 1. Only four offenses were listed in this classification:

> 1. Stealing.
> 2. Possessing or using intoxicants or drugs in the area of work.
> 3. Carrying weapons on Company property.
> 4. Physical fighting.

Id.

Another group of offenses subjected employees to "discharge following complete exhaustion of disciplinary warning and suspensions." *Id.* at 2. Under Reading's 1987 policy, the penalty for the first act of misconduct for these offenses was "a verbal warning."[5] *Id.* Neither cursing nor threats was listed as an offense under this category. *Id.* Nevertheless, Reading administered progressive discipline to several employees who cursed or verbally abused members of management. However, the four other reported incidents of cursing at Reading also involved other acts of misconduct or insubordination. Gov't Ex. C; M. Tr. 29. Specifically, in addition to cursing, other miners who cursed and were disciplined by Reading also left assigned work areas early, arrived for work late, argued with foremen about job assignments, ignored a supervisor giving work assignments, and refused to perform a job out of classification as ordered. Gov't Ex. C; M. Tr. 29. In none of these cases was the employee discharged.[6] Gov't Ex. C; M. Tr. 29. Thus, Reading had no established practice of disciplining workers for cursing in the absence of accompanying insubordinate acts, or of treating cursing as conduct warranting immediate discharge. *Cf. Cooley*, 6 FMSHRC at 521 ("[T]here is no evidence that anyone had ever been disciplined by [the operator] for swearing . . . ."); *Knotts*, 19 FMSHRC at 838, 840

---

[5] A third category of misconduct under the 1987 policy involved "willful safety violation[s]." Gov't Ex. B at 3.

[6] Four of the cases involved oral or written warnings. Gov't Ex. C. In one case, two miners were "fired for refusing to do a job out of their classification," not for cursing, but were returned to work one day after a grievance meeting. M. Tr. 28-30, 36-37.

(finding that operator failed to establish an affirmative defense because it "offered no evidence of past discipline, prior work record, or personnel practices showing that it would have terminated [complainant] regardless of his protected activity").

The judge failed to address the 1987 policy, or the policy prong of the *Cooley* standard, in his brief discussion of disparate treatment. 22 FMSHRC at 953. In his conclusion, the judge appeared to acknowledge that, under the terms of Reading's 1987 disciplinary policy and under its application of that policy prior to Bernardyn's discharge, Reading did not prohibit cursing or threats and did not permit immediate termination of miners who cursed or uttered a threat. The judge stated:

> The disciplinary policy of 1987 in effect when Bernardyn was terminated did not specifically grant Respondent the right to terminate an employee based upon the latter's use of profanity, and the issuance by the latter of a threat against a supervisor.

Id. at 955.

Based on the judge's findings that the 1987 disciplinary policy was in effect, that the policy did not permit summary termination for profanity or using threatening language, and that Reading nevertheless immediately discharged Bernardyn for those offenses, the conclusion is inescapable that Reading violated its policy in terminating Bernardyn. Yet the judge failed to apply these findings in deciding that Reading did not subject Bernardyn to disparate treatment. We direct the judge to do so when he revisits the disparate treatment issue on remand.

3. Treatment of Similarly Situated Miners

The judge distinguished Bernardyn's cursing from prior incidents of cursing at Reading on the following grounds: (1) Bernardyn's cursing was broadcast over the C.B. radio, (2) Bernardyn cursed for approximately 8 to 10 minutes, whereas other miners cursed only once, and (3) only Bernardyn threatened a supervisor. 22 FMSHRC at 953. We must decide whether the judge properly distinguished Bernardyn's cursing episode from prior cursing episodes at Reading that were either not cited at all as the basis for discipline, or resulted only in warnings.

a. Use of C.B. Radio

We understand the judge's finding regarding Bernardyn's use of the C.B. radio to mean that, because other people at the mine could hear his profane outburst, his case was distinguishable from prior cursing incidents. In this regard, Reading claimed at the hearing that the fact that other employees could hear Bernardyn's cursing influenced Derrick's decision to discharge Bernardyn. T. Tr. 127. However, like Bernardyn's cursing episode, other incidents of cursing at Reading involved miners who directed profanity at supervisors in the presence of other employees. Gov't Ex. C at 1, 4. For instance, one miner told a supervisor in front of other employees to

"kiss his Irish a--," and received only a verbal warning. *Id.* at 1. In another instance, at the same time the production foreman talked with other employees in front of the "Mine Comm. Chairman," an employee ignored the production supervisor, walked away from him and said, "Ah — f--- you, I'm sick of this f---in s--t." *Id.* at 4. This employee was given a one-day suspension for verbal abuse and failing to listen to a supervisor. *Id.* Accordingly, we conclude that substantial evidence does not support the judge's finding that Bernardyn's broadcast of his cursing over the C.B. radio materially distinguished his cursing episode from previous cursing incidents.

b. Duration of Cursing

The judge cited no authority for his assertion that the duration of Bernardyn's outburst was a factor distinguishing his from others. Commission precedent establishes that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but rather whether there was a prior problem with misconduct involving the complainant. *See Cooley*, 6 FMSHRC at 521. In addition, we note Derrick's concession that he could have contacted Bernardyn on the C.B. and told him to stop cursing, but "it never crossed [his] mind" to do so. T. Tr. 116. Thus, the record establishes that Reading could have terminated Bernardyn's outburst at any time.

Moreover, in comparing Bernardyn's cursing to prior cursing incidents, the judge found that the other miners who cursed at Reading had done so "only once." 22 FMSHRC at 953. Substantial evidence does not support this finding. One miner received at least two warnings for three separate incidents of verbal abuse within a two-month period, and yet was not terminated for cursing. *See* Gov't Ex. C at 2-3.[7] Bernardyn had no such history of cursing.

c. Bernardyn's Alleged Threat

We note at the outset that, even if Bernardyn's statement could be construed as a threat, it would not be dispositive of the disparate treatment issue because, under Reading's 1987 disciplinary policy, threats are not among the offenses justifying immediate discharge. That said, we are satisfied that substantial evidence does not support the judge's finding that Bernardyn threatened his supervisor.

Although the Commission instructed the judge to re-examine his holding that Bernardyn threatened Wapinski, given that Wapinski did not hear Bernardyn's statement, and in view of Bernardyn's use of only general words, the judge did not address either circumstance on his way to reiterating his initial finding that a threat was made. We find this lapse troubling. *See Dolan v. F&E Erection Co.*, 23 FMSHRC 235, 240-41 (Mar. 2001) (reiterating that judges must strictly follow Commission's remand instructions).

---

[7] This same miner had previously been given two verbal warnings and a written warning. Gov't Ex. C.

While delineating the parameters of a threat appears to be a question of first impression for the Commission, we now hold that a single, general statement that mentions no person by name, unaccompanied by coercive conduct or warning of specific harm, made in the course of a safety complaint to a safety representative, and not directed to any possible subject of the statement, does not constitute a threat. Our holding is consistent with decisions of the National Labor Relations Board ("NLRB" or "Board") and courts, which have looked to the words uttered, as well as the circumstances surrounding an alleged threat.[8] For example, in *Vought Corp.*, 273 N.L.R.B. 1290, 1292, 1295 (1984), *aff'd*, 788 F.2d 1378 (8th Cir. 1986), the NLRB held that an employee who, upon being ordered to sign a disciplinary statement the employee believed to be based on erroneous facts, said to his supervisor, "I'll have your a--" did not issue a physical threat, but rather made a threat to file an unfair labor practice charge or to report the supervisor to higher management. In *Heck's Inc.*, 280 N.L.R.B. 475, 479 (1986), the Board found that a discharged employee's statement that the employer "will get his, I guaran-d--n-tee you" was not a threat of bodily harm and was made when he was discussing with co-workers alleged grievances against management. In *Anaconda Insulation Co.*, 298 N.L.R.B. 1105, 1112-13 (1990), the Board determined that conduct of an employee who called a superintendent a "son of a b----" and threatened to "get" him did not constitute a threat of immediate harm or cause damage to property.

The Tenth Circuit's decision in *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982), is also instructive. In that case, an economic striker went to a non-striking employee's apartment and stated that he had better "watch" himself, and that "some of the boys might get rowdy." *Id.* at 766. The Tenth Circuit stated that "[i]n the absence of other threatening statements or of some coercive action, this statement is too ambiguous to be considered a threat." *Id.*

However, threats have been found where employees threaten to kill or harm employees. For instance, in *NLRB v. R.C. Can Co.*, 340 F.2d 433, 434, 436 (5th Cir. 1965), the Fifth Circuit found that a wrongfully fired employee's statement to his supervisor that he "would kick the hell out of him the first chance I got," was deemed serious enough to justify the employer's refusal to reinstate the employee. In *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336-37 (1st Cir. 1977), an employee's statement to three job applicants that they should not cross the picket line "if they valued their lives," was described by the First Circuit as a threat.

The substance and context of Bernardyn's statement closely parallels situations in which the NLRB and courts have concluded that no threat occurred. Here, as in *Midwest Solvents*, *Vought*, and *Heck's*, Bernardyn's statement that he would "get" an unnamed person was general

---

[8] The Commission has looked to law developed under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), for guidance in interpreting similar provisions of the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (recognizing that "cases decided under the NLRA — upon which much of the Mine Act's antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act").

and vague, and it was not repeated or accompanied by any threatening action. Moreover, like the complainant in *Heck's*, Bernardyn did not speak directly to any possible object of his statement, and made his statement in the course of complaint to a union safety committeeman about management actions. Bernardyn's statement is distinguishable from those of the employees in *Associated Grocers* and *R.C. Can* in that his words were not spoken directly to Wapinski, and his vague statement lacked the evidence of a threat of bodily harm exhibited by the employees in those cases.

Reading cites *NLRB v. Bin-Dicator Co.*, 356 F.2d 210, 212-14 (6th Cir. 1966), for the proposition that an employee's statement that he would "get" his manager was deemed a threat. The employee in *Bin-Dicator* stated "[t]his is a personal feud between you and me. I don't know when, but some day we are going to meet, and I am going to get you." *Id.* at 212. However, unlike the present case, the employee went on to threaten that "[w]hen I get you, you can expect to spend some time in a wheelchair," made a physical threat with a leather work mitten, the back of which was covered in metal staples, and subsequently threatened to strike the supervisor with a six and a half pound casting. *Id.* at 212-13. Moreover, in contrast to the instant matter, the employee verbally and physically threatened the supervisor in a direct confrontation. *Id.*

Finally, in support of his finding that Bernardyn threatened Wapinski, the judge stated that Bernardyn's cursing evidenced "a degree of animus." 22 FMSHRC at 952. However, as suggested by *Vought*, *Heck's* and *Anaconda*, an employee's expression of anger towards a supervisor is not tantamount to a threat.

In light of our determination that Bernardyn's use of the C.B. radio and the duration of the cursing incident do not meaningfully distinguish Bernardyn from other Reading employees who were not terminated for cursing, we conclude that substantial evidence does not support the judge's finding that Bernardyn was not similarly situated to those employees. Consequently, as to the third *Cooley* factor, we conclude that substantial evidence fails to support the judge's finding that Reading did not treat Bernardyn more harshly than similarly situated employees. The record evidence that Reading merely warned other miners for engaging in conduct similar to Bernardyn's further detracts from the judge's finding that Reading did not treat Bernardyn disparately. Given our conclusions that the record evidence on the first two *Cooley* factors, past incidents of Bernardyn cursing and Reading's policy concerning profanity, also detract from the judge's negative disparate treatment finding, we direct the judge on remand to reanalyze, consistent with *Cooley*, whether Bernardyn was the victim of disparate treatment.

C. Provocation

If the judge determines on remand that Reading disparately treated Bernardyn by firing him, he need not reach the issue of whether Reading provoked Bernardyn's conduct. However, we address the problems with the judge's analysis of provocation in the hopes of avoiding further appellate proceedings in this matter.

The Commission has held that an employer may not provoke an employee and then rely on the employee's provoked unprotected activity as grounds for discipline. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1482 (Aug. 1982). The complainant in *Moses* was accused on three occasions of reporting an accident at the mine to MSHA. *Id.* at 1476-77. Subsequently, a heated and profanity-laden exchange occurred between the complainant and his foreman, after which the foreman terminated the complainant. *Id.* at 1478. The Commission found that the operator failed to establish its affirmative defense in part because "much of the language and improper attitude [which the operator alleged motivated the complainant's discharge] arose in response to [the operator's] unlawful and provocative attempts to determine if [the complainant] had called the inspectors." *Id.* at 1482.

In *Bernardyn I*, the Commission noted that courts have excused employee outbursts when they are provoked by unjustified employer action. 22 FMSHRC at 306. Courts have recognized that unprotected actions will inevitably occur during otherwise protected activity, and that "not every impropriety is grounds for discharge." *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977). In *NLRB v. Thor Power Tool Co.*, 351 F.2d 584. 587 (7th Cir. 1965), the court stated that if an employee's conduct is not egregious, there is "some leeway for impulsive behavior."[9]

The leeway provided to employees whose unprotected behavior was provoked by the employer is fairly broad. In *Trustees of Boston University v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977), the First Circuit stated that "the leeway [afforded employees for impulsive behavior] is greater when the employee's behavior takes place in response to the employer's wrongful provocation." In that case, the court upheld an NLRB decision excusing an employee's brandishing of a pair of scissors as provoked by the employer's own wrongful conduct. *Id.* at 392-93. In *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965), the Fourth Circuit recognized that "[t]he more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." The court upheld the reinstatement of a complainant who, after her discriminatory layoff, threatened a supervisor and was rude to a vice-president. *Id.* The court noted that "the unjust and discriminatory treatment of [the complainant] gave rise to the antagonistic environment in which these remarks were made." *Id.* In *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1285, 1288 (10th Cir. 1980), the Tenth Circuit held that the complaining employees' unprotected behavior — cursing at employer-hired security guards who attempted to prevent the employees from engaging in protected activity — was excusable impulsive behavior which did not justify discharge. In *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 852 (1st Cir. 1982), the First Circuit

---

[9] Decisions addressing the question whether an employee's unprotected conduct provides an employer justification for disciplining the miner have utilized an objective standard. *See, e.g.*, *McQuaide*, 552 F.2d at 527 (adopting objective standard which looks at the relevant circumstances to determine whether strikers' statements and actions directed towards non-strikers are sufficiently egregious to justify denying reinstatement of the strikers); *Associated Grocers*, 562 F.2d at 1336 (applying objective standard enunciated in *McQuaide*).

upheld a decision of the NLRB excusing a complainant's offensive and abusive language which occurred during a confrontation with a supervisor in reaction to the supervisor's unjustified warning of the complainant.

Here, Wapinski ordered Bernardyn to drive faster under highly unsafe driving conditions. Because Bernardyn was driving slowly, Derrick ordered Wapinski to remove Bernardyn from the haulage run. Twenty minutes after first ordering Bernardyn to drive faster, Wapinski again approached Bernardyn at the pit, told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. Absent Wapinski's response to Bernardyn's protected refusal to drive faster, Bernardyn would not have had any reason to make the complaint to Dodds during which he used profanity. These facts in the record detract from the judge's conclusion that Reading did not provoke Bernardyn's outburst.

In his remand decision, the judge attempted to distinguish the cases discussed in *Bernardyn I*. The judge stated that the court's decision in *Steinerfilm* was inapposite because "Bernardyn's use of excessive profanity did not follow any unlawful warning or other unlawful act on the part of Respondent." 22 FMSHRC at 954 n.1. The judge also declined to follow *Trustees of Boston University* because, according to the judge, "the plain meaning of the words used by Wapinski in response to Bernardyn's driving slowly due to slippery conditions, do not contain any threat or animus toward Bernardyn relating to his protected activity under the Act, i.e., driving slow due to slippery conditions, and hence were not 'wrongful.'" *Id.*

We are at a loss to understand the reasoning in support of these statements. In his initial decision, the judge stated: "Based on the essentially uncontroverted evidence I find that Bernardyn engaged in protected activities *by driving at a speed consistent with the road conditions* . . . ." 21 FMSHRC at 822 (emphasis supplied). This finding was not before the Commission in *Bernardyn I*, was not remanded to the judge, and is the law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (holding that on remand, judge may not revisit on appeal portions of initial decision). The Secretary's mandatory safety standards require that "[e]quipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used." 30 C.F.R. § 77.1607(c). It is undisputed that the roadway was not only pitched at a grade of 8%, ranging in places up to 10.3%, but that conditions were foggy and misty, the roadway was slippery, conditions were worsening, a layer of ice later formed on the road, and the road was shut down within 30 minutes of Bernardyn's termination after a foreman's truck slid down the haulage road.

Moreover, once Bernardyn communicated to Reading his reasonable concern about driving faster on the slippery roads, Reading was obligated to address the perceived danger in a manner that his fears reasonably should have been quelled. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (Feb. 1984), *aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Sec'y of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (Sept. 1983). Here, far from addressing Bernardyn's legitimate safety concerns in a manner that should

have allayed them, Reading exacerbated the situation by directing Bernardyn to drive faster and then removing him from the haulage run when he refused. Based on these uncontroverted facts, if the judge finds it necessary to reach the provocation issue on remand, he must revisit his determination that Reading's instruction to Bernardyn to speed up was not wrongful.

Further, Wapinski's order that Bernardyn drive faster, his accusation that Bernardyn was holding things up, and his directive, in compliance with Derrick's instruction to remove Bernardyn from the haulage run, that Bernardyn meet him at the dump, were all in response to what the judge found to be Bernardyn's protected activity — driving at a speed consistent with road conditions. Whether Wapinski's order to Bernardyn to essentially operate the haulage truck in an unsafe manner is itself a "threat" or constitutes "animus" is entirely beside the point. The judge does not cite any authority for the novel proposition that an order to work unsafely is insufficient to constitute provocation.[10]

If the judge addresses the provocation issue on remand, he must also revisit his characterization of Bernardyn's conduct as "most egregious." 22 FMSHRC at 955 n.1 (emphasis in original). The judge based this conclusion on his findings on the duration of Bernardyn's cursing over the C.B. radio, and the "threat" uttered by Bernardyn. But as we have already found, substantial evidence in the record does not support the finding that Bernardyn threatened anybody, the duration of the episode was due in part to Derrick's unexplained failure to stop the outburst, and the fact that others heard the outburst does not materially distinguish this case from others involving Reading miners. Bernardyn's conduct was no more serious than the actions of employees found to have been provoked under the NLRA. *See, e.g.*, *M & B Headwear*, 349 F.2d at 174 (involving employee provoked into threatening a supervisor and being rude to a vice-president); *Blue Jeans Corp.*, 170 N.L.R.B. 1425, 1425 (1968) (holding that employee's statement that she "would kill the S.O.B." who told the company about her union activities, and her actions in threatening the plant manager with scissors in hand, were provoked by employer's discriminatory treatment of her).

Moreover, contrary to the judge's finding, neither Commission precedent nor other case law draws a distinction between provocative "words" and provocative "actions." In any event, the direct order by Bernardyn's supervisor to drive faster under poor road and weather conditions gave Bernardyn the unfortunate choice of either complying with the order and risking the consequences to life and limb of driving faster, or disobeying the order and risking discipline for insubordination. *See Anaconda Insulation Co.*, 298 N.L.R.B. at 1111, 1113 (holding that supervisor giving employee "Hobson's choice" to either cross picket line or quit justified complainant's unprotected cursing and alleged threat). This order, and indeed the order removing Bernardyn from the haulage run, effected management action.

---

[10] The judge also stated that, in contrast to the facts in *M&B Headware*, in the present case "there is no evidence of any unjust and discriminatory treatment of Bernardyn to lead to a conclusion that any wrongful provocation existed." 22 FMSHRC at 954 n.1. As we have already held, however, the judge's analysis of the disparate treatment issue was erroneous.

In *Bernardyn I*, the Commission instructed the judge to consider "whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" 22 FMSHRC at 307-08. The judge did not directly address the "leeway" question. 22 FMSHRC at 953-54. On the other hand, he determined that Bernardyn's statement was "out of proportion to the one-time, brief statements Wapinski made to him." *Id.* at 954.

We observe initially that the judge's reference to "one-time" statements is puzzling. The record establishes that Wapinski spoke to Bernardyn on two occasions, during which he ordered Bernardyn to speed up and directed him to meet Wapinski at the dump for the purpose of removing Bernardyn from the haulage run. Further, the judge's characterization is contradicted by the record in two other respects. As already noted, Wapinski's response to Bernardyn's protected activity was not only a "statement," it was a direct order to drive faster under hazardous road conditions. In addition, the judge's finding ignores the factual setting in which Bernardyn's outburst occurred. The Commission specifically noted that it was during "the complaint to Dodds [when Bernardyn] cursed and made the allegedly threatening remark." 22 FMSHRC at 307. Yet, in his discussion of the provocation issue, the judge failed to address the crucial context in which this incident took place, namely, the making of a safety complaint by a miner to his committeeman over an order from management to drive a truck in a manner that the miner legitimately considered to be unsafe.

We do not mean to suggest that we approve of the profanity used by Bernardyn, or that he could not have chosen a more civil (and effective) means of communicating his legitimate safety concerns to his safety representative. Nevertheless, the occurrence of this incident in the course of a safety complaint is a significant factor that the judge should not have ignored. We conclude that Bernardyn's cursing in the midst of a safety complaint to his safety committeeman is a factor which mitigates the seriousness of his cursing and detracts from the judge's conclusion that Bernardyn's use of profanity was not excusable. In sum, the record as a whole casts considerable doubt on the judge's conclusion that Bernardyn's actions were not provoked by Reading.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Reading's discharge of Bernardyn did not violate section 105(c) of the Mine Act. This matter is remanded for further proceedings consistent with this opinion.

Theodore F. Verheggen, Chairman

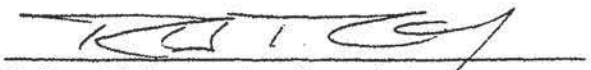
James C. Riley, Commissioner

Commissioner Beatty, concurring:

While I concur in the result reached by my colleagues in the majority, I write separately to indicate a slightly different focus on how I would reach this result.

In my view, the resolution of this case should turn on the judge's finding that Reading's 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. The 1987 policy lists only four offenses that warrant an employee's immediate discharge: stealing, possessing or using intoxicants in the area of work, carrying weapons on company property, and physical fighting. Since Bernardyn's cursing incident, which the operator claims is the reason for his discharge, does not fall within one of those categories, it is my opinion that the discharge was per se discriminatory because it violated the company's 1987 disciplinary policy with respect to conduct that warrants immediate termination of an employee. Therefore, in my view, this case does not require, in order to show disparate treatment, a comparison of Bernardyn's cursing with other incidents of cursing on the job by Reading employees. In a "mixed motive" analysis, as we have in this case, the judge is required to examine Reading's affirmative defense (cursing on the job) to determine if the company's actions were out of line with their normal business practices. Since Bernardyn was *discharged immediately* — a practice that violates Reading's own disciplinary policy — I see no need to compare him to the other employees to determine disparate treatment. Indeed, I cannot think of any situation that more clearly illustrates an operator being "out of line with normal business practices" than one where the company ignores its own disciplinary policy in the discharge of an employee.

In accordance with this alternative approach, I would instruct the judge, on remand, to consider his finding that Reading's 1987 disciplinary policy was then in effect in deciding whether Bernardyn was discharged in violation of section 105(c) of the Mine Act. Although I would normally go no further than this single instruction, I nevertheless join Chairman Verheggen and Commissioner Riley in their remand instructions so that we may dispose of this case with a clear majority.



Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

I stated in *Bernardyn I* that section 105(c) of the Mine Act precludes an operator from firing a miner for peripheral statements made while reporting a hazardous condition to a safety committeeman, unless the complaint was made in such a reprehensible manner that the miner is no longer entitled to the protection afforded by that statutory provision. 22 FMSHRC 298, 309-16 (Mar. 2000). In reaching that conclusion, I relied on *Caterpillar Inc.*, 322 N.L.R.B. 674 (1996) in which the National Labor Relations Board ruled that when "an employee is discharged for conduct occurring during a grievance meeting, the inquiry must focus on whether the employee's language is '*indefensible* in the context of the grievance involved.'" *Id.* at 677 (quoting *Crown Cent. Petroleum Corp. v. NLRB,* 430 F.2d 724, 731 (5th Cir. 1970)) (emphasis in original) (citation omitted). My opinion also referred to *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 840 (May 1997), in which the Commission held that, because a discharged miner's protected safety concerns were expressed in the same conversation as his disparaging views about mine management, the employer bore the risk that the influence of legal and illegal motives could not be separated.

In *Bernardyn I*, I wrote that one could not reasonably conclude from the record in this case that Bernardyn's conduct, in the context of the safety complaint involved here, was so indefensible as to deprive him of the protection afforded under the Act. 22 FMSHRC at 311. Accordingly, I stated my view that Reading's affirmative defense failed and that the judge's decision should be reversed. *Id.* at 315. That conclusion is now bolstered by the judge's finding that the 1987 disciplinary policy was in place at the time of Bernardyn's termination, 22 FMSHRC 951, 952-53 (Aug. 2000) (ALJ), and by my colleagues' finding that Reading violated this policy in terminating Bernardyn, slip op. at 9, 18. Moreover, my colleagues' rejection of several of the findings upon which the judge based his decision on remand serves to reinforce my earlier view as to the conclusions that could reasonably be drawn from the evidence in this case.[1]

---

[1] Chairman Verheggen and Commissioner Riley reject the judge's finding that because Bernardyn's cursing episode took place over the CB radio, it was materially distinguished from previous cursing incidents involving other employees. Slip op. at 9-10. They also reject his finding that Bernardyn threatened his supervisor, *id.* at 11, and that Reading did not treat Bernardyn more harshly than other employees who were not terminated for cursing, *id.* at 12. They have also determined that several facts in the record detract from the judge's conclusion that Reading did not provoke Bernardyn's cursing. *Id.* at 14. Indeed one wonders why, given these findings, my colleagues find it necessary once again to remand this case to the judge instead of reversing his decision.

For the foregoing reasons, I again conclude that a remand in this case would serve no purpose, and I would therefore reverse the judge's decision and find in favor of Bernardyn.

Mary Lu Jordan, Commissioner

Distribution

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

Martin J. Cerullo, Esq.
Cerullo, Datte & Wallbillich, P.C.
450 West Market St.
P.O. Box 450
Pottsville, PA 17901

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 97-170
	:	PENN 97-190
v.	:	PENN 97-194
	:	PENN 98-8
TARGET INDUSTRIES, INC.,	:	PENN 98-98
PHILLIP K. PETERSON, and	:	PENN 98-104
GREGORY L. GOLDEN	:	

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

DECISION

BY THE COMMISSION:

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge David F. Barbour affirmed nine citations against Target Industries, Inc. ("Target"), one against Phillip K. Peterson, and two against Gregory L. Golden for violations of the Secretary of Labor's main mine fan regulations. 21 FMSHRC 1031 (Sept. 1999) (ALJ). We granted Target's petition for discretionary review ("PDR") challenging the judge's decision.

The Commission's vote in this case is evenly split. Commissioners Jordan and Beatty would affirm the judge's decision. Chairman Verheggen and Commissioner Riley would reverse the judge's decision. For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

At Target's No. 1 Mine, an underground bituminous coal mine in Greene County, Pennsylvania, the room and pillar method of mining is used. 21 FMSHRC at 1034. During the

spring of 1997, between 35 and 38 people were employed at the mine, in general working three shifts: two production and one maintenance. *Id.* Junior Golden was the company's president and his son, Gregory Golden, maintenance foreman. *Id.* at 1036; Tr. 317.

Three surface fans ventilate the mine, and all have pressure gauges (also known as pressure charts), which record fan operation over 7 consecutive days by constantly recording the pressure of the air pulled by the fans. 21 FMSHRC at 1034. The mine's primary surface fan, known as the No. 1 fan, exhausts air from the active workings via return entries, with the capacity to pull approximately 120,000 cubic feet of air per minute ("cfm") out of the mine through a borehole approximately 89 inches in diameter. *Id.* On the mine map, the No. 1 fan is shown as "main mine fan." Gov't Ex. 25.

The other two surface fans, No. 2 and No. 3, were installed in 1989 or 1990 as bleeder fans. 21 FMSHRC at 1034; Tr. 269; Resp't Ex. 1. Identified in Target's mine ventilation plan as "gob bleeder fans"[1] (Gov't Ex. 22 at 9), and shown on the mine map as "Ventilation Borehole #2" and "Ventilation Borehole No. 3," each pulls approximately 4,000 to 5,000 cfm out of the mine through boreholes approximately 12 inches in diameter. 21 FMSHRC at 1034; Gov't Ex. 25. Fan No. 2 ventilates the three-left gob area of the mine, while No. 3 ventilates the four-left gob area. 21 FMSHRC at 1034.

A. The February-March 1997 Fan Stoppage

On the morning of March 3, 1997, MSHA ventilation specialist Ronald Hixson was at the mine to evaluate Target's proposal to amend its MSHA-approved ventilation plan to reflect a different location for a bleeder evaluation point. 21 FMSHRC at 1035. Hixson met with Phillip Peterson, a mine surveyor hired by Target approximately a year earlier, who was responsible for drafting the mine's ventilation plan and supplements, as well as for submitting ventilation proposals to MSHA. *Id.* Target had also assigned Peterson the task of conducting daily examinations of the No. 2 and No. 3 bleeder fans after Target had been advised by a state mine inspector that those fans, which were only being examined on a weekly basis, had to be examined daily. *Id.*; Tr. 389-90.

When Hixson and Peterson arrived at the No. 3 fan and discovered it was not operating, Peterson restarted it. 21 FMSHRC at 1035-36. According to the fan's pressure chart for the week beginning February 25, the fan had not been running since approximately 2:00 p.m. on Thursday, February 27. *Id.*; Tr. 43-44; Gov't Ex. 26. Knowing that Peterson was supposed to

---

[1] Bleeder fans are surface fans which pull air from bleeder entries, over the gob, and up and out of the mine. 21 FMSHRC at 1033 n.1. "Bleeder entries" are defined as "[p]anel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 55 (2nd ed. 1997).

examine the fan on a daily basis, Hixson asked him if he had examined the fan on Friday February 28, the first full day after it shut down. 21 FMSHRC at 1036. Peterson replied that he did not have a key to the fan house gate with him on February 28, but that he had gone there and seen and heard indications from outside the locked gate that the fan was running. *Id.*; Tr. 47.

Hixson also knew that Target had contracted with an off-site firm, Commonwealth Security Company ("Commonwealth"), to maintain an alarm system to monitor the No. 2 and No. 3 fans. 21 FMSHRC at 1036; Tr. 48-49. Commonwealth would receive a signal from a fan when the fan's pressure gauge showed a significant drop in air pressure, whereupon Commonwealth was expected to immediately contact the mine. 21 FMSHRC at 1036. Peterson told Hixson that Target had not heard from Commonwealth that the No. 3 fan had stopped. *Id.*[2]

Back at the mine office, Hixson reviewed examination books, including one entitled Daily and Monthly Examination of Ventilation Equipment. *Id.* at 1037. In that book he saw that Peterson's signature accompanied a 6:40 a.m, February 28, 1997, entry for a pressure gauge reading at the No. 3 fan of 8.6 inches. *Id.*; Gov't Ex. 15 at 3. Consequently, Hixson returned to the mine the next day, March 4, accompanied by his supervisor and an MSHA electrical inspector, to further investigate the status of the No. 3 fan. 21 FMSHRC at 1037.

While inside the No. 3 fan house that day, the MSHA personnel pulled the lines from the pressure gauge to the fan chart, causing the air pressure to fall to zero. *Id.* Commonwealth immediately called the mine office to report the signal indicating that the No. 3 fan was down. *Id.* Back at the mine office, after again reviewing ventilation equipment examination books,[3] Hixson again asked Peterson whether he had examined the No. 3 fan on February 28. 21 FMSHRC at 1037. At that point Peterson admitted that he had not made the examination on February 28, saying that he had meant to, but when he failed to do it,[4] not wanting to get in trouble he entered 8.6 inches of pressure in the book, a pressure reading within the normal range recorded. 21 FMSHRC at 1037; Tr. 316. There had been crews underground between the afternoon of February 27 and the restart of the No. 3 fan on the morning of March 3. Tr. 61-63.

---

[2] This system of reporting borehole fan slowdowns and outages was accepted by MSHA while Target was in the process of installing a direct line from the fans to the mine office in order to provide an immediate signal to the office when a fan slowed or stopped. 21 FMSHRC at 1036 n.5. While MSHA regulations that took effect in 1996 required a signal "at the mine when the fan slowed or stopped" (30 C.F.R. § 75.310(a)(3)), Target was permitted to continue relying only on Commonwealth until the direct signal line was installed and activated. *Id.*

[3] The book used to record inspections of the No. 2 fan did not include entries for February 28 or March 1 or 2. 21 FMSHRC at 1037. There was no evidence the No. 2 fan had stopped on those days. Tr. 71-72.

[4] Peterson testified that he expected to meet with a state inspector at the fans on Friday, February 28, but when the inspector did not show up he forgot to check the fans. Tr. 313-14.

Target was subsequently cited for multiple violations of MSHA's main mine fan regulations, while Peterson was cited for one violation under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). In addition to two citations and one order that were later settled (21 FMSHRC at 1060), Target was issued separate citations for violating 30 C.F.R. §§ 75.310(a)(3), 75.312(c), and 75.312(a) with respect to each of the two bleeder fans, as well as for violating 30 C.F.R. § 75.311(a)[5] with respect to the No. 3 fan. 21 FMSHRC at 1044-50; Gov't Ex. 1-6, 10. Each citation was designated significant and substantial ("S&S), and the section 75.311(a) violation as well as the Fan No. 3 section 75.312(a) violation were alleged to have resulted from Target's unwarrantable failure. 21 FMSHRC at 1044-50; Gov't Ex. 1-6, 10.[6] Peterson was individually charged with the No. 3 fan section 75.312(a) violation. 21 FMSHRC at 1056-57.

B. The April 1997 Fan Stoppage

After tracing the extended Fan No. 3 stoppage to a breakdown of communication between Target and Commonwealth on February 27 after a series of power failures that day (Tr. 81-88; Gov't Ex. 17, 18), at MSHA's prompting the two companies agreed in writing that, when Commonwealth received a signal that a fan at the mine had slowed or stopped, the signal was not to be disregarded and that Commonwealth would notify the mine site. 21 FMSHRC at 1037; Tr. 149-51; Gov't Ex. 23. If Commonwealth could not reach anyone at the mine, it was to notify Gregory Golden. 21 FMSHRC at 1037; Gov't Ex. 23. If it could not reach Gregory Golden, it was to find and notify Junior Golden. 21 FMSHRC at 1037; Gov't Ex. 23. While MSHA did not consider the agreement to be part of the mine ventilation plan, it accepted the agreement until Target was in full compliance with section 75.310(a)(3). 21 FMSHRC at 1037-38.

To better meet MSHA requirements, Target also hired new employees to monitor the No. 2 and No. 3 fans 24 hours a day. *Id.* at 1038; Tr. 99-100. One of the new employees, Donte Soucy, was at the No. 3 fan on April 7, 1997, when he heard it slow down, and later, after returning to normal, completely stop at around 9:40 p.m. 21 FMSHRC at 1038. Soucy testified

---

[5] Section 75.310(a)(3) requires a working signaling device between each main mine fan and a surface location that alerts the operator to fan slowdowns or stoppages, and that the signal location always be manned by a responsible person who has equipment to communicate with working sections and stations. Section 75.312(c) requires testing of the signaling device every 31 days by fan stoppage. Section 75.312(a) mandates examination of main mine fans each day that personnel are to be underground. Section 75.311(a) requires main mine fans to be continuously operated, with exceptions not pertinent here.

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

that he could not restart the fan, that he tried to call the mine office several times to report that the fan was down but was unable to get through, and that while the fan was stopped no one called him. *Id.*

Logs and a transcript of the conversations that night between Commonwealth representative Lori Kreider and the Goldens regarding the No. 3 fan (Gov't Ex. 17-18) revealed that, at 9:45 p.m., Kreider first called Gregory Golden at his home to report that the fan was down and that she would try to restart it from her remote location. *Id.*; Tr. 172-74. At both 10:35 and 10:51 p.m. Kreider again called Gregory Golden to report she had been unsuccessful in restarting the fan. 21 FMSHRC at 1038. In response to her statement that "Someone there needs to check the fan to make sure there is not some kind of equipment malfunction with the fan," Gregory Golden told her he would have someone attend to it in the morning. *Id.*[7]

Gregory Golden testified that from his home he tried to get through by phone to the mine office on all three of its telephone lines, on his cellular telephone that he had left at the mine, and on the line for the No. 3 fan, but that one of the mine office lines was busy, and no one answered any of the others. *Id.* at 1038-39. Gregory Golden did not travel to the mine when he could not reach anyone by telephone. *Id.* at 1039. When asked why he did not go to the mine, he said that he had hired people like Donte Soucy to be at the fans to monitor them and report to the mine site or to him if something happened to a fan, and he had assumed that the fan was running because Soucy was there to restart it, and must not have heard the telephone ringing over the noise of the running fan. *Id.*; Tr. 405, 409. Gregory Golden believed that it would have taken him 30 to 40 minutes to reach the mine from his home. 21 FMSHRC at 1038.

The next day, April 8, MSHA Inspector James Dickie, who was at the mine to check on Target's progress in developing fan information for the mine's ventilation plan, was told by Peterson that the mine telephone system was out of order due to a transformer problem. *Id.* at 1039. A state mine inspector named Miller, who was also there, told Dickie that when he arrived at the mine at approximately 7:30 a.m. that morning, all of the miners were above ground because the No. 3 fan was not operating. *Id.* Dickie subsequently saw in the mine fan examination book a notation for that day indicating the No. 3 fan was down. *Id.*; Gov't Ex. 27 at 32. Dickie's later review of that fan's pressure chart (Gov't Ex. 13) revealed that, around 7:30 p.m. the previous day, the fan went off, then came back on, but a little over 2 hours later shut down again and did not restart. 21 FMSHRC at 1039; Tr. 170-71.

---

[7] Kreider had also called Junior Golden at 9:47 p.m. to notify him about the fan and her call to Gregory Golden. 21 FMSHRC at 1038. When she asked Junior Golden if he wanted to be called back when the fan was restarted, he told her "No, call Greg." *Id.* Also, immediately after Kreider first notified Gregory Golden, Gregory Golden called Junior Golden to tell him the fan was not working. *Id.* Gregory Golden maintained that Junior Golden only told him to "take care of it. To take care of the call." *Id.* Junior Golden claimed he told his son more, namely, that if Gregory could not contact the mine, he should go to it. *Id.* The judge credited Junior Golden's account over Gregory Golden's. *Id.* at 1057.

The second shift was underground when the fan ceased operating. 21 FMSHRC at 1039; Tr. 162-63. Its foreman, Carl Betchey, told Dickie that he had not learned of the fan stoppage until Jim Orendorff, the foreman of the next shift, so informed him at 10:45 p.m., by which point the second shift was on its way out of the mine, and exited approximately 5 minutes later. 21 FMSHRC at 1039; Tr. 162-63. Dickie also spoke with Gregory Golden, and when Dickie asked him what he had done as a result of the calls from Commonwealth, Gregory Golden replied that he did not do anything. 21 FMSHRC at 1039. Gregory Golden also admitted to Dickie that he had not notified anyone at the mine that the fan was off, or that the fan had a problem and needed to be checked. *Id.* Gregory Golden also answered in the negative to the question of whether he had gone to the mine to see for himself if there was a problem with the fan. *Id.* at 1040. Target and Gregory Golden were each subsequently cited for violating 30 C.F.R. §§ 75.313(c)(1) and 75.311(d). *Id.* at 1052-54, 1057; Gov't Ex. 28, 29.[8]

C. The Judge's Decision

On the question of whether the two Target bleeder fans were main mine fans, the judge, finding no definition of "main mine fan" in either the regulations or the Secretary's *Program Policy Manual* ("*PPM*"), looked to a 1996 MSHA ventilation publication made available to operators. 21 FMSHRC at 1040. A question was posed in the booklet as to whether a "small, surface bleeder fan (i.e. 50,000 cfm)" is considered to be a main mine fan, and the answer given was that it would be considered to be so if shutting it down would have an immediate and perceptible impact on mine or section ventilation. *Id.* at 1040-41. The judge found this understanding of the term to be consistent with the treatment of main mine fans in the ventilation regulations and their preamble. *Id.* at 1041. Relying on the trial testimony of various MSHA inspectors and the Secretary's expert witness to find that shutting down either of the Target bleeder fans would have an immediate and perceptible impact on the mine's ventilation, the judge concluded that those fans were subject to MSHA regulations governing main mine fans. *Id.* at 1041-42.

The judge also found the MSHA ventilation publication sufficient to put a reasonably prudent mine operator on notice of MSHA's interpretation, and credited MSHA ventilation supervisor Dennis Swentosky's account that he had informed Target 9 months earlier that it would have to begin bringing the bleeder fans into compliance with the requirements for main mine fans. *Id.* at 1042-43. The judge stated that MSHA's forbearance in not citing Target at that time had no relevance to the issue of notice, but rather was more properly considered at the penalty assessment stage. *Id.* at 1043-44. Consequently, the judge affirmed all nine of the citations and orders issued to Target, the S&S designation of each, and the four unwarrantable

---

[8] Section 75.313(c)(1) requires withdrawal of all miners from a mine within 15 minutes after a main mine fan stops, while section 75.311(d) requires that the mine foremen or equivalent mine official be notified if an electrical or mechanical deficiency in the main mine fan is detected.

designations. 21 FMSHRC at 1044-55. He assessed penalties against Target in the amount of $6,600. *Id.* at 1060-61.

In the section 110(c) cases, the judge found that, because Peterson's function at the mine involved a level of responsibility normally delegated to management personnel, Peterson was an agent of Target. *Id.* at 1055-56. The judge also concluded that, in failing to make the daily examinations of the No. 3 fan, and thus violating section 75.312(a), Peterson acted knowingly, even though Peterson did not realize that such examinations were required by federal regulation. *Id.* at 1050, 1057. The judge also found that, by failing to go to the mine to make sure the miners were removed from the mine and that the foreman on duty knew of the April 7 No. 3 fan stoppage, Gregory Golden knowingly violated sections 75.313(c)(1) and 75.311(d). *Id.* at 1056, 1057. The judge was persuaded that Gregory Golden was a person in a position to protect employee safety who had information that gave him reason to know of the existence of a violative condition, yet had failed to act. *Id.* at 1057. The judge ordered Peterson and Gregory Golden to pay penalties of $300 and $1000, respectively. *Id.* at 1061.

II.

Disposition

Target's PDR was limited to the issues of whether the No. 2 and No. 3 fans are governed by the main mine fan regulations, whether Target can be held to have sufficient notice of the applicability of those regulations, and the section 110(c) charges against Peterson and Gregory Golden.

Target contends that, by relying on the short excerpt from the ventilation publication which uses a 50,000 cfm bleeder fan as an example, the Secretary is not reasonably interpreting her main mine fan regulations to include the Target bleeder fans. T. Br. at 11-13. Target also argues that, because the Target bleeder fans were not considered to be main mine fans prior to the issuance of the citations, the judge's conclusion should be reversed. *Id.* at 8-10, 12. Target further maintains that, even if the Secretary's definition is reasonable, the record evidence does not support the judge on the question of the effect of the fans on the mine's ventilation. *Id.* at 13-14. Target also contends that the judge should not have credited ventilation supervisor Swentosky's testimony, and questions why, if Swentosky considered the fans were main mine fans, Target was not cited earlier. T. Br. at 15-17, 18-19. According to Target, it also had no reason to consider regulatory comments about main mine fans, given MSHA's previous treatment of the fans. *Id.* at 18-19.

The Secretary argues that the judge properly deferred to her regulatory interpretation. S. Br. at 14-15. She maintains that treating the bleeder fans as main mine fans is consistent with the regulations, and their preambles, governing main mine fans, as well as the purpose and legislative history of the Mine Act. *Id.* at 16-18. The Secretary contends that substantial evidence supports the judge's finding on the effect of the fans on the mine's ventilation, and

responds to Target's notice argument by arguing that the inspector put Target on actual notice, and the judge's decision to credit the inspector should not be overturned. S. Br. at 19-22, 24-26.

III.

Separate Opinions of the Commissioners

Commissioner Beatty, in favor of affirming the decision of the judge:

A. The Citations Issued to Target

I would affirm the judge's determination that Target and its agents committed twelve separate violations of the regulations applicable to main mine fans under the Mine Act.

At the outset, it is worthwhile to recognize the importance of the issue involved in this proceeding. This case focuses the Commission's attention on the most hallowed of all safety issues involving underground mining — the mine's ventilation system. The results of ineffective or poorly maintained mine ventilation systems have left an indelible mark on the history of underground mining in America, as witnessed by catastrophic methane gas and coal dust explosions that have left in their wake many dead or seriously injured miners.

Fortunately, over the years, and particularly since the adoption of the Mine Act, improvements in mine ventilation systems and enforcement of MSHA's ventilation regulations have significantly reduced the number of mine fatalities occurring from methane gas and coal dust explosions in the mining industry. While an underground mine's ventilation system is comprised of a myriad of ventilation devices, the mine's fans are perhaps the most significant part of the ventilation system. In the instant case, we have been presented with a fundamentally important question in this significant area of mine safety: what is the definition of a main mine fan?

As the judge acknowledged (21 FMSHRC at 1033), and even Chairman Verheggen and Commissioner Riley appear to concede (slip op. at 27), the central issue in this case is whether the No. 2 and No. 3 bleeder fans at the Target mine are main mine fans. The resolution of this issue depends, in turn, on the definition of the term "main mine fan." As the judge noted, the term "main mine fan" is not defined in MSHA's regulations, and MSHA's *Program Policy Manual* ("*PPM*") provides no guidance on the subject. 21 FMSHRC at 1040. Since the term "main mine fan" is not defined in the pertinent regulations or the *PPM*, I conclude that the meaning of the term is ambiguous.

In the case of an ambiguous standard, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly

erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy W.*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary, relying on language contained in an informational booklet entitled *Ventilation Questions and Answers* (MSHA, Nov. 9, 1992) (Gov't Ex. 20),[1] takes the position that she will consider a fan to be a "main mine fan" if its shutdown would have an *immediate and perceptible impact* on mine or section ventilation. 21 FMSHRC at 1040-41 (emphasis added). Specifically, responding to a question as to whether a "small surface bleeder fan" may be considered a "main mine fan," the document states that the determination "depends on the impact a shutdown of the fan would have on the overall ventilation system." *Id.* at 1041; Gov't Ex. 20 at 6. It further states: "If the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." 21 FMSHRC at 1040; Gov't Ex. 20 at 6. Like the judge, I find no inconsistency between the definition adopted by the Secretary and her main mine regulations, and conclude that her interpretation of the term "main mine fan" does serve a permissible regulatory function. In proposing its present main mine fan regulations, MSHA stated that "[m]ain mine fans provide the means by which mechanically produced pressure is supplied to the mine ventilating current." 53 Fed. Reg. 2382, 2383 (1988). Among other things, that ventilating current routes methane away from worked-out areas and areas where pillars are being mined, via the mine's bleeder system. *See* 30 C.F.R. § 75.334; 53 Fed. Reg. at 2393.

As explained below, this is *exactly* what the No. 2 and No. 3 bleeder fans at Target were designed to accomplish. If the bleeder fans at Target cannot be considered main mine fans they would not be regulated at all as they clearly are not covered by the regulations governing other types of mine fans: booster fans, backup fans, and auxiliary fans.[2] The record in this case

---

[1] This publication, disseminated in connection with MSHA's revision of its underground coal mine ventilation regulations, states that its questions and answers were compiled from internal MSHA training sessions, the 18 public informational meetings held regarding the new ventilation standards, and subsequent discussions with industry and labor representatives. Gov't Ex. 20 at 2.

[2] Booster fans are underground fans designed to assist main mine fans, and in any event are prohibited in bituminous coal mines. *See* 30 C.F.R. § 75.302. Auxiliary fans are also underground fans, and provide face ventilation. *See* 30 C.F.R. § 75.331. The only other fans mentioned in the regulations are the backup fans to main mine fans. *See* 30 C.F.R. § 75.372(b)(6).

unequivocally shows that Target's bleeder fans played such an integral role in the proper ventilation of the mine that it is implausible to suggest they were intended to be unregulated under the Mine Act.[3] In my view, the Secretary's definition of the term "main mine fan" — as any fan whose shutdown would have an *immediate and perceptible* impact on mine or section ventilation — is a reasonable interpretation that is entitled to deference.

This is not the end of the analysis, however, because when we are examining whether or not to grant deference to the Secretary's interpretation, we must also address the question of whether the operator had adequate notice of the Secretary's interpretation of her standard or regulation. My reading of the record in this case suggests that Target did have adequate notice of the Secretary's interpretation of what constituted a "main mine fan." In fact, the record supports the judge's finding that Target was provided with *actual* notice by MSHA that it considered the No. 2 and No. 3 bleeder fans to be main mine fans. 21 FMSHRC at 1043. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement). In finding actual notice, the judge credited (21 FMSHRC at 1043) the testimony of MSHA ventilation supervisor Swentosky who testified that: (1) in two phone conversations with Junior Golden between April and June of 1996, Swentosky informed him that MSHA considered the bleeder fans to be main mine fans, and that Target would therefore have to modify them to meet MSHA's structural requirements for main mine fans (Tr. 260-62); (2) Swentosky met with Junior Golden on June 21, 1996, at the mine to discuss the modifications (Tr. 262-66; Gov't Ex. 14);[4] (3) during the visit, in response to Junior Golden's complaints that the previous owner of the mine had not had to comply with the main mine fan regulations, Swentosky agreed that Target would have time to phase in its compliance with the structural regulations, which was why MSHA did not issue any citations at that time. Tr. 287.

While Junior Golden denied during trial testimony that Swentosky had informed him that the bleeder fans were main mine fans (Tr. 392), his denial lacks credibility. The record clearly indicates that, prior to March of 1997, Target had started the process of bringing the bleeder fans into compliance with some of the main mine fan regulations, specifically by installing pressure recording devices and circulation doors on the fans and offsetting them. Tr. 293-94. In fact,

---

[3] The preamble to the proposal to revise the ventilation regulations supports treating all surface fans as main mine fans. Main mine fan regulation is derived from the Federal Coal Mine Health and Safety Act of 1969, but that statute did not use the term "main mine fan." Rather, section 303(a) of the 1969 Coal Act simply required mines to be ventilated with mechanical ventilation equipment. In the 1988 preamble, MSHA stated that such pieces of equipment "in all cases, are main mine fines." 53 Fed. Reg. at 2383.

[4] The judge found that, at this meeting, Swentosky and Golden discussed work Golden had already started to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet. 21 FMSHRC at 1043; Tr. 264, 285-86.

Junior Golden himself conceded that Target took these actions because it had been told to do so by MSHA. Tr. 294. Thus, the record evidence not only supports the judge's decision to credit Swentosky, but provides additional, independent evidence that Target was on actual notice of the MSHA interpretation. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) (record evidence of operator's repairs recognized as evidence of notice).

As we have held on numerous occasions, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Given the aforementioned record evidence on this issue, I see no compelling reason to disturb the judge's credibility determination with respect to the issue of notice and would affirm his conclusion that Target had actual notice of MSHA's interpretation.[5]

I also believe that there is substantial evidence[6] in the record to support the judge's determination that a shutdown of the No. 2 and No. 3 bleeder fans would have had an *immediate and perceptible impact* on mine and section ventilation at the Target mine. On this issue, the Secretary presented testimony from three inspectors — Ronald Hixson, James Dickie, and John Urosek. Urosek, chief of the ventilation division of MSHA's Safety and Health Technologies Center, testified without objection as an expert on bleeder and gob ventilation systems. *See* 21 FMSHRC at 1042-43; Tr. 335.

In order to appreciate the significance of the safety issues involved in this case, it is necessary to have a general understanding of bleeder systems, and their impact on the safe and efficient operation of the overall mine and section ventilation systems. During the trial in this matter, Urosek provided critical testimony to illustrate this point.[7] According to the record,

---

[5] I agree with the judge that the fact that Swentosky did show forbearance in not requiring Target to bring its bleeder fans into immediate compliance with all of the main mine fan regulations is not relevant to the notice issue. Once MSHA took the position that the Target bleeder fans were main mine fans, there is no evidence that it ever wavered in its opinion.

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

[7] In their separate opinion, Chairman Verheggen and Commissioner Riley fail to give any credence to the testimony of Urosek. Their analysis fails to take into account how the shutdown of a bleeder fan would impact the mine's overall ventilation. As I understand their analysis, if the mine ventilation plan does not designate a fan as a "main mine fan," its impact, either positive or negative on mine ventilation, is simply not important. This helps to explain their

Urosek spent an entire day at the Target mine conducting a study of the mine's ventilation system to determine, inter alia, how a shutdown of the No. 2 and No. 3 bleeder fans impacted the mine's overall ventilation. Tr. 336-42. During the study, Urosek visited each of the surface boreholes as well as all of the underground approved evaluation points in the ventilation plan. Tr. 336. At each of these locations he took air quantity, quality, and direction readings utilizing an anemometer or smoke tubes. Tr. 341. Based on the result of the aforementioned tests, Urosek concluded that the No. 2 and No. 3 boreholes were drawing air from the mains into the gob area and subsequently to the borehole fans. Tr. 343.

Based on this and other information gathered during the ventilation study, Urosek opined that the No. 2 and No. 3 bleeder fans were primary ventilation sources and critical to the effective ventilation of the entire mine. Tr. 350. He further cautioned that although this type of system can be very effective, operation of the bleeder fans was crucial because they provide a primary ventilation pressure source for the bleeder system. Tr. 349-52.

To illustrate this point, Urosek provided extensive testimony outlining the impact that a failure of either of the bleeder fans would have on ventilation at the Target mine. According to Urosek, failure of either fan could result in an accumulation of methane in the most recently mined gob area, which could migrate to the active areas of the mine. Tr. 355-59. Urosek stated that methane is only explosive at levels in the range of five and fifteen percent, and could begin to accumulate in the gob areas as soon as a bleeder fan stops operating. Tr. 364-65. Therefore, the amount of time that a fan is not operating compounds the problem. Tr. 364.[8]

According to Urosek's calculations, Target's bleeder fans were pulling approximately five to ten cubic feet of methane per minute from the gob area, or roughly 300 cubic feet of methane per hour. Tr. 364-65. Using the upper range of ten percent, Urosek hypothesized that this situation could have produced a volume of 3000 cubic feet of methane in the explosive range. Tr. 365. He further stated that ventilation changes in other areas of the mine could force the accumulated methane out of the gob area and into the active areas. Tr. 360. At the time that Target's bleeder fans were shut down, the most recently mined gob was the area *closest* to the active workings of the mine. Tr. 355-56. This is extremely significant, because the active areas of an underground mine have the greatest potential to provide an ignition source since most of the mining equipment used outby the last open crosscut does not have to be permissible.

---

reasoning when they criticize the idea of experts in the field of mine ventilation conducting detailed mine ventilation studies to determine the overall impact on mine and section ventilation that occurs from the shutdown of a bleeder fan. *See* slip op. at 33.

[8] It is estimated that the No. 3 bleeder fan at the Target mine was down for approximately 4 days between February 27 and March 3, 1997, and for an additional period of at least several hours on April 7-8, 1997. 21 FMSHRC at 1036-37, 1038-39.

Urosek's testimony clearly provides substantial evidence that the No. 2 and No. 3 bleeder fans at the Target mine were an integral part of the mine's overall ventilation system, and that a shutdown of the fans would have an *immediate and perceptible* impact on both mine and section ventilation at Target. I find it noteworthy that Target failed to offer any evidence whatsoever to rebut the testimony of MSHA's ventilation expert on the importance of the bleeder fans to the mine's overall ventilation. Instead, Target's counsel argues that the Secretary's evidence on the question is no more than "hypothetical scenarios . . . in which the shutdown of the cited fans could create hazardous conditions[,]" and that there is no evidence that mine ventilation was adversely impacted during the three days the No. 3 fan was not running. T. Br. at 13. I find this argument meritless, and frankly somewhat alarming. It is well established that the Commission may rely solely upon the testimony of MSHA inspectors and expert witnesses in making factual findings regarding violations and hazards posed by mining conditions, even when they are not eyewitnesses to the events. *See Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988). Fortunately for the miners employed by Target, our law does not require a major methane explosion and loss of life for MSHA to cite these conditions. Counsel's argument in this regard illustrates his fundamental misunderstanding of mine ventilation, and the critical nature of the conditions at the Target mine during the fan outage.

I disagree strongly with the approach taken by Chairman Verheggen and Commissioner Riley in their separate opinion. First, I am puzzled by the circular reasoning they employ in an attempt to resolve the dispositive issue in this case — namely, whether the No. 2 and No. 3 bleeder fans constitute "main mine fans" subject to the requirements of 30 C.F.R. §§ 75.310-.313. They reason that there is no ambiguity regarding the meaning of the term "main mine fan," even though they appear to admit that the term is not defined in the applicable regulations. They take the position that what constitutes a "main mine fan" at any particular mine is ultimately governed by the designation of main mine fans in the ventilation plan for that facility. Slip op. at 30. The problem with their analysis is that in the end it begs the ultimate question presented here: how do you define a main mine fan?

This situation can be illustrated by the following hypothetical. Suppose that operator X wants to begin producing coal at a small mining operation utilizing a single mine fan. Before production begins the operator is required by law to submit a ventilation plan to MSHA for approval. 30 C.F.R. § 75.370(a)(2). Furthermore, the operator would be required to provide a mine map identifying, inter alia, the *location* of all main mine fans. 30 C.F.R. § 75.372(a)(6).[9] In this hypothetical there would be little trouble determining whether the fan identified by the operator's mine map was a "main mine fan" inasmuch as it serves as the mine's only surface ventilation fan.

---

[9] Section 75.372(a)(6) refers only to the "location" of main mine fans on the map; it does not in any way attempt to define a main mine fan.

The problem identified in this case, however, arises when operator X determines that a change in the ventilation plan is needed, or the plan is reviewed by the Secretary pursuant to Section 75.370(g).[10] More specifically, what occurs if the ventilation change involves adding an additional mine fan to assure that ventilation is suitable to the current conditions at the mine? In our hypothetical, MSHA argues that the new fan is a "main mine fan" and that it intends to enforce all regulations relating to main mine fans. Conversely, operator X does not agree that the fan is a "main mine fan." How are the parties to resolve this fundamental disagreement? Under the view of Chairman Verheggen and Commissioner Riley, the parties would simply turn to the mine's ventilation plan because as they reason "a particular mine's fans are *defined* . . . in the mine's ventilation plan . . . ." Slip op. at 30 (emphasis added). The problem, of course, is that the new mine fan did not exist in the original ventilation plan, and under the position of my colleagues the parties are left with no objective criteria for determining whether or not the new fan is a main mine fan.

Chairman Verheggen and Commissioner Riley go to great lengths to emphasize that ventilation plans are individualized and need to address the specific conditions at a particular mine. Slip op. at 27 (citing *Peabody Coal Co.*, 15 FMSHRC 381, 385-86 (Mar. 1993)). They also emphasize that changes in a ventilation plan do not occur without discussion and negotiations with the mine's operator. In this regard, they cite *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 906-07 (May 1987), where the Commission held that "[t]he process is flexible, [and] contemplates negotiation toward complete agreement . . . ." Slip op. at 27-28.

I do not take issue with Chairman Verheggen and Commissioner Riley on this point, nor do I disagree with the case law they rely on holding that ventilation plans must be mine specific and allow for input by mine operators. What troubles me is that while my colleagues appear to promote negotiation and consultation between operators and MSHA concerning changes to ventilation plans, in reality their decision does not facilitate that process. In fact, the position they advocate will have the opposite effect, particularly with respect to disagreements over the status of mine fans. Their failure to provide any objective criteria for defining the term "main mine fan" will only impede the negotiation process, both in the initial formulation of a ventilation plans, and in the context of subsequent operational changes.

With respect to the negotiation process in this case, my colleagues assert that "[*i*]*t appears* that Swentosky made this decision [to treat the bleeder fans as main mine fans] unilaterally." Slip op. at 31 (emphasis added). This is only speculative, and certainly not the theory upon which Target litigated this case. As a result, the record was not developed on this issue and my colleagues are left to speculate about how much, if any, involvement Target had in the decision to consider the bleeder fans to be main mine fans. If anything, however, the record appears to indicate that Target acquiesced in the decision to bring these fans into compliance

---

[10] Section 75.370(g) states that "the ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions at the mine."

with the requirements for main mine fans. As noted above, the judge found that at a meeting held on June 21, 1996, to discuss modifications to the bleeder fans to meet MSHA's requirements for main mine fans, Swentosky and Junior Golden discussed work Golden had already initiated to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet. 21 FMSHRC at 1043; Tr. 262-66, 285-86; Gov't Ex. 14. In addition, Junior Golden himself conceded that actions taken by March of 1997 to bring the bleeder fans into compliance with some of the main mine fan regulations — which included installing pressure recording devices and circulation doors on the fans and offsetting them — were undertaken by Target in response to directives from MSHA. Tr. 293-94. This credited evidence directly refutes my colleagues' assertion that Target had no input into the decision to treat the fans as main mine fans or the means by which they would be brought into compliance with the applicable regulatory requirements.

Fortunately, as Chairman Verheggen and Commissioner Riley recognize (slip op. at 28-29), in the event of a disagreement regarding a ventilation plan, MSHA has the ultimate responsibility to insure that the plan achieves its protective purpose. In this case, it therefore follows that when the disagreement arose between Target and MSHA over whether the bleeder fans should be considered main mine fans, MSHA had the final say. This suggests that my colleagues' focus on the importance of negotiation between mine operators and MSHA over the designation of main mine fans in a ventilation plan exalts form over substance.[11] This is perhaps best illustrated by their recognition that they have chosen to focus on "when and how MSHA ought to have revised the operational requirements for the fans" (slip op. at 32 n.6), rather than the more important issue of whether the fans are subject to regulation as main mine fans.

My colleagues criticize me for deferring to the Secretary's interpretation of the term "main mine fan," based upon the impact of a fan on mine or section ventilation. They characterize my approach as endorsing an overly general standard that lacks clarity and whose resolution will ultimately turn on the opinions of inspectors in the field or the conflicting opinions of experts at trial. Slip op. at 34. I respectfully disagree. While the standard itself is

---

[11] Chairman Verheggen and Commissioner Riley argue that an operator who disagrees with MSHA's determination that a particular requirement must be included in its ventilation plan may seek review before this Commission by *refusing to comply* with the disputed provision. Slip op. at 29 n.2 (emphasis added). Without minimizing the importance to aggrieved operators of the availability of review by the Commission, and ultimately the courts, I do not believe we should encourage operators to refuse to comply with ventilation requirements. This would lead to uncertainty regarding the terms and status of a mine's ventilation plan for a considerable period of time. There can be little question that it is far more efficient for the operator and the Secretary to consult and negotiate regarding the terms of a ventilation plan — including what fans are to be designated as main mine fans — in the manner described by my colleagues. *See* slip op. at 27-29. In addition, I find it interesting that my colleagues, having initially raised the issue (*see* slip op. at 29 n.2), then proceed to criticize my approach as one that will foster litigation before the Commission. Slip op. at 32 n.6.

general, its application in any given case will depend upon an evaluation of a fan's impact on mine and section ventilation at a particular facility, based on mine-specific conditions. Thus, it is not a "vague and unworkable standard," as my colleagues suggest (*id.*), but rather one that is entirely consistent with the mine-specific approach they advocate.

Third, despite substantial evidentiary support that the bleeder fans had an *immediate and perceptible* impact on Target's overall ventilation, and the apparent agreement by Chairman Verheggen and Commissioner Riley that MSHA's actions were based on "valid safety concerns" (slip op. at 32 & n.6), they have chosen to focus on inspector Swentosky's and Hixson's conduct to raise doubts about the consistency of MSHA's position regarding the bleeder fans. Slip op. at 31-32. In fact, my colleagues go as far as to allege that inspector Hixson's conduct "is inconsistent with and seriously undercuts the Secretary's position in this case." Slip op. at 32. I find this characterization factually inaccurate, and legally unpersuasive.

To begin with, there is no evidence in the record to support their assertion that inspector Hixson acquiesced in Peterson's decision to restart the No. 3 bleeder fan after discovering that it was not operating. To the contrary, the record indicates that the evidence on this issue is inconclusive.[12] More importantly, however, the judge did not make any direct findings on the issue, nor did he discuss Hixson's failure to cite Target for Peterson's actions. While I may question inspector Hixson's reaction to this particular situation, I am unwilling, in the absence of any pertinent record evidence on the issue, to invade the fact finding province of the judge and find the inspector's conduct created an inconsistency in MSHA's position that the bleeder fans were main mine fans.

In addition, the record evidence contradicts the additional assertion of Chairman Verheggen and Commissioner Riley that Swentosky "may well have been the only person who fully comprehended" the safety implications of having the gob bleeder fans comply with the requirements for main mine fans. Slip op. at 32. Swentosky testified that when he visited the Target mine on June 21, 1996, to discuss the applicability of the main mine fan requirements to the bleeder fans with Junior Golden, he was accompanied by another MSHA inspector James Conrad. Tr. 262-63. In addition, as my colleagues concede (slip op. at 30 n.5), an MSHA 2000-204 form was prepared at the conclusion of a ventilation inspection at the Target mine on March 7, 1996, clearly raising the applicability of the main mine fan regulations to Target's bleeder

---

[12] On this point, inspector Hixson testified:

> We pulled down in the driveway to the fan and due to not hearing the fan running we knew the fan was down. I got out of the Jeep *and got into the back seat to get my hard hat and my detectors* and Phil had opened the gate and opened the door and gone in the building. Phil had gone over and started the fan.

Tr. 42 (emphasis added).

fans. This document was initialed or signed by the following MSHA officials: Jim Conrad, Thomas Light, Swentosky, and Kevin Strickland. Resp't Ex. 1; Tr. 274-75.

Moreover, MSHA's position regarding the importance of bleeder fans was published in a 1996 MSHA course text on bleeder ventilation systems. Gov't Ex. 31 at 113. This text was co-authored by MSHA's expert in this case, John Urosek, and was developed as a direct response to a series of mine explosions during the 1990's, many of which were a result of ineffective bleeder systems that allowed methane to accumulate in the mine's gob area. Tr. 345-46. The purpose of the 1996 text was to develop a mine ventilation course that would enhance the knowledge and skills of all coal industry ventilation personnel in establishing and maintaining safe and effective bleeder systems. Gov't Ex. 31 at 2. According to Urosek, the course was taught to *every* MSHA mine inspector, and to various members of the mining industry on at least ten occasions. Tr. 348. The text states very clearly that bleeder fans must be *maintained and operated* in accordance with sections 75.302, 75.310, 75.311, 75.312, and 75.313. Gov't Ex. 31 at 118. For my colleagues to state that Swentosky may have been the only MSHA official concerned with the agency's position regarding the appropriate regulatory treatment of the bleeder fans is simply an inaccurate assessment of the record in this case.

Even assuming that inspector Hixson's conduct at the Target mine on March 3, 1997, could be construed as inconsistent with MSHA's general position that bleeder fans were to be treated as main mine fans, neither his conduct, nor MSHA's prior practice of not treating Target's bleeder fans as main mine fans, could exonerate Target for its failure to comply with the applicable requirements. We have consistently held that such an enforcement background does not supply a defense to violations of the Mine Act. As we recently stated:

> The Commission has held that the estoppel defense is not ordinarily available against the government. Furthermore, the Commission has held that an inconsistent enforcement pattern by its inspectors does not estop MSHA from proceeding under an interpretation of the standard that it concludes is correct. *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993) ("[T]he fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited . . . is not a viable defense to liability.").

Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (Sept. 2000) (other citations omitted). Accordingly, I cannot agree with Chairman Verheggen and Commissioner Riley that the conduct of inspector Hixson during his March 3, 1997, visit to the Target mine, however it is characterized, undermines MSHA's authority to enforce the requirements of the main mine regulations with respect to Target's bleeder fans.

Finally, I find my colleagues' criticism of MSHA's role in this case, and particularly their statement that "[i]n our opinion, the agency's *conduct* [in this case] compromised the safety of

miners at Target" (slip op. at 32 (emphasis added)), misplaced.[13] While the agency may not have dotted enough i's or crossed enough t's in handling this matter to satisfy Chairman Verheggen and Commissioner Riley, I cannot say that its conduct was egregious enough to provide a basis for a reversal of the judge and dismissal of the serious violations alleged in this case. We should not lose sight of the fact that it was Target's disregard for ventilation that allowed this dangerous condition to exist in the first place. Even my colleagues admit that, by failing to correct problems with its gob bleeder fans and falsifying inspection records relating to the fans, Target committed serious violations that put miners at risk. Slip op. at 33. In my opinion MSHA's conduct in this case, albeit not textbook, did advance a reasonable and fundamentally important interpretation of their ventilation regulations that ultimately rectified a problem at the Target mine that, left unchecked, could have easily resulted in a tragic loss of life.

I am troubled by the net effect of my colleagues' decision, which, in my view, exonerates Target and its agents for conduct that seriously compromised the health and safety of the miners employed at the Target mine. As stated earlier, after working through their reasoning I find myself asking the very same question over and over again: how do they define a main mine fan? Instead of providing clarity on this important issue, their approach is focused on highlighting what they consider to be an inappropriate method of handling a change in Target's ventilation plan. Regardless of fault, at the end of the day the fact remains that this incident endangered the lives of many miners. I therefore respectfully disagree with their position, and instead vote to affirm the judge's finding that Target violated the main mine fan regulations with respect to the No. 2 and No. 3 bleeder fans.

B. The Section 110(c) Charges

The Secretary contends that the section 110(c) cases of Phillip Peterson and Gregory Golden are not properly before the Commission because only Target petitioned for and was granted review, and Target lacks standing to challenge the judge's section 110(c) determinations against Peterson and Golden. S. Br. at 26-29. I disagree.

The section 110(c) citations were tried before the judge together with the Target citations, and the same attorney represented all the respondents throughout the proceeding. By signing the answers of Peterson and Golden to the Secretary's section 110(c) complaints against them,

---

[13] While I have not refrained from serving as an outspoken critic of the regulatory agency's conduct at times, I believe it is important to limit such criticism to situations where MSHA advances a position or an interpretation of a statute or regulation that is actually antithetical to safety. *See Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 715 (June 2000) (requirements for qualification of electricians); *Excel Mining LLC*, 23 FMSHRC 600, 613-14 (June 2001) (concurring opinion of Commissioner Beatty) (finding Secretary's interpretation of regulations relating to respirable dust sampling to be unreasonable and inconsistent with protective intent of applicable Mine Act provision), *appeal docketed*, No. 01-1335 (D.C. Cir. July 31, 2001).

Target's attorney entered an appearance for both the individuals. *See* 29 C.F.R. § 2700.3(c). Moreover, the Commission docket numbers assigned to Peterson's and Golden's cases — PENN 98-98 and PENN 98-104, respectively — appear on both the cover of the PDR and the Commission's Direction for Review. Moreover, and most importantly, the PDR clearly states that review is sought of the judge's section 110(c) findings. Consequently, this is not, as the Secretary seems to suggest, a case in which Target is attempting to assert the rights of an absent party. *See* S. Br. at 27. The individual respondents are simply acting collectively with Target, as they did below.

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). For the reasons discussed below, I would uphold the judge's findings of section 110(c) liability on the part of Phillip Peterson and Gregory Golden.

1. Phillip Peterson

Peterson contends that, because he conducted the examinations in the belief that they were required not by federal regulation, but rather by state requirements, he was not an agent of Target. T. Br. at 21-22. The Secretary responds that, if the Commission reaches the substance of the 110(c) charges against Peterson, it should affirm the judge's decision because Peterson's inspection responsibilities were those normally delegated to management, and he knowingly acted in failing to make the examinations. S. Br. at 30-32.

Here, by focusing on whether Peterson was performing a function which involved a level of responsibility normally delegated to management personnel, I believe that the judge applied the proper test for determining whether Peterson was an agent of Target. *See Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996). We have held that even rank-and-file miners qualify as "agents" under the Mine Act when they perform examinations mandated by law. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Mettiki Coal Corp.*, 13

FMSHRC 760, 772 (May 1991). Therefore, Peterson's undisputed responsibility to conduct the fan examinations supplies substantial evidence to uphold the judge's finding that he is properly chargeable under section 110(c) as an agent of Target, and I would hold that the judge was correct in deeming Peterson's lack of understanding regarding the legal source of the examination requirement as irrelevant to the issue of his agency. *See* 21 FMSHRC at 1056.

I would also conclude that the judge correctly rejected that lack of understanding as a valid defense to whether Peterson acted knowingly. The Commission has rejected ignorance of the existence of the standard being violated as a defense to a section 110(c) charge. *See Warren Steen*, 14 FMSHRC at 1131. It logically follows that ignorance of the legal source of a requirement is equally unavailing. Accordingly, I would affirm the judge's decision holding Peterson liable under section 110(c) for knowingly failing to examine the No. 3 fan on February 28, March 1, and March 2, 1997. Recognizing that the assessment of civil penalties is a function of the trier of fact in the first instance (*Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)), I would affirm the judge's assessment of a $300 penalty against Peterson. I simply note, however, that a $300 penalty seems hardly sufficient to penalize an individual who committed such an "extremely serious violation," and "exhibited more than ordinary negligence" in failing to conduct the required examinations. 21 FMSHRC at 1059.

2. Gregory Golden

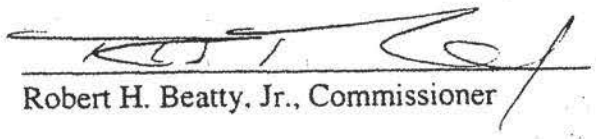
Gregory Golden contends that he acted reasonably under the circumstances and that his conduct did not rise to the level of aggravated conduct. T. Br. at 22. He argues that it was reasonable not to travel to the mine because of Target's history of false fan alarms, his understanding that a miner was stationed at the No. 3 fan on April 7, and his belief that, by the time he would have arrived at the mine, the shift would already be on its way out. *Id.* at 22-23. The Secretary responds that Gregory Golden did not act reasonably in failing to take action. S. Br. at 33-34. According to the Secretary, Gregory Golden cannot escape liability for a violation by sitting idly by while miners may be in danger. *Id.* at 34-35.

The judge found that Gregory Golden knew a production shift was in the mine at the time he was notified of the No. 3 fan stoppage, and that another crew was due to enter the mine at 11:00 p.m. 21 FMSHRC at 1039. It is undisputed that, in response to communications from Commonwealth that the alarm system was indicating that the No. 3 fan had stopped and was not restarting, Gregory Golden chose not to travel to the mine to ensure that miners were removed from the mine and that the foreman on duty knew of the fan stoppage, in compliance with section 75.313(c)(1) and 75.311(d). Furthermore, he did so despite an instruction from his father to go to the mine to check out the alarm in the event he could not get through on the phone. 21 FMSHRC at 1057; Tr. 394. I conclude that the judge's section 110(c) findings are therefore supported by substantial evidence.

I am simply astounded by Gregory Golden's assertion that his reliance on assumptions was so reasonable under the circumstances as to compel the conclusion that he should not have

been held liable under section 110(c). His assumption that the No. 3 fan was operating, and thus drowning out the ringing of the phone at the fan house, was not only incorrect but was made in blatant disregard for the lives of an entire shift of miners who were in the mine at the time of the fan shutdown, and another shift of miners who were then preparing to enter the mine. Moreover, Gregory Golden's assumption that the fan alarm was a false one was also a violation of Target's avowed policy, testified to by his father, of checking out every fan alarm because there was no way of knowing whether it was false without doing so. Tr. 395. Finally, accepting Gregory Golden's remarkable assertion would also be directly contrary to Commission precedent. In finding aggravated conduct, the Commission has rejected an agent's reliance on "best-case scenario" assumptions as a basis for failing to take action despite evidence of a potentially dangerous condition. *See, e.g., Prabhu Deshetty*, 16 FMSHRC 1046, 1051-52 (May 1994) (finding unreasonable agent's assumption that lower level employees or agents will attend to the condition); *see also Roy Glenn*, 7 FMSHRC 1583, 1587 (July 1984) (stating that supervisor's self-induced ignorance not defense to section 110(c) liability).

For the foregoing reasons, I would affirm the judge's finding of section 110(c) liability on the part of Gregory Golden. While I also affirm the judge's assessment of a $1000 penalty for the two violations committed by Gregory Golden, based upon his analysis of the statutory penalty criteria — in particular his findings that the violations were "extremely serious" and the result of high negligence (21 FMSHRC at 1059) — it is my personal view that a much higher penalty should have been assessed against Gregory Golden because of his blatant disregard for the lives of the miners employed at Target.[14]



Robert H. Beatty, Jr., Commissioner

[14] I note that a former superintendent for North Star Mining, Inc.'s No. 5 Mine in Leslie County, Kentucky, faces the possibility of a sentence of one year in prison and/or a $100,000 fine, plus up to one year of supervised release, after pleading guilty to a knowing failure to comply with provisions of the mine's ventilation plan. *Supervisor Guilty of Ventilation Violations*, 8 Mine Safety & Health News, August 3, 2001, at 354.

Commissioner Jordan, in favor of affirming the decision of the judge:

Although I concur with Commissioner Beatty's decision to affirm the judge, I reach that result by a different analysis and therefore I write separately.

The issue before us is whether the two borehole bleeder fans at Target's mine are main mine fans, as that term is used in several of the mandatory regulations contained in Subpart B of 30 C.F.R. Part 75. As the administrative law judge observed: "A definition of the term 'main mine fan' is found neither in the Act nor in the regulations, even though sections 75.310, 75.311, 75.312, and 75.313 apply only to such fans and even though the regulations repeatedly use the term." 21 FMSHRC at 1040.

The Secretary determines whether a particular fan must comply with main mine fan requirements by considering that fan's impact on the overall ventilation of the mine. S. Br. at 11-12. According to the explanatory booklet MSHA distributed to the mining community, "if the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." Gov't Ex. 20 at 6. Relying on the testimony submitted by MSHA's ventilation experts, the judge concluded that a shutdown of either of the bleeder fans in question here would have the requisite effect on the overall ventilation of the mine and that such fans were appropriately considered to be main mine fans. 21 FMSHRC at 1042.

In their opinion reversing the judge's decision and vacating his findings of liability, Chairman Verheggen and Commissioner Riley maintain that the status of the bleeder fans is more appropriately determined by referring to the ventilation plan in effect at Target's mine. Slip op. at 27. They point out that such plans are intended to address the specific conditions of a particular mine, and that the provisions of a ventilation plan approved by the Secretary are enforceable as mandatory safety standards. *Id.* Concluding that Target's plan unambiguously designates only the No. 1 fan as a main mine fan, they disagree with the judge's conclusion that the Secretary's regulations do not define the term "main mine fan," at least as it applies to Target's mine. *Id.* at 30-31.

I agree with these colleagues that to the extent the Secretary has unambiguously designated certain fans as main mine fans in a mine's ventilation plan, she must enforce the requirements of 30 C.F.R. § 75.310 et. seq. in a manner consistent with that designation. I also share their view regarding the benefits of an enforcement approach based on the requirements of a plan that has been tailored to the conditions of the mine in question, as opposed to one based on the generalized statement in the Secretary's question-and-answer booklet. Having said that however, I respectfully disagree with their conclusion that we can discern an unambiguous designation of main mine fans from the ventilation plan in this case.

The Secretary's regulation at 30 C.F.R. § 75.370(a)(1) informs us that ventilation plans "consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372." Chairman Verheggen and Commissioner Riley contend

that the term "main mine fan" is "defined insofar as each underground coal mine is required to have one or more main mine fans . . . identified on the mine's ventilation map." Slip op. at 30 (citations omitted). In relying on this aspect of the map, however, they ignore 75.370's caveat that *"[o]nly that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager."* 30 C.F.R. § 75.370 (a)(1) (emphasis added). Although the mine ventilation map must contain information about "[t]he locations of all main mine fans, . . ." 30 C.F.R. § 372(b)(6), this information is specifically excepted from MSHA's approval since it is required pursuant to section 75.372, not section 75.371.

Unlike Chairman Verheggen and Commissioner Riley, I am unwilling to conclude that the reference to the main mine fan on Target's map amounts to an unambiguous determination by MSHA that only the No. 1 fan need comply with the protective requirements that pertain to main mine fans, and that the No. 2 and No. 3 bleeder fans (which are also clearly identified on the map) are exempted from these requirements. These map designations were not subject to MSHA's approval, and the record in this case is completely bereft of any information regarding how these designations were arrived at, what the drafters (who were presumably Target employees) intended by the labels used to describe the fans, and whether MSHA ascribed any significance to, or even considered these designations in the course of approving Target's ventilation plan.[1]

In addition to the map, a descriptive ventilation plan for the No. 1 mine was also introduced into the record. Gov't Ex. 22. Unfortunately, this document also fails, in my view, to clarify which fans must comply with main mine fan requirements. The plan repeats the requirements contained in section 75.371 regarding the information that must be submitted by each operator, and then either provides that information or indicates that the requirement is not applicable to the Target No. 1 mine. *Id.* On page 1 of the plan, the information required by section 75.371 (c) is set forth in typed form:

> (c) Methods of protecting main mine fans and associated components from the forces of an underground explosion if a 15-foot offset from the nearest side of the mine opening is not provided (see 75.310(a)(6)); and the methods of protecting main mine fans and intake air openings if combustible material will be within 100 feet of the area surrounding the fan or these openings (see 75.311(f)).

Gov't Ex. 22 at 1.

---

[1] Surprisingly, the parties made no effort to enlighten the judge regarding the significance, or lack thereof, to be awarded to Government Exhibits 22 (Target's ventilation plan) and 25 (Target's mine map), in determining which fans are main mine fans. Consequently, the judge did not even refer to the ventilation plan in reaching his conclusion. On appeal, the parties scarcely refer to the ventilation plan in urging their respective positions upon this Commission.

In response to this requirement, the plan contains a handwritten instruction directing the reader to a drawing found on page 22 which, one is informed, is an alternative 15 foot offset plan for the No. 2 Borehole fan.[2] A reference to the No. 2 borehole fan in connection with a ventilation plan requirement that pertains to main mine fans seriously undermines my colleagues' contention that the plan unambiguously excludes the borehole bleeder fans from the category of a main mine fan. Indeed the allusion to the borehole fan would appear to be an acknowledgment that these bleeder fans must meet the requirements that pertain to main mine fans.

The opinion of Chairman Verheggen and Commissioner Riley relies primarily on page 9 of the ventilation plan. Slip op. at 30. That page is titled "Ventilation Fan Data Sheet," and contains information such as the model, size, manufacturer, and RPM for three fans. Gov't Ex. 22 at 9. Unlike the preceding eight pages of the ventilation plan, however, this information is provided without reference to a requirement of section 75.371, leaving one less certain about the drafter's purpose in providing this information. Chairman Verheggen and Commissioner Riley rely on the fact that two of the fans are designated as "gob bleeder fans," while one carries the designation of "main line fan." Slip op. at 30, citing Gov't Ex. 22 at 9, which actually reads "main line fan" in the ventilation plan. Presumably this designation is a misprint for what should have read "main mine fan." However given the dearth of testimony or argument related to the ventilation plan, one wonders if we can even be certain of this fact.

Even assuming that the designation was supposed to be "main mine fan," what should we conclude from that? Are we to assume that only one fan was expected to comply with the protective requirements pertaining to main mine fans? While that might be a plausible assumption, it is one that does not comport with the plan's acknowledgment on page 1 that the borehole fan must meet the offset requirements that pertain to main mine fans. Perhaps the references on page 9 to "gob bleeder fan" and "main mine fan" were not meant to be mutually exclusive. Perhaps "gob bleeder fan" was meant as an additional descriptive term of a main mine fan, the function of which is to ventilate the gob.

I thus cannot agree that Target's ventilation plan removes any ambiguity about which fans must comply with the requirements that pertain to main mine fans. Having determined that neither the mandatory standards nor the ventilation plan clearly define which of Target's fans are "main mine fans," I find myself in agreement with Commissioner Beatty's conclusion: the meaning of the term is ambiguous. Slip op. at 8. As he has indicated in his opinion, the appropriate analysis in such cases is to determine whether the Secretary's interpretation of the term is a reasonable one. *Id.* at 8-9.[3]

---

[2] As explained previously, the borehole fans referred to on the mine map are bleeder fans. Slip op. at 2. *See also* S. Br. at 2 n. 1 (the terms "bleeder fan" and "borehole fan" were used interchangeably in Target's ventilation plan and at the hearing).

[3] Commissioner Beatty concludes that the Secretary's interpretation is reasonable. Slip op. at 9-10.

As I stated earlier, the Secretary has interpreted the term "main mine fan" to apply to those fans which, if shut down, would have an "immediate and perceptible" impact on mine or section ventilation. In determining whether this is a reasonable interpretation, we must consider whether it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (DC. Cir. 1995) (citations omitted).

At the outset, we must consider whether the Secretary's interpretation is consistent with the phrase "main mine fan," which might arguably be said to encompass only a single fan in each mine. Such a restrictive interpretation, however, would not be consistent with the regulation at 30 C.F.R. § 75.302 which is titled "Main mine fans" and which clearly contemplates that mines may have more than one main fan, stating that "Each coal mine shall be ventilated by one or more main mine fans." *See also* 30 C.F.R. § 75.310(f) ("In mines ventilated by multiple main mine fans . . .).

Having determined that the Secretary can reasonably designate more than one fan as a main mine fan, we must consider whether a designation based on the fan's contribution to the overall ventilation of the mine is consistent with the language and purpose of the main mine fan regulations. The standards in question require operators to take certain precautions in connection with the installation, operation, and examination of these fans. The Secretary's determination that main mine fans are those with an "immediate and perceptible impact on the mine's overall ventilation system," S. Br. at 15, follows from the text of the specific regulatory requirements. For example, section 75.311(d) requires an operator to promptly repair any electrical or mechanical deficiencies in a main mine fan. Section 75.313(a)(3) requires that all miners be withdrawn from working sections if a main mine fan stops and there is no adequate back-up system. Thus the language of the regulations reflects the importance of the main mine fans to the mine's ventilation system, and it is perfectly logical for the Secretary to apply the designation of a main mine fan on the basis of the fan's role in providing ventilation to a working section or to the mine in general.

Because the Secretary's interpretation is reasonable and therefore entitled to deference, the next step is to consider the reasonableness of the Secretary's main mine fan designation in this particular case. For although it may be a reasonable approach to classify fans as main mine fans on the basis of their impact on mine or section ventilation, the question remains: Did MSHA prove that Target's No. 2 and No. 3 bleeder fans met this criteria? Although Target contends that MSHA failed to demonstrate the requisite impact, all of my colleagues have cited to the extensive evidence in the record that supports the judge's determination that shutting down a bleeder fan would have an immediate and perceptible impact on ventilation. Slip op. at 13 (sep. op. Comm'r Beatty), 32 n.6 (sep. op. Chairman Verheggen and Comm'r Riley). I agree with their analyses and conclude that the Secretary met her burden of proof in this regard.

We must also consider, as Commissioner Beatty points out, whether the operator had adequate notice of MSHA's interpretation. Slip op. at 10. After discussing specific parts of the

record, Commissioner Beatty concludes that ample support exists for the judge's determination that Target was provided with actual notice by MSHA that the No. 2 and No. 3 bleeder fans were considered by the agency to be main mine fans. *Id.* at 10-11. I concur with my colleague's reasoning and finding on this point.

As a final matter, I agree with Commissioner Beatty's analysis of the section 110(c) cases. Slip op. at 19-21. I join him in upholding the judge's finding of section 110(c) liability and the penalty determination against Phillip Peterson and Gregory Golden.

Accordingly, for the reasons stated above, I would affirm the judge's decision.

Mary Lu Jordan, Commissioner

Chairman Verheggen and Commissioner Riley, in favor of reversing the judge and vacating his findings of liability:

A. The Citations Issued to Target

Both the Secretary and Target have argued this case under theories of statutory interpretation. This case, however, involves components of Target's ventilation system, the operations of which are regulated by a mine ventilation plan. *See* 30 C.F.R. §§ 75.370, 75.371, and 75.372. We have thus looked to the law of mine ventilation plans to resolve the question presented here, which is whether, at the time they were cited, Target's No. 2 and No. 3 gob borehole fans were subject to the various requirements that pertain to main mine fans. The judge concluded that they were main mine fans. For the reasons that follow, we would reverse the judge and vacate his findings of liability on the part of Target and its agents.

We begin by reiterating the well-established principles of law set forth in previous Commission decisions relating to mine ventilation plans. Section 303(o) of the Mine Act states:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title.

30 U.S.C. § 863(o). The provisions of a ventilation plan are enforceable as mandatory safety standards. *Wyoming Fuel Co. n/k/a Basin Res., Inc.*, 16 FMSHRC 1618, 1624 (Aug. 1994), *aff'd.*, 81 F.3d 173 (10th Cir. 1996) (table). The legislative history of section 303(o), and decisions by the Commission and the courts, emphasize "the individual nature of . . . ventilation plans." *Peabody Coal Co.*, 15 FMSHRC 381, 385-86 (Mar. 1993). Such plans "must address the specific conditions of a particular mine." *Id.* at 386.

The Commission has also commented on the procedures whereby ventilation plans become law at a mine:

> Ventilation plans are approved by the Secretary and adopted by mine operators pursuant to section [75.370] and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or

> suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. The ultimate goal of the approval and adoption process is a mine-specific plan with provisions *understood by both the Secretary and the operator* and with which they are in full accord.
>
> . . . .
>
> The Act and the mandatory standard require the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good faith to develop a conclusive and suitable plan containing provisions *clearly understood by both*. . . . It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted.

Jim Walter Res., Inc., 9 FMSHRC 903, 906-07, 909 (May 1987) ("*JWR*") (citations omitted, emphasis added).

Although the plan approval process anticipates that negotiation and consultations will occur, MSHA must ultimately make sure that the plan achieves the protective purpose for which it is intended. The D.C. Circuit pointed this fact out in a roof control case:[1]

> We note that while the mine operator had a role to play in developing plan contents MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgement with respect to the

---

[1] The process of developing a roof control plan is analogous to the ventilation plan process. *See* 30 C.F.R. § 75.220.

content of such plans in connection with his final approval of the plan."

United Mine Workers of Am., Int'l Union v. Dole, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989) (citation omitted).[2]

The Secretary's regulation pertaining to the approval of mine ventilation plans, 30 C.F.R. § 75.370, in keeping with the "the individual nature of . . . ventilation plans" (*Peabody*, 15 FMSHRC at 385), clearly contemplates periodic revisions being made to such plans. In fact, the regulation requires that the "ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine." 30 C.F.R. § 75.370(g). If the Secretary finds a plan provision that is not suitable, section 75.370 sets forth the procedures to be followed for a plan to be revised. *See, e.g.*, 30 C.F.R. § 75.370(a)(2) ("The proposed ventilation plan and any revision to the plan shall be submitted in writing to the [MSHA] district manager."); 30 C.F.R. § 75.370(c)(1) ("The district manager will notify the operator in writing of the approval or denial of approval of a . . . proposed revision.").

Here, the threshold legal question is the proper definition of the term "main mine fan." 21 FMSHRC at 1033. The judge concluded that the Secretary's ventilation regulations do not define the term, but that the Secretary offered a general definition of the term in the course of litigating this case to which deference was owed. *Id.* at 1040-42. The interpretation offered by the Secretary in support of the enforcement actions under review is a passage from a publication entitled *Ventilation Questions and Answers*, dated November 9, 1992, which states: "If the impact of a shutdown [of a fan] on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." Gov't Ex. 20 at 6.

Under the body of law set forth above, however, mine fans are designated as main fans on a mine specific basis in an operator's ventilation plan. Section 75.370 states that a "ventilation plan shall consist of two parts, the plan content as prescribed in [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372." 30 C.F.R. § 75.370.

---

[2] An operator who disagrees with MSHA's determination that a particular requirement must be included in its plan can seek review before the Commission by attempting to mine under a plan that does not include the disputed provision, thereby subjecting itself to a citation or order for failure to have an approved ventilation plan. *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 n.8 (Dec. 1981). An operator who believes a revision of its plan is warranted and believes the Secretary "has acted in bad faith in refusing to approve the revision" can seek review "by refusing to comply with the disputed provision, thus triggering litigation before the Commission." *Id.* (Of course, under either of these scenarios, MSHA would require immediate compliance with the plan it approved as a precondition for abatement of any such citation or order, thus ensuring that no mining would occur under any provisions the agency had not approved.)

Ventilation maps must include, inter alia, "locations of all main mine fans . . . and each fan's specifications, including size, type, model number, manufacturer, operating pressure, motor horsepower, and revolutions per minute." 30 C.F.R. § 75.372(b)(6). All fans designated as main mine fans are further subject to the general requirements of sections 75.302, 75.310, 75.311, 75.312, 75.313, etc. Thus, a particular mine's fans are defined as main fans in the mine's ventilation plan developed under sections 75.371 and 75.372.

We therefore disagree with the judge's conclusion that the Secretary's ventilation regulations, taken as a whole, do not define the term "main mine fan." To the contrary, the term is defined insofar as each underground coal mine is required to have one or more main mine fans (30 C.F.R. § 75.302) identified on the mine's ventilation map (30 C.F.R. § 75.372(b)(6)) and subject to the general operational requirements set forth elsewhere in the Secretary's ventilation regulations.[3]

Here, the cited fans were designated in the narrative portion of Target's ventilation plan, *which was approved by the Secretary*, as "gob bleeder fans" on the same page where a single main fan is clearly identified. Gov't Ex. 22 at 9. The narrative also included the information required under section 75.372(b)(6) — i.e., detailed specifications for the mine's main and borehole fans. Gov't Ex. 22 at 9; *see* 30 C.F.R. § 75.371 ("The mine ventilation plan shall contain . . . any additional provisions required by the district manager.").[4] There is some indication that MSHA considered revising the plan to require Target to bring the cited fans up to the specifications main mine fans must meet under section 75.310.[5] But it does not appear from

---

[3] We also disagree with the judge's statement that "The problem is that the Act and the [ventilation] regulations do not provide for a gradual approach to compliance with regard to sections 75.310 through 75.313." 21 FMSHRC at 1043. To the contrary, as the Commission stated in *JWR*, the ventilation plan "process is *flexible*, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements." 9 FMSHRC at 907 (emphasis added). Section 75.370 also contemplates periodic revisions being made to such plans, and in fact requires that the "ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine." 30 C.F.R. § 75.370(g). Clearly, this flexible regulation provides ample room for phasing in particular requirements, regardless of whether an existing fan has been previously designated as a main mine fan or a new fan is being added to the plan.

[4] The gob bleeder fans were thus regulated under the ventilation plan, which detailed the specifications for each of the fans. Gov't Ex. 22 at 9. The requirements in the plan covering the gob bleeder fans were enforceable as mandatory safety standards. *Wyoming Fuel Co.*, 16 FMSHRC at 1624.

[5] Approximately one year before issuing the citations under review, MSHA inspectors included the following notation on a form 2000-204 — a document prepared at the conclusion of a ventilation inspection:

the record that any follow-up ever occurred. Instead, MSHA ventilation supervisor Swentosky, during several calls and visits to Target during April and June 1996, simply told company officials "that the fans were main mine fans" (21 FMSHRC at 1043), having made no attempt whatsoever to revise Target's ventilation plan. It appears that Swentosky made this decision unilaterally, contrary to the requirements of section 75.370 and the principles set forth in the Commission's *JWR* decision (*see* 9 FMSHRC at 906-07, 909).

We are unwilling to uphold an enforcement action on the basis of a generalized statement in an MSHA question and answer document, while ignoring statutorily mandated mine specific safety provisions contained in the operator's ventilation plan which clearly do not identify the fans at issue as main mine fans. Accordingly, we would reverse the judge and dismiss these proceedings not to condone Target's irresponsible actions but because the Secretary's enforcement action contradicts her own regulations.

This is not the end of our analysis, however. It is troubling that, apparently, not all the MSHA officials involved in this case were aware that Swentosky considered the gob bleeder fans to be main fans when Hixson visited the mine on March 3, 1997 (a Monday). We can find no other explanation for Hixson's conduct when he and Peterson discovered that the No. 3 gob bleeder fan was not operating. *See* 21 FMSHRC at 1035-36. When they arrived at the fan, "Hixson could not hear the fan." *Id.* at 1036. "The men got out of the Jeep, and Peterson unlocked the gate. Hixson and Peterson went into the fan house and found that the fan was not operating. Peterson restarted it by pressing the fan's restart buttons. Meanwhile, Hixson looked at the fan's pressure chart." *Id.*; *see also* Tr. 42 (Hixson testifying that "I got out of the Jeep and got into the back seat to get my hard hat and my detectors and Phil . . . had gone over and started the fan"). Hixson discovered that the fan had not been operating since the previous Thursday, February 27. 21 FMSHRC at 1035-36. After some conversation about procedures Target had in place to alert company officials of fan outages, the men "left the fan house and traveled back to the mine office." *Id.*

> Recently questions concerning the two bleeder borehole fan installations were raised. The concern was dealing with their present installation and whether they should be required to meet the main fan regulations installation as defined in section 75.310 of the CFR. It appears that an in depth ventilation survey may be needed to be conducted at this mine. The results of this survey could be used to determine what degree or impact these bleeder borehole fans have on the mine's main ventilation system and what if any changes would be needed on the two bleeder borehole fan installations. *The approved ventilation plan upon completion of this inspection appears to be adequate.*

Resp't Ex. 1; Tr. 274-75 (emphasis added).

Had it been clearly understood by everyone at the mine, including all MSHA inspectors, that the No. 3 fan was a main fan, Hixson would undoubtedly have taken emergency measures set forth in 30 C.F.R. § 75.313, or even issued an imminent danger order under section 107(a) of the Act due to a potential build up of methane in the gob, to ensure the safety of miners then underground. *See* 21 FMSHRC at 1045-46 n.8. That he did not do so is inconsistent with and seriously undercuts the Secretary's position in this case.

It is just this sort of potentially dangerous confusion that mine ventilation plans, including adoption and revision procedures, are designed to avoid. Swentosky's desire to have the gob bleeder fans meet the regulatory requirements for main mine fans was undoubtedly motivated by valid safety concerns.[6] The problem was that he may very well have been the only person who fully comprehended those concerns. Clearly, Hixson did not. But if the agency had proceeded under section 75.370 to revise Target's ventilation plan, all persons affected by the revision would have been "on the same page." *See* 30 C.F.R. § 75.370(e) ("Before implementing . . . a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions."). We disapprove of MSHA's disregard of the requirements and procedures of section 75.370 in its relations with Target. In our opinion, the agency's conduct compromised the safety of miners at Target.

In the litigation that followed in the wake of MSHA's actions at the mine, the Secretary sought to justify those actions by arguing that her inspectors were acting under the authority of a non-authoritative interpretation of what "main mine fan" means found in the question and answer document. The Secretary thus only compounded the problem by defending the confusion of her inspectors with a post hoc explanation (no record evidence indicates that any MSHA official relied explicitly on the question and answer document at the time confusion reigned at Target's mine). We consider the Secretary's failure to rely upon the clarity provided by her mine

---

[6] MSHA introduced ample testimony, which the judge credited, about the impact of the bleeder fans on the ventilation of the mine. *See* 21 FMSHRC at 1042-43; Tr. 335-71. Contrary to Commissioner Beatty's suggestion that we find this testimony "simply not important" (slip op. at 11 n.7), we fully recognize that the cited fans were critical components in Target's ventilation system. In fact, given that they ventilated gob areas where methane could have accumulated, we find Hixson's reaction to the outage of the No. 3 fan inexplicable. But the larger question here is when and how MSHA ought to have revised the operational requirements for the fans. In sanctioning MSHA's actions here, our colleagues appear to prefer an approach in which MSHA can regulate fans on an ad hoc, after the fact basis in litigation before this Commission. We find such an approach misguided — and contrary to MSHA's ventilation plan regulations, which clearly require that fans be regulated on the front end of the ventilation plan process so as to avoid the potentially life-threatening confusion that occurred in this case. It would have been erring far more on the side of safety, and been in accordance with the law, had MSHA evaluated the impact of the gob bleeder fans on the mine's ventilation, and required Target to revise its ventilation plan based on the evaluation.

ventilation plan regulations, and instead pursuing this litigation, as contrary to the overall safety purposes of the Mine Act.

We would hasten to add that it was *Target's* conduct in the first place that put the miners at risk. The record in this case clearly demonstrates that the company and its agents violated the requirement to ventilate its gob areas when it failed to correct the problems with its gob bleeder fans. *See* 30 C.F.R. § 75.334 (ventilation requirements for worked-out areas and bleeders). Furthermore, falsification of a record is a very serious offense under section 110(f) the Act itself. 30 U.S.C. § 820(f). Thus, although we find that the Secretary failed to establish that the fans at issue in this case were main mine fans, we certainly do not endorse Target's conduct, which we find reprehensible. It is unfortunate that MSHA chose to prosecute this case under an insupportable theory.

Turning briefly to the separate opinions of our colleagues, we begin by noting that both Commissioner Jordan and Commissioner Beatty ultimately rely upon the Secretary's interpretation in finding that Target violated the cited standards. Slip op. at 25 (sep. op. Comm'r Jordan); slip op. at 9-10 (sep. op. Comm'r Beatty). They both believe that the fans at issue were main mine fans because shutting them down would have an immediate and perceptible impact on mine or section ventilation.[7] This approach is problematic because it imposes a general standard where the Secretary's regulations clearly call for a mine specific approach. The standard they endorse also provides no useful guidance — shutting down virtually *any* fan in a mine would have an immediate and perceptible impact on mine or section ventilation.

On the other hand, given that the standard endorsed by our colleagues lacks any clarity, whether the effect of a fan shutdown was immediate and perceptible would be left to the opinions of inspectors in the field — notwithstanding relevant provisions of a mine's ventilation plan — or to the conflicting opinions of experts at trial. As written, the Secretary's regulations explicitly require that main mine fans be clearly identified on a mine specific basis. We reject our colleagues' approach because it is based on a vague and unworkable standard rather than the bright line of a mine specific ventilation plan. Our colleagues invite the chaos of uncertainty and needless litigation in an area where the Secretary's regulations are perfectly suited to the problem raised by this case.

We also note that Commissioner Jordan recognizes that Target's ventilation plan includes "an alternative 15 foot offset plan for the No. 2 Borehole fan. . . . [a] requirement that pertains to main mine fans." Slip op. at 24. She insists that this plan provision "would appear to be an acknowledgment that these bleeder fans must meet the requirements that pertain to main mine

---

[7] Although Commissioner Jordan states that she would favor "an enforcement approach based on the requirements of a plan that has been tailored to the conditions of the mine in question, as opposed to one based on the generalized statement in the Secretary's question-and-answer booklet" (slip op. at 22), she nevertheless bases her opinion on those very "generalized statements" (slip op. at 25).

fans." *Id.* But the provision applies to only one of the fans, so we fail to see how it somehow proves that both fans should have met the main mine fan requirements. More importantly, though, if the fans had been designated as mains, this plan provision would not have been needed at all. They would have been subject to *all* the regulations pertaining to main mine fans. All this offset provision shows is that mine ventilation plans can and do include additional requirements tailored to the circumstances of a particular mine that may go above and beyond the requirements set forth elsewhere in the ventilation regulations.

Finally, we agree with Commissioner Beatty that this case addresses issues of vital importance to the mining community — namely, mine ventilation. We disagree, however, when our colleague states that MSHA's position in this case is not "actually antithetical to safety," which is why he has refrained from joining us in questioning the agency's actions in this case. Slip op. at 18 n.13. To the contrary, MSHA's actions here seriously compromised the safety of miners, and if repeated elsewhere, would needlessly put other miners in serious jeopardy of their lives. Not only did the agency's actions create confusion regarding the requirements Target's fans had to meet, which alone was a serious enough safety problem. But when Peterson turned on the No. 3 fan as Hixson discovered that the fan had been out of service for approximately four days (21 FMSHRC at 1035-36), there could very well have been a build up of methane in the gob the No. 3 fan should have been ventilating, a build up of methane that could have killed and maimed any number of miners as Hixson stood idly by. Our colleagues' separate opinions do nothing to avoid such a scenario from playing out again in the future. We find it unfortunate that this Commission cannot come together and forestall such legal confusion and the ensuing danger that such uncertainty fosters by instructing MSHA to ensure that all mine ventilation plans more clearly delineate the components of the ventilation systems of each and every mine in this nation.

B. The Section 110(c) Charges

We agree with our colleagues that the section 110(c) cases of Phillip Peterson and Gregory Golden are properly before the Commission. Slip op. at 18-19. Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). We have found, however, that the Secretary failed to establish that Target violated the cited standards. We would thus reverse the judge's findings of section 110(c) liability on the part of Phillip Peterson and Gregory Golden.

C. Conclusion

Accordingly, for the foregoing reasons, we would reverse the judge's decision, vacate his findings of liability in these proceedings, and dismiss the case.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

Joseph A. Yuhas, Esq.
P.O. Box 1025
Northern Cambria, PA 15714

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of TERRY MCGILL	:	
v.	:	Docket No. SE 2000-39-DM
U.S. STEEL MINING COMPANY, LLC	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Commission granted the Secretary of Labor's petition to review Administrative Law Judge Avram Weisberger's dismissal of a complaint charging U.S. Steel Mining Company, LLC ("U.S. Steel") with having discharged miner Terry McGill in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 22 FMSHRC 1327 (ALJ) (Nov. 2000). For the reasons that follow, we vacate and remand the judge's decision.

I.

Factual and Procedural Background

McGill worked as a miner for U.S. Steel for approximately 27 years, mostly as a roofbolter. 22 FMSHRC at 1328; Tr. 20. In 1999, he worked at its Oak Grove Mine, an underground mine in Alabama. 22 FMSHRC at 1328; Tr. 20. At the mine, McGill was a member of the United Mine Workers of America local committee ("mine committee"), which handles labor contract issues. 22 FMSHRC at 1328; Tr. 20-22. McGill injured his knee at the mine in the spring of 1999, and was off work for 13 weeks. 22 FMSHRC at 1328.

McGill returned to work around June 21, 1999, and learned that Carl Harless had become his section foreman. 22 FMSHRC at 1328; Tr. 44. Thereafter, Harless told McGill and his partner on the roofbolter, Jerry Norris, also a mine committeeman, that, because he was outnumbered by mine committeemen on the section, he "probably needed to start wearing a tape recorder." 22 FMSHRC at 1328, 1330; Tr. 44-45,139-40. Both McGill and Jerry Norris testified that they believed Harless was serious about the tape recorder. Tr. 45, 139. McGill stated that he felt that Harless "kept trying to goad me into something or get me to say something or get me to act." Tr. 45.

In July 1999, Harless' crew was working in the 6 East Main section of the mine. Resp't Ex. A, B. On July 11 or 12, McGill and Norris bolted the roof of the No. 2 entry as far as they could, but not all the way to the face, as rocks on the floor prevented the roofbolter from advancing further inby along the right side of the entry. 22 FMSHRC at 1328 n.2, 1330-31; Tr. 178-83. When McGill asked Harless why the continuous miner had not "squared up" its cut before departing the entry, which would have allowed the roof of the entry to be bolted up to the face, Harless said that it was "his f___ing section, he'd run it like he wanted to." 22 FMSHRC at 1328 n.2; Tr. 216, 218-19.

According to McGill, on July 13, 1999, he passed the No. 2 entry and saw that it had still not been bolted as far as he thought it should, the last row of bolts being approximately 7 to 8 feet from the face along the right side of the entry, while on the left side the last row of bolts was approximately 10 to 12 feet from the face. 22 FMSHRC at 1328; Tr. 53, 56-57. When McGill learned from Luther Self, the continuous miner operator on the crew, that Self planned to crosscut all the way through from the No. 3 entry to the No. 2 entry, McGill told Self that would result in cutting into an area that was not completely bolted. 22 FMSHRC at 1328. Self responded that Harless had told him to crosscut through to the No. 2 entry. *Id.*

Shortly thereafter McGill and Jerry Norris saw Harless while they were on their way to the section dinner hole for lunch; McGill asked Harless if he intended to cut through to the No. 2 entry, and was told that he did. *Id.*; Tr. 54. When McGill told Harless that "you know you will be cutting into a place that is not completely pinned," Harless responded "that it was his f___ing section and he would run it like he wanted to and for us to get our . . . butts out there and eat." 22 FMSHRC at 1328; Tr. 55-56. Jerry Norris told Harless that the cut would be illegal under federal law, and essentially confirmed McGill's account of the conversation. 22 FMSHRC at 1330; Tr. 141, 186-87.

While at the dinner hole, McGill asked MSHA Inspector Bud Norris, who was present that day conducting an inspection, whether the law would be violated if a cut was taken "and it [was] not bolted up all the way." 22 FMSHRC at 1328. According to McGill, Inspector Norris stated that it would be a violation, and then asked if such a cut had already been taken, to which McGill replied it had not. *Id.* at 1328-29. After seeing McGill speaking to Inspector Norris, Harless entered the dinner hole and asked Norris what he was inspecting that day. *Id.* at 1329.

According to both McGill and Harless, Norris replied he was inspecting a belt, upon which Harless then left McGill to continue talking to the inspector. *Id.*; Tr. 61, 376.

After lunch, McGill started to return to the No. 3 crosscut with Jerry Norris to bolt the roof, but Harless instructed the two instead to build run-through curtain drops for ventilation. Tr. 63-64, 142-43. McGill was directed to retrieve the approximately 10 to 12 curtains that had been left in the tail track area, which was eight to ten crosscuts away.[1] 22 FMSHRC at 1329; Tr. 64-65. McGill testified that while the curtains only weighed 3 pounds each, they were bulky, and the walkway from the tail track to the section sloped downhill and was covered with mud that was more than ankle-deep. 22 FMSHRC at 1329. McGill stated that the scoop normally used to bring materials such distances was right beside him, but when he reminded Harless of the condition of his knees and asked if he could use a scoop to transport them, Harless responded: "Look, I told you to walk out there and get it. Are you violating a direct work order?" *Id.*; Tr. 64-68. McGill then told Harless that it would take him some time to get the curtains. 22 FMSHRC at 1329. According to Jerry Norris, when he subsequently asked Harless where the material to build the curtain drops was coming from, Harless responded that "McGill would bring me the curtain if he wasn't too f___ing crippled." Tr. 143.

McGill took one curtain to the section, returned to the tail, and put another curtain on his shoulder, intending to take it to the section. 22 FMSHRC at 1329. At that point Harless again met up with him and, admittedly upset that McGill was only carrying one curtain at a time, told him to put the curtain down, saying that he would carry the rest of the curtains, and assigned him another task. *Id.* at 1329, 1332. McGill responded that if Harless carried the curtains, then he (McGill) would file a grievance, as Harless would be performing "classified" work in violation of the union contract. *Id.* at 1329; Tr. 71-73, 409-10.

At this point the testimony of McGill and Harless sharply diverge. According to McGill, Harless, as soon as McGill threatened to file a grievance, told him to put down the curtain and said "you little son of a bitch, I'm going to show you something about what's right and what's wrong." 22 FMSHRC at 1329; Tr. 73. In response to what he described as Harless' "cussing," McGill told him that he would leave to go and return with Hank Keaton, a section repairman and the mine committee chairman, to be a witness. 22 FMSHRC at 1329; Tr. 73-74, 77, 194-95, 205.

Harless responded that McGill did not need Keaton to be a witness because McGill "was a f___ing committeeman." 22 FMSHRC at 1329; Tr. 74, 205-06. McGill said that Harless then began to run at him with a fist drawn, telling him that "'[y]ou're not going nowhere," and ordering him to stop. 22 FMSHRC at 1329; Tr. 74, 77, 205. McGill again told Harless that he was getting Keaton and started to walk away, at which point Harless said that McGill was

---

[1] The judge stated the distance the curtain had to be transported was 180 feet, but that is the average length estimated by McGill of *each* crosscut, so the distance was much greater than that. 22 FMSHRC at 1329; Tr. 65. Moreover, Harless testified that McGill was 500 feet away from entry No. 3 when he saw him carrying a curtain. Tr. 406-08.

insubordinate and "you're a fired son of a bitch," and stated that his time was stopped at that point. 22 FMSHRC at 1329; Tr. 74-75, 206. In response, McGill told him that he was calling Mike Sumpter, a management official, and when informed by Harless that Sumpter was on the section, McGill started to leave to get him. 22 FMSHRC at 1329; Tr. 75-76. Harless then again called McGill insubordinate, again told him that he was fired, and told him that he would get Sumpter. 22 FMSHRC at 1329; Tr. 76. Harless left and returned with Sumpter, who asked what was going on. 22 FMSHRC at 1329; Tr. 77. McGill said that he did nothing, and he went outside accompanied by Harless and Sumpter. 22 FMSHRC at 1329-30; Tr. 77-79.

According to Harless, when McGill responded to Harless' offer to help carry curtain material with the threat to file a grievance, he began walking away, refusing to stop walking so that Harless could give him instructions for the remainder of the shift. 22 FMSHRC at 1332; Tr. 409-10. Harless testified that four times McGill responded by saying "f___ you," or a like phrase, to Harless' order for him to stop and listen. 22 FMSHRC at 1332; Tr. 411-12. According to Harless, it was only then that he fired McGill, at which point McGill requested the presence of Keaton. 22 FMSHRC at 1332; Tr. 413-14. Because McGill was a committeeman himself, Harless responded by leaving and returning with Sumpter. 22 FMSHRC at 1332; Tr. 414.

Harless recommended that McGill be fired. 22 FMSHRC at 1332. U.S. Steel suspended McGill with the intent to discharge him for failing to comply with Harless' direction and using profane and abusive language towards Harless in violation of Mine and Shop Conduct Rule No. 4. Gov't Ex. 4 at 5-6, Gov't Ex. 8. At the conclusion of the meeting held July 14, 1999, regarding Harless' recommendation, McGill was informed that the company intended to discharge him. 22 FMSHRC at 1331; Gov't Ex. 4 at 6. U.S. Steel then discharged McGill effective July 18, 1999. Gov't Ex. 4 at 6. By decision issued August 19, 1999, however, an arbitrator ruled that the company had failed to carry its burden of showing that McGill had engaged in the conduct that Harless alleged. *Id.* at 11-13. The arbitrator ordered U.S. Steel to reinstate McGill with full backpay. *Id.* at 15.

Thereafter, the Secretary filed a discrimination complaint on McGill's behalf pursuant to Mine Act section 105(c). Subsequently, McGill retired on January 3, 2000. Tr. 19. The Secretary seeks reimbursement of McGill's case-related mileage expenses, and a civil penalty of $5,000. S. Post-Trial Br. at 24; Tr. 85-87.

Following a hearing, the judge determined that McGill engaged in protected activity when he communicated to both Harless and Inspector Norris his concern that, because the right side of the No. 2 entry had not been bolted to within 5 feet of the face, completing the crosscut between the No. 3 and No. 2 entries and continuing into the No. 2 entry would be unsafe and in violation of MSHA regulations. 22 FMSHRC at 1333. In addition, based on the coincidence in time between those communications and Harless' statement that McGill was fired, as well as the animus Harless displayed in responding to McGill's concern about the crosscut, the judge

concluded that the Secretary had established that the adverse action taken against McGill was at least in part motivated by McGill's protected activities. *Id.* at 1333-34.

Under the heading "U.S. Steel's Defense," the judge found it significant that Harless exhibited animus and took adverse action against McGill, but not against any of the three other members of the crew. *Id.* at 1335. The judge found it even more significant that Harless stopped McGill's time immediately upon McGill's threat to file a grievance if Harless were to carry curtain material, and that Harless' cursing of McGill and firing him immediately followed McGill's statement that he was going to get mine committee chairman Keaton. *Id.* The judge also took into account the testimony of Norris and McGill concerning Harless' prior statements to them expressing displeasure with having union members on his section, and the unrebutted testimony of Harless (which the judge found credible on this point) that McGill refused to stop walking away when ordered to do so by Harless. *Id.* The judge concluded that Harless would have taken the adverse action against McGill for these actions. *Id.* The judge, after noting that the activities for which McGill was actually discharged may be protected by the National Labor Relations Act, concluded that they are not protected under the Mine Act, determined that U.S. Steel had thus "prevailed in its affirmative defense," and dismissed the complaint. *Id.* at 1335-36.

II.

Disposition

The Secretary urges the Commission to vacate the judge's decision because the affirmative defense which he found was established was not the affirmative defense the operator attempted to establish at trial, is not supported by the record, and should not be allowed as a matter of public policy. S. Br. at 9-13. The Secretary argues that the record compels the conclusion that the operator did not establish the affirmative defense on which it relied at trial (that McGill was discharged for cursing and insubordination). *Id.* at 14-21. The Secretary submits that, if the Commission does not find a violation of section 105(c), it should remand the case to the judge with instructions to correct errors the Secretary believes he made, including failing to admit certain evidence, and to properly reevaluate the record. *Id.* at 21-34.

U.S. Steel contends that the judge was mistaken in finding that the Secretary established the elements of a prima facie case of discrimination under the Mine Act. USS Br. at 7-8, 11-12, 14-15. U.S. Steel also argues that the judge did not raise an affirmative defense sua sponte, but rather relied on evidence showing that McGill was insubordinate and disrespectful to Harless, thus essentially finding that U.S. Steel had established its affirmative defense. *Id.* at 8-9, 12-15, 17-18. U.S. Steel also urges the Commission to uphold the judge's credibility and evidentiary rulings. *Id.* at 20-27.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the

individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. Prima Facie Case

We are not persuaded by U.S. Steel's challenges to the judge's finding that McGill engaged in protected activity. It is undisputed that McGill complained about roof conditions he considered to be unsafe. Whether the conditions were objectively unsafe is not determinative of the protected status of the complaints. Section 105(c) defines protected activities as including any "complaint notifying the operator or the operator's agent . . . of an *alleged* danger or safety violation" at the mine. 30 U.S.C. § 815(c)(1) (emphasis added). *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) ("section 105(c)(1) broadly protects" miners' complaints to management about alleged dangers), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

We also reject U.S. Steel's contention that the coincidence in time between the adverse action taken against McGill by Harless and McGill's safety complaint is insufficient to support an inference of discriminatory motive. The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence."[2] *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.* With regard to the coincidence in time between protected activity and adverse action, in *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984), the court observed that adverse

---

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

action taken against a miner two weeks after his protected activity qualifies as "evidence of an illicit motive." Consequently, the judge was well within his authority when he inferred discriminatory motive from adverse action taken by Harless less than 2 hours after McGill's safety complaints to him and the inspector.

Also unconvincing is U.S. Steel's challenge to the judge's finding that Harless exhibited animus towards McGill and his concerns about the insufficiency of the roof bolting. While Harless testified that he gave a calm, measured response to McGill's concern about unsupported roof (Tr. 343-44), both McGill and Jerry Norris reported that Harless reacted in a profane and dismissive fashion to McGill's advice not to make the crosscut. Tr. 55-56, 141. The judge credited McGill and Norris. 22 FMSHRC at 1334. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason here to overturn the judge's credibility determination in favor of McGill. Accordingly, we conclude that substantial evidence supports the judge's determination that the Secretary established a prima facie case of discrimination.

B. Affirmative Defense

1. Affirmative Defense Found by Judge

Under *Pasula-Robinette*, if an operator cannot rebut the prima facie case, it may affirmatively defend by alleging that unprotected activity also motivated the adverse action, and that it would have taken the adverse action against the miner for that activity alone. *See Robinette*, 3 FMSHRC at 817-18. The operator bears the burden of proving the affirmative defense. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 838 (May 1997); *Meek v. Essroc* Corp., 15 FMSHRC 606, 613 (Apr. 1993).

Here, U.S. Steel sought to affirmatively defend its discharge of McGill. However, it is necessary to first determine what the affirmative defense was in this case, as the judge found one affirmative defense — that McGill was discharged for threatening to file a grievance and other labor contract related issues — while the operator attempted to establish at trial, and continues to argue (USS Br. at 13-19), another affirmative defense — that McGill was discharged for insubordination and profanity.

These alternative rationales first surfaced during the hearing in this case.[3] At the close of the Secretary's case, counsel for U.S. Steel moved to dismiss on several grounds, including that

[3] The pre-trial pleadings are of no assistance in discerning the substance of U.S. Steel's affirmative defense prior to trial. The only mention of an affirmative defense is in U.S. Steel's answer to the Secretary's initial complaint, where it avers that McGill "was engaged in unprotected activity on July 13, 1999 that justified the imposition of the discipline of termination." Resp't Answer to Compl. at 3.

McGill's testimony established that his discharge was due to his threat to file a grievance against Harless. Tr. 173-74. The judge denied the motion. Tr. 174-77. The grievance threat was not subsequently cited by U.S. Steel's witnesses as a reason for McGill's discharge, and no other evidence was presented by the operator that U.S. Steel fired McGill for these reasons. Instead, the evidence introduced by U.S. Steel in support of its affirmative defense was limited to the reasons given at the time McGill was discharged — his alleged insubordination and use of profanity towards Harless during their July 13 confrontation — as well as his past work record.[4]

Nevertheless, in his decision, the judge cited the grievance threat, along with McGill's failure to stop walking away and his union status, as activity that would have resulted in McGill's discharge regardless of his protected activities, and concluded that an affirmative defense was therefore established. 22 FMSHRC at 1335. In his decision, the judge made no mention that the affirmative defense differed from the one on which U.S. Steel primarily relied.[5]

We are thus faced with a situation in which the operator sought to establish at trial one reason for the discharge as an affirmative defense, but the judge found another reason for the discharge, which was only mentioned in passing, as the basis for an affirmative defense. For the following reasons, we believe the judge erred.

In examining whether the operator has successfully established its affirmative defense, the Commission has based its review on the reasons given by the operator for taking the adverse action in evaluating whether the adverse action would still have occurred absent the protected activity. *See, e.g., Pasula*, 2 FMSHRC at 2801; *Robinette*, 3 FMSHRC at 819-20. For example, in *Pasula*, the Commission upheld the judge's determination that the operator had failed to show that the reasons it gave for the miner's discharge — his alleged insubordination, interference with mine management, role in causing an unnecessary interruption in production, and past disciplinary record — would have resulted in his discharge regardless of the miner's protected activities. 2 FMSHRC at 2788, 2801. Similarly, in *Robinette*, the Commission remanded to the judge the factual determination of whether the adverse action would have taken place regardless of the protected activity, and in so doing instructed the judge to analyze the evidence presented regarding the specific reasons given by the operator for the miner's discharge. 3 FMSHRC at 819-20; *see also E. Assoc.*, 813 F.2d at 643 (affirming judge's rejection of operator's affirmative defense that it fired miner for act of sabotage on ground that operator failed to show good-faith basis in blaming miner for act); *Chacon*, 709 F.2d at 92-94; *Haro v. Magma Copper Co.*, 4

---

[4] In an isolated reference in its initial post-trial brief, U.S. Steel argued that, according to McGill's account, the triggering event of his discharge by Harless was McGill's threat to file a grievance against Harless. USS Proposed Findings of Fact and Post-Hr'g Legal Argument at 25. However, that brief closes by stating that U.S. Steel's reason for the discharge was McGill's gross insubordination toward Harless. *Id.* at 27.

[5] Contrary to U.S. Steel's arguments, the judge entirely ignored the allegations that it was McGill's insubordination and profanity that resulted in his discharge.

FMSHRC 1935, 1939-45 (Nov. 1982); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1481-82 (Aug. 1982); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993-94 (June 1982).

We are aware of no case in which an affirmative defense to discriminatory conduct was found to have been established based not on the evidence supporting the reasons the employer asserted for taking the adverse action against the employee, but rather on the basis of evidence the judge considered sufficient to establish that the employer took the action for a different reason. Simply put, under *Pasula-Robinette*, once a prima facie case has been established, the affirmative defense determination is not an open-ended search for the "one true reason" for the adverse action taken against the employee alleging discrimination. *See Robinette*, 3 FMSHRC at 819 (rejecting as irrelevant to determination of affirmative defense under *Pasula* judge's conclusion on the "primary" and "effective" cause of adverse action). Rather, the judge's inquiry is limited to an examination of the reasons given by the operator for the adverse action. The Commission, in setting out the operator's burden in *Pasula*, used the phrase "the unprotected activity" to refer not to just any unprotected activity, but rather to the unprotected activity the operator alleges would have resulted in the adverse action regardless of any protected activity. *See Moses*, 4 FMSHRC at 1481 (Commission's role in determining whether affirmative defense has been established is to "examine whether [the operator] nevertheless would have discharged [the miner] for certain unprotected activities alone that it asserts were the cause of his departure"); *Bradley*, 4 FMSHRC at 993 (Commission's function in deciding whether affirmative defense has been established is limited to determining whether business justifications asserted for adverse action "are credible and, if so, whether they would have motivated the particular operator as claimed").

The judge's approach of relying on an affirmative defense which the operator has not consistently raised nor attempted to prove also presents due process problems. The Secretary and the miner must have adequate notice of the affirmative defense in order to effectively rebut it at trial, just as any party must have adequate notice of the issues being litigated. *See Consolidation Coal Co.*, 20 FMSHRC 227, 236-37 (Mar. 1998) (party must understand during trial that issue is being litigated). By ignoring the justification proffered at trial for McGill's discharge — insubordination and profanity — and finding the operator to have instead been motivated by other conduct which was also not protected by the Mine Act, the judge misapplied the concept of an affirmative defense. We therefore vacate his determination that U.S. Steel established an affirmative defense, and remand the case to him to determine under Commission law whether U.S. Steel established that it would have fired McGill in any event for his conduct during his confrontation with Harless.

2. Remand

Remand is necessary because U.S. Steel's affirmative defense is entirely dependent upon Harless' testimony that McGill was insubordinate and profane during their confrontation, and

that McGill only requested the presence of mine committee chairman Keaton after being fired.[6] McGill's version of events is that he was neither insubordinate nor profane, and that Harless aggressively and profanely responded to McGill's threat to file a grievance, firing him when he attempted to leave to get Keaton as a witness to Harless' conduct. We cannot discern from the judge's decision whose version of events he credited.[7] After examining all of the evidence,[8] the judge needs to resolve these widely disparate accounts of what occurred between Harless and McGill without contradicting any of the factual findings and credibility resolutions included in his original decision.

---

[6] The judge apparently rejected the notion that the adverse action resulted from anything other than the Harless-McGill confrontation. *See* 22 FMSHRC at 1333-34. Mine Superintendent Rick Nogosky testified that he made the decision to fire McGill based not only on the accounts of the July 13 events provided by McGill and Harless, but also based on having heard McGill say "f___ you" on two prior occasions to different supervisors, and on a review of McGill's personnel file. *Id.* at 1331 & n.5. However, the judge noted that Nogosky's deposition testimony was that he relied solely upon the events of July 13 in upholding Harless' discharge of McGill, and the judge limited his analysis of whether an affirmative defense was established to the Harless-McGill confrontation. *Id.* at 1331 & n.5, 1335. Moreover, the documents notifying McGill of the grounds for his discharge only mentioned the confrontation between Harless and McGill, so the arbitration that resulted in McGill's reinstatement was similarly limited. Gov't Ex. 4. U.S. Steel does not take issue with the judge's approach, and seems to drop the issue on review, stating that it "never has sought to justify Mr. McGill's discharge on the basis of an unsatisfactory work record." USS Br. at 18.

[7] The judge's determination to credit Harless' "unrebutted" testimony that McGill refused to stop walking away when he ordered him to stop (22 FMSHRC at 1335) does nothing to resolve the two very different accounts on *why* it was that McGill walked away from Harless. Unlike the Secretary, we do not read the judge's decision to in any way credit Harless as to what else occurred during his confrontation with McGill, so we do not address the Secretary's arguments that we should overturn the judge's credibility "finding" in favor of Harless and order reopening of the record for the admission of evidence the judge excluded. *See* S. Br. at 23-34. The judge made no credibility finding in favor of Harless or against McGill on the facts necessary to support U.S. Steel's affirmative defense that McGill was fired for insubordination and use of profanity.

[8] For example, the judge failed to discuss the arbitration award entirely in McGill's favor. Gov't Ex. 4. Having properly admitted the arbitration decision, the judge must consider it and determine the weight, if any, to which it is entitled. *See Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 18 FMSHRC 2096, 2101 (Dec. 1996) (in determining whether to give weight to an arbitrator's findings, judge must consider congruence of contractual and statutory provisions, degree of procedural fairness, adequacy of record, and special competence of arbitrator).

Because U.S. Steel bears the burden of proving any affirmative defense, if the judge does not credit Harless' version of events, he cannot find that U.S. Steel has established its defense that McGill was profane and insubordinate, as there is no other record support for that assertion. If the judge does credit Harless, he must then decide whether U.S. Steel has shown that, absent McGill's protected activities, it would have discharged him for what Harless alleges he did and said during their confrontation. *See Pasula*, 2 FMSHRC at 2801. The judge must evaluate the reasons given for McGill's discharge — use of profanity and insubordination — pursuant to the principles set forth in *Bradley*, where the Commission stated:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC at 993. The reasons supporting an operator's business justification defense must not be "examined superficially or be approved automatically once offered." *Haro*, 4 FMSHRC at 1938. Moreover, we have recognized that "pretext may be found . . . where the [operator's] asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534.[9]

---

[9] In *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), the Commission tailored the *Bradley* principles specifically to situations involving the use of profanity by looking to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991) (applying the factors announced in *Cooley*). The previously discussed facts of this case constitute only some of the evidence the parties supplied on these issues. In addition, if the judge finds that McGill acted insubordinately in refusing to stop and listen to Harless, the judge can look to a number of our cases which applied the *Bradley* principles to an affirmative defense based on a miner's insubordination. *See, e.g., Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 960-61 (Sept. 1999); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 17-18 (Jan. 1984).

It is U.S. Steel's burden to show that its asserted justification would have moved it to take the adverse action against McGill. *Price*, 12 FMSHRC at 1534. Therefore, on remand the judge must closely scrutinize the merits of the operator's evidence because:

> [i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, [it should] not [be] consider[ed]. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event."

Pasula, 2 FMSHRC at 2800 (emphasis in original).

We also agree with the Secretary that, even if the judge determines that U.S. Steel has established the elements of its affirmative defense, as a matter of law he must address the question of whether that defense might nevertheless fail because the conduct for which McGill was discharged was provoked by the operator. *See* S. Br. at 17-19; S. Reply Br. at 1-2, 8-9; *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-06 (Mar. 2000) (*Bernardyn I*); *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC ____, Slip op. at 12-16, Nos. PENN 99-129-D, etc. (Sep. 19, 2001) (*Bernardyn II*). We have recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked. *Bernardyn I*, 22 FMSHRC at 306-07. As we made clear in *Bernardyn I*, in a case such as this, a judge is obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity, and if so, "whether the particular facts and circumstances of this case, when viewed in their totality, place [the miner's provoked actions] within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" *Id.* at 307-08 (quoting *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977)) (second alteration in original).

In sum, on remand the judge should examine all of the facts and circumstances leading up to McGill's alleged conduct in his confrontation with Harless, making further findings of fact, including credibility resolutions, necessary to decide disputed issues.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further proceedings consistent with our decision.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

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

Anthony F. Jeselnik, Esq.
U.S. Steel Mining Co., LLC
600 Grant Street
Pittsburgh, PA 15219-2749

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket Nos.	WEST 2000-44-M
	:		WEST 2000-149-M
ALAN LEE GOOD, an individual doing business as GOOD CONSTRUCTION	:		

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge Gary Melick affirmed eight citations and vacated two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Alan Lee Good, an individual doing business as Good Construction ("Good"). 22 FMSHRC 1081, 1082-89 (Sept. 2000) (ALJ). Good filed a petition for discretionary review ("PDR"), requesting that the Commission vacate the judge's finding of the eight violations. PDR at 2-5. The Commission subsequently granted Good's petition. For the reasons set forth below, the judge's decision is affirmed in part and reversed in part.

I.

Factual and Procedural Background

Good owns and operates the Brown Road Quarry, a sand and gravel operation located in Lewis County, Washington. Tr. 8, 131. On June 29 and 30, 1999, MSHA Inspector Terry Miller performed a regular inspection of the Brown Road Quarry, accompanied by Good's supervisor Kenneth Gates and Jason Good, an independent contractor in charge of drilling and blasting at the site. 22 FMSHRC at 1082; Tr. 10, 12, 53-54, 88. During the inspection, Inspector Miller observed numerous conditions which he believed violated several of MSHA's safety standards and issued 10 citations. Those at issue in this appeal are Citation No. 7974336 for inoperative

parking brakes on the shop truck in violation of 30 C.F.R § 56.14101(a)(3); Citation Nos. 7974338 and 7974339 for lack of handrails on the elevated platforms in violation of 30 C.F.R § 56.11002; and Citation Nos. 7974337, 7974340, 7974341, 7974342, and 7974343 for unguarded moving machine parts in violation of 30 C.F.R § 56.14107(a). 22 FMSHRC at 1081-88. Subsequently, the Secretary proposed a $200 penalty for Citation No. 7974343, which she alleged was "significant and substantial,"[1] and $55 penalties each for the remaining citations. Good contested the citations, and a hearing was held in Chechalis, Washington on April 27, 2000.

II.

Disposition

The eight citations on review concern three different safety regulations found in 30 C.F.R. Part 56. At issue is whether the judge erred when he found that Good violated section 56.14101(a)(3) for an inoperative parking brake on the front end loader; section 56.11002 for failure to provide handrails on elevated platforms; and section 56.14107(a) for inadequate guards on moving machine parts.

A. Parking Brake Violation

Inspector Miller issued Citation No. 7974336 for an inoperative parking brake on the shop truck in violation of section 56.14101(a)(3).[2] 22 FMSHRC at 1086. At the time the citation was issued, the shop truck was parked next to the highwall above the pit where the crusher equipment was located, and the keys were in the vehicle. Tr. 14. Miller observed that the parking brake was not set and would not latch when Gates tried to engage it. Tr. 13-14. At the time of the inspection, Gates told Miller that he was not sure when the truck was last used or when it would be used again. Tr. 15, 71.

The judge found that Good violated section 56.14101(a)(3) because of an inoperative parking brake on the shop truck. 22 FMSHRC at 1086. He rejected Good's argument that only "equipment to be operated during a shift needs to be inspected on any given day," noting that Good relied on "qualifying language in a different regulatory standard" than the standard cited by the inspector. *Id.* The judge found that the regulation required braking systems on equipment be maintained in a functional condition, and concluded that, because Good conceded the parking

---

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

[2] 30 C.F.R. § 56.14101(a)(3) provides: "All braking systems installed on the equipment shall be maintained in functional condition."

brake was inoperative, the evidence established that Good violated the cited standard. *Id.* The judge assessed a penalty of $55. *Id.* at 1089-90.

In its petition, Good argues that the judge erroneously rejected its assertion that the functional braking system requirement contained in section 56.14101(a)(3) was qualified by the requirement in section 56.14100(a) that equipment to be used during a shift be inspected before the equipment is placed in service, and the requirement in section 56.14100(b) that the operator correct defects in a timely manner. PDR at 2-3.[3] Good clarified its position in its reply brief, stating that the functional braking system standard only applies to "self-propelled" mobile equipment to be used during a particular shift, and not to all equipment on the mine site. G. Reply Br. at 4-7. Good maintains that the undisputed evidence supports its contention that the shop truck was not in use on the date of the inspection. *Id.* at 3-4.

The Secretary interprets Good's argument as requiring her to first prove that the operator violated the inspection and defect corrections provisions in order to make out a violation of the functional braking system standard. S. Br. at 8. The Secretary contends that substantial evidence supports the judge's finding that Good violated section 56.14101(a)(3), that the judge's finding is in accordance with the plain language of the standard (which requires that braking systems on equipment be maintained in a functional condition), and that Good's reliance on sections 56.14100(a) and (b) so as to limit application of the cited standard is contrary to that standard's plain language. *Id.* at 7-11.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Good's argument that the functional braking system standard only applies to "self-propelled" mobile equipment to be used during a particular shift is inconsistent with the plain language of the cited regulation. Section 56.14101 is clearly a different standard from section 56.14100, with separate requirements. Section 56.14101(a), by its terms, applies to "self-propelled mobile equipment." Unlike sections 56.14100(a) and (b), section 56.14101(a) does not contain any language limiting its application to equipment "to be used during a shift." As long as the cited equipment is not tagged out of operation and parked for repairs, it fits within the definition of "mobile equipment" contained in section 56.14000, and is "self-propelled," section 56.14101 applies, whether or not the equipment is to be used during the shift.

---

[3] Good designated its PDR as its opening brief.

Good does not contend that the shop truck is not self-propelled mobile equipment and does not dispute that the parking brake was not functional. Moreover, the requirement that all braking systems on self-propelled mobile equipment be functional avoids the problem of an operator using equipment with defective braking systems despite its initial expectation that such equipment would not be utilized.

Similarly, we are not persuaded by Good's argument that the standard as read by the Secretary would require maintenance of braking systems on all equipment, including the mobile trailers on which the crushing equipment is mounted. According to Good, these trailers are not "self-propelled," but rather, are parked and placed on blocks. G. Reply Br. at 5. As noted, section 56.14101(a) applies only to "[s]elf-propelled" equipment. The preamble to the standard makes clear that not all mobile equipment is self-propelled, and that the words "self-propelled" are used in Subpart M to refer to mobile equipment "capable of moving itself." 53 Fed. Reg. 32496, 32497-98 (Aug. 25, 1988). Thus, Good's trailers would not fall within the definition of "self-propelled" mobile equipment under section 56.14101(a).

Based on the above, we conclude that substantial evidence[4] supports the judge's finding that Good violated section 56.14101(a).

B. Handrail Violations

Miller observed that there were no handrails on the elevated platforms on which the roll crusher and the LJ cone crusher were mounted. 22 FMSHRC at 1086-87; Tr. 24, 27; Ex. R-2 (front top photo), R-5 (front bottom photo), R-6 (reverse bottom photo). He issued Citation No. 7974338 for the absence of handrails on the roll crusher platform, and Citation No. 7974339 for the LJ cone crusher platform, alleging violations of section 56.11002.[5] 22 FMSHRC at 1086-87. The roll crusher and LJ cone crusher were located on separate platforms that were between five and six feet above the ground, and accessible by ladder. Tr. 24-25, 27-29. The areas lacking handrails were located at one end of both platforms, where the access ladders were located, next to the machinery. Tr. 24, 27. The roll crusher platform area adjacent to the location of the missing handrail measured approximately six feet by eight feet; the LJ cone crusher platform area adjacent to the missing handrail measured approximately seven and a half feet by six to seven

---

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

[5] 30 C.F.R. § 56.11002 provides in pertinent part: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition."

feet. Tr. 25, 27-28, 113. These areas had handrails along one side of the platforms, but not on the side where the access ladders were located. Tr. 25, 28, 120. Miller testified that miners accessed the platforms to examine and perform maintenance on the machinery. Tr. 26, 77-79. Gates testified that the platform areas lacking handrails were about six to eight feet away from the platform areas accessed to service the machinery, and that miners never used these areas. Tr. 94-95, 97-98.

The judge concluded that Good violated section 56.11002. 22 FMSHRC at 1086-87. He rejected Good's argument that the cited areas were elevated platforms and not "travelways," and inferred from the inspector's testimony that the areas of the platforms cited were of sufficient size to permit walking. *Id.* at 1087. Based on his findings, the judge concluded that the areas of the elevated platforms cited were "elevated walkways" within the meaning of the standard, and assessed penalties of $55 for each violation. *Id.* at 1087, 1089-90.

Good asserts that the judge erred by concluding that it violated section 56.11002. It contends that the record clearly supports a finding that the areas of the platforms accessed by miners had handrails, while the cited areas without handrails were empty, unused spaces. PDR at 3; G. Reply Br. at 7-9. Good argues that the evidence does not support a finding that the cited areas were "travelways" or "elevated walkways." PDR at 3-4; G. Reply Br. at 7-9. The Secretary responds that substantial evidence supports the judge's conclusion that Good violated section 56.11002 because the platform areas cited were "elevated walkways." S. Br. at 11-13. She disagrees with Good's contention that the cited areas are not "travelways" within the meaning of section 56.2. *Id.* at 12-14.

First, we consider whether the judge properly concluded that the cited platform areas were "elevated walkways" within the meaning of section 56.11002. There is no dispute that the platforms were "elevated." However, it is not clear whether these platforms constitute "walkways" within the meaning of the standard. The term "walkway" is not defined in subpart J. A "walkway" is defined in the dictionary as "a passageway used or intended for walking . . . a passageway in a place of employment . . . designed to be walked on by the employees in the performance of their duties." *Webster's Third New Int'l Dictionary Unabridged* 2572 (1993).[6] A "passageway" is defined as "a way that allows passage to or from a place or between two points." *Id.* at 1650.

The judge's analysis of this issue was terse. He stated: "It may reasonably be inferred . . . from the testimony of the citing inspector, that the cited area . . . was of sufficient size to permit actual 'walking'." 22 FMSHRC at 1087. The judge's inference that the platform constituted a "walkway" is problematic for several reasons. Based on the ordinary definition of "walkway,"

---

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

the relevant question is whether the areas in question were used, or intended to be used, for walking. The inference that the areas were of sufficient size to permit actual "walking" does not answer that question.

The judge did not evaluate the record evidence pertaining to whether the cited platform areas were used for walking by miners, or were intended for such use. However, we need not remand this matter to the judge for analysis of the record evidence on this point, because we find that the record simply cannot support a conclusion that the cited platform areas constitute "walkways" within the meaning of section 56.11002. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding remand unnecessary because evidence could justify only one conclusion). With regard to Citation No. 7974338, although cited as an unguarded "walkway," even the citation describes the area as a "platform." 22 FMSHRC at 1086. In addition, none of the record testimony describes the cited areas as walkways or travelways as referenced in the regulation. For example, Inspector Miller testified that miners walked on the platform, and that the cited area was designed for miners to "walk on" or to "stand on." Tr. 24, 77. However, when asked whether the platform was an elevated walkway, he responded that it was an "elevated platform." Tr. 77. He further testified that the cited area was "unused space," and that "workers don't normally access the platform unless it is for maintenance and if so, when they climb to the top of the ladder," they would be looking at the machinery located in front of them and to their right, and would not likely fall down the ladder or the side where the ladder was located. Tr. 26, 77; Ex. R-2 (front). With respect to Citation No. 7974339, Inspector Miller testified that the platform had railings on one side, but that "the end of the trailer where persons would access to get up and check the machinery" did not have a handrail. Tr. 28, 79; Exs. R-1 (front top photo); R-5 (front). He conceded that an accident was unlikely because of "the distance a person would have to go walking to the end of the trailer to fall off . . . and the absence of workers." Tr. 29. Gates testified without contradiction that the unguarded areas of the platforms were empty, unused spaces, about six to eight feet away from the guarded areas which miners accessed to service the crushers, and that there was no reason for anyone to go to the unguarded areas. Tr. 94-97.

Thus, while the record evidence clearly indicates that miners accessed the platforms to maintain and service the equipment, it cannot support a conclusion that miners walked in the areas of the platforms that were missing handrails, or that those areas were intended to serve as walkways. Accordingly, we reverse the judge's finding of the handrail violations.[7]

---

[7] Commissioner Jordan agrees that these elevated platforms do not constitute "elevated walkways" within the meaning of section 56.11002, and therefore, joins in reversing the judge's finding of violations of that standard. However, she notes that section 56.11027 requires handrails on working platforms. 30 C.F.R. § 56.11027. Based on the record evidence, she would conclude that the elevated platforms are "working platforms" within the meaning of section 56.11027, and that consequently handrails would be required under that provision.

Commissioner Beatty would vacate and remand these two citations, rather than simply

C. Guarding Violations

Miller issued five citations to Good for violations of section 56.14107(a),[8] as follows:

Citation No. 7974337: alleging that rollers on the roll crusher were not guarded. 22 FMSHRC at 1082. The rollers had a handrail in front of them, and were guarded on the sides. Tr. 20, 93. Miller testified that when he stood in front of the handrail, he could reach out and touch the rollers, which were approximately two feet away, and five feet above the platform. Tr. 20. He also testified that he discussed the violation with Gates at the time of the inspection, and that Gates agreed that he could touch the rollers. Tr. 21.

Citation No. 7974340: alleging that a portion of the v-belt drive located beneath the trailer platform on which the LJ cone crusher was mounted was not guarded. 22 FMSHRC at 1083; Tr. 32-33. The belt drive was about one-foot wide and was located about four feet from the edge of the platform. Tr. 35. It extended approximately one foot beneath the trailer platform. Tr. 35. The portion of the belt drive located above the platform was guarded on the top and sides. Tr. 34. However, the portion below the platform was exposed. Tr. 99. Miller testified that miners were required to go beneath the trailer to perform maintenance or repair work on the equipment, and that they could come into contact with the unguarded belt drive when working in the area. 22 FMSHRC at 1083; Tr. 34-35, 80, 99.

Citation No. 7974341: alleging that a tail pulley on the feed underbelt of the LJ cone crusher was not guarded. 22 FMSHRC at 1083-84. Once material is sized by the LJ cone crusher, it exits from the bottom of the crusher onto the feed underbelt where it then travels to a screen plant. Tr. 38. The tail pulley of the feed underbelt was located below the trailer platform on which the LJ cone crusher was mounted, and was accessible beneath the trailer. Tr. 38-39, 80, 99. The pulley was about three feet wide and located about two feet from the edge of the trailer in the center of the platform. Tr. 39. Gates testified that a miner would only go beneath the platform for maintenance or repair work about twice a year and that the machinery was shut down before the miner entered the area. Tr. 100-01, 151-52, 156-57; Exs. R-1, R-3.

Citation No. 7974342: alleging that a guard on the tail pulley of the double-deck screen was inadequate. 22 FMSHRC at 1084. The double-deck screen is a piece of equipment separate from the crushers, approximately 12 to 15 feet high and eight feet wide, and is used to size and sort rocks that come from the crushers on a conveyor belt. Tr. 41. The tail pulley was guarded

---

reverse the judge's findings of two violations of section 56.11002, to enable the judge, as the trier of fact, to make factual findings on whether, and to what extent, the two areas in dispute were actually used by miners as walkways.

[8] 30 C.F.R. § 56.14107(a) 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."

on the side and top, and two-thirds of the backside, but the bottom of the pulley was not guarded. Tr. 42-43; Ex. R-6. The pulley extended beyond the shaker screen about three feet above the ground. Tr. 42. Miller testified that he could walk right next to the conveyor and tail pulley and that a miner could reach out and touch the moving part while maintaining or servicing the equipment. Tr. 43, 81. Gates testified that the tail pulley was adequately guarded, and had passed previous inspections. Tr. 101.

Citation No. 7974343: alleging that the guarding of the flywheel on the jaw crusher was inadequate. 22 FMSHRC at 1084. The flywheel was approximately five feet in diameter and was located on the lower level platform of the crusher, next to the walkway and ladder used to access the platform. Tr. 45-46. The flywheel was located along the edge of the trailer and was approximately four feet above the ground. Tr. 47, 51. The outer side of the flywheel next to the ladder was guarded, but the inside of the flywheel, which was about two feet away from the crusher, was not guarded. Tr. 46-47, 51-52. The jaw crusher operator climbed the ladder onto the platform and walked past the flywheel to access the operator station located on the second level of the platform above the flywheel. Tr. 45-46. According to Miller, once a miner climbed the ladder and stood on the platform, he could reach out and touch the exposed flywheel. Tr. 47. Miller testified that the flywheel moved at fast speeds and that a miner could get a part of his clothing or body caught in the wheel and be crushed. Tr. 51-52. Gates testified that the jaw crusher operator would not pass the flywheel while it was operating, that no other miner would access the area while the equipment was operating, and that the part of the flywheel that was guarded was sufficient. Tr. 101-02.

The judge relied on Inspector Miller's testimony to conclude that Good violated section 56.14107(a). 22 FMSHRC at 1082-85. The judge rejected Good's contention that the standard was previously inconsistently enforced and therefore unconstitutionally vague, holding that Good had failed to provide "necessary factual support." *Id.* at 1082. The judge held that, to prevail on this claim, Good had to provide credible testimony of an inspector who "had inspected the precise areas now cited and found those areas adequately guarded." *Id.* Characterizing the inspector as a reasonably prudent person, the judge found that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have been on notice that section 56.14107(a) applied to the unguarded portions of the machinery cited by MSHA. *Id.* The judge concluded that the violation for the unguarded flywheel (Citation No. 7974343) was "significant and substantial," and assessed a penalty of $200. *Id.* at 1084-85, 1089-90. For the remaining four violations, he assessed penalties of $55 each. *Id.* at 1089-90.

Good contends that the language of section 56.14107(a) does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years. PDR at 4-5; G. Reply Br. at 11-13. Good argues that the judge erred by ignoring Gates' testimony regarding prior inconsistent enforcement, by relying solely on Inspector Miller's testimony regarding the

violations, and by failing to make any findings of fact with regard to the conflicting testimony. G. Reply Br. at 10-11. Good disclaims an affirmative defense of estoppel. *Id.* at 13.

The Secretary maintains that the language of section 56.14107(a) is sufficiently specific to provide adequate notice and is not unconstitutionally vague. S. Br. at 14-16. The Secretary asserts that Good's argument that the cited conditions were previously inspected and not cited by other inspectors is an estoppel argument which must be rejected as a matter of law. *Id.* at 16-17.

Distilled to its essence, Good's appeal rests on its contention that it did not have adequate notice of the requirements of section 56.14107(a). The parties do not dispute the facts regarding what parts of the machinery were or were not guarded. Good does not challenge the application of the regulation to the machinery cited. Thus, we construe Good's challenge to the judge's finding of violations as a defense of lack of notice of the Secretary's interpretation and application of the standard to the cited exposed moving parts based on prior inconsistent enforcement.

The Commission's vote on the guarding violations is split. Chairman Verheggen and Commissioner Riley would reverse the judge's decision. Commissioners Jordan and Beatty would vacate the decision and remand to the judge for further consideration. However, Chairman Verheggen and Commissioner Riley concur in result with their colleagues' remand opinion in order to avoid the effect of an evenly divided decision.[9] The separate opinions of the Commissioners follow.

---

[9] For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision would be to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of the Commissioners

Commissioners Jordan and Beatty, in favor of vacating the finding of guarding violations, and remanding to the judge for further consideration of the notice issue:

To determine whether Good had adequate notice of the Secretary's interpretation of the regulation, we must first consider whether the regulation is plain or ambiguous. We conclude that the standard is ambiguous, since its language is broad and does not specify the extent of guarding required or explain how moving parts should be guarded. Accordingly, we would normally be required to decide whether the Secretary's interpretation of the regulation is reasonable. *See Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (Commission must decide whether the Secretary's interpretation is reasonable, which is separate from the inquiry as to whether there was fair notice of its requirements). We must defer to an agency's interpretation of a regulation as long as it is reasonable, consistent with statutory purpose, and not in conflict with the statute's plain language. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *see Nolichuckey Sand Co., Inc.*, 22 FMSHRC 1057, 1062 (Sept. 2000) (traditional principles of regulatory interpretation must be applied to determine if the Secretary's interpretation of guarding regulation was reasonable and entitled to deference). In this case, the judge did not consider whether the regulation is plain or ambiguous or address the issue of the reasonableness of the Secretary's interpretation that all moving machine parts be guarded, skipping immediately to the notice issue. 22 FMSHRC at 1082. Since neither the judge nor the parties discuss the reasonableness issue, we choose not to address it.

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). To determine whether an operator received fair notice of the agency's interpretation, the Commission asks "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). Because we conclude that the judge erred when he applied this test, we would vacate his decision and remand the case to him for additional analysis.

The judge "inferred" that the inspector was a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, and that consequently his testimony sufficed to prove that adequate notice existed, pursuant to the criteria in *Ideal Cement*. 22 FMSHRC at 1082. The "reasonably prudent person" test, however, is an objective standard. *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). Relying solely on the testimony of the inspector to determine whether an operator had fair notice of a regulation's requirements (as the judge did in this case) transforms this analysis into a subjective inquiry based on the

views of an MSHA inspector. Although an inspector's views are generally relevant to the notice inquiry, they do not automatically equate to what the prototypical "reasonable person" would conclude about the scope of the guarding requirements at issue here. On this basis alone we would vacate the judge's decision and remand for him to use the objective standard we have consistently applied.

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982). Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. *Ideal Cement Co.*, 12 FMSHRC at 2416. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.[1] *Island Creek Coal Co.*, 20 FMSHRC at 24-25; *BHP Minerals*, 18 FMSHRC at 1345, citing *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983). On remand, the judge should discuss and evaluate all of these factors.

Of all of the factors listed above, Good relies most heavily on the lack of prior enforcement of this regulation. In rejecting this defense the judge declared: "Respondent could very well have prevailed in it's [sic] argument if any of those inspectors had offered credible testimony at trial that he had inspected the precise areas now cited and found those areas adequately guarded." 22 FMSHRC at 1082. The judge erred in so limiting the manner in which Good could prove prior inconsistent enforcement. In fact, Commission Procedural Rule 63 suggests that "relevant" evidence can serve to satisfy a party's burden of proof. 29 C.F.R. § 2700.63.

Both Gates and Alan Good testified, without contradiction, that other MSHA inspectors had inspected and not cited the same conditions that are at issue in this case. Tr. 93-94, 99, 101-02, 133, 168-69, 177-79. The record indicates that in the 24-month period preceding the hearing, Good received three citations, and the judge determined that these citations were not issued for

---

[1] To analyze the "circumstances at the operator's mine" in this case, the judge would need to make additional findings regarding the existing guarding on each moving part, the location of each part in relation to where miners traveled and worked, and when and how miners accessed each part, if at all.

the same conditions cited by Miller. 22 FMSHRC at 1089; G. Pre-Hearing Report at 3; S. Consol. Pre-Hearing Submission at 3.[2] On remand, the judge should take this into account.

We also note that, as the above-cited cases indicate, prior inconsistent enforcement is only one of several factors that the Commission considers in evaluating whether an operator has received fair notice of the Secretary's interpretation of an ambiguous regulation. In his analysis of the notice issue, however, the judge only looked at prior inconsistent enforcement, and failed to consider the other notice factors.[3] On remand, the judge should also consider these other factors, including the language of the regulation, its purpose, the regulatory history, whether MSHA has published notices informing the regulated community of its interpretation of the standard, and the facts of each violation to determine whether Good would have had notice that the standard required the moving machine parts to be guarded entirely. In this connection, the judge failed to make necessary findings of fact on matters such as the existing guarding on each moving part, the location of each part in relation to where miners worked and traveled, and when and how miners accessed each part. Based on such findings, the judge should have determined whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have understood that the partial or area guarding Good provided on each moving part was inadequate to protect miners from contacting it.

---

[2] The Secretary did not address the issue of prior inconsistent enforcement below or on review.

[3] In Commissioner Beatty's view, Chairman Verheggen and Commission Riley continue this error when they direct the judge, on remand, to focus exclusively on his prior finding of no prior inconsistent enforcement, with no mention of the other factors that, under Commission law, are entitled to consideration in evaluating the notice issue. *See* slip op. at 16. He suspects that this may be the result of the determination by his colleagues that there is "nothing else in the record to indicate that Good knew or should have known that its guarding might have been considered inadequate by some at MSHA." *Id.* (footnote deleted). Commissioner Beatty believes that this factual determination by Chairman Verheggen and Commission Riley usurps the role of the judge as the trier of fact. Where, as here, a judge fails to adequately address the evidentiary record, a remand is necessary for fuller evaluation. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). It is Commissioner Beatty's position that the judge, as fact finder, is in the best position to evaluate the relevant factors relating to the notice issue.

In sum, we would vacate the judge's finding of the guarding violations and remand for further consideration of whether Good had adequate notice of the Secretary's interpretation of section 56.14107(a). On remand, we would instruct the judge to consider all of the relevant record evidence in applying the notice factors discussed above, and to determine whether a reasonably prudent person would have known that the conditions at issue violated the standard.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, who would reverse the judge's findings of liability on all of the guarding citations, but who concur in result with their colleagues' remand opinion in order to avoid the effect of an evenly divided decision:

To determine whether Good had adequate notice of the Secretary's interpretation of the regulation, we must first consider whether the regulation is plain or ambiguous. The judge did not examine this question or attempt to construe section 56.14107(a). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted)).

We conclude that the language of section 56.14107(a) is ambiguous as applied to the circumstances of this case. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1062-63 (Sept. 2000) (finding that the term "unguarded" as used in 30 C.F.R. § 56.14109 was ambiguous). Section 56.14107(a) provides that moving machine parts shall be guarded "to protect persons from contacting" types of moving machine parts covered by the regulation. The term "guarded" is not defined in subpart M. Although the standard clearly applies to the moving parts in question, i.e., rollers, tail pulleys, flywheels, and belt drives, it does not make clear how or the extent to which the moving parts should be guarded.[1]

Normally, we would turn next to the question of whether the Secretary's interpretation of the standard is reasonable. During the course of this litigation, the Secretary has maintained consistently that section 56.14107(a) requires all moving machine parts be guarded even if located in areas where miners do not frequently work or travel or may work or travel only when the equipment is shut down. Good has not argued that the Secretary's interpretation is unreasonable.

Separate from the issue of regulatory interpretation, however, is whether Good had received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a

---

[1] Significantly, the regulatory history of the standard suggests that the degree of protection required may vary according to the circumstances. The preamble to section 56.14107(a) states that the purpose of the standard is "to protect persons from coming into contact with hazardous moving machine parts," and that a "guard must enclose the moving parts *to the extent necessary to achieve this objective*." 53 Fed. Reg. 32509 (Aug. 25, 1988) (emphasis added).

civil penalty is at issue, considerations of due process "prevent[] . . . deference [to an agency's interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). As we explain below, we find that Good did not have fair notice, and thus need not reach whether the Secretary's interpretation of section 56.14107(a) is reasonable.

The Commission has not required that an operator receive actual notice of the Secretary's interpretation of a cited standard. Rather, the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. *E.g., Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The Commission has summarized this test as "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). In deciding whether a party had adequate notice of a regulation's requirements, the Commission has also examined, among other factors, the consistency of the Secretary's interpretation. *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998).

Prior inconsistent enforcement (i.e., a lack of consistency in the Secretary's interpretation) is the bedrock of Good's defense of inadequate notice. In rejecting this defense, the judge held that, essentially, prior inconsistent enforcement can only be proven by testimony *from MSHA inspectors* that they previously found areas now cited to be adequately guarded. 22 FMSHRC at 1082 (stating that Good could have carried its burden on the defense by offering "credible testimony at trial that [MSHA inspectors] had inspected the precise areas now cited and found those areas adequately guarded"). We join our colleagues in rejecting this higher burden of proof for a prior inconsistent enforcement defense. Slip op. at 11. To the contrary, Commission Procedural Rule 63 suggests that any "relevant" evidence can satisfy a party's burden of proof. 29 C.F.R. § 2700.63.

Based on the record evidence, we conclude that substantial evidence does not support the judge's conclusion that there was no prior inconsistent enforcement. Most significantly, the Secretary failed to rebut the testimony of Gates and Alan Good that other MSHA inspectors had inspected the same conditions at issue in this case and not issued any citations. Tr. 93-94, 99, 101-02, 133, 168-69, 177-79. In fact, Good had maintained the cited areas for 18 years, during which time MSHA inspected them repeatedly — as many as twenty times (Tr. 176-77) — and did not cite them. We also note that during the 24 months before the citations were issued, Good received only three citations, none of which were issued for the conditions cited by Miller. 22 FMSHRC at 1089; G. Pre-Hearing Report at 3; S. Consol. Pre-Hearing Submission at 3. Significantly, the Secretary did not address the issue of prior inconsistent enforcement either below or on review.

We find nothing else in the record to indicate that Good knew or should have known that its guarding might have been considered inadequate by some at MSHA.[2] We thus conclude that Good did not have notice of the Secretary's interpretation of the regulation that led her to issue the citations under review here. We thus would reverse the judge's decision and vacate the five guarding citations.

However, in order to avoid the effect of an evenly divided decision, we concur in result with our colleagues' remand opinion. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (holding that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought). We thus join Commissioners Jordan and Beatty in remanding the case, but only on the following grounds: first, the judge must reconsider his finding that there was no prior inconsistent enforcement in light of the ample record evidence to the contrary. We also agree with our colleagues that the judge improperly transformed his notice analysis "into a subjective inquiry based on the views of an MSHA inspector" (slip op. at 10-11) when he found that Good was on notice of the Secretary's interpretation by virtue of Miller somehow embodying the "reasonably prudent person familiar with the mining industry and the protective purposes of the standard" (*Ideal Cement Co.*, 12 FMSHRC at 2416). *See* 22 FMSHRC at 1082. The judge must therefore also reconsider this finding, again in light of the record evidence of the Secretary's inconsistent prior enforcement.

Accordingly, we join our colleagues in vacating the judge's findings of guarding violations and remand for reconsideration of whether Good had adequate notice of the Secretary's interpretation of section 56.14107(a).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

[2] The Secretary attempted at trial to introduce into evidence a guarding handbook which Miller gave to Good approximately one month after issuing the guarding citations. Tr. 67. The judge, however, did not admit the pamphlet into evidence and struck it from the record after the Secretary's counsel conceded it was not relevant. Tr. 68.

Distribution

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

James A. Nelson, Esq.
205 Cowlitz
P.O. Box 878
Toledo, WA 98591

William W. Kates, Esq.
Office of the Solicitor
U.S. Department of Labor
1111 Third Avenue, Suite 945
Seattle, WA 98101-3212

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-355-M
	:	A.C. No. 23-00458-05576
THE DOE RUN COMPANY	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 17, 2001, the Commission received from the Doe Run Company ("Doe Run") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, Doe Run, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due in part to its mistake and in part to a miscommunication with MSHA. Mot. at 2. On October 10, 2000, MSHA issued Citation No. 7884600 to Doe Run. *Id.* at 1; Ex. 1 at 2. The operator contends that it requested and attended a conference on January 26, 2001, with MSHA concerning the citation. Mot. at 2. On April 23, 2001, MSHA issued a proposed penalty assessment relating to the citation. *Id.*, Ex. 1. Doe Run

asserts that, although it received the proposed penalty assessment on or about April 30, 2001, due to an internal processing mistake, the proposed assessment did not reach Dave Brown, its safety director, until June 5, 2001, almost a week after the 30-day deadline for filing a timely request for a hearing. Mot. at 2; 30 U.S.C. § 815(a). Doe Run subsequently made a request for a hearing which was received by MSHA on June 19, 2001. Mot., Ex. 2 at 1. Doe Run contends that, based on his impression from the conference with MSHA on January 26, 2001, Brown was not expecting a proposed penalty assessment to be issued until another conference with MSHA occurred after the agency issued a Tech Support report on the accident associated with the citation. Mot. at 2. Doe Run asserts that, because such an additional conference had not occurred when MSHA issued the proposed penalty assessment on April 30, 2001, Brown "did not specifically look for it." *Id.*

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

On the basis of the present record, we are unable to evaluate the merits of Doe Run's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See, e.g.*, *Red Coach Trucking*, 23 FMSHRC 125, 125-27 (Feb. 2001) (remanding where operator failed to timely request hearing because of internal mistake and confusion about Commission procedures); *Cent. Wa. Concrete, Inc.*, 21 FMSHRC 146, 148 (Feb. 1999) (remanding where operator received penalty assessment, but such receipt was not brought to management's attention until deadline for filing green card had passed); *Ky. Stone*, 19 FMSHRC 1621, 1622-23 (Oct. 1997) (remanding where operator failed to contest penalty assessment due to its accounts payable department's internal processing error of penalty assessment). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

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

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

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

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. CENT 2001-374-M
	:	A.C. No. 14-00162-05575
HEARTLAND CEMENT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 21, 2001, the Commission received from Heartland Cement Company ("Heartland") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Heartland's request for relief.

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

In its request, Heartland, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due to an internal processing error. Mot. at 1-2. It contends that at around the time it received the proposed penalty assessment, it also received seven other penalty assessments covering a total of 124 citations. *Id.* It asserts that it contested the other seven penalty assessments in a timely manner but, due to the large amount of correspondence with MSHA at that time, it inadvertently neglected to contest the penalty assessment which is the subject of its motion to reopen. *Id.* at 2-4. It explains that it only became aware of its error after it received a delinquency notice from MSHA on or about August 7, 2001. *Id.* at 1-3. Heartland attached to its request the notarized affidavit of William D. Bertie, environmental and safety engineer for Heartland, and a copy of the delinquency notice from MSHA, dated August 1, 2001. *Id.*, Exs. A & B.

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

The record indicates that Heartland intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The declaration attached to Heartland's request is sufficiently reliable and supports Heartland's allegations. In the circumstances presented here, we treat Heartland's late filing of a hearing request as resulting from inadvertence or mistake. *See Lehigh Portland Cement Co.*, 22 FMSHRC 1186, 1186-88 (Oct. 2000) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Martin Marietta Aggregates*, 22 FMSHRC 1178, 1178-1180 (Oct. 2000) (granting operator's request to reopen where operator alleged that it inadvertently sent a hearing request to the wrong MSHA address and its assertions were supported by affidavit).

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

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Bradley S. Hiles, Esq.
R. Lance Witcher, Esq.
Blackwell, Sanders, Peper, Martin, LLP
720 Oliver Street, Suite 2400
St. Louis, MO 63101

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2001-162
	:	A.C. No. 36-08525-03531
PENN AMERICAN COAL, L.P.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 5, 2001, the Commission received from Penn American Coal, L.P. ("Penn American") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On March 30, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Penn American a proposed penalty assessment for $2350 for nineteen alleged violations. Attach. Ex. A at 2. Penn American asserts that it intended to pay the proposed penalties in the sum of $1850 for seventeen of the alleged violations and to request a hearing on the proposed penalties for Citation Nos. 09853625 and 09853626, which each had a proposed penalty of $250. *Id.*; Mot. Penn American states that it returned the request for a hearing to contest the proposed penalty assessment ("green card") to MSHA, and that it mailed MSHA a

check for $1850. Mot.; Attach. Ltr. dated April 24, 2001. Penn American further submits that it received a letter from MSHA on July 2, 2001, stating that it was delinquent in the amount of $500. Mot. The operator attached to its request a copy of the green card and a letter dated April 24, 2001, to MSHA, stating that it enclosed payment in the amount of $1850.

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

On the basis of the present record, we are unable to evaluate the merits of Penn American's position. It is unclear from the record whether the civil penalties associated with Citations Nos. 09853625 and 09853626 became final orders because MSHA erred in processing Penn American's green card or because Penn American returned the green card to an incorrect MSHA address.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Powell Mountain Coal Co.*, 23 FMSHRC 144, 144-46 (Feb. 2001) (remanding to judge where operator's failure to timely request hearing allegedly resulted from erroneous information provided by MSHA); *W. Aggregates, Inc.*, 20 FMSHRC 745, 747 (July 1998) (remanding to judge where operator alleged that it mailed hearing request to incorrect MSHA address). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] There are separate addresses for corresponding with MSHA for purposes of either paying a penalty or returning a green card. It is not clear from the record whether Penn American sent its green card to the same address to which it sent payment.

Chairman Verheggen and Commissioner Riley, concurring in result:

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

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

William Kokla, Asst. Safety Director
Penn American Coal, L.P.
P.O. Box 459
Blacklick, PA 15716

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 2001-491-M A.C. No. 50-01545-05538
COMINCO ALASKA, INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 8, 2001, the Commission received from Cominco Alaska, Inc. ("Cominco") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Cominco, which is represented by counsel, asserts that it intended to contest the proposed penalty associated with Citation No. 7994028, but that its request for a hearing on the penalty was not timely filed because it inadvertently paid the assessment along with nine other assessments it intended to pay. Mot. at 1-2. Cominco asserts that it received Citation No. 7994028 on November 7, 2000, and that it filed a Notice of Contest of that citation on December 6, 2000. *Id.* at 1. Such contest was docketed under Docket No. WEST 2001-102-RM and assigned to Administrative Law Judge Richard W. Manning, who

subsequently stayed the contest proceeding pending the issuance of the proposed penalty assessment. *Id.* at 1-2. On March 21, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed penalty assessment relating to Citation No. 7994028 in the amount of $55, along with assessed penalties of $55 each for nine other citations. *Id.* at 2. Cominco asserts that it did not timely file a request for a hearing with respect to the proposed penalty for Citation No. 7994028 because, due to an internal misunderstanding and misrouting of the proposed penalty assessments, it inadvertently paid the assessment for Citation No. 7994028 when it paid the assessed penalties for the other nine citations. *Id.* Accordingly, Cominco requests the Commission to reopen the proposed penalty assessment related to Citation 7994028, which became a final order. *Id.* at 3. The operator did not provide any documents to support its assertions.

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

On the basis of the present record, we are unable to evaluate the merits of Cominco's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Kenamerican Res., Inc.*, 21 FMSHRC 1377, 1379 (Dec. 1999) (remanding to a judge to determine whether relief is warranted where operator's inadvertent payment of the proposed assessment was due to a processing error by its accounting department); *Westmoreland Coal Co.*, 11 FMSHRC 275, 277 (Mar. 1989) (vacating judge's dismissal of civil penalty proceeding and remanding for a determination of whether payment was a mistake). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Cominco's request for relief here. It is a matter of record that Cominco contested the citation associated with the penalty which the company subsequently and inadvertently paid. Docket No. WEST 2001-102-RM. We see few clearer indications of an operator's intention to contest a penalty than by its earlier filing of a Notice of Contest challenging the citation or order underlying the penalty subsequently proposed. We also note the Secretary does not oppose granting the relief requested.

However, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case to allow the judge to consider whether Cominco has met the criteria for relief under Rule 60(b) of the Federal Rules of Civil Procedure. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

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

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2001-67-M
	:	A.C. No. 30-03254-05508
D.A.S. SAND AND GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 29, 2001, the Commission received from D.A.S. Sand and Gravel, Inc. ("D.A.S.") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, D.A.S. asserts that it never received a copy of the proposed penalty assessment. Mot. D.A.S. states that it first received notice of the proposed penalty assessment on June 11, 2001, when it received a letter from the Department of Labor's Civil Penalty Compliance Office, stating that D.A.S. was delinquent in the payment of the proposed penalties. *Id.* It further contends that it was unable to match the number assigned to the proposed penalty assessment to any of the citations it had received. *Id.* D.A.S. requests an opportunity for a hearing on the penalty assessment. *Id.* D.A.S. attached to its request a copy of the correspondence from MSHA dated June 6, 2001.

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

On the basis of the present record, we are unable to evaluate the merits of D.A.S.'s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See John Richards Constr.*, 22 FMSHRC 1054, 1055 (Sept. 2000) (remanding to judge to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment); *Bauman Landscape, Inc.*, 22 FMSHRC 289, 290 (Mar. 2000) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

David Scheer, President
D.A.S. Sand & Gravel Inc.
1444 Hydeville Road
Newark, NY 14515

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-340-M A.C. No. 03-00855-05532 A
JUSTIN DEES, employed by ROGERS GROUP, INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 6, 2001, the Commission received from Rogers Group, Inc. ("Rogers Group") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The penalty assessment proposed a civil penalty for a citation issued pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), to Justin Dees, an employee of Rogers.

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

In its request submitted by Ed Elliott, Rogers Group's Safety Director, Rogers Group states that it is requesting relief to reopen the penalty assessment in order to provide information regarding the citation issued to Dees. Mot. Elliott states that on November 8, 2000, Dees received a proposed penalty assessment of $750. *Id.* He further submits that Rogers Group requested an informal conference with the Department of Labor's Mine Safety and Health Administration ("MSHA"), which was subsequently held on December 15, 2000. *Id.* Elliott

states that on February 8, 2001, Dees received the final proposed assessment of $750, and then contacted Elliott. *Id.* Elliott explains that he subsequently informed an MSHA District Manager that Rogers Group wished to contest the citation issued to Dees, but that it could not until it contested the "original citation" that acted as a basis for the citation issued to Dees. *Id.* Elliott states that Rogers Group eventually settled the underlying citation, which apparently involved a modification of the citation from one issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to one issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). He states that Rogers Group believes that "there was no unwarrantable failure on the part of [Dees] to violate a regulation . . . [which] was borne out in the final agreement on the original citation." *Id.*

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

On the basis of the present record, we are unable to evaluate the merits of Rogers Group's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Rogers Group has met the criteria for relief under Rule 60(b). *See, e.g., Ogden Constructors*, 22 FMSHRC 1 (Jan. 2000) (remanding where the operator mistakenly believed that proceeding was suspended during MSHA investigation); *Holbrook, emp. by Island Fork Constr., Ltd.*, 23 FMSHRC 158, 159 (Feb. 2001) (remanding where fellow employee claimed named individual failed to timely file due to wife's illness).[1] If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In addition, it is unclear from the record whether, under the Commission's Procedural Rules, 29 C.F.R. §§ 2700.3 and 2700.6, Rogers Group is authorized to represent Dees in this case. Therefore, as a threshold matter, the judge should determine whether Rogers Group is authorized to represent him. *See Holbrook*, 23 FMSHRC at 159 n.1.

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Dees' request for relief because the Secretary does not oppose it, Dees has set forth (through Rogers Group's Safety Director Ed Elliott) sufficiently compelling circumstances to warrant relief, and no other circumstances exist that would render a grant of relief here problematic. However, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

Ed Elliott, Safety Director
Rogers Group, Inc.
P.O. Box 849
Bloomington, IN 47402

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2000-559-M
	:	A. C. No. 48-00837-05508
	:	
	:	Docket No. WEST 2000-573-M
	:	A. C. No. 48-00837-05509
v.	:	
	:	Docket No. WEST 2000-574-M
	:	A. C. No. 48-00837-05510
RIO ALGOM MINING CORPORATION, Respondent	:	
	:	Docket No. WEST 2000-575-M
	:	A. C. No. 48-00837-05511
	:	
	:	Smith Ranch Project
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2000-537-M
	:	A. C. No. 48-00837-05501 N5Y
v.	:	
	:	Docket No. WEST 2000-538-M
PRONGHORN DRILLING COMPANY, Respondent	:	A. C. No. 48-00837-05502 N5Y
	:	
	:	Smith Ranch Project

SUMMARY DECISION

Appearances: Ann M. Noble, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Katherine Shand Larkin, Esq., Jackson & Kelly, PLLC, Denver, Colorado, on behalf of Respondent, Rio Algom Mining Corp.;
Sean P. Durrant, Esq., Palmerlee & Durrant, Buffalo, Wyoming, on behalf of Respondent, Pronghorn Drilling Company.

Before: Judge Melick

These cases are before me upon Petitions 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.* (1994), the "Act," charging Respondents Rio Algom Mining Corp. (Rio Algom) and Pronghorn Drilling Company (Pronghorn) with violations of mandatory standards at the Smith Ranch *in-situ* uranium recovery operation in Douglas, Wyoming. Respondent, Pronghorn, on April 11, 2001, and Rio Algom, on April 12, 2001, filed separate motions for summary decision asserting that the Secretary is without jurisdiction in this matter and that they are entitled to summary decision vacating all of the citations at bar. Their arguments are based on claims that the Smith Ranch Project is not a "mine" within the meaning of the Act. On April 12, 2001, the Secretary filed her own motion for partial summary decision asserting that she has jurisdiction under the Act to proceed against both Rio Algom, the owner and operator of the Smith Ranch Project, and independent contractor Pronghorn.

Under Commission Rule 67, 29 C.F.R. § 2700.67, a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law. For the reasons that follow I find that Respondents are entitled to summary decision as a matter of law.

Whether the "Smith Ranch Project" is a "mine" depends on whether it meets the definition set forth in Section 3(h)(1) of the Act. Section 3(h)(1) provides as follows:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

In connection with their motions for summary decision the parties have reached joint stipulations on the jurisdictional issue and more particularly regarding the processes and activities involved in uranium recovery at the Smith Ranch Project. The process utilized at the Smith Ranch Project is described in an article entitled, "The Smith Ranch Uranium Project" published in the Uranium Institute Twenty Second Annual International Symposium 1997, and authored by R. Mark Stout and Dennis E. Stover (SJ Exhibit No. 2). For purposes of this decision however, it is sufficient to note, and it is undisputed, that the mineral here at issue, *i.e.*, uranium, is extracted in liquid form without any workers underground.

As previously noted, Section 3(h)(1)(A) of the Act defines "coal or other mine" as "[a]n area of land from which minerals are extracted in nonliquid form or, *if in liquid form, are extracted with workers underground.*" (emphasis added). It is therefore beyond dispute that the Smith Ranch Project at issue herein is not a "mine" within the meaning of Section 3(h)(1)(A) of the Act.

The Secretary nevertheless argues that Rio Algom's processing of this mineral, which has been extracted in liquid form without workers underground, is covered under Section 3(h)(1)(C) of the Act as "the milling of such minerals." "Coal or other mine" is there defined to also include ". . . structures, facilities, equipment, machines, tools, or other property, . . . used in, or to be used in, or resulting from , the work of extracting such minerals from their natural deposits in nonliquid form, or, if in liquid form, with workers underground, *or used in, or to be used in, the milling of such minerals* . . ." (emphasis added).

It is well established that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails." *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If it is plain on its face, effect should be given to its clear meaning. *Exportal Ltda. v. United States,* 902 F.2d 45, 50 (D.C. Cir. 1990).

Under the clear and plain language of Section 3(h)(1)(C) those milling operations covered under the Act are only those involving the milling of "such minerals," *i.e.*, "minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground." Clearly when the adjective "such" is used to modify the noun "minerals" it qualifies the word "minerals" limiting it to only those minerals previously qualified in the statute, *i.e.*, only those minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground.

The adjective "such" sometimes serves a useful purpose, as where it saves having to repeat a concept that cannot be referred to in a word or two. In statutes and regulations, for example, it may be necessary to make clear that the second reference is exactly the same concept mentioned previously. The word "such" is the simplest way to do so. *See People v. Jones,* 46 Cal 3d 585, 250 Cal Rptr 635, 759 P2d 1165 (1988). The legislative history is also consistent with this construction. As that history reflects, the definition of mining was intended to

encompass the milling process, but only those milling operations "related" to minerals defined by and incorporated into the Act's provisions.

Within this framework of law it is clear that the operations here at issue, whether or not they constitute "milling" within the meaning of the Act, are excluded from coverage under the Act and the Secretary has no jurisdiction in these proceedings.[1] Accordingly all citations herein must be vacated and these civil penalty proceedings dismissed.

ORDER

Docket Numbers WEST 2000-537-M, WEST 2000-538-M, WEST 2000-559-M, WEST 2000-573-M, WEST 2000-574-M and WEST 2000-575-M, are hereby dismissed and all citations therein vacated.

Gary Melick
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716

Katherine Shand Larkin, Esq., Jackson & Kelly, PLLC, 1660 Lincoln Street, Suite 2710, Denver, CO 80264

Sean P. Durrant, Esq., Palmerlee & Durrant, L.L.C., 11 North Main Street, Suite 100, Buffalo, WY 82834

\mca

---

[1] Under the circumstances it is not necessary to determine whether such operations constitute "milling" within the meaning of the Act and supplemental briefing on this issue is, of course, no longer necessary.

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

September 13, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 99-348-M A.C. No. 24-02070-05502
v.	:	Docket No. WEST 2000-168-M A.C. No. 24-02070-05503
JOHN RICHARDS CONSTRUCTION, Respondent	:	Docket No. WEST 2000-470-M A.C. No. 24-02070-05504
	:	Richards Pit

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John Richards, John Richards Construction, Seeley Lake, Montana, 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 John Richards Construction ("Richards 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 Secretary's petitions allege 21 violations of the Secretary's safety standards and propose penalties totaling $19,073. A hearing in these cases was held in Missoula, Montana.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Richards Construction

John Richards owns Richards Construction as a sole proprietor. It operates the Richards Pit in Missoula County, Montana. The pit includes a crushing plant as well as a sand and gravel quarry. All of the citations and orders were issued at the crushing plant. John Richards employs two individuals at the pit. One employee operates the crushing plant and the other operates a loader to feed the hopper for the plant. Mr. Richards frequently works out of state for another employer.

MSHA Inspector Siebert Smith first tried to inspect the pit on February 4, 1999. When he could not find anyone at the pit on that date, he left the pit and did not conduct an inspection. Inspector Smith returned to the pit on August 12, 1999. Mr. Richards was not at the pit on that day because he was working out of state. When Inspector Smith arrived he talked to Mr. Carl Tanner. When Tanner discovered that Smith was an MSHA employee, Tanner told Smith that he was going to shut the plant down. Tanner walked through the plant to the other side, shut it down, and left with the other employee. (Tr. 48-50). As they were leaving, Tanner told Smith that he was not going to participate in the inspection and that he could "[w]rite anything you want - I've seen it all before." (Tr. 49-50). Smith believes that Tanner talked to Lance Richards, John's son, because Lance arrived a short time later.

Mr. Richards raised a number of defenses that are applicable to all of the citations and orders in this case. First, he contends that, because there were only two employees at the pit, each with assigned duties, many of the conditions cited did not pose a hazard. For example, Richards contends that many of the guarding citations, discussed below, should be vacated because employees do not walk around the plant while it is operating. Mr. Tanner operates the loader while the other employee operates the plant. Richards asserts that anytime the plant operator is cleaning up accumulations or performing maintenance on the plant, he shuts it down.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. In assessing penalties in this case, I have taken into consideration the fact that Richards Construction is a small business. I cannot vacate citations or reduce penalties to zero simply because the risk of injury was small.

The Commission interprets safety standards, including the guarding standard, to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). The Commission specifically 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. It is conceivable

that 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 easily become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded pinch point at this operation is not a defense because there is a history of such injuries at crushing plants throughout the United States and the Richards Pit could be next. Fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

Mr. Richards also argues that Mr. Tanner was responsible for the creation of the cited conditions because he left Mr. Tanner in charge while he was out of state. For example, Richards states that many of the guarding citations were issued because Mr. Tanner had allowed large amounts of material to accumulate around the plant contrary to Richards' explicit instructions. The accumulations had the effect of raising the walking surfaces placing them within seven feet of unguarded pulleys. Richards states that if he had been at the plant, he would have made sure that accumulations were cleaned up on a regular basis and the pulleys would have been guarded by location. Richards also raises this defense with respect to the unwarrantable failure citation and orders.

As a general matter, a mine operator can be held liable for the acts of his agents. An agent is defined at section 3(e) of the Mine Act as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of miners in a . . . mine." The Commission has held that the negligence of an agent of a mine operator must be considered when determining the operator's negligence in assessing a civil penalty under section 110(i) of the Mine Act and when evaluating an unwarrantable failure allegation. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991). The issue is whether Mr. Tanner was an agent of Richards Construction.

> When deciding whether a miner is an agent of an operator, the Commission has focused on the miner's function and not his job title. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

Martin Marietta Aggregates, 22 FMSHRC 633, 637 (May 2000) (citations omitted). The conduct of a rank-and-file miner, "may *not*, absent agency, be imputed to the operator." *Whayne Supply Co.*, 19 FMSHRC 447, 454 (Mar. 1997) (emphasis in original).

Mr. Richards' testimony is somewhat inconsistent. On the one hand, he stated that he has "been (working) in Arizona since 1987, part years." (Tr. 492). On the other hand, he testified that he is usually around during crushing operations. *Id.* He testified that "this was really the

first time that I'd left [Montana] and left [Tanner] in charge." (Tr. 491). Apparently, Richards had been in Houston for about three weeks at the time of this particular inspection. (Tr. 437).

Ordinarily, Tanner was not an agent of Richards Construction. Mr. Richards put Tanner in charge of the pit while he was in Houston, Texas. The question is whether Tanner was an agent of Richards Construction while Richards was away. Richards argues that he had given his employees, including Tanner, safety training. For example, he told his employees to always wear seat belts when operating equipment. (Tr. 491). As discussed below, Inspector Smith observed Tanner operating a loader without wearing a seat belt. After Mr. Richards returned to Montana, he requested a health and safety conference with MSHA under 30 C.F.R. § 100.6 to discuss the citations that Inspector Smith issued. He requested this conference because he believed that Tanner should have been held responsible for the violations in Richards' absence. The conference was held on October 1, 1999, by telephone. Supervisory MSHA Inspector Wayne Wasson represented the Secretary. Carl Tanner and Lance Richards were also on the telephone conference. Inspector Wasson testified at the hearing that Mr. Richards told him during the telephone conference that Tanner was the "superintendent" at the pit at the time of Inspector Smith's inspection. (Tr. 350). Several of the citations that were issued by Inspector Smith involved violations committed by Carl Tanner, including the seat-belt violation. As a consequence, Inspector Wasson modified these citations to section 104(d)(1) citation and orders. He made these modifications because he believes that a mine superintendent should be held to a higher degree of care than an employee who is not a manager. (Tr. 351-52).

At the hearing, Richards testified that Tanner was a very safety conscious individual who always "followed the directives." *Id.* Richards does not understand why he failed to wear a seat belt. Richards testified that he terminated Tanner from his employment with Richards Construction as a result of his conduct during the inspection. (Tr. 495). Richards believes that Tanner should have been cited for this violation and for other similar violations rather than Richards Construction because Tanner failed to follow the pit's safety rules. Richards believes that Tanner "was not looking out for my best interests. . . ." when Richards was away, especially during the MSHA inspection. (Tr. 519). As a consequence, he argues that Richards Construction should not be held responsible for Tanner's actions during the inspection.

Mr. Richards did not clearly set forth Mr. Tanner's responsibilities at the hearing. Tanner apparently had the authority to supervise the other employee, take orders for product, run the plant, and manage the day-to-day operations. It does not appear that Tanner had the authority to hire or fire employees or to discipline employees. It is clear, however, that Tanner had responsibility for safety at the pit. It was within his power to make sure that safety rules and procedures were followed. Tanner was more than a leadman; he "exercised managerial responsibilities" at the pit in Mr. Richards' absence. For purposes of the Mine Act, I find that Mr. Tanner was an agent of Richards Construction when Mr. Richards was out of state. The fact that Tanner did not follow Mr. Richards' guidelines does not negate the agent-principal relationship, but it may affect the degree of negligence attributable to Richards Construction.

Mr. Richards also asserted that the penalties proposed by MSHA are so high that they will affect his ability to continue in business. At the close of the hearing I advised Mr. Richards that this claim is an affirmative defense for which he bears the burden of proof. (Tr. 551-56). He provided his personal federal tax returns for 1993-1998, which showed business losses for those years. He also submitted W-2 forms for 1999 and 2000. I advised Mr. Richards that I would need more detailed financial information in order to consider this issue. By order dated April 24, 2001, I set forth the specific information that I would need. I enclosed a copy of my decision on remand in *Unique Electric*, 21 FMSHRC 91 (Jan. 1999). Mr. Richards did not file a response to my order by the June 4, 2001, due date.[1] Consequently, I have not reduced the penalties in this case based on the ability to continue in business criterion.

B. Inspection of February 4, 1999

Citation No. **7903871**, the only one issued on February 4, 1999, alleges a violation of 30 C.F.R. § 56.1000, because the "owner, operator, or the person in charge of the Richards Pit did not give notification to the nearest Mine Safety and Health Administration office of the shutdown of the Richards Pit." Inspector Smith determined that the violation was not of a significant and substantial nature ("S&S") and was the result of Richards Construction's moderate negligence. Section 56.1000 provides, in part, that "[W]hen any mine is closed, the person in charge shall notify the nearest [MSHA] subdistrict office . . . and indicate whether the closure is temporary or permanent."

When Inspector Smith traveled to the pit on February 4, he did not see anyone around. He tried two different approaches to the pit without success. Smith testified that the pit is classified as an intermittent operation. Mr. Richards testified that he was out of state on February 4, but that the pit had not been shut down. If a customer wanted to purchase sand, the customer would contact a Richards Construction employee who would direct him to the pit. (Tr. 416-18). If the customer was purchasing only one truckload, he might load the sand himself from the stockpile, otherwise one of the pit employees would load the customer's trucks. Because it was winter, the crusher had not operated since about December 1998. *Id.* Nevertheless, if a customer wanted to purchase a large amount of sand and the weather was not too severe, Richards Construction would operate its crusher to fill the order. The sand was primarily used to sand subdivision roads in inclement weather.

Inspector Smith issued this citation solely because he did not see anyone at the pit on February 4. Intermittent operations do not mine and crush every day. The inspector testified that he did believe that an operator of an intermittent pit and crusher would be required to notify MSHA every week whether it was planning on being open. (Tr. 35). The standard is designed to

---

[1] On July 18, 2001, Mr. Richards filed a motion for a 90-day extension of time to respond to my order and to file a brief in these cases. The Secretary opposed the motion. By order dated July 30, 2001, I denied Mr. Richards' motion for an extension of time. At Richards' request, I placed his tax records under seal.

cover situations where an operation closes permanently or is closing for some definite period of time, such as November through March. In the case of this pit, it remained open all winter, but it had employees present only when there was a demand for its products. If Richards Construction had notified MSHA that it was closed at the end of December 1998, the standard would have required it to notify MSHA every time a customer called for sand. I do not read section 56.1000 imposing such a requirement on intermittent operations. Consequently, Citation No. 7903871 is vacated.

C. Guarding Citations

Citation No. **7904240** alleges a violation of section 56.14107(a), because no guard was installed on the v-belt drive unit for the discharge conveyor under the kinetic crusher. The citation states that the "v-belt drive unit was located approximately 56 inches from the ground level and could be contacted by employees at the site." Inspector Smith determined that the violation was S&S and was the result of Richards Construction's moderate negligence. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail, and takeup pulleys . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $399 for this alleged violation.

There is no dispute that the cited V-belt drive was not guarded. (Ex. P-3, p.1 bottom photo). Inspector Smith testified that there was no guarding on this v-belt drive and estimated that the pinch point was about 56 inches from the ground level. (Tr. 53, 59). There was an accumulation of spilled material at that location at the time of the inspection. (Tr. 59-61). He determined that Richards Construction's negligence was moderate because it received guarding citations in the past. (Tr. 54-55). He also determined that the violation was S&S because if the drive remained unguarded it was reasonably likely that someone would sustain an injury of a reasonably serious nature. (Tr. 55, 67-70).

Mr. Richards testified that the conveyor was installed in 1993 and had been inspected on at least one previous inspection. (Tr. 426). No guarding citations have ever been issued for this v-belt drive. He further stated that the distance from the ground to the tail pulley is about ten feet. *Id.* Richards testified that the reason Inspector Smith measured a distance of 56 inches was because he was standing on spilled material that had accumulated. (Tr. 431-32). Richards also testified that the violation should not have been designated as S&S because "you have to contort yourself to get anywhere near it." (Tr. 434). Employees would not walk under this conveyor when it was running because large rocks fall from the conveyor, as evidenced by the accumulation of spilled material. *Id.* He stated that "no one with any . . . common sense would get in that area where those rocks are falling." (Tr. 434-35). Richards also testified that he instructed his employees to keep the area under the conveyor clean and to remove spilled material. (Tr. 436). Mr. Richards was not in Montana at the time of this inspection, so he believes that he should not be held negligent for the failure of Tanner to make sure that the area was clean of spilled material.

There can be no dispute that at the time of the inspection, the v-belt drive was not guarded and was a little more than 4.5 feet above the ground level. If accumulations in the area had been cleaned out, the v-belt drive would have been higher off the ground. It may well have been more than seven feet from the ground during previous MSHA inspections. (30 C.F.R. § 56.14107(b)). I find that the area under the v-belt drive was a walking surface. Employees could walk through the area and Inspector Smith observed Mr. Tanner walking under operating conveyors on the date of the inspection. (Tr. 49, 68, 260, 262).

I find that the Secretary established a violation of the safety standard. I also find that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . 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." *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).

In this instance, the exposed moving parts were about 4.5 feet above the walking surface. A measure of danger to safety was present that was contributed to by the violation. Assuming continued mining operations, it was reasonably likely that someone would come in contact with the moving machine parts that were about 4.5 feet above the walking surface. The exposed moving parts were close to the walking surface because the agent of Richards Construction allowed a significant quantity of rock to accumulate in the area. The fact that Richards would have kept the accumulations cleaned up does not negate the fact that employees were exposed to moving machine parts. A person's clothing can easily get caught in moving machine parts and pull the individual into the moving parts causing an injury. Richards testified that no employee "with common sense" would walk under a moving conveyor because he could get hit by falling rocks, yet Inspector Smith observed Tanner walking under operating conveyors. I find that the Secretary also established that any injury would be of a reasonably serious nature.

The Secretary established that the mine operator's negligence was moderate. The negligence of Mr. Tanner, Richards Construction's agent, is attributable to Richards Construction. A penalty of $200 is appropriate.

Citation No. **7904241** alleges a violation of section 56.14107(a) because the guard on the tail pulley for the return conveyor to the Telesmith plant "did not extend a [sufficient] distance to cover the moving parts of the tail pulley." It further states that the tail pulley was about 24 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposed a penalty of $399 for this alleged violation.

Inspector Smith testified there was a guard present at this location but it did not extend all the way back to protect employees from coming into contact with the self-cleaning tail pulley. (Tr. 76; Ex. P-3, p. 2 top photo). The open area was about 24 inches above the ground. (Tr. 77). Inspector Smith determined that Richards Construction was moderately negligent with respect to this citation. He determined that the violation was S&S because if someone were to trip and fall in the area adjacent to the opening around the guard, he could come in contact with the pinch points. (Tr. 78, 89).

Richards testified that during 1998, a different MSHA inspector issued a citation at the same location and the guard that was installed to abate the previous citation was the guard that Inspector Smith considered to be inadequate. (Tr. 441-42). As a consequence, Richards believes that he was not negligent. (Tr. 445). Richards also testified that, in order to contact a pinch point, an employee's entire arm would have to go through the opening. (Tr. 442). Given that the opening was very narrow, he believes that such an event was highly unlikely. (Tr. 442-44).

I find that the Secretary established a violation but did not establish that it was S&S. The opening that was not covered by the guard was quite small. Inspector Smith did not measure the opening, but the photograph shows a small opening. Although the opening created a discrete safety hazard, it is highly unlikely that anyone would trip and fall next to the opening and then inadvertently have his hand enter the opening. The moving machine parts were well inside the opening. Although such an event could occur, it was not reasonably likely to happen. The gravity is low.

I also find that Richards Construction was not negligent. Mr. Richards testified that another MSHA inspector issued a citation at the same tail pulley a year earlier for a violation of section 56.14107(a). The guard that Inspector Smith found to be inadequate was installed to abate the previous citation. I credit Mr. Richard's testimony on this issue. The pit received seven guarding citations during the MSHA inspection of August 6, 1998. (Ex. P-6). This fact does not negate this violation because equitable estoppel does not apply to the Secretary in Mine Act proceedings. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). It is within MSHA's authority to determine that the tail pulley was not adequately guarded on August 12, 1999. Nevertheless, the fact that another MSHA inspector determined that the guard cited by

Inspector Smith met the requirements of the safety standard significantly lowers the level of negligence that should be imputed to Richards Construction. It is unfair to cite a mine operator for a violation of a safety standard and then cite it again for a violation of the same standard at the same location with a moderate negligence finding. If the first MSHA inspector had required that the violation be properly abated, Richards Construction would not have received the second citation. Consequently, I find that a nominal penalty of $10 is appropriate.

Citation No. **7904242** alleges a violation of section 56.14107(a) because the guard on the fin-type tail pulley of the discharge conveyor under the Pioneer crusher "did not extend a [sufficient] distance to cover the moving parts" on the tail pulley. The citation also states that the tail pulley was about 30 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified no guard was provided on the tail pulley. (Tr. 93; Ex. P-3, p. 2 bottom photo). The lower pulley was partially guarded but the top pulley was not. It was 30 inches from the ground. For the reasons set forth with respect to the previous citations, Inspector Smith determined that the violation was S&S and the result of Richards Construction's moderate negligence. (Tr. 94-95). An employee could trip and fall in the immediate area and get his hand caught in the pinch point of the self-cleaning tail pulley. (Tr. 104).

Mr. Richards testified that normally the tail pulley is about four feet above the ground but that material had been allowed to accumulate in the area. (Tr. 448). He also stated that other sides of this tail pulley had been guarded by Richards Construction following a previous MSHA inspection. Richards believes that it was highly unlikely that anyone would walk close to the cited area and even more unlikely that he would trip and fall. (Tr. 448-49). He believes that if there was a violation, it was neither serious nor S&S. The MSHA inspector who conducted the previous inspection did not designate guarding violations as S&S. (Tr. 450; Ex. P-6). In addition, Richards believes that there was no negligence associated with this condition because the guards that were present were installed to abate a citation issued during the previous MSHA inspection. (Tr. 452). He believes that he should not be cited twice for the same condition and then assessed higher penalties for moderate negligence.

I find that the Secretary established a violation. I also find that the violation was S&S. The opening that was not covered by the guard was fairly substantial in size and it is reasonably likely that someone could be seriously injured if this condition were not corrected. The fact that the MSHA inspector who issued a citation at this same location a year earlier considered the violation to be non-S&S is not binding on the Secretary or the Commission.

For the reasons set forth with respect to the previous citation, I find that Richards Construction was not negligent. I credit Richards' testimony that the other guards on this tail pulley were installed to abate another MSHA inspector's citation. If the first MSHA inspector

had required that the violation be properly abated, Richards Construction would not have received the second citation. I assess a penalty of $50 for this violation.

Citation No. **7904246** alleges a violation of section 56.14107(a) because a guard was not installed on the head pulley and on the v-belt drive unit on the discharge conveyor under the El Jay screen. The citation states that the head pulley and v-belt drive were about 56 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that the unguarded v-belt drive was under the decking on the El Jay screen. (Tr. 133). There was no guarding at this head pulley and v-belt drive. (Tr. 134; Ex. P-3, p. 4 bottom photo). He determined that the unguarded moving parts were 56 inches above the ground in an area that could be accessed by employees. He determined that the violation was S&S and that Richards Construction's negligence was moderate based on the same factors that he considered with respect to the other guarding violations. (Tr. 135-35).

Mr. Richards testified that the cited head pulley and v-belt drive would normally be ten feet above the walking surface. (Tr. 459, 461). Because his employees had allowed material to accumulate under the pulley and drive, the distance was considerably less. He testified that material can accumulate rather quickly in that area. (Tr. 460-61). Richards further testified that employees never walk under the cited drive pulley because of the falling rock. (Tr. 462-63). He believes that the condition was not S&S. He also contends that he was not negligent. He points to the fact that there has not been a serious injury at his operation in 30 years. (Tr. 464).

The condition cited is similar to the condition in Citation No. 7904240. Because Richards Construction had permitted material to accumulate in the area, the moving machine parts were about 4.5 feet above the walking surface. Normally the moving parts were protected by location. For the same reasons discussed above with respect to Citation No. 7904240, I find that the Secretary established an S&S violation and that Richards Construction's negligence was moderate. A penalty of $200 is appropriate.

Citation No. **7904247** alleges a violation of section 56.14107(a) because a guard was not provided and installed to "extend a [sufficient] distance to cover the moving parts of the fin-type tail pulley" on the number 3061 conveyor. The citation states that the tail pulley was about 33 inches from the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that the existing guard on the conveyor did not cover all of the moving parts. (Tr. 141). He believed that an additional guard had been present but had been removed. Small openings were present as well as a protruding shaft for the pulley. (Tr. 142; Ex. P-3, p. 5 top photo). For the reasons discussed above, the inspector determined that the violation

was S&S and that the operator's negligence was moderate. He testified that the openings were large enough to pose a hazard. He was concerned that if someone were to trip and fall while walking by the unguarded conveyor, he could become entangled in the moving parts. (Tr. 160).

Mr. Richards testified that the end of the conveyor was sitting on a block that was six feet long, two feet high, and about two feet deep. (Tr. 465). He stated that, as a consequence, an employee could not get close to the moving parts. If an employee were to trip and fall in that area, he believes that it would be highly unlikely that he would become entangled in the moving parts. (Tr. 466-68). As with some of the other guarding citations, Richards testified that he had been issued a citation for this conveyor in 1998 and the guarding that was present was adequate to abate the previous citation. *Id.* I credit Richards' testimony.

The condition cited in this citation is quite similar to the violation in Citation No. 7904241. For the same reasons, I find that the Secretary established a violation; the violation was not S&S; the gravity was low; and Richards Construction was not negligent. A penalty of $10 is assessed.

Citation No. **7904248** alleges a violation of section 56.14107(a) because a guard was not installed on the back side of the drum-type tail pulley on the number 157 conveyor. The citation states that the tail pulley was about 33 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that a number of moving parts presented a hazard at this location including a scraper bar across the top of the belt and the tail pulley. (Tr. 163). No guard was present on the front and top of the tail pulley. (Tr. 165; Ex. P-3, p. 5 bottom photo). There was a guard on the right side, but the guard on the left side had been pulled back exposing the moving parts. *Id.* As with the previous citations, Inspector Smith believes that someone could become entangled in the moving parts if he were in the area.

Mr. Richards testified that a guard had been present before he left Montana. (Tr. 470). He stated that he became furious when he discovered that the guard had been removed. He believes that the condition should be characterized as non-S&S and he also believes that his negligence was very low. (Tr. 470-71).

I find that the Secretary established an S&S violation. This violation created a very serious safety hazard. I also find that Richards Construction's negligence was moderate. A penalty of $250 is appropriate because of the serious nature of the violation.

Citation No. **7904249** alleges a violation of section 56.14107(a) because a guard was not installed on the fin-type tail pulley on the conveyor under the pro-screen. The citation states that the tail pulley was about 26 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of

Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that there was no guard present on the back side of the self-cleaning tail pulley. (Tr. 184). The fins are visible in the photograph. (Ex. P-3, p. 6 top photo). The inspector believes that an employee could be seriously injured if he fell in the area and came in contact with the unguarded moving parts. (Tr. 186). For the reasons stated above, he determined that the violation was S&S and was the result of Richards Construction's moderate negligence. (Tr. 187). There was spilled material in the area. (Tr. 196).

Mr. Richards stated that an employee would "have to crawl" to get close to the tail pulley because the Fab Tec screen is on top of the conveyor. (Tr. 472). He also testified that this tail pulley had been fully guarded but his employees removed part of the guard. (Tr. 473). Richards stated that he is angry because his employees "know better, that's what makes me mad." (Tr. 473). Because the tail pulley was immediately below a screen, Richards believes that it was highly unlikely that anyone would be injured by the condition. He stated that an injury was especially unlikely because he has two employees not hundreds. (Tr. 474). He also believes that the Secretary failed to show that his negligence was moderate. (Tr. 479).

I find that the Secretary established an S&S violation. The fins on the self-cleaning tail pulley were exposed presenting a serious safety hazard. Mr. Richards believes that the hazard was minimal because the exposed moving parts were immediately below a screen. While this may have lessened the likelihood of an injury to some extent, I find that an injury was reasonably likely. If someone were to stumble and fall in the area, his hands or clothing could become entangled in the moving parts. I also find that Richards Construction's negligence was moderate because its employees removed the guards that had previously been installed. A penalty of $200 is appropriate.

Citation No. **79804251** alleges a violation of section 56.14107(a) because a guard was not installed on the fin-type tail pulley on the Fab Tec feed conveyor at the main feed hopper. The citation states that the tail pulley was about 12 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith stated that this citation was issued because there was no guard on the self-cleaning tail pulley on the feed conveyor under the main feed hopper for the plant. (Tr. 211-12; Ex. P-3, p. 7 top photo). He stated that an employee could walk along the side of this conveyor. (Tr. 214). Smith testified that he designated the condition as S&S and the negligence as moderate for the same reasons discussed above. (Tr. 214-15).

Mr. Richards testified that no employee would walk near the conveyor while the plant was operating because large rocks constantly fall off the sides of the hopper from the grizzly on

top of the hopper. (Tr. 215-16, 482-4). Inspector Smith testified that he would not walk through that area while the plant was operating. Richards believes that the conditions did not present a violation, much less an S&S violation.

Citation No. **7904252** alleges a violation of section 56.14107(a) because a guard was not installed on the head pulley and on tail pulleys for the small discharge conveyer under the same feed hopper at the crushing plant. The citation states that the pulleys were about 40 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

The condition cited in this citation is immediately above the condition cited in the previous citation. (Tr. 223; Ex. P-3, p. 7 bottom photo). The small discharge conveyor was under the main feed hopper for the plant. The inspector's testimony is the same for both citations. (Tr. 224-225). Mr. Richards' testimony was also the same.

These two citations present a close issue. Were the moving machine parts within seven feet of a walking or working surface? The cited areas were at the back of the main feed hopper. The land falls away quickly at the back as illustrated in Ex. P-3, p. 7. I credit the testimony of Mr. Richards that employees do not walk behind the feed hopper while it is operating because large rocks fall from the grizzly. Inspector Smith testified that he would not walk in this area. Nevertheless, I find that it is possible that an employee might walk near those moving parts that are pictured on the left side of the photographs. There is a wide flat area there that can be classified as a "walking surface." The rocks in the area create a tripping hazard. Consequently, I find that the Secretary established these violations. I find that the violations are not S&S because it is not reasonably likely that anyone would be exposed to the hazard assuming continued operations. It is not likely that anyone would walk in the area when the hopper was operating. The gravity is low. I also find that Richards Construction's negligence was low. Reasonable people could differ on whether guards were required at these locations under the safety standard. A penalty of $25 for each citation is appropriate.

D. Unwarrantable Citation and Orders

Citation No. **7904235** alleges a violation of section 56.14130(g) because Mr. Tanner was operating a front-end loader on an elevated ramp at the pit without wearing a seat belt. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson determined that citation should be modified to a section 104(d)(1) citation with high negligence. He made this change because the individual operating the loader was the "mine superintendent." The standard provides, in part, that "[s]eat belts shall be worn by the equipment operator." The Secretary proposes a penalty of $1,800 for this alleged violation.

Inspector Smith testified that when he first arrived at the pit, he observed Mr. Tanner operating the loader on the ramp to the hopper for the crusher. When Smith flagged him down, Tanner was not wearing the safety belt that was installed on the loader. (Tr. 240). When the inspector asked Tanner why he was not wearing it, Tanner replied that he was "just not wearing it." *Id.* Smith testified that it took Tanner quite a while to pull it out from under the seat cushion. Inspector Smith determined that the violation was S&S because Tanner was using the loader on the elevated ramp and the ramp was not equipped with a berm. Smith was concerned about a rollover accident on the ramp which was about six feet off the ground at its highest point. (Tr. 242; Ex. P-3, p.1 top photo). He said that it was reasonably likely that a loader operator would roll his equipment over on the ramp and sustain a serious injury. (Tr. 252-53).

Mr. Richards testified that the loader was equipped with seatbelts. He stated that he instructed all equipment operators to wear seatbelts at all times. (Tr. 491). Richards testified that Tanner followed this rule when Richards was at the property. He admitted that Richards Construction received seatbelt citations in the past. Richards does not believe that the citation should have been designated as S&S or that a serious injury was reasonably likely. (Tr. 494). He also testified that the previous citation was designated as non-S&S. Richards also testified that the ramp was only about 50 to 55 inches high (4.5 feet). (Tr. 510-11). He believes that the inspector included some horizontal distance when he attempted to measure the height. Richards also maintains that his negligence was not high. He testified that Tanner wore his seatbelt when Richards was at the pit. (Tr. 495). Richards stated that he instructed Tanner to wear a seat belt and that his failure to do so should not be attributed to Richards Construction.

I find that the Secretary established a violation and that the violation was S&S. Based on the photograph, I credit Mr. Richards' testimony that the ramp was closer to 4.5 feet high than 6 feet high. Nevertheless, the violation created a serious safety hazard. It is reasonably likely that someone operating a loader without wearing a seat belt will be injured and that the injury will be reasonably serious. *See Lakeview Rock Products*, 17 FMSHRC 83, 87 (Jan. 1995)(ALJ). I reject the inspector's testimony that a fatal injury was reasonably likely, but that does not negate my S&S finding.

The key issue is whether the violation was caused by an unwarrantable failure of Richards Construction to comply with the safety standard. The Commission determined that unwarrantable failure is aggravated conduct constituting more that ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as: the extent of the violative condition; the length of time it has existed; the operator's efforts in abating the violative condition; whether the operator has been placed on notice that greater efforts are necessary for compliance; the operator's knowledge of the existence of the violation; and whether the violation is obvious or poses a high degree of

danger. *See Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These factors need to "be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario." *Id.* These factors must be examined to determine if "an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated." *Id.*

Because Mr. Richards appointed Mr. Tanner as his agent in his absence, the negligence of Tanner is attributable to Richards Construction. During this inspection, Mr. Tanner stood in Mr. Richards' shoes, so to speak. Although this result may seem harsh, it has the effect of requiring mine operators to take every reasonable step to ensure that it appoints agents that are responsible and competent to manage the operation in a safe manner. In the case of mine operators that are corporations, the operator always depends on the acts of its agents. In this case the operator is a sole proprietor, Mr. Richards. When Mr. Richards is present, he directly manages the pit without any agents. On those occasions when he does rely on agent, Richards Construction is liable for the agent's negligent acts.

I find that this violation was the caused by the unwarrantable failure of the operator to comply with the safety standard. Richards Construction received a citation for a violation of this safety standard on August 6, 1998. (Ex. P-6). Consequently, Mr. Richards was aware that he needed to take further steps to enforce this safety standard at the pit. The operator's agent was well aware of the violation because he was the individual operating the loader. It appears that this was not the first time that Tanner operated the loader without wearing a seat belt because the belt was under the seat cushion between the back and the cushion. The violation was also obvious. Although I recognize that Mr. Richards was not at the pit to enforce his safety rules, his agent violated the safety standard and was aware that he was doing so. A penalty of $500 is appropriate for this violation.

Order No. **7904236** alleges a violation of section 56.15002 because Mr. Tanner was not wearing a protective hat at the pit. The inspector observed him walking through the crushing plant. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[a]ll persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." The Secretary proposes a penalty of $1,400 for this alleged violation.

Inspector Smith testified that when Tanner told him that he was going to shut the plant down, he walked under two moving conveyors at the pit instead of walking on the roads to reach the other employee. (Tr. 260-61). Tanner was not wearing a hard hat at the time. Inspector Smith does not know what was on these particular conveyors at the time Tanner walked under them. (Tr. 265). He stated that if it was sand, a serious hazard would not be presented. When Tanner left the pit, he had his hard hat in his truck. (Tr. 273).

Mr. Richards testified that the conveyors that Tanner walked under carried three-eighths-inch sand. (Tr. 498). He stated that this material could not have injured Tanner even though he was not wearing his hard hat. Mr. Richards also testified that he cannot understand why Tanner walked through the plant given its configuration and the location of the other employee. (Tr. 499; Ex. R-5). He stated that Tanner would have gone out of way to do so and such action does not make any sense. Mr. Richards stated that there was no likelihood of an injury in this case. (Tr. 500-01).

I find that the Secretary established a violation. As discussed above with respect to the guarding citations, the Commission interprets safety standards taking into consideration the unpredictable nature of human conduct. There are many areas at the crushing plant where falling objects may create a hazard. Although the conveyors that Smith saw Tanner walk under may have carried only sand, Tanner's actions indicate that he is not hesitant to walk in and around the plant without a hard hat. Given his behavior, the Secretary established a violation. I find, however, that the Secretary did not establish that the violation was S&S. Tanner walked through the plant in a fit of anger. I credit the testimony of Richards that Tanner did not walk under conveyors that carry large rocks. There is insufficient evidence to establish that it was reasonably likely that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. It is impossible to ascertain whether Tanner's actions were unusual or commonplace. Although there is sufficient evidence to establish a violation, I cannot determine that the violation was S&S. The gravity was moderate.

I find that the Secretary established that this violation was caused by the unwarrantable failure of the operator to comply with the safety standard. The violation was obvious and it was committed by the agent that Richards Construction had put in charge of the pit. This violation demonstrated a serious lack of reasonable care on the part of Mr. Tanner. A penalty of $300 is appropriate.

Order No. **7904237** alleges a violation of section 56.15003 because Mr. Tanner was not wearing protective footwear at the pit. The inspector observed him walking through the crushing plant. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[a]ll persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to feet." The Secretary proposes a penalty of $2,000 for this alleged violation.

Inspector Smith testified that Tanner was wearing tennis shoes at the pit. (Tr. 291). Smith was concerned that if an object were to fall and hit his foot, he could suffer a serious injury. The inspector was primarily concerned about falling rocks. (Tr. 292). John Richards testified that it was highly unlikely that a large rock would fall on Tanner's foot. (Tr. 500). He also testified that Richards Construction was not negligent. (Tr. 501).

I find that the Secretary established a violation. Tanner was observed walking through the plant wearing tennis shoes. There were hazards present that could have caused injury to his feet. I also find that the violation is S&S. In analyzing the previous violation, I took into consideration the fact that Tanner might have inadvertently left his hard hat in the loader when he walked through the crushing plant. In this instance I cannot reach such a conclusion. Had Inspector Smith not shown up at the pit, it is foreseeable that Tanner would have worn his tennis shoes all day. Numerous hazards exist at a crushing plant that can cause serious injury to an employee's feet. The evidence establishes that it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature, assuming continuing operations at the pit.

I also find that the Secretary established that this violation was caused by the unwarrantable failure of the operator to comply with the safety standard. The violation was quite obvious and it was committed by the agent chosen by Mr. Richards to run the pit in his absence. This violation demonstrated more than a serious lack of reasonable care on the part of Tanner. A penalty of $500 is appropriate.

Order No. **7904238** alleges a violation of section 56.14132(a) because the backup alarm on the loader Mr. Tanner was operating was not working. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "audible warning devices provided on self-propelled mobile equipment shall be maintained in functional condition." The Secretary proposes a penalty of $2,500 for this alleged violation.

The inspector testified that he observed the loader back up and upon further inspection discovered that there was a broken wire on the alarm. (Tr. 293). Smith also observed a truck driver standing "in the area where the truck was backing up." (Tr. 294). He believes that it was reasonably likely that someone would be killed or injured as a result of this violation.

Mr. Richards testified that the broken wire was immediately repaired. (Tr. 503). He stated that although the truck drivers do get out of their vehicles to stretch their legs, they do not get in the way of the loader. He further testified that when a person regularly works around back-up alarms, he no longer hears them. He believes that backup alarms do little to prevent accidents. (Tr. 504). He stated that an accident was not reasonably likely. Richards does not know when the wire broke and stated that it could have occurred that morning. The backup alarm functioned properly in the past.

I find that the Secretary established an S&S violation. There is no dispute that the back-up alarm was not working. Although it is possible for people to get used to the sound of backup alarms, there is little dispute that they help prevent accidents. Hearing a backup alarm as back-ground noise is quite different from hearing one right behind you. Assuming continued mining

operations, it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature.

Whether this violation was the result of the operator's unwarrantable failure is a closer question. I find that this violation does not meet the unwarrantable failure criteria established by the Commission. The record does not reveal how long the condition existed. It is also not clear that the operator's agent knew about the violation, even though he was operating the loader. He may simply not have noticed, an indication of ordinary negligence. The record reveals that Richards Construction was cited for this safety standard in the past. (Ex. P-6). I find that the Secretary did not establish that Richards Construction was engaged in aggravated conduct constituting more than ordinary negligence. A penalty of $200 is appropriate.

Order No. **7904239** alleges a violation of section 56.9300(a) because a berm was not installed on the outer edge of the elevated ramp at the hopper. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $3,000 for this alleged violation.

Smith testified that there was no berm present on the right side of the ramp to the main feed hopper for the plant. (Tr. 295; Ex. P-3, p. 1 top photo). He measured the height of the ramp to be about 72 inches at the highest point. (Tr. 242, 541). He testified that it was reasonably likely that the loader operator would run the loader off the ramp because no berm was present and would seriously injure himself, especially since he was not wearing a seat belt. (Tr. 297).

Mr. Richards testified that Smith's measurement of the ramp was inaccurate. (Tr. 507-11; Ex. R-6). He believes that the ramp was about 4 to 4.5 feet above the surrounding land at its highest point. *Id.* Richards also testified that the ramp is about 55 feet wide; the loader is 12 feet wide; and the feed hopper is 14 feet wide. (Tr. 512-13). In addition, the ramp is about 25 feet long and the loader is about 35 feet long. *Id.* Richards testified that given these dimensions, it is highly unlikely that the loader operator would go off the edge of the ramp. First, the ramp is more than four times as wide as the loader so it is not likely that the operator would be near the edge. Second, when the loader is up on the ramp dumping material into the hopper, its rear wheels are not on the ramp. Given these facts, Mr. Richards believes that an accident was highly unlikely.

Mr. Richards also testified that MSHA inspected this ramp in the previous August and issued a citation because the berm on the left side of the ramp was not high enough. (Tr. 514; Ex. P-6). Richards states he was not negligent with respect to this citation because an MSHA inspector previously inspected this ramp and did not believe that the area cited in this case required a berm. He testified that the ramp had not changed in the intervening year. *Id.*

I find that the Secretary established a violation. The Secretary established that the drop-off on the right side of the ramp was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. As stated above, the fact that another inspector did not write a citation for this condition does not negate the violation. In general, it is reasonably likely that a drop-off on the side of a ramp to a feed hopper would contribute to an injury of a reasonably serious nature. Given the facts that Mr. Richards presented, I find that the Secretary did not establish an S&S violation. I credit the dimensions that Mr. Richards introduced at the hearing. The ramp was very wide relative to the size of the loader. The ramp was quite short relative to the length of the loader. The hopper was near the center of the ramp. The Secretary did not meet the third element of the Commission's *Mathies* test. It was not reasonably likely that the loader operator will accidentally run off the edge of the ramp. Although such an event is possible, it is not reasonably likely. The gravity is moderate.

I also find that Richards Construction did not engage in aggravated conduct constituting more than ordinary negligence. Although the condition had existed for a long period of time, an MSHA inspector observed the condition the previous August and did not issue a citation. The previous inspector issued a non-S&S citation because the berm on the opposite side of the ramp was not high enough. (Ex. P-6). Richards Construction was not put on notice that greater efforts are necessary for compliance. If anything, the previous MSHA inspector lulled Mr. Richards into believing that a berm was not required on the right side of the ramp. I delete the unwarrantable failure designation from this order and hold that the operator's negligence was quite low. A penalty of $50 is appropriate.

Order No. **7904245** alleges a violation of section 56.12005 because an unbridged electrical cord extended across a roadway at the pit. The cord provided power to a radio. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[m]obile equipment shall not run over power conductors . . . unless the conductors are properly bridged or protected." The Secretary proposes a penalty of $900 for this alleged violation.

Inspector Smith testified that he observed a pickup truck drive across the cited power cord. (Tr. 297; Ex. P-3. P. 4 top photo). Mr. Tanner was in the truck that ran over the cord as he left the pit. Smith testified that driving over the power cord could damage the insulation and create a safety hazard.

Mr. Richards testified that the radio and the cord were the personal property of the crusher operator. (Tr. 515). He took the radio home with him every night and threw the cord back across the road. Tanner drove over it in anger soon after Inspector Smith arrived at the mine. Apparently, Tanner had an argument with another MSHA inspector on a previous occasion. *Id.* Richards testified that he does not want the crusher operator to listen to the radio

because he wants him to be able to hear the crusher. Since this is not his equipment, Richards does not believe that he should be held responsible.

I find that the Secretary established a violation. I find, however, that the violation does not fit the criteria for unwarrantable failure. The violation was not serious; it had not existed for a long period of time; and there was no showing that the operator had been put on notice that greater efforts were necessary to comply with this standard. The violation is not very obvious because there was no showing that vehicles normally traveled through this area while the cord was present. There is no showing that the operator engaged in aggravated conduct constituting more than ordinary negligence other than the fact that Tanner drove over it when leaving the pit. The negligence of Richards Construction was moderate. I find that a penalty of $50 is appropriate.

Order No. **7904256** alleges a violation of section 56.18002(a) because a competent person was not examining each working place at least once each shift for hazardous conditions. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[a] competent person . . . shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $2,500 for this alleged violation.

The inspector testified that he issued this citation because he issued a large number of citations for obvious safety violations. (Tr. 300). He designated this violation as S&S "because of the large number of [S&S] violations" he had written. (Tr. 301). He believed that serious injuries would likely result from the operator's failure to do on-shift examinations. He felt that at the time of the inspection, the pit was in very poor condition "safety wise." *Id.*

Mr. Richards testified that he thought, based on his prior experience with Mr. Tanner, that the pit would be operated in a competent manner when he was in Houston. (Tr. 519). He has a difficult time understanding why Tanner let him down. He does not believe that this citation was S&S because he makes sure that the pit is safe when he is there.

I find that the Secretary established an S&S violation. The Commission identified three requirements of section 56.18002 as follows: (1) . . . workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1988). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defines a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2. Mr. Richards did not present any evidence that the required examinations were being performed or recorded. He testified that his employees quickly repair any conditions that create a safety hazard, at least when he is at the pit. (Tr. 518). Although that

is an excellent practice, if followed, it does not comply with the safety standard. Given the large number of violations discovered during this inspection, it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature, assuming continued mining operations. *See Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1110 (Oct. 1999) (ALJ); *but cf. Dumbarton Quarry Associates,* 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ).

I also hold that the violation was created by the operator's aggravated conduct constituting more than ordinary negligence. Tanner was the agent of Richards Construction. Richards testified that another inspector had discussed the need for on-shift examinations with him during a previous inspection. (Tr. 518-19). Consequently, he was put on notice that greater efforts were necessary. Smith asked Lance Richards about examination records, but the inspector was not shown any such records. The violation was extensive because no records were kept. Mr. Richards knew of the specific requirements of this safety standard. I find that the operator unwarrantably failed to comply with the standard. A penalty of $500 is appropriate.

E. Other Citations

Citation No. **7904243** alleges a violation of section 56.4101 because signs were not posted at the portable fuel storage tank at the crushing plant prohibiting smoking and open flames. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. Section 56.4101 provides, in part, that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The Secretary proposes a penalty of $224 for this alleged violation.

Inspector Smith testified that there were no signs prohibiting open flames or smoking near the fuel storage tank. (Tr. 120; Ex. P-3, p. 3). The tank contained diesel fuel, which could catch on fire or explode if someone smoked or lit a match in the area. Mr. Richards testified that there was a "no smoking" sign on the trailer about 50 feet from the cited portable fuel storage tank. (Tr. 453-54). He further testified that none of his employees smoke. He stated that a fire or explosion was highly unlikely.

The safety standard requires that the warning sign must be posted "where a fire or explosion hazard exists." The only warning sign was 50 feet away on a trailer. The portable fuel storage tank can be moved at any time and it was not at the same location on the date of the hearing. *Id.* I find that the Secretary established a violation. The violation was not very serious. The fact that no employee smokes is not controlling since a truck driver or other person could smoke in the area without realizing the hazard. The operator's negligence was moderate. A penalty of $50 is appropriate.

Citation No. **7904244** alleges a violation of section 56.4200(a)(1) because firefighting equipment was not present at the portable fuel storage tank at the crushing plant. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. Section 56.4200(a)(1) provides that each mine shall have "onsite

firefighting equipment for fighting fires in their early stages." The Secretary proposes a penalty of $224 for this alleged violation.

The inspector testified that this citation involves the same fuel storage tank. He stated that he could not find any firefighting equipment in the vicinity of the fuel tank. (Tr. 122). Richards testified that he had fire extinguishers in his trailer and a water hose was about 24 feet from the fuel tank. (Tr. 455). In addition, he testified that the best way to fight a fire is to throw dirt on the fire. A shovel was located near the fuel tank and there was plenty of dirt available.

I find that the Secretary did not establish a violation. The safety standard provides that the mine operator must have "onsite firefighting equipment," but it does not require that this equipment be located at fuel storage tanks. Inspector Smith did not know what firefighting equipment the operator had at the pit. (Tr. 122). This citation is vacated.

Citation No. **7904250** alleges a violation of section 56.12004 because the outer jacket on the orange extension cord in use behind the electrical trailer was damaged, but bare copper wire was not exposed. The safety standard provides, in part, that electrical conductors "exposed to mechanical damage shall be protected." Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $224 for this alleged violation.

Smith testified that he saw an extension cord that had a broken jacket in at least one location. (Tr. 198; Ex. P-3, p. 6 bottom photo). The cord had not been spliced or repaired. The cord was plugged into an outlet. (Tr. 202). Mr. Richards testified that the cited cord was not one of his cords. (Tr. 479). The cord cited by the inspector looks very cheap and unreliable. Richards believes that one of his employees must have brought it for his radio. He believes that this cord was not being used for anything and was not energized. Richards stated that if he knew that the cord was at the pit, he would have thrown it away. (Tr. 480). Richards testified that his negligence should be low.

I find that the Secretary established a violation. The violation was not serious and the operator's negligence was moderate to low. It created a slight risk of an electric shock. A penalty of $30 is appropriate.

Citation No. **7904253** alleges a violation of section 56.18013 because a communication system was not provided at the crushing plant for employees to use in the event of an emergency. The safety standard provides, in part, that a "suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency." Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $655 for this alleged violation.

Inspector Smith testified that Lance Richards told him that he had a cellular phone but that there was no provision for a phone to be present at all times. (Tr. 230-31). Smith

determined that the violation was S&S because there were a number of serious hazards at the pit and there was no way to obtain emergency assistance. For example, if someone were to become caught in a tail pulley, he would need immediate medical assistance. (Tr. 232). Smith relied on the statements made by Lance Richards in issuing the citation. (Tr. 233). Mr. Richards testified that there was a house, which is kept unlocked, about 300 feet from the pit where there was a telephone. (Tr. 486). He also testified his truck has a CB radio in it that can be used to obtain emergency assistance. Richards further testified that there were other facilities nearby, including a state maintenance yard, that could be used for emergency communications. Finally, he stated that the scale house contained a telephone. (Tr. 487). He agrees that it is important to have a means of obtaining emergency assistance. Richards testified that the Seeley Lake paramedics are about 2.5 miles away and that they could be at the pit in about three minutes. *Id.*

I find that the Secretary established a violation. The safety standard requires that the mine operator provide an emergency communication system. Richards Construction cannot rely on off-site telephones under the control of others to comply with the standard. *See Ferndale Ready Mix & Gravel, Inc.*, 6 FMSHRC 2154, 2160 (Sept. 1984) (ALJ). The CB radio in Mr. Richards truck is not sufficient because the truck is not always at the pit. *See Robert L. Weaver*, 21 FMSHRC 370, 372 (March 1999) (ALJ). Finally, I question Richards' testimony concerning the telephone in the scale house. Mr. Richards testimony about this phone was almost an afterthought. The scale house was kept locked and the employees were apparently not provided with a key so an employee would be required to break the window to use this phone. Lance Richards made no mention of such a telephone to the inspector. Since Lance Richards did not remember this phone, the two employees at the pit may not remember it either. Given these facts, I find that Richards Construction did not comply with the safety standard.

I also find that the violation was S&S. A quick response to a medical emergency can help prevent permanent injuries and fatalities. *Id.* When an accident occurs, the lack of a communications system can contribute to a fatal accident. I find that it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature, assuming continued mining operations. The operator's negligence was moderate. A civil penalty of $200 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that 13 non-S&S citations were issued at the pit between February 4, 1997, and February 3, 1999. (Ex. P-6). Richards Construction is a very small operator with two employees in addition to Mr. Richards. MSHA's records show that the pit worked about 1860 man-hours in 1998, less than 900 man-hours in 1999, and 286 man-hours in 2000. (Ex. J-1). All of the citations and orders were abated in good faith. In the absence of evidence to the contrary, I find that the penalties assessed in this decision will not have an adverse effect on Richards Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the

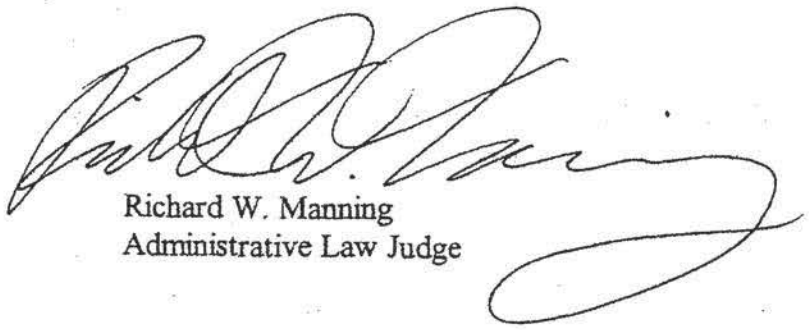
penalties set forth below are appropriate. The reduction in the penalties is based primarily on the very small size of the operator and, where noted above, the gravity and negligence criteria.

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
WEST 99-348-M		
7903871	56.1000	Vacated
WEST 2000-168-M		
7904240	56.14107(a)	$200.00
7904241	56.14107(a)	10.00
7904242	56.14107(a)	50.00
7904243	56.4101	50.00
7904244	56.4200(a)(1)	Vacated
7904246	56.14107(a)	200.00
7904247	56.14107(a)	10.00
7904248	56.14107(a)	250.00
7904249	56.14107(a)	200.00
7904250	56.12004	30.00
7904251	56.14107(a)	25.00
7904252	56.14107(a)	25.00
7904253	56.18013	200.00
WEST 2000-470-M		
7904235	56.14130(g)	500.00
7904236	56.15002	300.00
7904237	56.15003	500.00
7904238	56.14132(a)	200.00
7904239	56.9300(a)	50.00
7904245	56.12005	50.00
7904256	56.18002(a)	500.00
Total Penalty		$3,350.00

Accordingly, the citations and orders contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Richards Construction is **ORDERED TO PAY** the Secretary of Labor the sum of $3,350.00 within 90 days of the date of this decision, unless the parties agree upon a different payment schedule. Upon payment of this penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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

John Richards, John Richards Construction, Box 316, Seeley Lake, MT 59868 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 2001

FRANKIE UNDERWOOD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2001-192-DM
v.	:	SC MD 01-05
	:	
HUNT MIDWEST MINING, INC.,	:	Stamper Quarry
Respondent	:	Mine ID No. 23-01926

DECISION

Appearances: Marlin Johanning, Esq., Atchison, Kansas, on behalf of Complainant; Rachel H. Baker, Esq., Seigfreid, Bingham, Levy, Selzer & Gee, P.C., Kansas City, Missouri, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Discrimination filed by Frankie Underwood, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994), the "Act." Mr. Underwood alleges in his complaint that Hunt Midwest Mining Inc. (Hunt Midwest) violated Section 105(c)(1) of the Act when he was discharged for not reporting to work for three consecutive days.[1] Underwood maintains that he refused to report to work because it would have been hazardous to do so.

---

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

In his initial complaint filed December 7, 2000, with the Department of Labor's Mine Safety and Health Administration (MSHA), Mr. Underwood alleged as follows:

> On 11/8/00 Gary Wright told me I was relieved of duty as stripping foreman. At that point he offered me any job I wanted at the Stamper plant. I would report to work on 11/13/00, when I got there they offered me a mechanics job. I refused to do this job. I had a talk with Gary Wright and Jim Murray explained to them that I was not a mechanic & it wasn't safe for the guys running the equipment if I was to take the job. Gary then said that the only job we have take it or leave it. I was discharged for not reporting to work, because I refused to perform an unsafe act. I would like to be reinstated plus back pay for wages lost.

At hearings Underwood testified that he began working for Hunt Midwest in April of 1990 as an equipment operator. Except for a one-year period when he worked elsewhere he continued working as an equipment operator until January 2000. He was then promoted to stripping foreman, responsible for 8 to 15 employees who were removing top soil. He continued to receive the same hourly rate of pay. According to Underwood, on November 8, 2000, he was told by Gary Wright, then manager of Hunt Midwest's Western Operations, that he was being relieved of his duties as a foreman because of his lack of communication.

According to Underwood, when he reported to his new job site at the Stamper Quarry the following Monday, November 13, mine foreman Willis Pretzer, allowed him to take off and report the following day, November 14th. When Underwood reported back the next day Pretzer furnished him with a hard hat and showed him around the mine site. Pretzer wanted Underwood to start the equipment in the morning, do some welding and to help him keep the equipment running until he hired a mechanic. He purportedly also told Underwood that he would be cutting his pay to $12.00 an hour. Dissatisfied with this rate of pay, Underwood told Pretzer that he would have to talk to Jim Murray, Hunt Midwest's Vice President and General Manager, about increasing his pay.

Underwood did not begin working but went to see Murray who was then at the corporate offices at the Randolph Mine about one-half mile away. Although he was uncertain of the date, sometime later that week Underwood received a conference call from Murray and Wright during which they agreed to raise his pay to $14.00 an hour. During the course of this conversation, Underwood apparently expressed some concern about performing mechanical work and Murray or Wright reassured him that he would not be expected to overhaul or replace engines. In specific response to one of his questions, Underwood was also told that he would not be asked to repair brakes. Underwood acknowledges that at no time was he asked to perform any specific duty for which he felt he was not qualified. Based on his allegations herein it may therefore also be inferred that he was likewise not asked to perform any duty which he felt would have been unsafe. At the conclusion of his conversation with Wright (which Underwood believed occurred subsequent to the conference call) he was again offered a job at the Stamper Quarry. Wright wanted him to report to work Friday, November 17. In response, Underwood admits that he said

"okay." Underwood further admits that he thereafter never did show up for work and never returned to the quarry.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The Complainant herein asserts that he is entitled to relief under a "work refusal" theory. The Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of a perceived danger. In order to be protected however work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette,* 3 FMSHRC at 810; *Gilbert v. FMSHRC,* 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette,* 3 FMSRC at 810. Consistent with the requirement that the Complainant establish a good faith, reasonable belief in a hazard "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue." *Secretary of Labor, on behalf of Dunmire v. Northern Coal Company,* 4 FMSHRC 126, 133 (February 1982).

The first issue to be addressed in this case is whether the Complainant ever actually refused to work. In his last communication with mine management (in either a conference call with Murray and Wright or a subsequent call with Wright alone) the Complainant concedes that when he was offered work at $14.00 an hour at the Stamper Quarry and was told to report there for work, he responded "okay." There were no subsequent communications and Underwood acknowledges that he never did show up for work. He subsequently received a letter notifying him of his discharge for failing to "show up for work for three or more consecutive days without notification to [his] supervisor." (Exh. C-3). Considering Underwood's testimony alone, I find that his expression "okay" in response to management's offer of employment was indeed an acceptance of work and not a refusal to work. Under the circumstances his failure to subsequently show up for work, without any further communication, can in no way be construed as a "work refusal."

Even assuming, *arguendo*, that his failure to appear for work may be construed as a "work refusal" such a "refusal" to work cannot in any way be construed as having been the result of any hazardous condition. Underwood admittedly was never told to perform any specific job function that he deemed to be hazardous. Indeed, when Underwood apparently expressed some concerns about performing job duties as a mechanic for which he was not qualified, Murray and Wright allayed any such concerns in the conference call when they specifically stated that he would not be performing such duties as overhauling engines, replacing engines and, in response to a specific question from Underwood, not repairing brakes. If Underwood had any other concerns about hazardous conditions, he admittedly did not communicate those concerns to management. For these additional reasons I cannot find that the Complainant has met his burden to establish a protected "work refusal."

In reaching these conclusions, I have not disregarded the decision by Deputy S. Stacey, of the Missouri Division of Employment Security, holding that Mr. Underwood, was "disqualified from 11/19/00 because the Complainant failed without good cause on 11/16/00 to apply for or accept available suitable work." (Exh. No. C-2).[2]

The "reason" given by Deputy Stacey for the holding was as follows:

> The Claimant refused an offer of work because he believed he could not perform the work without training. The employer was willing to "train him on that job."

The Complainant argues that this "reason" was inconsistent with the Respondent's claims herein. It is not at all clear however that the stated "reason" was based upon any defense or claim by this Respondent or upon any evidence of record since neither the pleadings nor the complete record of such proceedings was introduced at these proceedings.[3] Under the circumstances I can give but little weight to the Complainant's argument herein.

Under all the circumstances I find that the Complainant has failed to sustain his burden of proving a violation of Section 105(c)(1) of the Act and his Complaint must accordingly be dismissed.

---

[2] The parties agree that this decision is now before the Missouri Court of Appeals upon a request for reconsideration. Accordingly the deputy's decision is not yet final.

[3] The Complainant was granted additional time following hearings to produce such a record but failed to do so.

ORDER

Discrimination Proceeding Docket No. CENT 2001-192-DM is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Frankie Underwood, 819 Kiowa, Leavenworth, KS 66048

Marlin Johanning, Esq., 5th & Commercial, Southwest, 500 Commercial Street, Atchison, KS 66002

Rachel H. Baker, Esq., John M. Neyens, Esq., Seigfreid, Bingham, Levy, Selzer & Gee, P.C., 2800 Commerce Tower, 911 Main Street, Kansas City, MO 64105

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-65
Petitioner	:	A. C. No. 15-17587-03571
v.	:	
	:	
OHIO COUNTY COAL COMPANY,	:	
Respondent	:	Freedom Mine

DECISION

Appearances: Arthur J. Parks, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Madisonville, Kentucky, on behalf of Petitioner;
Flem Gordon, Esq., Gordon & Gordon, P.S.C., Madisonville, Kentucky, on behalf of 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 (1994) *et seq.*, the "Act," charging the Ohio County Coal Company (Ohio County) with six violations of mandatory standards and proposing civil penalties of $330.00 for those violations.

At hearings the Secretary vacated two citations, Citations No. 7644854 and 7644856, and Ohio County agreed to pay the proposed penalty of $55.00 in settlement of Citation No. 7644863. I have considered the representations and documentation submitted with the respect to the latter citation and I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision. The general issue before me with respect to the remaining three citations is whether Ohio County violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7644862 alleges a violation of the standard at 30 C.F.R. § 75.342(a)(4) and charges as follows:

> The methane monitor installed on the left side Joy miner, Company No. M-1 was not maintained in proper operating condition. The monitor would only go up to 2.2% when checked with 2.5% methane.

The cited standard, 30 C.F.R. § 75.342(a)(4), provides in relevant part that "methane monitors shall be maintained in permissible and proper operating condition." Archie Colburn, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified that on August 1, 2000, he was performing a regular inspection of the Freedom Mine accompanied by another MSHA employee and James Nichols, Ohio County's Safety Director. In testing the methane monitor installed on the left side of the Joy miner with a 2.5% methane sample, the monitor registered only 2.2%. The test was performed at least twice and Ohio County acknowledges that indeed, the methane monitor registered only 2.2% when tested with a known sample of 2.5% methane. Under the circumstances the violation is proven as charged.

The Secretary alleges that the violation was the result of moderate operator negligence. It is noted in this regard that although the cited standard requires the calibration of methane monitors at least once every 31 days the record herein shows that Ohio County was recalibrating its methane monitors on almost a weekly basis. The most recent testing on the monitor at issue was performed only four days before the violation herein. Nichols acknowledged that the monitors must be checked regularly because they are not reliable. Under the circumstances I accept the Secretary's assessment of moderate negligence.

Inspector Colburn found that "injury or illness" was "unlikely" and that any such "injury or illness" would not reasonably be expected to involve any lost workdays. These findings of low gravity by the Secretary are not disputed and are accepted for purposes of assessing a civil penalty.

Citation No. 7644864 was issued by Inspector Colburn on the following day, August 2, 2000, and charges as follows:

> The approved ventilation, methane and dust control plan in effect at this time was not being complied with on the OO1-O MMU. The required 5,000 cfm was not present behind the line curtain in the No. 3 room where the miner was loading coal. Only 3,910 cfm could be measured.

Inspector Colburn testified that, as he approached the No. 3 room where the continuous miner was loading coal, the miner operator suddenly shouted to shut down the miner and the miner was shut down. Colburn, intending to take air readings, requested that brattice curtains not be hung before he performed his testing. In spite of this request the miner operator rehung the brattice curtains that had been lying on the mine floor. Nichols also began hanging brattice curtains. Colburn nevertheless took his air readings after these additional curtains had been hung and found only 3910 cfm behind the line curtain in the No. 3 room where the miner had been loading coal.

The cited standard, 30 C.F.R. § 75.370(a)(1), requires that the mine operator follow its approved ventilation methane and dust control plan, "Plan." See *Zeigler Coal Co. V. Kleppe,* 536 F.2d 398 (D.C. Cir. 1976). The Plan then in effect provided that "in entries or rooms, there shall be a minimum of 5,000 cfm or [*sic*] air reaching each working face where coal is being mined by continuous mining machine" (Gov't Exh. No. 3, Pg. 3, Par. 2). Respondent argues, based on this portion of the Plan, that there was no violation because at the time Inspector Colburn took his air measurement the continuous miner had shut down and was not mining coal.

The approved plan, however, also provides as follows:

> Before this cut is started, a measurement of the volume of air passing by the proposed cut shall be made. The volume of air shall be 5,000 cfm or greater. After the cut has progressed to 20 feet and the line brattice has been installed, the volume of air at the inby end of the line brattice shall be maintained to at least 5,000 cfm. While the scrubber is in operation, 6,000 cfm shall be maintained at the end of the line brattice.

Since it is not disputed that the cut at issue had progressed to 20 feet and line brattice had been installed, it appears from the above language that the volume of air at the inby end of the line brattice must be maintained to at least 5,000 cfm whether or not the continuous miner is in operation. Accordingly, when Inspector Colburn obtained a reading of 3,910 cfm at that location, there was a violation of those Plan provisions. It may also reasonably be inferred, since Colburn obtained his air reading of only 3,910 cfm after the brattice had been reinstalled, that coal was being mined with less than 5,000 cfm just before the miner was shut down and with the brattice lying on the mine floor. A violation of the cited standard was accordingly also proven under this alternative theory.

Inspector Colburn found that the operator was only moderately negligent because he assumed that before the continuous miner had begun operating there was at least 5,000 cfm as required by the Plan. In this regard I note the testimony of the continuous miner operator that one of the brattice curtains only moments earlier had been torn down by a ram car. He explained that that was the reason he called for the shut down. It is also noted however that not only was that curtain rehung but another separate curtain was also hung to improve ventilation and Inspector Colburn was nevertheless able to obtain only 3,910 cfm.

Colburn also found with respect to the violation that "injury or illness" was "unlikely" and that if an "injury or illness" occurred it would not involve lost work days. These findings of low gravity are not disputed and are accepted for purposes of assessing a civil penalty.

Citation No. 7644873 alleges a violation of the standard at 30 C.F.R. § 75.523-3(b)(1) and charges that "the automatic emergency parking brake installed on the SNS 270 Tractor, Company No. S-7, would not set up the brakes immediately when tested." The cited standard,

30 C.F.R. § 75.523-3(b)(1), provides that "automatic emergency-parking brakes shall - (1) be activated immediately by the emergency deenergization device required by 30 C.F.R. §§ 75.523-1 and 75.523-2." Inspector Colburn testified that after at least three tests it was determined that once the panic bar (emergency deenergization device) was activated it required three seconds to "set up." However after adjustments were made to abate the citation it required only about one second to engage the brakes.

The maintenance coordinator for Ohio County, Barry Nelson, testified that they had intentionally delayed the brake activation mechanism to avoid injuries to persons from inadvertently hitting the panic bar. This delay was accomplished by widening the gap before the piston would engage the brake mechanism. Particularly in light of the fact that the operator was able to adjust the parking brake mechanism to activate within about one second, I conclude that a three second activation would not be "immediate" within the meaning of the cited standard. Accordingly, I find that the violation is proven as charged.

I accept the Secretary's findings of moderate negligence. The violation was caused by the coordinator's intentional adjustment. The inspector's findings that "injury or illness" was "unlikely" and that any such injury or illness would not involve lost work days is not disputed and is accepted as a finding of low gravity for purposes of assessing a civil penalty.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the affect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The gravity and negligence relating to each violation have previously been discussed. Respondent has a significant history of violations as shown by Gov't Exh. No. 5, however, only eight of those violations were designated as "significant and substantial." It has been stipulated that Ohio County produced 684,797 tons of coal in the year preceding the proposed assessment, thereby placing the mine in a moderately large category. It has also been stipulated that the penalties proposed by the Secretary are appropriate to the size of the operator's business. It has been further stipulated that the penalties would not affect the operator's ability to continue in business and that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

ORDER

Citations No. 7644854 and 7644856 are vacated. Citations No. 7644862, 7644863, 7644864 and 7644873 are hereby affirmed and the Ohio County Coal Company is hereby directed to pay the same $55.00 penalty as proposed by the Secretary for each such citation within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Arthur J. Parks, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Adm. (MSHA), 100 YMCA Drive, Madisonville, KY 42431

Flem Gordon, Esq., Gordon & Gordon, P.S.C., 1822 North Main Street, P.O. Box 1305, Madisonville, KY 42431-1305

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 2001

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of **WILLIAM C. ALLEN**	:	Docket No. CENT 2001-366-D
Complainant	:	SC MD 01-11
v.	:	
PEA RIDGE IRON ORE COMPANY, INC.,	:	
Respondent	:	
	:	Mine: Pea Ridge Iron Ore Co.
	:	Mine ID 23-00454

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon application, filed by the Secretary on August 2, 2001, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Pea Ridge Iron Ore Company, Inc. ("Pea Ridge") to temporarily reinstate William Allen to his former position as a long hole drill operator/blaster at its mine, or to a similar position at the same rate of pay, with the same or equivalent duties. Section 105(c)(2) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The application is supported by declaration of Ronald M. Mesa, Mine Safety and Health Administration ("MSHA") special investigator assigned to the Dallas, Texas District Office, and a copy of the discrimination complaint filed by Allen with MSHA on February 27, 2001.[1] The application alleges that Allen was terminated from employment by Pea Ridge because of safety concerns Allen had raised with MSHA inspectors during an escapeways inspection of the mine.

---

[1]Allen's Discrimination Complaint names Thomas Gallagher, director of personnel, as the management official responsible for the adverse action, and alleges that Allen was terminated on January 29, 2001, for refusing to submit to drug testing without benefit of legal counsel, on the heels of having reported, "among other things, the poor condition of the middle incline between 2475 level and 2370 level." Allen's Complaint also alleges that mine operations supervisor Jeff Sumpter had observed Allen's conversation with the MSHA inspectors on January 24, 2001.

Pea Ridge elected not to request a hearing and on August 27, 2001, filed its Opposition to the application, with declarations of Pea Ridge employees Thomas Gallagher (with attachments), Jeff Sumpter, Jim Reed, Jr., and Dennis Lafferty, therein denying that Pea Ridge had discriminated against Allen and asserting that Allen was discharged for violating the company's drug policy. The Secretary filed her Response, with supplemental declaration of Special Investigator Mesa, on August 31, 2001. Pea Ridge filed its Reply on September 10, 2001.

Procedural Framework

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

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court explained the standard as follows:

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

Ruling

The Mine Act accords to miners protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. §815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act and, that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Coal Company,* 3 FMSHRC 803, 817-18 (April 1981). In a temporary reinstatement proceeding, however, an applicant is not required to prove a *prima facie* case of discrimination, as is the ultimate burden in prevailing on the merits of the complaint, although it is useful to consider the elements of a *prima facie* case in determining whether the non-frivolous test has been satisfied.

The Secretary's allegations are based, in part, on Investigator Mesa's investigation of Allen's discrimination claims. In Mesa's Declaration of July 30, 2001, he made the following findings upon which he based his conclusion that Pea Ridge had discriminated against Allen:

> 1) on or about January 24, 2001, Mr. Allen spoke with MSHA inspectors at the mine conducting an escape ways inspection and told them that particular parts of the mine were not safe and that he had given up reporting safety concerns to management as his concerns were never addressed;
>
> 2) on or about January 29, 2001, Allen's first day back to work after speaking with the MSHA inspectors, Pea Ridge asked Mr. Allen to submit to a drug test. When Mr. Allen refused to submit, because he was not able to consult with an attorney on that day, Pea Ridge terminated Mr. Allen; and
>
> 3) this was Pea Ridge's first instance of requiring a drug test once an employee passed a pre-employment drug screening.

By supplemental declaration, Mesa provided additional information respecting his investigation by summarizing interviews with several Pea Ridge employees. Mesa referenced an interview with hourly "employee A," who reported to Mesa a general rumor in the mine that superintendent Larry Tucker believed that Allen had pointed MSHA inspectors to some of the underground violations that had resulted in issuance of citations and orders during the escapeways inspection. This rumor, Mesa stated, was corroborated by "Employee B," who told Mesa that Pea Ridge employees were very upset by the citations it had received during the regular and escapeways inspections. According to Mesa, both employees told him that they were unaware of drug usage on the job by Allen. Mesa stated that "Employee C" reported having seen Allen talking frequently with MSHA inspector Rodney Rice during the regular inspection which took place between November 2000 and January 2001, prior to the escapeways inspection

between January and February 2001. "Employee D," Mesa asserted, told the investigator that he had repeatedly asked Pea Ridge for a written copy of its drug policy, which he had never received, and that he had never known Allen to use drugs. Mesa states that "Employee E" told him that Pea Ridge would sometimes request that he report to work while he was off and drinking alcohol, despite the fact that he would make his supervisor aware that he had been drinking. Furthermore, Mesa asserts that Pea Ridge management officials Thomas Gallagher (employee relations director), Larry Tucker (mine superintendent), and James Sumpter (mine operations supervisor) refused his requests for interviews. Hourly employee Jim Reed refused as well, but did speak to the investigator informally. According to Mesa, Reed stated that he had never seen nor heard of Allen using marijuana and that he, Reed, had not made any allegation of Allen using drugs to Gallagher. In summary, based on these interviews, Mesa found that Allen had a reputation of reporting safety concerns, and that there was a rumor that Allen was responsible for some of the citations and orders issued to Pea Ridge by MSHA . In addition, he also found that, while Pea Ridge had discussed implementing its drug policy during several employee meetings, there was no written policy and the employees did not understand what the policy was with any certainty. Mesa concluded, therefore, that Allen's complaint of discriminatory discharge was not frivolously brought.

Pea Ridge's Opposition, supported by declarations of Gallagher, Sumpter, Reed and Lafferty, seeks to establish that Allen has only shown temporal proximity between his protected activity and his termination, which is insufficient to establish that his complaint was not frivolously brought. Pea Ridge asserts that in regularly scheduled monthly meetings from September through December 2000, employees, including Allen, were made aware of the company's intention to respond on an "incident or accident" basis to information that caused a reasonable suspicion of drug usage on the part of an employee, by requiring submission of the suspect to a drug test. According to Pea Ridge, on January 25, 2001, two non-supervisory employees, independently provided Gallagher with information that caused him to suspect employees Allen and Roger Sohn of reporting to work under the influence of drugs. Gallagher attested to Jim Reed (mechanic lead man) having reported his belief that Sohn came to work "doped up" and rumors that Allen also worked under the influence of drugs. Gallagher also attested to Dennis Lafferty (production lead man) reporting drug problems underground and alluding to Allen's work area as smelling of marijuana. It is this information, Pea Ridge asserts, that motivated Gallagher to require Allen and Sohn to be drug tested, and the sole reason for both terminations was their refusal, despite notice that the consequence of refusal was termination. Pea Ridge also maintained that employees regularly and routinely conversed with MSHA inspectors and that, prior to Allen's termination, neither Jeff Sumpter nor any other management official had reported Allen's alleged conversations with MSHA inspectors during the January 24, 2001, escapeways inspection or during any prior inspections.

Because Pea Ridge has waived its right to a hearing on the Secretary's application, while I have considered Pea Ridge's Opposition, my review must accept as true the events, as alleged by the Secretary. Indeed, what is in dispute is Pea Ridge's motivation for terminating Allen, rather than the facts giving rise to the controversy. Allen has not only shown that he engaged in protected activity during the escapeways inspection, but has also raised the possibility that he had a reputation of complaining to MSHA inspectors during previous inspections. Allen has also

shown that he suffered adverse action, and he has put into question his termination by challenging the legitimacy of the drug test required by Pea Ridge. Pea Ridge, by establishing that management was aware that miners routinely conversed with MSHA inspectors, has put into question the actual extent of Gallagher's knowledge and, while Gallagher was the deciding official in Allen's termination, whether other management officials had any input in that decision. While Pea Ridge's termination of Roger Sohn is relevant to a construction of Pea Ridge's motivation in terminating Allen, the circumstances surrounding Sohn's termination are distinguishable from Allen's because there is no allegation that Sohn engaged in protected activity. Furthermore, the evidence of exactly who reported Allen's alleged on-the-job drug usage and whether it was reasonable to require him to take a drug test is in dispute.

The temporal proximity between the protected activity and Allen's termination, in combination with circumstantial evidence of management's awareness of miners' candid conversations with MSHA inspectors, rumor that management believed Allen to have tipped off MSHA inspectors during a prior inspection, and complaints about Allen's on-the-job drug usage cast in shadow, are sufficient to meet the non-frivolous test. While, on the merits of the complaint, the Secretary bears the ultimate burden of proving pretext by a preponderance of the evidence, the allegations, as set forth in the Secretary's application, are not clearly lacking in merit and, therefore, satisfy the lesser threshold in this proceeding, of being not frivolously brought.

ORDER

For the reasons set forth above, the Application for Temporary Reinstatement is **GRANTED**. It is **ORDERED** that Pea Ridge Ore Company, Inc., **REINSTATE** William C. Allen to the position that he held immediately prior to his termination from employment on January 29, 2001, at the same rate of pay and benefits, or to a similar position at the same rate of pay and benefits, with the same or equivalent duties, effective August 30, 2001.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Lydia A. Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, 1099 18th Street, Suite 2150, Denver, CO 80202

Michael P. Burke, One Metropolitan Square, 221 North Broadway, Suite 3600, St. Louis, MO 63102

nt

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

September 28, 2001

UNITED METRO MATERIALS,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2000-35-RM
v.	:	Citation No. 7923659; 9/21/99
	:	
SECRETARY OF LABOR	:	Docket No. WEST 2000-36-RM
MINE SAFETY AND HEALTH	:	Citation No. 4073211; 8/3/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Plant 48
	:	Mine ID 02-02116
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-180-M
Petitioner	:	A.C. No. 02-02116-05528
	:	
v.	:	
	:	Plant 48
UNITED METRO MATERIALS,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Cetti

The above-captioned Contest Proceedings are consolidated with the corresponding Civil Penalty Proceeding Docket WEST 2001-180-M.

On March 20, 2001, Respondent, United Metro Materials (United Metro), filed a Motion to Dismiss the above-captioned section 110(a) civil penalty proceeding alleging an unreasonable delay by MSHA in proposing civil penalties for the two violations at issue in this case. In addition, United Metro states that it was unduly prejudiced by the delay between the issuance of the citations and the civil penalty proposal.

The material facts are not in dispute. On August 9, 1999, a laborer working at Plant 48 located in Final County, Arizona, operated by United Metro, was fatally injured when he was caught in a conveyor belt return roller while attempting to clean the roller with a hoe.

Two citations are at issue. Citation No. 7923659 charges a violation of 30 C.F.R. § 56.14107(a) and states that the return roller was one of two return rollers about six feet above the ground level which was not guarded. This citation was modified from a section 104(d)(1) citation to a section 104(a) citation by the Secretary on November 10, 1999. At the same time two other citations that are not presently involved in this case were vacated. The second citation at issue is Citation No. 7923660 which arises out of the same accident charging a failure to shutoff the conveyor prior to cleaning the rollers. The proposed penalty for this citation is $35,000.00 and the proposed penalty for Citation No. 7923659 is $40,000.00. Both citations were promptly abated by United Metro. All employees were instructed and specifically prohibited from manually cleaning conveyor components while conveyors were in motion.

The undisputed material facts are as follows:

1. On August 9, 1999, the Mine Safety and Health Administration ("MSHA") initiated an investigation of a fatal accident at United Metro's facility Plant 48 located in Final County, Arizona.

2. During the investigation, MSHA interviewed about eleven employees and requested fewer than a hundred pages of documents from United Metro.

3. On September 21, 1999, MSHA issued four citations to United Metro (Citation Nos. 7923659, 7923660, 7923661, 7923663). Two of the citations (Nos. 7923659 and 7923661) were issued under section 104(d)(1) of the Mine Act; the other two citations (Nos. 7923660 and 7923663) were issued under section 104(a).

4. On September 24, 1999, three days after issuance of the citations, MSHA issued its final investigation report.

5. On October 20, 1999, United Metro filed its Notice of Contest of all four citations. The Secretary of Labor ("Secretary") filed her Answer on October 28, 1999. United Metro's contests of the four citations were assigned to Administrative Law Judge August F. Cetti.

6. On November 10, 1999, following a Safety and Health Conference with MSHA's District Manager pursuant to 30 C.F.R. § 100.6, MSHA vacated two of the citations (Nos. 7923661 and 7923663) and modified the remaining section 104(d)(1) citation (Citation No. 7923659) to a section 104(a) citations. The other section 104(a) citation (Citation No. 7923660) was not modified.

7. On November 19, 1999, Judge Cetti dismissed the two proceedings involving the citations vacated by the Secretary (Docket Nos. WEST 2000-37-RM and WEST 2000-38-RM), and consolidated and stayed the remaining two proceedings (Docket Nos. WEST 2000-35-RM and WEST 2000-36-RM) pending the filing of the corresponding penalty case.

8. On December 19, 2000, MSHA issued its Proposed Assessment of Penalties for the two remaining section 104(a) citations. The Proposed Assessment was issued over 16 months after MSHA began its investigation and about 14 months after its citations and final investigation report were issued.

9. On January 11, 2001, United Metro filed its Notice of Contest of the Proposed Assessments.

Discussion

Looking first to the Mine Act for guidance in this matter, section 105(a)[1] of the Act requires the Secretary to notify the operator of the civil penalty proposed within a reasonable time after the termination of the inspection or investigation that resulted in the issuance of the citation. In this case, the citations were issued on September 21, 1999, and three days later, September 24th, MSHA issued the final investigation report. On December 19, 2000 MSHA notified the operator of the civil penalty proposed. [Undisputed material facts No. 4, 5, and 8].

Black's Law Dictionary, 5th Ed., defines "reasonable" as follows:

> Reasonable. Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

I find the first line of the above definition particularly fair, proper, just, and suitable under the circumstances to be most appropriate definitions for "reasonable" as used in section 105(a) of the Act. I further find that under the undisputed facts of this case, the 15 months delay exceeded a proper or a suitable length of time for notifying the operator of the civil penalty proposed. I,

---

[1] Sec. 105. (a) If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

therefore, find the 15-month period prior to notification of the operator of the proposed penalty is not within a reasonable time within the meaning of section 105(a) of the Act and as applied to the undisputed material facts and the vague reasons given by the Secretary in her opposition to the Motion to Dismiss.

Although the accident was tragic, it is apparent from the record that this was a straightforward uncomplicated case requiring the assessment of penalties for only two citations; one alleging unguarded equipment, and the other alleging that the same equipment was not shutdown before cleaning.

The last sentence of section 110(i), 30 U.S.C. § 820(i), states: "In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact" concerning the section 110(i) penalty factors.

The Solicitor's explanation for the delay is general and vague. The specific circumstances which caused the delay are not addressed.

As pointed out by United Metro there is no allegation that the investigation was prolonged or complicated. There is no allegation of a sudden rise in the number of special penalty cases nor any complications with respect to the investigation. The case involves the assessment of penalties for only two straightforward citations: one alleging unguarded equipment and the other alleging that the same equipment was not shut down before cleaning.

MSHA relies on its Program Policy Manual interpretation of the term "reasonable time" as a period of time that is less than 18 months and does not state the specific causes for the delay in this case. Citing *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1663 (2000).[2] United Metro contends that as a matter of law, MSHA's 18 months' "interpretation" in its Program Manual is not entitled to deference because it was not made through formal adjudication or notice and comment rulemaking.

MSHA's current guidance document Program Policy Letter No. P99-III-5 (August 16, 1999) further states that, "absent unusual circumstances," even cases involving "a serious

---

[2] The Supreme Court stated (120 S. Ct. At 1663):

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference.

accident, fatality, or other special circumstance should be assessed within 180 days [i.e., six months] of the accident . . ." In this case MSHA exceeded its six-month guideline by nine months.

In *Rhone-Poulenc*, 15 FMSHRC 2089, 2093, Oct. 1993 the Commission reaffirmed its ruling in *Salt Lake* and *Medicine Bow* that "the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay" and stated "if the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal."

I find that the Secretary in this case failed to demonstrate adequate cause for the substantial delay in notifying the operator the proposed penalty.

In view of the foregoing and the principals, arguments, and authorities cited in United Metro's Motion to Dismiss and its Reply to Secretary's Opposition to Dismiss, I enter the following Order of Dismissal.

ORDER

The above-captioned Civil Penalty Proceeding and the corresponding Contest Proceedings are **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

James A. Lastowka, Esq., McDermott, Will & Emery, 600 13th Street, NW, Washington, D.C. 20005-3096

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

/sh

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 2001 492-135/52453