**OCTOBER 2000**

COMMISSION DECISIONS AND ORDERS



ADMINISTRATIVE LAW JUDGE DECISIONS



ADMINISTRATIVE LAW JUDGE ORDERS

## OCTOBER 2000

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

Secretary of Labor, MSHA v. Alan Lee Good, an individual d/b/a Good Construction, Docket Nos. WEST 2000-44-M, WEST 2000-149-M. (Judge Melick, September 13, 2000)

Secretary of Labor, MSHA v. Douglas Rushford Trucking, Docket No. YORK 99-39-M. (Judge Melick, September 22, 2000)

Secretary of Labor, MSHA v. Georges Colliers, Inc., Docket Nos. CENT 2000-65, CENT 2000-80. (Judge Melick, September 20, 2000)

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

# COMMISSION DECISIONS AND ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006
October 11, 2000

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. LAKE 2000-64-M |
| | : | A.C. No. 33-00168-05520 |
| SHELLY MATERIALS, INCORPORATED | : | |

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

## ORDER

BY: Jordan, Chairman; Riley 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 August 7, 2000, Chief Administrative Law Judge David Barbour issued an Order of Default to Shelly Materials, Inc. ("Shelly") for failing to answer the petition for assessment of penalties filed by the Secretary of Labor on May 18, 2000, or the judge's Order to Respondent to Show Cause issued on June 28, 2000. The judge assessed a civil penalty of $7,000, proposed by the Secretary.

On August 21, 2000, the Commission received a motion to reopen from Shelly, along with an answer and its motion to approve settlement. Shelly contends that the case file for this matter did not reach its counsel until after the default order was received. Mot. Shelly asserts that the Secretary does not oppose its motion to reopen and that the parties have reached a settlement in this case. *Id.* In the answer, Shelly admits the allegations in the citation at issue in this proceeding and contends that the violation has been abated. Answer. In the motion to approve settlement, Shelly alleges that the parties have reached a settlement and agreed to reduce the penalty to $4,300. Mot. to Approve Settlement. Shelly requests the Commission to reopen this matter. Mot.

On August 24, 2000, the Secretary filed a response to Shelly's motions, indicating that she does not oppose Shelly's motion to reopen. S. Letter dated Aug. 24, 2000. The Secretary clarifies that the parties have not reached a settlement, but that trial counsel for the Secretary has stated to Shelly's counsel that, if the case is reopened, the Secretary will be willing to discuss settlement. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on August 7, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). On September 18, 2000, the Commission issued a direction for review, construing Shelly's motion to reopen as a petition for discretionary review. On September 26, 2000, an order was issued staying briefing in this matter pending the Commission's consideration of Shelly's request for relief.

On the basis of the present record, we are unable to evaluate the merits of Shelly's position and would remand the matter for assignment to a judge to determine whether relief from default is warranted.[1] *See Fielding Hydroseeding*, 16 FMSHRC 2399, 2400 (Dec. 1994) (remanding to judge where operator failed to answer Secretary's penalty proposal due to a change in address and misunderstanding in mail pickup); *Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990) (remanding to judge where operator mistakenly believed that it timely filed answer). Shelly has failed to provide any explanation for the asserted delay in the receipt of the case file in this matter by its counsel or to offer any affidavits to support its position. *Cf. Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 18-19 (Jan. 2000) (granting operator's request to reopen where operator claimed it failed to timely file hearing request due to inexplicable delays in postal service and provided an affidavit and copy of signed and dated green card to support its allegations). Accordingly, in the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In view of the fact that the Secretary does not oppose Shelly's motion to reopen this matter for a hearing on the merits, Commissioner Verheggen concludes that the motion should be granted.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 2000

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. WEVA 2000-104-M |
| | : | A.C. No. 46-01563-05558 |
| v. | : | |
| MARTIN MARIETTA AGGREGATES | : | |

BEFORE: Jordan, Chairman; Riley, Verheggen, 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, 2000, the Commission received from Martin Marietta Aggregates ("Martin Marietta") 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 the motion for relief filed by Martin Marietta.

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, Martin Marietta asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7728476 was due to a processing error made by its accounts payable department. Mot. at 2. The penalty assessment in question was issued to Martin Marietta, along with three other penalty assessments for other violations. *Id.* at 1. Martin Marietta alleges that while it intended to pay the penalty assessments for the three other violations, it intended to contest the penalty assessment for Citation No. 7728476. *Id.* Martin Marietta states that its accounts payable department apparently sent payment of the three single

penalty assessments,[1] along with a hearing request to contest the penalty assessment for Citation No. 7728476, to MSHA's regional office in Pittsburgh, Pennsylvania, rather than separately filing the request with MSHA's Assessment Office. *Id.* at 1-2. Martin Marietta claims that it learned of this misfiling when George Hospodar, Martin Marietta's Safety Engineer, called MSHA's Assessment Office to check on the status of the penalty proceeding and was informed that MSHA did not receive its hearing request and had issued a letter demanding payment. *Id.* at 2; Ex. A. Martin Marietta asks the Commission to reopen the final order pursuant to Rule 60(b)(1) and allow the contest to proceed to hearing. Mot. at 2-3. Attached to its request is a notarized statement from Darrell Casto. Ex. A.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The record indicates that Martin Marietta intended to contest the proposed penalty, but that it failed to do so because it mailed its green card to the wrong MSHA office. The notarized statement attached to Martin Marietta's request appears to be sufficiently reliable and supports Martin Marietta's allegations. *See* Ex. A. In the circumstances presented here, Martin Marietta's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 19 (Jan. 2000) (granting operator's request for relief where operator provided reliable documentation to support its allegation that it timely mailed hearing request); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996) (granting operator's motion to reopen when operator had reasonable basis for believing that it timely mailed its hearing request and when any late filing was due to unique mail service at mine).

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[1] In its motion, Martin Marietta claims that it submitted a check for $427 for payment of Citation Nos. 7728473, 7728474, and 7728475 under A.C. No. 46-01563-05558. Mot. at 1-2. However, the three penalties were assessed respectively for $224, $161, and $55, totaling $440. *Id.* at 1. In Darrell Casto's statement, he explains that Martin Marietta's accounts payable department submitted a check for $867 for payment of penalties totaling $440 in A.C. No. 46-01563-05558, and $427 for payment of penalties in A.C. No. 46-00001-05560, which is an unrelated matter. Ex. A.

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation No. 7728476, 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.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 2000

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. WEVA 2000-94 A.C. No. 46-01318-04436 |
| v. | : | |
| CONSOLIDATION COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Riley, and Verheggen, Commissioners[1]

ORDER

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"). On September 5, 2000, Chief Administrative Law Judge David Barbour issued an Order of Dismissal to Consolidation Coal Company ("Consolidation") dismissing this civil penalty proceeding for payment of the proposed penalty. On October 3, 2000, the Commission received from Consolidation a request to vacate the judge's dismissal order. The Secretary of Labor does not oppose the motion for relief filed by Consolidation.

In its motion, Consolidation asserts that it timely submitted a request for a hearing ("green card") to contest the proposed penalty associated with Order No. 7087724, but that it inadvertently paid the assessment along with six other penalties it intended to pay, which were issued by the Department of Labor's Mine Safety and Health Administration at the same time.

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[1] Commissioner Beatty recused himself in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Mot. at 1. Consolidation contends that on August 9, 2000, the day after it had sent payment in the amount of $3,900 for the proposed assessment, it called MSHA's Assessment Office to advise them that it had mistakenly paid the penalty and that it still intended to contest it. *Id.* Consolidation states that MSHA informed it that the payment would be held pending settlement or adjudication. *Id.* Consolidation contends that on September 11, 2000, it received the Secretary's Petition for Assessment of Penalty in this case, but was subsequently informed by counsel for the Secretary that on September 5, 2000, Judge Barbour had entered an order dismissing this case in light of payment. *Id.* at 2. Consolidation offers that the documents must have crossed in the mail, creating confusion. *Id.* Consolidation requests that the Commission reopen this proceeding. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on September 5, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Consolidation's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

It appears from the record that on August 4, 2000, the Commission received Consolidation's timely-filed request for a hearing to contest the proposed penalty assessment at issue in this civil penalty proceeding. On August 30, 2000, MSHA sent to the Commission via facsimile a confirmation of its receipt of Consolidation's payment in this matter. Consequently, on September 1, 2000, Chief Judge Barbour issued an order assigning this case to himself, and on September 5, issued an order of dismissal. After Chief Judge Barbour's dismissal order, the Secretary of Labor filed a Petition for Assessment of Penalty in this case on September 11, 2000.

The record indicates that Consolidation contested the proposed assessment associated with Order No. 7087724 by timely returning the green card, but subsequently inadvertently paid the assessment. The record evidence sufficiently supports Consolidation's allegations of inadvertent payment. In similar circumstances, the Commission previously has granted an operator's unopposed request for relief where the operator inadvertently paid a penalty assessment. *See Cyprus Emerald Resources Corp.*, 21 FMSHRC 592 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit); *see also Stillwater Mining Co.*, 19 FMSHRC 1021 (June 1997) (granting operator's motion to reopen where operator inadvertently paid assessment because Secretary failed to send assessment to its counsel of record).

For the foregoing reasons, we vacate the judge's dismissal order and remand this matter to the judge for further proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311, 313 (Mar. 1996). The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2000

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | |
| v. | : | Docket No. CENT 2000-473-M<br>A.C. No. 13-00095-05551 |
| LEHIGH PORTLAND CEMENT COMPANY | : | |

BEFORE: Jordan, Chairman; Riley, Verheggen, 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 September 14, 2000, the Commission received from Lehigh Portland Cement Company ("Lehigh") 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 Lehigh's motion 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 the request, Lehigh, which is represented by counsel, asserts that a series of internal mail delivery problems delayed the receipt of the proposed penalty assessment by the appropriate personnel at Lehigh. Memorandum in Support of Mot. ("Memo.") at 1. Specifically, Lehigh explains that its clerk/typist, who had been working at Lehigh for five months, received the proposed penalty assessment but failed to follow internal procedures for handling certified mail, including date-stamping the assessment and forwarding it to Lehigh personnel who are responsible

for health and safety at the plant. *Id.* at 2. It contends that the mail was sent through the regular mail distribution system, where it was delivered to the plant manager while he was out of the office. *Id.* at 2-3. Lehigh asserts that Gail Meyer, the Lehigh employee responsible for contesting proposed assessments, did not receive the proposed penalty until the plant manager returned to the plant on May 12, 2000. *Id.* at 3. It explains that, Ms. Meyer mailed the green card contesting three of the nine assessments on June 12, 2000 based on her mistaken belief that the penalty assessment had been received by Lehigh on May 11 or 12. *Id.* Lehigh contends that upon learning of the error, it corrected deficiencies in its internal mail distribution system. *Id.* Lehigh argues that its delay of five days in mailing the green card did not create undue delay or prejudice the Secretary, and notes that it was unrepresented at that stage. *Id.* at 5-6. It requests that the Commission reopen the final order. *Id.* at 6. Attached to its request is the declaration of Gail Meyer. Attach.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *See, e.g., Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *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 Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). 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 National Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The record indicates that Lehigh intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to internal mismanagement of its mail. The declaration attached to Lehigh's request appears to be sufficiently reliable and supports Lehigh's allegations. In the circumstances presented here, Lehigh's late filing of a hearing request may be considered inadvertence or mistake within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 18 (Jan. 2000) (reopening final order where operator attached sufficiently reliable documents to support its allegations that it failed to timely file hearing request due to inexplicable mail delays); *Martin Marietta Aggregates*, 22 FMSHRC __, slip op. at 3, No. WEVA 2000-104-M (Oct. 11, 2000) (granting the operator's request to reopen where the operator alleged that its accounts payable department made a processing error when it inadvertently sent a hearing request along with payment for other penalties it did not intend to contest to MSHA's regional office).

Accordingly, in the interest of justice, we grant Lehigh's request for relief, reopen this 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.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2000

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | CIVIL PENALTY PROCEEDING |
| v. | : | Docket No. CENT 2000-447-M<br>A.C. No. 23-02128-05506 |
| LEO JOURNAGAN CONSTRUCTION<br>COMPANY, INC. | : | |

BEFORE: Jordan, Chairman; Riley, Verheggen, 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 28, 2000, the Commission received from Leo Journagan Construction Company ("Journagan") 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 the motion for relief filed by Journagan.

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,[1] Journagan contends that its failure to timely file a hearing request to contest the proposed penalty was due to its misplacement of the proposed assessment notification. Mot. at 2, 4. Journagan asserts that it received a substantial amount of correspondence, pleadings, and notices from MSHA around the time it received the subject proposed penalty assessment. *Id.* at 1, 4. It submits that it timely contested other proposed assessments it received then. The company mistakenly believed that it had also contested the penalty assessment at issue, and the form was filed with other documents pertaining to matters where the penalty had already been contested. Journagan explains that the green card had apparently been separated from the notice, and if it had been attached, it would have prompted the company to contest the citation. *Id.* at 2, 4. Journagan asserts that it promptly mailed the hearing request when it subsequently discovered that the request had not been filed, but that the thirty-day deadline for submission had already passed. *Id.* at 2. It contends that granting its request to reopen would not delay proceedings and that its actions amount to inadvertence or neglect under Fed. R. Civ. P. 60(b). *Id.* at 3, 5. Journagan requests that the Commission grant its request for relief and reopen the matter so that it may proceed to a hearing on the merits. *Id.* at 5.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Journagan intended to contest the proposed penalty assessment and that, but for its mistaken belief that it had already filed the proper papers, it would have timely submitted the hearing request and contested the proposed penalty assessment. Journagan has supported its allegations with a sufficiently reliable affidavit. In these circumstances, Journagan's failure to timely file a hearing request properly may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200 (Mar. 1998) (reopening final order where operator failed to timely file hearing request due to internal processing error by its accounting department); *Peabody Coal Co.*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between counsel and personnel at mine); *Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 19

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[1] Attached to Journagan's motion is an affidavit of John A. View III, vice president of Journagan. Ex. A.

(Jan. 2000) (reopening final order where operator attached sufficiently reliable documents to support its allegations).

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

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2000

| | | |
|---|---|---|
| LOUIS W. DYKHOFF, JR. | : | |
| | : | |
| v. | : | Docket No. WEST 99-26-DM |
| | : | |
| U.S. BORAX, INCORPORATED | : | |

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

## DECISION

BY: Riley and Verheggen, Commissioners

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"), Administrative Law Judge Jerold Feldman concluded that Louis W. Dykhoff, Jr. failed to prove that U.S. Borax, Inc. ("Borax") discriminated against him under section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1),[1] when it issued a corrective notice to him for excessive absences. 21 FMSHRC 791, 792 (July 1999) (ALJ). The Commission granted Dykhoff's petition for discretionary review challenging the judge's dismissal of his discrimination complaint. For the following reasons, we affirm the judge's decision in result.

## I.

## Factual and Procedural Background

Borax operates a borax mine and processing facility in Boron, California. 21 FMSHRC at 792. Borax administers discipline for excessive absences on a case-by-case basis pursuant to

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

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...because of the exercise by such miner...on behalf of himself or others of any statutory right afforded by this Act.

an unwritten absenteeism policy. *Id.* at 793. Borax examines an employee's attendance record at random, or when it notices that an employee has missed a lot of work, to determine whether he or she is excessively absent. Tr. 46, 132. Borax's general rule allows "an incident every other month . . . and [an] average [of] a day a month." Tr. 43. For example, examining an employee's attendance record for the preceding 12 months, more than 6 incidents or 12 days of absence will warrant discipline under Borax's policy. 21 FMSHRC at 793. An incident is any number of consecutive days of absence. *Id.* Borax's no-fault policy counts *bona fide* absences due to illness, even if certified by a physician, for disciplinary purposes, while excluding absences exempt under the collective bargaining agreement ("CBA"), such as vacation, jury duty, union business, funeral leave, or leave under the Federal and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. *Id.* Under the CBA, Borax is permitted to consider an employee's absences during the preceding two years. *Id.*; Tr. 43; Ex. R-1. Once it determines that an employee has been excessively absent, Borax administers discipline under a five-step progressive system. 21 FMSHRC at 793. The first step is verbal counseling, the second is a corrective notice, the third is a written warning, the fourth is disciplinary suspension, and the fifth is termination. *Id.* Between June 1987 and January 1998, Borax discharged eleven employees for excessive absences. *Id.*

Dykhoff began his employment at Borax on January 2, 1979. *Id.* During the time period at issue in this case, from early 1995 to March 6, 1998, Dykhoff was employed as a shipping operator in Plant 9. *Id.* His responsibilities included operating a fork lift for the purpose of loading packed product into rail cars and trucks, lifting heavy objects, and climbing stairs. *Id.* Following knee surgery in July 1994 due to a deteriorating bilateral knee condition, Dykhoff had trouble performing the duties of his position. *Id.* Pursuant to the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (1994), upon his return to work in early 1995, Borax accommodated Dykhoff by modifying the duties of his position, based on his doctor's recommendations to reduce his amount of lifting and climbing. *Id.* Also at this time, according to his doctor's recommendation, Borax required Dykhoff to wear knee braces at all times while working. *Id.* at 794. The knee braces were custom-made for an exact fit and were provided by Borax's insurance company. *Id.* The braces had to be replaced periodically. *Id.* Because the braces had to be specially ordered, they could take up to a month to arrive. *Id.* Dykhoff did not work during these times since neither Borax nor the insurance company would pay for a spare brace, and Dykhoff asserted that he could not afford to pay for a back-up. *Id.* During these absences, Dykhoff informed Borax of his status and anticipated return to work. *Id.*

In December 1996, Dykhoff received a verbal warning for excessive absences from his supervisor, Chuck Amento, who requested that personnel manager Darryl Caillier get a copy of Dykhoff's attendance record. *Id.* Dykhoff's attendance record revealed that, as of December 6, 1996, he had been absent for 7 incidents totaling 21 days in the preceding 12 months. *Id.* On or about October 20, 1997, Mike King, Dykhoff's shipping foreman from January 1997 to January 1998, also gave Dykhoff a verbal warning for his excessive absences. *Id.* King was aware of Dykhoff's accommodations because of his knees, but was not aware of any special exception concerning leave. *Id.*

On March 3, 1998, because of a jaw infection resulting from major dental work, Dykhoff worked for only one hour and did not report to work on March 4 through March 6. *Id.* Dykhoff told David Leach, his shipping supervisor at the time, that he would be out, but Leach did not remember having a conversation with Dykhoff regarding the reason for his absence. *Id.* On March 6, Leach reviewed Dykhoff's attendance records, which revealed that in the previous 21 months, he had 10 incidents and missed 71 full and 13 partial days.[2] *Id.* at 794-95. Of these 10 incidents, two incidents involved absences related to Dykhoff's knee braces: one incident of 46 days from January 29 to April 4, 1997, and the second incident of nine days from July 2 to July 12, 1996. Tr. 61, 65-66, 230-31; Ex. R-5. Leach and Caillier signed a corrective notice on the same day and gave it to Dykhoff on March 12 at a step two meeting under the CBA's grievance procedure. 21 FMSHRC at 793, 794-95. On June 18, at a step three grievance meeting with the Human Resources Department, Dykhoff explained that he was unable to work from March 3 through 6 because he had taken Percodan as prescribed by his physician. *Id.* at 795. Percodan is a strong pain killer which made Dykhoff drowsy. *Id.* Dykhoff also stated that he was fatigued from lack of sleep. *Id.*

During his employment with Borax, Dykhoff was an active union member, serving in his local union as the secretary-treasurer and a shop steward for the shipping department. *Id.* From 1994 through January 1998, Dykhoff was involved in a variety of union related health and safety complaints. *Id.* at 796. The union's grievance regarding Dykhoff's corrective notice did not contend that the notice was related to his health and safety complaints. *Id.*

On July 20, 1998, Dykhoff filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2),[3] requesting that the corrective notice be removed from his personnel record. *Id.* at 795. On September 9, after its investigation of

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[2] Borax explained at the hearing and in its pre-hearing statement that during this period, Dykhoff, in actuality, had 23 incidents because each partial day also counted as one incident. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. Borax also explained that it considered the preceding 21 months for full days missed, but only the preceding six months for partial days missed. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. Darryl Caillier, Borax's personnel manager, testified that he ran an absentee check on the partial absences for the preceding six months only because the data on his computer screen did not go further back and could not print out that information. Tr. 59-60; Ex. R-5. At the hearing, Borax claimed that, in fact, in the preceding 21 months from the time the corrective notice was issued in March 1998, Dykhoff had 55 incidents involving 71 full days and 46 partial days. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. The judge did not make an explicit finding on whether Borax's attendance policy treated partial absences as incidents, and the parties have not argued this issue to the Commission on review.

[3] Section 105(c)(2) provides in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

Dykhoff's claims, MSHA determined that there was no basis for discrimination. On October 19, Dykhoff filed a complaint with the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).[4]

In his decision, the judge analyzed the case as a work refusal and concluded that Dykhoff's refusal was not protected because he did not communicate the reason for his refusal to Borax. 21 FMSHRC at 797. In the alternative, the judge reasoned that, even if the reason for Dykhoff's work refusal had been communicated, it would still have been unprotected because the basis of Dykhoff's refusal was his "idiosyncratic physical impairment," which the Mine Act does not protect, and not "hazardous mine practices or conditions over which the operator has control." *Id.* at 797-98. Analyzing Borax's defense, the judge found that the operator had a legitimate business justification for disciplining Dykhoff because of his excessive absences. *Id.* at 798. Finally, the judge concluded that the alleged adverse action, the corrective notice, was in no part motivated by Dykhoff's prior safety complaints as an active union member.[5] *Id.* at 799. Based on his conclusions, the judge dismissed Dykhoff's complaint. *Id.*

II.

Disposition

Dykhoff argues that he stayed home when he did not have his knee braces because he was unable to safely work, was a danger to himself and others, and that such conduct constituted a protected work refusal.[6] PDR at 1-2; D. Br. at 1-2, 7. He contends that there was no need to communicate to Borax the reason for his refusal to work because Borax already knew the reasons for Dykhoff's knee-related absences, as evidenced by the parties' agreement. D. Br. at 1-2, 7. He asserts that Borax required him to wear knee braces when working and agreed not to discipline him for absences due to the unavailability of the knee braces through no fault of his own. *Id.* Dykhoff also argues that the judge committed a procedural error by failing to enter default against the operator when it failed to comply with the judge's orders. Mot. for Relief from Default and/or Reconsideration at 2 ("Mot. for Relief") and attachs.; D. Br. at 5-6. Dykhoff requests that the Commission order Borax not to consider any absences based on his knee

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[4] Section 105(c)(3) provides in pertinent part: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

[5] Dykhoff does not challenge the judge's finding with regard to his prior safety complaints.

[6] Dykhoff does not challenge the judge's finding that his absences related to his use of Percodan from March 3 through 6 are unprotected.

condition for purposes of disciplinary action and to remove from his personnel file all record of such instances.

Borax responds that Dykhoff's work refusal was not protected because he failed to communicate the hazardous condition to the operator. B. Br. at 4-5. It also asserts that the Mine Act does not protect work refusals based on "idiosyncratic physical impairments." *Id.* at 8-9. Borax contends that it had a legitimate business justification for issuing the corrective notice to Dykhoff under its attendance policy and has the right to exclude from the workplace miners who are unsafe. *Id.* at 5-7. Furthermore, Borax argues that Dykhoff's claim of procedural error was not properly preserved for review because he did not raise the issue before the judge below. *Id.* at 10. Alternatively, Borax contends that the judge's error was harmless and cannot be a basis for reversal of the judge's decision. *Id.* Borax requests that the Commission affirm the judge's decision and dismiss Dykhoff's complaint.

A. Work Refusal

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. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary 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); *Secretary 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 Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Mine 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 such perceived danger. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *See Robinette*, 3 FMSHRC at

809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

The underpinning of Dykhoff's argument that he engaged in a protected work refusal is that, by staying home from work when he did not have the knee braces, he was in essence refusing to work under unsafe conditions. The judge did not address whether Dykhoff's absences constituted refusals to work, and the parties on review also ignore this issue. However, we conclude this is the dispositive question in this case. The Commission has held that a miner's absence due to a medical condition exacerbated by the miner's job duties does not constitute a work refusal. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988). In *Perando*, an underground miner stayed at home on extended sick leave upon receiving a diagnosis of industrial bronchitis from her physicians, who recommended that she work in a less dusty environment.[7] *Id.* at 492-93. Examining the miner's actions, and the communications between her physicians and the operator, the Commission concluded that the miner had never actually refused to work underground. *Id.* at 495. Similarly, in *Sammons v. Mine Servs. Co.*, 6 FMSHRC 1391, 1397 (June 1984), the Commission held that, to establish that a work refusal had taken place, the miner must show "some form of conduct or communication manifesting an actual refusal to work."

Here, Dykhoff did not state that he was refusing to work nor did he exhibit conduct manifesting a refusal to work. Like the miner in *Perando*, neither Dykhoff nor his doctor communicated that he could not work, but only suggested that accommodations be made. Consistent with his doctor's prescription, Borax instructed Dykhoff to wear braces while working and not to come to work without them. Thus, Dykhoff's absences due to the unavailability of the braces were not refusals to work, but efforts to comply with Borax's policy. Dykhoff never refused to comply with Borax's order to wear the braces, and Borax did not order him to work when he did not have the braces.[8] Under the circumstances, we conclude that Dykhoff did not refuse to work by staying home.

We recognize that compliance with Borax's directive incorporating his doctor's prescription for braces made it difficult, if not impossible, for Dykhoff to comply with Borax's

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[7] The miner was ultimately given a surface job at much lower pay, but was frequently absent and finally discharged for failing to report to work for a substantial period of time. 10 FMSHRC at 493.

[8] At the June 18 step three grievance meeting, in response to Dykhoff's questions whether Borax would want him to come to work when he was physically unable, Kevin Long told Dykhoff that Borax wanted him at work. 21 FMSHRC at 795; Tr. 176-78, 195-96, 215-16. We do not understand Long's response to mean that Borax wanted Dykhoff to work when he was sick or otherwise unable to work. Rather, we read Long's testimony as a statement that, consistent with its attendance policy, Borax generally wanted to see Dykhoff at work.

general attendance policy. Whether Dykhoff's predicament could be successfully addressed in actions under the American with Disabilities Act or the collective bargaining agreement is beyond the scope of this proceeding. However, that Dykhoff was the subject of conflicting employer policies is not relevant to determining whether he refused to work. Indeed, under these facts, it is difficult to say that Dykhoff "refused" to comply with the attendance policy itself, much less an order to work. Rather, it was application of the braces directive, in the context of Dykhoff's not having temporary replacements, that caused him to run afoul of the attendance rules.

Even if Dykhoff's absences occasioned by his lack of knee braces could be considered work refusals, his argument that his medically-related absences were in fact work refusals in the face of unsafe conditions stretches the work refusal doctrine far beyond its contours as heretofore recognized by the Commission. If the Commission were to construe Dykhoff's decision to stay home as a work refusal, then it is difficult to see why every absence for medical reasons would not be a work refusal. Such an expansion of the work refusal doctrine would make enforcement of otherwise valid attendance policies difficult if not impossible. This result would be at odds with Commission precedent, which recognizes that operators may discipline employees who violate non-discriminatory time and attendance policies. *See Mooney v. Sohio Western Mining Co.*, 6 FMSHRC 510, 513-14 (Mar. 1984).[9]

Dykhoff's submissions may also be understood as challenging Borax's attendance policy as applied because, under the policy, absences related to Dykhoff's knee condition are counted for disciplinary purposes, in violation of his alleged agreement with Borax not to be penalized for these absences. PDR at 1-2; D. Br. at 1-2, 7. Assuming *arguendo* the existence of such an

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[9] Similarly, if Dykhoff's absences were protected activity, as Commissioner Beatty concludes in his dissent (slip op. at 15), every absence for an illness could also be considered protected activity. We are not prepared to stretch the meaning of protected activity to such a point that every time a miner calls in sick, he or she is engaging in protected activity — which is essentially what the dissent does. Such an approach would trivialize the concept of protected activity. It would also interfere with an operator's ability to administer non-discriminatory time and attendance policies, if any action taken by the operator to enforce its absenteeism policy against miners calling in sick was unlawful.

We do not find persuasive Commissioner Beatty's argument that Borax's choice of 21 months, instead of 12 months, to evaluate Dykhoff's attendance record is suspect. Slip op. at 16. The record shows that Borax has considered a variety of time periods, ranging from one month to 24 months, when evaluating a miner's attendance record for disciplinary purposes. Ex. R-3. Further, the terms of the collective bargaining agreement permit Borax to consider a miner's absences for up to the preceding two years. *See* Ex. R-1. In any case, even taking the preceding 12 months as the appropriate period for determining compliance with Borax's attendance policy, Dykhoff's absences, which included 30 full days, still exceed the threshold of no more than 12 days.

agreement,[10] its breach by Borax would not be *per se* a violation of section 105(c). Although we recognize, as Dykhoff asserts, the difficulty in complying with both Borax's attendance policy and its brace requirement, we do not find either policy, considered separately or together, discriminatory, because they do not interfere, on their face or as applied, with a protected right under the Act. *See Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1307 (Aug. 1987) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of [the operator's] drug testing program apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act"); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981) ("The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity."), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Similarly, to the extent Dykhoff challenges Borax's non-discriminatory attendance policy, we find that challenge inconsistent with *Mooney*. *See also Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1532 (Aug. 1990) (holding that operator's facially-neutral drug policy did not violate section 105(c)).

Based on the foregoing, we find that Dykhoff's previous decisions to stay at home when his braces were unavailable, prior to the March 3-6 incident which triggered the disciplinary corrective notice, were not work refusals. Because the record cannot support a contrary conclusion, we conclude that a remand to the judge on the issue of whether a work refusal occurred is unnecessary. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where record supports only one conclusion). We therefore affirm in result the judge's determination that Borax did not discriminate against Dykhoff in violation of section 105(c) of the Act.

In upholding the judge's dismissal of Dykhoff's complaint, we decline to adopt the judge's rationale that a miner's physical condition alone cannot serve as the basis for asserted protected activity. See 21 FMSHRC at 797-98. The judge's conclusion is contrary to Commission precedent.[11] *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June

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[10] The judge did not directly address Dykhoff's argument that the application of Borax's attendance policy breached an agreement between Dykhoff and Borax not to count knee brace absences for attendance purposes. However, the judge's findings that Borax required Dykhoff to wear the braces, and that his supervisor was not aware of any exception to the attendance policy for absences related to the braces (21 FMSHRC at 794), implies that the judge rejected Dykhoff's contention that such an agreement existed. In addition, record evidence supports this conclusion since Dykhoff's witnesses, including at least one union official, could not corroborate Dykhoff's testimony regarding discussion of such an agreement with Borax.

[11] In support of his conclusion that "idiosyncratic physical impairments" cannot serve as the basis for a protected work refusal, the judge erroneously relied on a concurring opinion and an unreviewed judge's decision. *See* 21 FMSHRC at 798 (citing *Price*, 12 FMSHRC at 1519-20

1984) (holding that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations").[12]

B. Procedural Error

On December 10, 1998, Chief Administrative Law Judge Paul Merlin issued a show cause order to Borax for failure to file an answer to Dykhoff's complaint and ordered Borax to file an answer or show good reason for its failure to do so within 30 days. On February 12, 1999, Chief Judge Merlin assigned the case to Judge Feldman, and on February 17, Judge Feldman issued a hearing notice and pre-hearing order. On February 19, Borax filed an answer with Judge Feldman, more than one month after the deadline in the show cause order had passed. With its answer, Borax sent a letter explaining that its answer was originally drafted in response to the December 10 show cause order, but that it could not determine whether the Commission received it and, pursuant to a telephone conversation with Judge Feldman on February 19, Borax was sending its answer directly to Judge Feldman. Borax further stated that there was no prejudice to Dykhoff from this delay because he was still employed at Borax. On April 27, 1999, a hearing on the merits was held. On appeal, Dykhoff argues that the judge committed a procedural error by failing to enter default against Borax when it failed to comply with the judge's show cause order. Mot. for Relief at 2 and attachs.; D. Br. at 5-6.

We find persuasive Borax's argument that the issue of the judge's procedural error is not properly before the Commission because Dykhoff failed to raise it before the judge below. B. Br. at 10. Under the Mine Act, except for good cause shown, a party may not rely upon an assignment of error on any question of fact or law upon which the judge has not been afforded an opportunity to pass. 30 U.S.C. § 823(d)(2)(A)(iii). Dykhoff did not raise the issue of the judge's failure to enter default upon Borax at the hearing or in his post-hearing brief. Nor did he show cause for his failure to raise the issue below. Accordingly, we conclude that this issue was not properly raised and the Commission need not reach it.

Even if Dykhoff had preserved this question, however, we would reject Dykhoff's argument. The Commission has held that default is a harsh remedy which is not favored. *M.M. Sundt Construction Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986) *and Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (Dec. 1986). Also, the decision to enter default against a party is within the judge's discretion. *See* 10 Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2693 ("An application . . . to set aside a default . . . is addressed to the sound discretion of the [judge]. The judge's determination normally will not be disturbed on appeal unless he has

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and *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). Neither is binding precedent. 29 C.F.R. § 2700.72 ("an unreviewed decision of a judge is not a precedent binding upon the Commission").

[12] In light of our disposition of the work refusal issue, we do not address the issue of Borax's affirmative defense.

abused his discretion or the appellate court concludes that he was clearly wrong.") (footnotes and internal quotation marks omitted). An "abuse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) (quoting *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)).

Based on the record evidence, we hold that Chief Judge Merlin's failure to enter default against Borax for its late filing does not amount to an abuse of discretion. While Judge Merlin's decision to assign the case before Borax responded to the show cause order is unexplained, ultimately, Borax filed an answer shortly after the deadline set in the show cause order. There is no indication that Dykhoff suffered any prejudice as a result of Borax's one-month delay in responding to the show cause order. Likewise, we conclude that Judge Feldman did not abuse his discretion when he accepted Borax's late-filed answer and allowed the case to proceed to a hearing on the merits. Dykhoff does not demonstrate any prejudice from Borax's failure to timely file an answer. By contrast, entry of default against Borax, thereby denying it an opportunity to defend itself against claims of discrimination, would have been highly prejudicial. Because the judges' decisions not to enter default against Borax are consistent with Commission precedent disfavoring defaults, and because no prejudice has been shown, we believe that there is no basis for reversal on the ground of procedural error.

III.

Conclusion

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

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan, concurring:

Although I concur with my colleagues' decision to affirm the judge's dismissal of Dykhoff's complaint, I would characterize the issue somewhat differently, and so have chosen to write separately. This case requires us to consider whether Dykhoff's absences from work constituted protected activity under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). As my colleagues have pointed out, the first element a miner must establish in order to make out a case of prohibited discrimination under the Mine Act is to present evidence sufficient to support a conclusion that he or she engaged in some activity or conduct that Congress sought to protect from adverse consequences. *Secretary 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); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Dykhoff contends, essentially, that his absences from work equate to protected activity because the absences were necessary to ensure that he did not injure himself or others. However, the fact that the absences may have served to avoid potential injury does not transform them into protected activity, at least under the facts of this case.

It is important to bear in mind that Dykhoff's absences did not result from any decision or choice in his part. Dykhoff concedes that his employer imposed a safety requirement that he wear leg braces in order to work, PDR 2, and he does not disagree with the wisdom or necessity of this mandate. Tr. 24, 25. Dykhoff's absences occured because he was unable to comply with this safety rule.

Dykhoff was not choosing to be absent from work on the days his braces were unavailable. He was absent because he did not have the option of working on those occasions. An absence from work that does not result from any decision or choice on the part of the miner, but occurs solely because the miner is unable to comply with the employer's safety requirement, does not amount to protected activity by the miner. Indeed, I do not think one would normally characterize that situation as involving any particular type of conduct or activity (protected or otherwise) on the part of a miner at all.

By the same analysis, I agree with my colleagues' conclusion that Dykhoff's absences cannot be considered a refusal to work under unsafe conditions. It seems axiomatic that before a miner can refuse to work, the employer has to be at least willing to let the miner come to work. If a miner does not have the option of going to work, I do not see how that miner can be said to be engaged in a work refusal.

Like my colleagues in the majority, I also decline to adopt the judge's rationale that a miner's physical condition alone can never serve as the basis for asserted protected activity. As my colleagues have pointed out, the Commission has previously held that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations," slip op. at 8-9, quoting *Bjes v. Consolidation Coal Co.* 6 FMSHRC 1411, 1417 (June 1984).

I also concur in my colleagues' determination that there is no basis for reversal on the ground of procedural error, and I agree with the analysis they have set forth to support that conclusion.

Mary Lu Jordan, Chairman

Commissioner Beatty, dissenting:

Applying the Commission's standard discrimination analysis, I would find that Dykhoff established a prima facie case that Borax's issuance of a disciplinary corrective notice to him was discriminatorily motivated and that Borax failed to either rebut the prima facie case of unlawful discrimination or establish an affirmative defense that it would have taken the same action against Dykhoff for his nonprotected conduct, specifically his record of absences. In my view, substantial evidence[1] fails to support the administrative law judge's findings that Borax's issuance of the disciplinary corrective notice to Dykhoff was in no part motivated by Dykhoff's protected activities and that Borax had a legitimate business justification for issuing the corrective notice to Dykhoff because of his excessive absences. 21 FMSHRC at 798-99. I would instead find that Borax's claimed business justification for the adverse action taken against Dykhoff was pretextual. Accordingly, I would reverse the judge's decision to dismiss Dykhoff's complaint, and instead conclude that Dykhoff was disciplined in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

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. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary 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); *Secretary 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 Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

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[1] 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)).

Unlike the judge and my colleagues in the majority, I do not believe that this case is properly analyzed as one involving a protected work refusal.[2] Instead, I would apply the Commission's standard discrimination analysis to evaluate the issue of whether the adverse action taken by an operator against a miner — the issuance of a disciplinary corrective notice — was based on the miner's protected conduct. I begin by considering whether Dykhoff has made out a prima facie case sufficient to support a conclusion that he "engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Robinette*, 3 FMSHRC 817-18, and cases cited above. As noted above, the record demonstrates that Dykhoff was an active union member who served as secretary-treasurer and shop steward for the local union, and was involved in a variety of union-related health and safety complaints during the period from 1994 through January 1998. 21 FMSHRC at 795-96. In addition, as explained below, many of the work absences ostensibly relied upon by Borax in issuing a corrective notice to Dykhoff may be considered to be a form of protected conduct since they were designed to avoid the risk of injury to Dykhoff and other miners.

Dykhoff's extended absences during the period January-April 1997 and in July 1996, totaling 53 days, were directly attributable to the unavailability of knee braces while replacements were being made. Ex. R-5; Tr. 65-67, 230-31. As the result of his deteriorating bilateral knee condition, and on the recommendation of Dykhoff's physician, Borax required Dykhoff to wear bilateral knee braces as a condition of his employment, in order to avoid the possibility of an injury when he operated the forklift.[3] 21 FMSHRC at 794. Dykhoff's knee braces were custom made in order to generate an exact fit based on a cast of each leg. *Id.* A pair of braces cost approximately $1200, and they were paid for, and replaced when necessary, by Borax's insurance carrier. *Id.* When the braces had to be periodically replaced, it took approximately one month to obtain a new pair. *Id.* During such periods, Dykhoff was prevented

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[2] In this regard, I agree with the following reasoning set forth by Chairman Jordan in her concurring opinion:

> It seems axiomatic that before a miner can refuse to work, the employer has to be at least willing to let the miner come to work. If a miner does not have the option of going to work, I do not see how that miner can be said to be engaged in a work refusal.

Slip op. at 11.

[3] The record indicates that the requirement to wear knee braces at work was imposed by Borax as a condition of Dykhoff's continued employment following a request for an accommodation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (1994). Tr. 192, 194-95.

from working without the braces.[4] *Id.* Dykhoff testified that Borax specifically agreed not to discipline for absences taken on days when the knee braces were not available. Tr. 155. Contrary to the judge's finding,[5] the Commission has held that exposure to hazards because of a miner's idiosyncratic physical impairment may, at least under certain circumstances, give rise to protected conduct. *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984) (holding that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations").

Thus, the record clearly establishes that, in the period preceding the adverse action, Dykhoff engaged in protected conduct. Moreover, since Borax's discipline of Dykhoff was admittedly based on his record of absences, several of which were clearly protected in nature, it is reasonable to conclude that the adverse action was motivated at least in part by that conduct. Accordingly, I conclude that Dykhoff established a prima facie case that Borax's issuance of a corrective notice was discriminatorily motivated. To rebut this prima facie case, or establish an affirmative defense for the adverse action taken against Dykhoff, Borax was therefore required to establish that it was not motivated by Dykhoff's protected conduct or that it would have disciplined him in any event for legitimate business reasons — in this case, violation of its attendance policy. I conclude, on the basis of the present record, that Borax has failed to either rebut Dykhoff's prima facie case or establish, by a preponderance of evidence, an affirmative defense for the adverse action taken against him.

Because several of Dykhoff's absences were based upon protected conduct — that is, the desire to avoid creating a potentially unsafe situation for Dykhoff and other miners — it follows that those absences cannot be considered in determining whether Borax has established a legitimate basis for its issuance of a corrective notice. To do so would amount to an admission of unlawful motivation. Rather, to prevail, Borax must establish that it would have discharged Dykhoff for his other, unprotected absences alone. On basis of the present record, I find that Borax has not met this burden.

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[4] Dykhoff testified that he asked his supervisor to assign him to perform other, sedentary work during the period that his knee braces were being replaced, and was told there was no such work available. Tr. 243.

[5] The cases cited by the judge (21 FMSHRC at 798) to support his erroneous legal conclusion are inapposite. The judge's citation to *Paula Price v. Monterey Coal Co.*, 12 FMSHRC 1501, 1519-20 (Aug. 1990), refers to the concurring opinion of Commissioner Doyle in a case that is, in any event, factually distinguishable from the instant case. The other case cited, *Sam Collette v. Boart Longyear Co.*, 17 FMSHRC 1121 (July 1995) (ALJ), is a judge's decision that is not precedent binding on the Commission. 29 C.F.R. § 2700.72.

Although Borax has no written attendance policy, Personnel Manager Darryl Caillier testified that its general "rule of thumb" is that 6 incidents[6], or 12 days of absence, within a 12-month period is considered "excessive" for disciplinary purposes. 21 FMSHRC at 793; Tr. 43, 55. The corrective notice issued to Dykhoff was based on a 21 month review of his attendance, and stated that during this time period he had been absent for 71 days on 10 incidents. Ex. R-6. Further, it noted that Dykhoff had missed 13 "partial" days over the prior 6 months. *Id.* Curiously, neither of the time periods referenced in the corrective notice — 21 months for total absences, or 6 months for partial days off — corresponds to the 12-month period that Caillier indicated was normally used by Borax to evaluate a miner's attendance record. I find Borax's failure to follow its "rule of thumb" with respect to evaluating Dykhoff's attendance record troubling. By using a 21-month standard to review his attendance, Borax was able to paint a harsher picture of Dykhoff's record than would be the case under their 12-month "rule of thumb" policy. This decision calls into question the validity of the business justification offered by Borax for the discipline of Dykhoff, and requires a closer analysis of Dykhoff's attendance record.

The record reveals that when the absences based upon Dykhoff's protected activity are excluded from consideration, the remaining absences do not meet Borax's "rule of thumb" for excessive absences warranting disciplinary action. For example, in the 12 months preceding the issuance of the March 6, 1998 corrective notice, Dykhoff had been absent for a total of 30 days on 5 incidents. Ex. R-5. Excluding the fifth incident, which was based upon the unavailability of the knee braces (Tr. 65-67, 231-32), and the 21 days of absence attributable to the knee braces in the prior calendar year,[7] leaves a total of 4 incidents and 9 days of unexcused absence in the previous 12 months. Ex. R-5. These "unprotected" absences by Dykhoff during the applicable time period are well within Borax's self-proclaimed "rule of thumb" standard of 6 incidents, or 12 days of absence, within a 12- month period.[8]

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[6] An "incident" is comprised of any number of days of consecutive absences. 21 FMSHRC at 793.

[7] Although this incident resulted in 46 total days of absence by Dykhoff, during the period from January 29 through April 4, 1997, only 21 of these days of absence occurred in the 12-month period preceding the March 6, 1998 corrective notice. Ex. R-5. Dykhoff testified that the knee braces took twice as long as normal to replace on this occasion because they were constructed improperly and therefore had to be sent back to the manufacturer and rebuilt. Tr. 239-40.

[8] In the absence of any evidence that partial absences were considered the same as full absences, or treated as separate incidents, under Borax's informal attendance policy, I do not believe that the 13 "partials" referred to by Borax in the corrective notice would have been otherwise sufficient to render Dykhoff's record of absences over the previous 12 months excessive. Notably, Borax's own summary of prior discharges for excessive absenteeism indicates that all of the 13 corrective notices, and 9 of the 11 terminations listed, made no

Even if Dykhoff's record of absences is evaluated with respect to the 21-month period selected by Borax, rather than the 12-month "rule of thumb" period it normally used to evaluate employee absenteeism, his absences do not meet Borax's standard for taking disciplinary action if we exclude the protected absences during the periods that knee braces were not available to Dykhoff. Of the 10 incidents and 71 days of absenteeism referenced in the March 6, 1998 Corrective Notice, 2 incidents involving 53 days were attributable to two periods (January 29-April 4, 1997; July 2-10, 1996) when Dykhoff was unable to report to work due to the availability of the knee braces. Ex. R-5; Tr. 65-67, 230-31. Thus, excluding these protected absences, Dykhoff had a total of 8 incidents and 18 days of absences over a 21-month period, which projects to about 4 incidents and 8½ days over a 12-month period. Again, this is well within Borax's established "rule of thumb" standard for determining when an employee's absences are considered excessive for disciplinary purposes.

The majority attempts to construct a straw man by asserting that under my approach "every absence for an illness" could be considered protected activity. Slip op. at 7 n.9. My conclusion that Dykhoff's knee brace-related absences were protected is based on the particular circumstances of this case. Specifically, record evidence indicated that Dykhoff would pose a threat to the safety of other miners, as well as himself, if he operated a forklift without the required knee braces. Moreover, the fact that Borax prohibited Dykhoff from reporting to work when he did not have the knee braces indicates that it also recognized this potential safety hazard. Accordingly, my position herein is entirely consistent with our holding in *Bjes* that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations." 6 FMSHRC at 1417 (emphasis added). While the majority attempts to pay lip service to our holding in *Bjes*, their decision completely undermines the legal efficacy of that decision.

Based on the foregoing, I find that the record fails to support Borax's asserted explanation for the issuance of a disciplinary corrective notice to Dykhoff, and instead indicates that its claimed justification is pretextual. Accordingly, I would conclude that Borax has failed to either rebut Dykhoff's prima facie case that this disciplinary action was discriminatory, or to establish an affirmative defense that it would have taken the same action against Dykhoff for his nonprotected conduct, namely his record of absences. Based upon my determination that the record compels this conclusion, I would reverse the judge's dismissal of the discrimination complaint and find that Dykhoff was disciplined in violation of section 105(c) of the Mine Act. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

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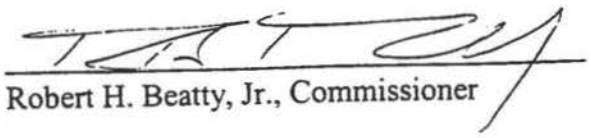
reference to — and thus were presumably not based upon — partial absences. Ex. R-3. I also note that the majority of the partial absences attributed to Dykhoff were for periods of less than 2 hours, and that the total time lost by Dykhoff as a result of the 13 "partials" was 30 hours. Ex. R-5. One of these partial absences, on March 3, 1998, which accounted for 7 of the 30 total hours, was related to Dykhoff's absence on March 4-6, 1998, while he was under the influence of Percodan used to treat a jaw infection resulting from major dental work. 21 FMSHRC at 794; Ex. R-5; Tr. 232-33.

For the foregoing reasons, I would reverse the judge, and therefore I respectfully dissent.



Robert H. Beatty, Jr., Commissioner

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# ADMINISTRATIVE LAW JUDGE DECISIONS

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

October 2, 2000

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LEVI BUSSANICH, Complainant | : | DISCRIMINATION PROCEEDING<br><br>Docket No. WEST 2000-188-D<br><br>Centralia Coal Mine |
| v. | : | Mine I.D. 45-00416 |
| CENTRALIA MINING COMPANY, Respondent | : | |

## DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company ("Centralia") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). A hearing in this case commenced in Tacoma, Washington, on August 22, 2000.

At the start of the hearing, the parties stated that they were trying to negotiate a settlement in this case and asked for additional time to continue these negotiations. I granted their request. At 11:05 a.m., the hearing reconvened at which time the parties announced that they settled all issues in this proceeding and also settled all issues in a separate wrongful termination case brought by Mr. Bussanich in Superior Court for the State of Washington for Lewis County. The basic terms of the settlement were read into the record and the parties subsequently filed a joint Motion to Approve Settlement signed by all parties including Mr. Bussanich.

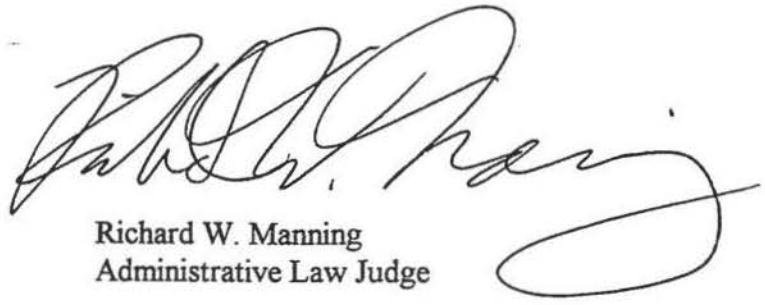
The proposed settlement contains detailed terms, which can be summarized as follows. Centralia does not admit the truth of any alleged facts, any characterizations of Centralia's alleged conduct, or any of the allegations set forth in the Secretary's complaint. The parties entered into the settlement motion for the purpose of settling this case. The settlement cannot be used for any purpose except in proceedings and matters arising under the Mine Act and under

any applicable Mine Act enforcement provision available to enforce the terms of the settlement. The Secretary agrees to reduce the civil penalty for Centralia's violation to $1,500. Centralia shall pay
Mr. Bussanich, within 45 days of the date of this decision, an undisclosed monetary amount to settle Mr. Bussanich's wrongful termination proceeding brought in Lewis County. Approximately one-third of the settlement is for back wages. In consideration for this payment and the settlement of both cases, Mr. Bussanich agrees not to be reinstated as an employee of or seek employment at Centralia or its affiliates. Centralia agrees to return any personal property of Mr. Bussanich, including financial records obtained in the discovery process.

In addition, Centralia agrees to post on the official mine bulletin board a copy of the settlement motion and this decision. A notice shall also be posted stating that all miners are permitted to express safety concerns or make complaints to MSHA without harassment, punishment, or different treatment. This notice will also remind miners to alert mine management of any safety hazards so that the condition can be corrected as quickly as possible. Centralia agrees that within 60 days of the date of this decision, all of its supervisors will receive MSHA-approved training on the subject of miners' rights and the anti-discrimination mandates of section 105(c) of the Mine Act. The details of this training requirement are contained in paragraph six of the parties' motion.

I have considered the representations and documentation submitted in this case, including the discussions at the hearing and the motion to approve settlement, and I conclude that the proposed settlement is appropriate and that the proposed civil penalty complies with the criteria in section 110(i) of the Mine Act. The motion to approve settlement was signed by Mr. Bussanich, as well as counsel for the Secretary and counsel for Centralia.

For good cause shown, the settlement set forth in the parties' motion is **APPROVED** and the joint motion to approve settlement is **GRANTED**. Centralia Mining Company is **ORDERED TO PAY** the Secretary of Labor a civil penalty of $1,500 within 45 days of the date of this decision. Centralia is also **ORDERED** to comply with the other terms of the motion to approve settlement including the payment of the agreed upon back-pay award to Mr. Bussanich within 45 days of the date of the decision. The parties are **ORDERED** to comply with all the other terms of the motion to approve settlement. Upon payment of the agreed upon amounts, this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 3, 2000

| | | |
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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2000-44-M |
| Petitioner | : | A. C. No. 45-03086-05512 |
| v. | : | |
| | : | |
| ALAN LEE GOOD, an individual doing | : | |
| business as GOOD CONSTRUCTION, | : | |
| Respondent | : | Good Portable Crusher |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. WEST 2000-149-M |
| MINE SAFETY AND HEALTH | : | A. C. No. 45-03086-05513 |
| ADMINISTRATION (MSHA), | : | |
| Petitioner | : | |
| v. | : | |
| | : | |
| GOOD CONSTRUCTION, | : | |
| Respondent | : | Good Portable Crusher |

## AMENDED ORDER

The following order is hereby issued in place of and to correct the Order issued with the decision in this matter dated September 13, 2000.

Citations No. 7974344 and 7974345 are hereby vacated. The remaining citations are affirmed and Good Construction is directed to pay the following civil penalties within 40 days of the date of this decision: Citation No. 7974336 - $55, Citation No. 7974337 - $55, Citation No. 7974338 - $55, Citation No. 7974339 - $55, Citation No. 7974340 - $55, Citation No. 7974341 - $55, Citation No. 7974342 - $55, Citation No. 7974343 - $200.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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

\mca

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 3, 2000

| | | |
|---|---|---|
| RICHARD L. WILSON, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. SE 99-292-DM |
| v. | : | |
| | : | SE MD 99-10 |
| C S R SOUTHERN AGGREGATES, Respondent | : | Dogwood Quarry |

## DECISION

Before: Judge Bulluck

This case is before me on an amended discrimination complaint filed by Richard Wilson, alleging that CSR Southern Aggregates ("CSR") had discriminated against him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Wilson alleged that, on June 26, 1997, CSR terminated him from employment for having reported numerous safety violations to CSR.

Procedural History

On August 27, 1997, Wilson filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"), designating race as the basis, and describing his cause of action as having "been discriminatorily accused of sexual harassment and subsequently discharged on the basis of [his] race, black, a violation of Title VII of the Civil rights Act as amended." As a consequence of the EEOC's investigation, Wilson was issued a Dismissal and Notice of Rights on February 26, 1998, concluding that the evidence failed to establish a violation of Title VII, and notifying him of his right to file suit against CSR in U.S. District Court and the time limitation applicable thereto. Thereafter, Wilson sought legal counsel and engaged a private detective agency to investigate the circumstances surrounding his termination, and an investigative report was issued suggesting that the alleged discriminating official may have been motivated by a continued effort to reduce the number of minorities in the company.

On May 18, 1999, pursuant to telephone contact from Wilson the previous day, the Mine Safety and Health Administration's ("MSHA") Birmingham, Alabama, office forwarded a discrimination complaint form and cover letter to Wilson, urging him to complete and return the complaint as quickly as possible, and directing him to attach a letter explaining why it had not

been filed within the 60-day statutory limitation, if he had failed to do so. Wilson filed his discrimination complaint with MSHA on July 6, 1999, without providing the requested explanation for delayed filing. Notwithstanding this omission, MSHA investigated Wilson's complaint and on August 26, 1999, issued its determination that no violation of the Mine Act had occurred, and advised Wilson of his right to file a discrimination claim with the Commission, on his own behalf, within 30 days of said notice.

Wilson, *pro se*, filed his discrimination complaint with the Commission on September 24, 1999, and subsequently obtained counsel, whose appearance was entered on March 3, 2000. Thereafter, pursuant to unopposed Motion to Amend Complaint, filed April 24, 2000, Wilson was permitted to amend his complaint to allege protected activity under the Mine Act, which had not been raised previously.

CSR filed a Motion for Summary Judgment on June 15, 2000, seeking dismissal of Wilson's complaint for untimely filing with MSHA. Wilson's Response, filed July 3, 2000, essentially alleges that Wilson was unaware of his right to file a discrimination complaint under the Mine Act until May 18, 1999, when MSHA so advised him and sent him a discrimination complaint form. CSR's Reply, filed July 7, 2000, notes, among other things, that Wilson's EEO complaint was also untimely filed, that Wilson never provided any explanation to MSHA for delayed filing of his complaint, and that CSR would be greatly prejudiced by continued processing of Wilson's complaint. By Order Requesting Clarification, issued July 12, 2000, Wilson was afforded the opportunity to explain a course of behavior that would seem to indicate that Wilson originally believed himself aggrieved based on his race, and that he subsequently sought relief under the Mine Act only after his claim failed under Title VII. Specifically, he was asked to explain the following: 1) why he originally filed his discrimination complaint with the EEOC, rather than MSHA; 2) why he failed to allege the safety-related complaints raised in his amended complaint before the Commission, when he filed his EEO complaint; 3) why he failed to provide written explanation to MSHA, as directed, for untimely filing under the Mine Act; and 4) why he filed his complaint with MSHA seven weeks after he had received the complaint form and instructions. Complainant's Response was filed July 20, 2000, asserting that Wilson was aware that complaints could be filed with MSHA, but that he was unknowledgeable as to the legal requirements of filing or that *discrimination* complaints could be filed with MSHA, and that he essentially received no assistance and information from the EEOC and MSHA regarding filing with MSHA, as well as what appears to be legal advice of a dubious nature. CSR filed a Reply to Complainant's Response on August 7, 2000.

Findings of Fact and Conclusions of Law

Section 105(c) sets forth the time limitation applicable to filing a complaint under the Mine Act:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against in violation of this subsection may within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

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

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

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

There are several cases that examine whether untimely filing is excusable, by considering factors such as: Complainant's capacity or ability to initiate and pursue such a remedy, *see William T. Sinnott, II v. Jim Walter Resources, Inc.*, 6 FMSHRC 2445 (1994) (ALJ); Complainant's awareness of his rights under the Act, *id.*; *Hollis, supra; Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996) (ALJ) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act, filing of substantially identical allegations in workman's compensation and employment discrimination claims, and absence of prejudice to Respondent); *Secretary of Labor on behalf of Smith v. Jim Walter Resources, Inc.*, 21 FMSHRC 359 (1999) (ALJ) (10 month delay excused by filing within 65 days of first learning of section 105(c), no claim of prejudice by Respondent); *Secretary of Labor on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996) (ALJ) (3 month delay excused by filing one day after first learning of section 105(c) rights and no claim of prejudice); and the length of delay and whether it has resulted in prejudice to a Respondent, *see Sinnitt, supra* (delay of over 3 years "inherently prejudicial"). Consequently, the lengthier the day, the more substantial the justification required to overcome it. *See Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997) (ALJ) ("very special circumstances" required to justify delay of over 2 years). Concrete demonstrable prejudice may also occur, e.g., unavailability of witnesses or documents. Factors such these, pertinent to the particular circumstances of each case, must be weighed in order to determine whether the delay has been justified. *Hollis, supra; Herman, supra.*

In the instant matter, Wilson filed his discrimination complaint with MSHA on July 6, 1999, almost two years beyond the August 25, 1997 deadline for timely filing. Wilson did file a discrimination complaint with the EEOC 62 days after his termination, and despite representations made in this proceeding that Wilson did not "word or personally draft" the complaint (he signed it), his claim of protection and the ensuing EEO investigation were based on race alone. Likewise, according to the investigative report arising from Wilson's engagement of a private investigation of his termination, that inquiry was made solely on the basis of race. Consequently, I conclude that Wilson did not file with the EEOC allegations substantially identical to those ultimately before the Commission. In fact, there is consistency in Wilson's complaints before the EEOC, MSHA and the Commission, in that they allege race as the basis of the discrimination, and the allegations of activity protected under the Mine Act do not surface until April 24, 2000, when Wilson, through his attorney, was permitted to amend his complaint. The clearest indication of what was on Wilson's mind--why he felt aggrieved--is his own words and supporting documentation he submitted to the EEOC in close proximity to his termination; all indications are that Wilson thought that he was the victim of racial discrimination. Accordingly, he initially took his complaint to the proper forum, in which, unfortunately, he did not prevail. Apparently, Wilson held the same belief when he engaged the private investigator, since there is no evidence of safety-related issues having been investigated or considered in the report.

Wilson seeks to have his delayed filing excused by claiming that he was unaware that a discrimination complaint could be filed with MSHA. *See Complainant's Response to Order Requesting Clarification*. However, Wilson's assertions relative to involvement, as CSR's safety coordinator, in a previous MSHA investigation, belie his claim of lacking awareness of his rights under the Mine Act. *See Complainant's Response to Respondent's Motion for Summary Judgment; affidavit.* Wilson's references to conversations with EEOC and MSHA officials respecting his case are lacking in specificity, and therefore, difficult to test for truthfulness. However, even if they were substantiated, Wilson's rendition of both agencies' conduct, that neither the EEOC nor MSHA advised him to file a discrimination complaint under the Mine Act, is consistent with the evidence as a whole--that Wilson had been advancing his claim on the basis of racial discrimination. Wilson bears some responsibility in articulating his claim; if he believed his termination to have been based, in any part, on safety-related complaints made to CSR, he should have said so. Had he raised these issues, it is probable that his complaint would have reached MSHA earlier in the process. It is noteworthy, when evaluating the course of events, that when MSHA sent Wilson the discrimination complaint form on May 18, 1999, Wilson displayed no diligence in filing that complaint (filed on July 6th ), and provided no explanation, as requested, for the two year delay. He has yet to provide a plausible explanation: "I did not include a letter of explanation regarding the date of my filing as I was not advised that it was mandatory." *Id.*

Clearly, because of this inordinate passage of time, CSR's ability to defend against the allegations raised in Wilson's amended complaint has been prejudiced. Overall, Wilson's attempts to justify his delayed filing--that he made elections out of ignorance--simply do not pass

scrutiny. The reasons that he has advanced for pursuing an EEO claim, and hiring a private investigator, suggest some sophistication or, at least, cursory knowledge of his rights under Title VII. Moreover, his own statements evidence a level of knowledge of his rights under the Mine Act. There is no credible evidence of any safety-related complaints having been raised in writing or discussion during Wilson's pursuit of his civil rights, upon which a conclusion could be drawn that his case was mishandled or that he was ill-advised by the EEOC and MSHA. Consequently, I conclude that Wilson voluntarily elected to pursue his claim with the EEOC, rather than MSHA, in accordance with his belief that CSR terminated him because he is Black. The filing of his complaint with MSHA occurred only after he was unable to prevail under Title VII, and efforts to obtain back pay and reinstatement through a private investigator also proved futile.

## ORDER

Based on the factors discussed above, Richard L. Wilson's delay of almost two years beyond the proscribed period for filing a complaint of discrimination with MSHA was not justified and is, therefore, not excused. Accordingly, this discrimination complaint is hereby **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

M. V. Booker, Esq., Attorney at Law, P.O. Box 447, Washington, GA 30673

Robert J. Coursey III, Esq., Fisher & Phillips, 945 E. Paces Ferry Road, 1500 Resurgens Plaza, Atlanta, GA 30326

/nt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 2000

| | | |
|---|---|---|
| DONALD L. RIBBLE, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. LAKE 2000-25-DM |
| v. | : | NC MD 99-16 |
| | : | |
| T & M DEVELOPMENT CO., Respondent | : | T & M Development Pit |
| | : | Mine ID 20-02595 |

## DECISION

Appearances: Donald L. Ribble, Hudsonville, Michigan, *pro se*;
James J. Boutrous II, Esq., Butzel Long, P.C., Detroit, Michigan,
on behalf of Respondent.

Before: Judge Melick

This case is before me following remand by the Commission and upon the complaint of discrimination by Donald L. Ribble (Ribble) pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*, the "Act." In his complaint Mr. Ribble alleges that his former employer, T&M Development Company (T&M), fired him on August 17, 1999, purportedly in violation of Section 105(c) of the Act, after he sustained injuries on August 11, 1999.[1]

In his complaint to the Department of Labor's, Mine Safety and Health Administration (MSHA) filed September 13, 1999, Mr. Ribble specifically alleges as follows:

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[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.

> I have a back injury there [*sic*] Company Doctor was treating me for pulled muscle or torn. I stopped going to Company Doctor because they would not ok therapy. So I have gone to my family Doctor. He oked therapy. On 8-11-99 I was checking a roller on the stacker about 18 ft. up I slipped and Lost Balance. I fall about 18 ft into a pile off sand feet first I report it to Gary Benting my boss. At the time it was just a sore knee. Then the next day my back & neck began to hurt. On 8-12-99 I asked if I could go to the Company Doctor on my own. My boss Gary Benting said he needed a accident report from his boss Rick Hill. Asked everyday for the form so I could go to the Doctor. Never received it always had excuse. Rick didn't have it. So on the day of 8-17-99 when the day was over. Gary Benting fired me couldn't give me a reason. So I called main office in Belleville MI. Marlene VanPatten gave me permission to go to there Company Doctor. When I need therapy it was never ok with the Company. Company Doctor informed me I could go back on light duty. Marlene VanPatten informed me again I was fired. I still have Blue Cross Blue Shield with Thompson & McCully so that's paying medical bills. I don't know when that will quit. I have no means of income. They referred me Workman Comp. & refused to hire me back on light duty.

By letter dated November 16, 1999, MSHA advised Mr. Ribble that the facts disclosed during its investigation did not constitute a violation of Section 105(c). On December 20, 1999, Mr. Ribble filed the same complaint with this Commission. Pursuant to the Commission's remand, hearings were held in Charlotte, Michigan on August 3, 2000, and September 7, 2000. At hearings on August 3, 2000, Ribble requested a postponement to obtain the assistance of counsel. The postponement was granted over Respondent's objection. At continued hearings on September 7, 2000, Mr. Ribble proceeded without counsel.

In discrimination cases under Section 105(c) of the Act the complainant bears the burden of production and proof to establish that: (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that 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 Circuit 1981); *Secretary on behalf of Robinette v. United Castle Coal Company,* 3 FMSHRC 803, 817-818 (April 1981). In this case the credible evidence shows that while the Complainant may have engaged in protected activity, he engaged in such activity only after he suffered the alleged adverse action, i.e., discharge, on August 17, 1999. Accordingly the adverse action could not have been motivated by such activity.

In its remand decision the Commission held that Ribble's allegation that he requested an accident report form on which to report an injury would constitute a protected activity since this request could trigger an obligation, under 30 C.F.R. § 50.20, for T&M to report Ribble's injury to

MSHA. For the reasons set forth below I do not find that Ribble requested any such report form prior to his discharge. Accordingly, even assuming such a request would constitute a protected activity, it could not have motivated his discharge. The Commission also noted that in an interview on September 20, 1999, a week after the complaint was filed, Mr. Ribble mentioned that he had reported safety problems to a mine inspector and that this would also constitute a protected activity. Ribble testified in this regard at hearings that he reported these safety problems only after he had already been discharged. Accordingly such protected activities could not have motivated his discharge.

Ribble testified that he had been working for about a year at the T&M operation as a loader operator when, on August 11, 1999, he fell "at the most" 18 feet into a sand pile as he was climbing onto the conveyor to check a roller. The roller was "either worn-out or it came out of its bracket." He claims that although his left knee hurt, he "walked it off" and completed his work assignments that day. No one else was present at the time of this alleged incident and there is no independent corroboration that it occurred. Ribble testified that at the end of the shift, around 6:45 that evening, all the workers met with superintendent Gary Benting. According to Ribble after everyone left this meeting he told Benting that he had slipped off the conveyor and that his knee hurt. There were no other witnesses to this purported one-on-one meeting with Benting and Benting denies that Ribble ever complained to him about any injury. The medical records submitted by Ribble do not moreover reflect that he had any knee or leg injury (Exhs. C-1 and C-2).[2]

Ribble testified that around 7:30 or 8:00 on the morning of the following day he approached Benting. He testified "my leg was starting to hurt quite bad, or my knee, actually, and I might want a little time off to go to the doctor, is exactly what I said." According to Ribble, Benting responded that he could not see his own doctor but had to go to the company doctor, and needed a form to see the company doctor. According to Ribble, Benting said he did not have any forms with him at the time but would obtain one for him. Again, there were no other witnesses nor independent corroboration for this alleged conversation and Benting denies that it occurred. Ribble took off work early that day not because of any injury, but to do something with his wife.

Ribble testified that on the morning of the 13th of August, he again told Benting that he had to go to the doctor and Benting purportedly responded that he needed to get a form from Rick. Ribble claims that on August 13, he also told co-workers Miller and Bosch that he wanted to see the company doctor. Neither Miller nor Bosch was called as a witness nor statements from them provided, however, to corroborate this claim. In spite of his alleged injury there is no

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[2] A question remains why a loader operator whose job was to load trucks would have taken it upon himself, without the knowledge or direction of any supervisor and in knowing violation of the law, to place himself in danger of serious injury or death, by climbing 18 feet above a sand pile without a safety belt to check on a roller. A question also remains why, since he claims he fell before repairing the alleged defective roller, Ribble did not report this condition to Benting at the end-of-shift meeting held to check on "whatever needs to be done to the plant for the next day."

evidence that Ribble ever requested light duty work but continued working at his regular job. Ribble testified that on Tuesday, August 17, 1999, he saw Regional Manager, Rick Hill at the mine and that he mentioned to other employees that "Rick should have the form." No witnesses or other corroboration was provided. At the end of the day on August 17, Benting purportedly told Ribble not to bother coming back to work. When Ribble was asked why he was being terminated Benting purportedly only turned and walked away. Ribble maintains that he then said to Benting "I know why, because of what I told you by the loaders the other day, that I had slipped and fell," and that Benting responded "yeah, whatever" and walked away.

Ribble testified that after he was fired he contacted Hill by phone that same night to obtain the form he purportedly needed to see the company doctor. In the telephone conversation Hill purportedly told Ribble to get the form from the company's Grand Prairie office or from Office Manager Marlene Van Patten. Ribble then purportedly contacted Ms.Van Patten who informed him the next day that his visit to the company doctor was authorized and that he did not need to first obtain any form.[3]

In his statement to the MSHA investigator Ribble claimed that the doctor took X-rays of his neck and told him that the X-rays did not show anything. Ribble stated that he then told the doctor that it was his back that hurt but that they did not want to X-ray his back. Ribble also stated that another doctor also told him that the X-rays "look good, nothing wrong." (Court Exh. No. 1, pg. 5-6). The doctor nevertheless restricted him to light duty work and authorized therapy. According to the record this visit occurred on August 19, 1999. (Exh. No. C-1).

T&M Division Manager Gary Benting testified that he had been Ribble's direct supervisor as long as Ribble had been employed for T&M. Benting testified that he terminated Ribble because he was not performing his duties. The drivers whose trucks Ribble was supposedly loading were complaining to Benting that they were waiting too long. Benting claims that he therefore warned Ribble on August 16th, to spend less time on the phone and to do more loading. The problem purportedly continued on August 17th, and, at the end of the shift, Benting told Ribble that his services were no longer needed. Ribble then purportedly responded to Benting "I'll get you, you son-of-a-bitch, you asshole."[4] According to Benting, as Ribble was leaving he also said "by the way I fell off the loader today."

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[3] In his statement to the MSHA investigator, Ribble stated that, in this phone call, Hill said that he would get back to him about the necessary authorization form and that Ribble apparently on his own initiative and before Hill responded then called Van Patten who approved his visit to the company doctor. In his Complaint herein he does not allege that he ever asked Hill for an accident report form but claims only that after his discharge he called Ms. Van Patten at the main office for permission to see the company doctor.

[4] This statement suggests that Ribble may have indeed been vindictive for his discharge and suggests a motive for the safety complaints he subsequently made to MSHA. MSHA investigated these complaints but found no violations. It also suggests a motive for the possible fabrication of Ribble's claimed injury and his attempt after his discharge, to obtain workers' compensation benefits.

Benting testified credibly that Ribble never told him that he had been injured, that Ribble never asked him for any form to authorize him to see the company doctor, and that Ribble never made a safety complaint or complaint about the conveyor or loader. T&M Operations Manager Richard Hill likewise testified that at no time before his discharge did Ribble ever complain to him about any injuries from falling off the stacker conveyor. However, Hill recalled receiving a telephone call from Ribble after Ribble had been fired in which Ribble may have told him that he had been injured and could return to work on light duty.

Given the lack of corroboration of Ribble's testimony that he had, prior to his discharge, requested an authorization form to see a doctor, the credible denials by both Gary Benting and Richard Hill that Ribble had requested such a form prior to his discharge, the absence of any medical evidence that Ribble had any leg or knee injury and the absence of any objective medical evidence of any neck or back injury, and the inconsistencies in Ribble's testimony, his complaint and his statement to the MSHA investigator, I do not find that Ribble has sustained his burden of proving by credible evidence that he in fact had requested such a form at any time prior to his discharge on August 17, 1999. Accordingly, this alleged activity, even assuming that it was protected, could not have been a motivating factor in his discharge. This discrimination complaint must therefore be dismissed.

In reaching these conclusions I have not disregarded the decision of the state administrative law judge that Ribble was not disqualified from unemployment benefits because T&M was unable to prove that Ribble's discharge was for disqualifying conduct. Since my findings herein are limited to a determination that Ribble failed to meet his burden of proving that his discharge was motivated by an activity protected under the Act, they are not in conflict with the state judge's decision. Because the state hearings were conducted by telephone in the absence of the company's key witness and no record of the proceedings was available to evaluate, I could not in any event accord any weight to the decision. See *Pasula v. Consolidation Coal Company*, 2 FMSHRC at 2794 - 2795.

## ORDER

Discrimination Proceeding Docket No. LAKE 2000-25-DM is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Mr. Donald L. Ribble, 4775 22nd Avenue, Hudsonville, MI 49426

James J. Boutrous, II, Esq., Butzel Long, P.C., Suite 900, 150 West Jefferson, Detroit, MI 48226

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 2000

| | | |
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| UNITED MINE WORKERS OF AMERICA<br>LOCAL UNION 2232, DISTRICT 20<br>on behalf of MINERS,<br>Applicants,<br><br>v.<br><br>ISLAND CREEK COAL COMPANY,<br>Respondent. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | COMPENSATION PROCEEDING<br><br>Docket No. VA 1999-79-C<br>Mine ID 44-03795<br><br><br><br>VP No. 8 Mine |

## DECISION ON REMAND

Before: Judge Avram Weisberger

On July 31, 2000, the Commission issued a decision in this compensation proceeding, 22 FMSHRC 811 (July 2000), reversing my initial decision, 21 FMSHRC 1093 (Oct. 1999), and remanding for calculation of the compensation due miners for the 2 ½ hours of the shift during which they were idled by a Section 107(a) withdrawal order.

On September 29, 2000, pursuant to discussion with counsel in numerous conference calls, the parties filed a Joint Stipulation stipulating, inter alia, the names of the 41 miners due compensation, and the amount of principal due each, totaling $1,539.61. In addition, Applicant seeks an award of interest due each miner totaling $209.43. Respondent, in opposing this request, relies on the decision of the majority[1] of the commission in this matter, 22 FMSHRC supra, which awarded principal without interest in contrast to Commissioner Verheggen, who wrote an opinion concurring in result but asserting that an award should include interest.

In UMWA v. Clinchfield Coal, 10 FMSHRC 1493 (1988), the Commission established, based on, inter alia, its review of the legislative history of Section 111 of the Federal Mine Safety and Health Act of 1977, that interest should be awarded in cases where compensation is sought pursuant to Section 111, supra. UMWA v. Clinchfield Coal, supra, has not been overruled by any subsequent commission case, including, importantly, the commission decision in the instant

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[1]Commissioners Marks and Riley constituted the majority of the panel of the commission assigned to decide this matter, as Chairman Jordan and Commissioner Beatty recused themselves, and Commissioner Verheggen wrote a separate opinion concurring in result.

case. Accordingly, based on the controlling authority of UMWA v. Clinchfield Coal, supra, I find that the affected miners are, properly, to be awarded interest.

## Order

It is **ORDERED** that the Respondent pay $1,749.04, within 30 days of this decision, as delineated in Exhibit B of the parties' Joint Stipulation.

Avram Weisberger
Administrative Law Judge

Distribution

Max Kennedy, International Representative, United Mine Workers of America, District 20, Subdistrict 28, P.O. Box 28, Castlewood, VA 24224 (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/sct

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 12, 2000

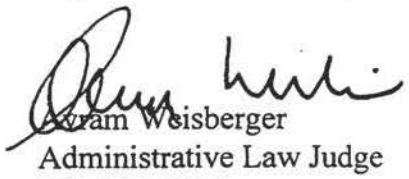
| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 99-368-M |
| Petitioner | : | A.C. No. 02-02806-05501 |
| v. | : | |
| | : | |
| VALLE CONSTRUCTION, LLC, | : | |
| Respondent. | : | |
| | : | Valle Construction Pit |

## DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve settlement agreement and to dismiss the case. A reduction in penalty from **$1,533.00** to **$1,217.00** is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of **$1,217.00** within 30 days of this order.



Avram Weisberger
Administrative Law Judge
703-756-6215

Distribution:

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

Norman Gobiel-Operations Manager, Valle Construction HCR 34, Box B, Williams, AZ 86046

/sct

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
October 24, 2000

| | | |
|---|---|---|
| CONSOLIDATION COAL COMPANY, Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. WEVA 2000-110-R |
| | : | Citation No. 7143392; 8/28/2000 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Loveridge No. 22 Mine ID 46-01433 |
| and | : | |
| UNITED MINE WORKERS OF AMERICA (UMWA) Intervenor | : | |

## DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, the Respondent;
Claudia Davidson, Esq., Healey Davidson & Hornack, P.C., Pittsburgh, Pennsylvania; Judith Rivlin, Esq., United Mine Workers of America, Fairfax, Virginia, (on the brief), for the Intervenor.

Before: Judge Feldman

This proceeding concerns a Notice of Contest filed by Consolidation Coal Company (Consol) that challenges 104(a) Citation No. 7143392 issued on August 28, 2000, at Consol's Loveridge No. 22 Mine. The Loveridge Mine had been sealed following a fire and explosion that occurred in June 1999. Consol began its efforts to re-enter the mine in July 2000 in accordance with a Mine Safety and Health Administration (MSHA) re-entry plan approved by the Secretary under section 103(k) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 813(k).[1]

[1] Section 103(k) requires an operator to obtain the Secretary's approval of any recovery plan concerning re-entry into a mine following an accident such as a fire or explosion. It also authorizes the Secretary to issue any orders she deems necessary to insure the safety of those re-entering the mine.

Citation No. 7143392 alleges a violation of the paid walkaround rights conferred on miners' representatives by section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 813(f).[2] The central issue in this matter is the circumstances under which Consol has a statutory duty, pursuant to the provisions of section 103(f) of the Mine Act, to pay a union representative to accompany an MSHA inspector who is monitoring the underground recovery activities of MSHA personnel from a communications center located on the surface of mine property. As a general proposition, as discussed below, section 103(f) walkaround rights apply when MSHA is engaged in investigative or inspection activities conducted pursuant to section 103(a) of the Mine Act. 30 U.S.C. § 813(a). The United Mine Workers of America (UMWA) has intervened in this proceeding.

The expedited hearing in this contest matter was conducted on September 19, 2000, in Fairmont, West Virginia. At the hearing, the Secretary and Consol proffered a written Motion for the Approval of Settlement that is opposed by the UMWA. A ruling on the settlement motion was held in abeyance pending briefs in support of the settlement motion by the Secretary and Consol, and the UMWA's written opposition. The parties filed their post-hearing briefs and opposition on October 18, 2000.

Background

As noted above, the Loveridge Mine was sealed in June 1999 following an underground fire and explosion. The mine remained sealed until July 2000 to allow the fire to burn out at which time Consol personnel re-entered the mine to determine if it was safe to resume operations. Entry into the mine was undertaken by mine rescue teams to determine if re-entry was safe. The mine rescue teams consisted of MSHA and Consol personnel who carried self-contained breathing apparatus (SCBA). Because the mine had been sealed for more than one year, rehabilitation work such as pumping water, and installation of electrical cables and ventilation controls was required before the site of the fire and explosion located deep inside the mine could be reached. Initial entry into the mine in July 2000 began approximately eight miles away from the site of the fire and explosion.

A communications center was established on the surface of the mine at the Sugar Run Portal. The communications center is located in one room containing desks, a storage cabinet and a table. The room contains one outside telephone line. In addition, there are three mine phones that are connected to a cable used to communicate within mine property on the surface and underground. These three phones cannot be used to communicate with off-site locations. The room contains a mine ventilation map and a mine re-entry map. There are no sampling, analysis or barometric devices in the room. The communications center was established as a central location for Consol, MSHA, West Virginia Department of Mines, and Union officials, to

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[2] The terms miners' representative, Union official, and Union representative refer to Consol employees who act as walkaround representatives. These terms are used interchangeably in this decision.

monitor and record underground activities. Generally speaking, Union officials do not accompany mine rescue teams underground during their initial advancement through the accident site because conditions are unknown and potentially hazardous. Union officials had been present in the communications center when underground activities were monitored, however, they were not receiving walkaround pay from Consol.

On August 7, 2000, after re-entry efforts had begun, MSHA District Manager Timothy Thompson responded to the July 28, 2000, inquiry of Joseph Main, the UMWA's Occupational Health and Safety Administrator, concerning MSHA's interpretation of the applicability of the no loss of pay (walkaround pay) provisions of section 103(f) to the re-entry activity at the Loveridge Mine. (Gov. Ex. 3). Thompson noted recovery of the mine included initial re-entry as well as "subsequent phases of accident investigation, inspection, and rehabilitation work." *Id.*

Thompson characterized the re-entry activities at the mine as "initial exploration . . . to re-establish proper ventilation and to ensure that the mine is safe for further recovery work." *Id.* Since the re-entry activities were taking place pursuant to the re-entry plan submitted by Consol under section 103(k) of the Mine Act, Thompson opined that MSHA's activities during the re-entry phase "are not related to inspection activity under section 103(a)." *Id.* Although Thompson noted enforcement action during this phase is possible, he explained that such enforcement action was "highly unlikely." *Id.* Rather, Thompson opined that MSHA was serving as a "first-person" observer who was present to lend technical support during rehabilitation activities such as installation of electrical cables to re-establish power, track installation, water pumping and installation of ventilation controls. *Id.*

Thompson further explained that once the mine was rehabilitated, MSHA would conduct inspections and an investigation of the accident pursuant to section 103(a). *Id.* Finally, Thompson stated that, consistent with prior MSHA applications of section 103(f) to mine recovery efforts, post-rehabilitation inspections and investigations would give rise to the no loss of pay walkaround provisions of section 103(f). *Id.*

The rescue teams initially arrived at the site of the fire and explosion on August 25, 2000. Shortly thereafter, on August 28, 2000, MSHA supervisor Paul Mitchell arrived at the Loveridge Mine to monitor activities from the communications center. Mitchell notified Consol that he was there as part of an accident investigation and that a miners' representative was entitled to accompany him during his inspection. Consol disagreed that Mitchell was conducting a "physical inspection" of the mine as contemplated by section 103(f), and it refused to provide a paid miners' representative to accompany him. As a result of Consol's refusal to provide a paid Union official to accompany Mitchell in the communications center, MSHA issued the subject Citation No. 7143392 alleging a violation of section 103(f) of the Mine Act. The violation,

which was characterized as non-significant and substantial (non-S&S),[3] was attributed to Consol's moderate degree of negligence.

The Settlement Agreement

At the hearing, after extensive off-the-record negotiations between the parties, the Secretary and Consol reached an agreement concerning the applicability of section 103(f) to the recovery activities at the Loveridge Mine. Consequently, the Secretary and Consol proffered a formal Motion to Approve Settlement at the hearing. Under the proposed settlement, Consol proposes to withdraw its contest of Citation No. 7143392, and, it has agreed to pay a civil penalty of $55.00. In return, the Secretary moves to modify Citation No. 7143392 to reflect that Consol's negligence was "low" because it had a good faith belief that section 103(f) did not require it to pay a Union representative who was accompanying an MSHA inspector who was monitoring underground activities from the surface. The settlement terms also note Consol's immediate and good faith abatement of the citation.

The settlement agreement also sets forth a statement of understanding concerning MSHA's application of section 103(f) during the recovery activities at the Loveridge Mine. Pursuant to the their motion, Consol stipulates that when MSHA is engaged in activities related to the investigation of the fire and explosion, and, a paid Union representative is not accompanying MSHA personnel underground, Consol will pay a Union representative to accompany MSHA personnel who are monitoring activities from the surface. The motion further sets forth that, when paid Union officials are with MSHA personnel underground at all locations where MSHA is conducting accident investigation activities, Consol is not required to provide a paid walkaround on the surface in the communications center.

At the hearing, the UMWA objected to the proposed settlement asserting that the settlement agreement is overly broad because it does not distinguish section 103(a) inspection and accident investigation activities from section 103(k) technical support activities related to MSHA's general re-entry oversight authority. In addition, the UMWA asserts that section 103(f) requires Consol to pay a Union representative who is present in the communications center during MSHA monitoring regardless of whether underground MSHA personnel are accompanied by paid walkarounds.

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[3] A violation is properly characterized as non-S&S if it is not reasonably likely that the hazard contributed to by the violation will result in an event that causes illness or injury of a reasonably serious nature. *U.S. Steel Mining, Inc.*, 7 FMSHRC 1125, 1129 (August 1995).

Discussion and Evaluation

The UMWA has intervened in this proceeding as a matter of right pursuant to Commission Rule 4(b). 29 C.F.R. § 2700.4(b). Having intervened, Commission Rule 4(a) confers party status on the UMWA. 29 C.F.R. § 2700.4(a). This case presents the unusual threshold question concerning whether an Administrative Law Judge has the authority under Commission Rule 31 to approve a settlement motion over the objections of an intervening party. 29 C.F.R. § 2700.31.

In this contest proceeding brought by Consol against the Secretary, Consol and the Secretary are indispensable parties.[4] The UMWA is an interested party with standing.[5] While a settlement agreement between an indispensable party and an interested party cannot be approved over the objection of the other indispensable party, it is clear that a settlement agreement between indispensable parties can be approved over the objection of an interested party. Thus, the UMWA's opposition does not preclude the grant of the settlement motion under Commission Rule 31.

Resolution of whether the settlement proposal should be approved must be based on whether the terms of the agreement result in a reasonable interpretation and application of the no loss of pay provisions of section 103(f) of the Mine Act. In making this determination, it is helpful to examine the legislative history of section 103(f), as well as its language.

The walkaround rights provisions of section 103(h) of the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Mine Act) established the right of a miners' representative to accompany an MSHA inspector during "any inspection" without requiring the mine operator to pay the miners' representative for the time spent accompanying the MSHA inspector. 30 U.S.C. § 813(h) (1976). Thus, while the 1969 Mine Act provided a broad right for miners' representatives to accompany MSHA inspectors, there was no corresponding responsibility of the mine operator to pay the walkaround representative.

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[4] An indispensable party is defined as, "[a] party who, having interests that would inevitably be affected by the court's judgment, must be included in the case. If such a party is not included, the case must be dismissed. Fed. R. Civ. P. 19(b). Cf. *necessary party.*" *Black's Law Dictionary* 1144 (7th ed. 1999).

[5] An interested party is defined as, "[a] party who has a recognizable stake (and therefore standing) in a matter. *Black's Law Dictionary* 1144 (7th ed. 1999).

Section 103(f) of the 1977 Mine Act changed significantly the language of section 103(h) of the 1969 Mine Act by adding the right to no loss in pay, with express limitations, to the right to accompany. Specifically, section 103(f) provides:

> Subject to regulations issued by the Secretary , a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative ***during the physical inspection of any coal or other mine made pursuant to the provision of subsection (a),*** for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. ***Such representative of miners who is also an employee of the operator shall suffer no loss of pay*** during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, ***only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay*** during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. (Emphasis added).

While, unlike the 1969 Act, the 1977 Act provides for both the right to accompany and the right to pay, the broad "any inspection" language in the 1969 Act was changed to "physical inspection . . . made pursuant to the provisions of subsection (a)." Thus, the right to pay under Section 103(f) is contingent upon MSHA's activities being conducted "pursuant to the provisions of subsection (a)." Subsection (a) of section 103 authorizes the Secretary to conduct "inspections" and "investigations" for the following purposes:

> (1) Obtaining information concerning health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments;
>
> (2) Gathering information with respect to mandatory health or safety standards;

(3) Determining whether an imminent danger exists; and

(4) Determining whether there has been compliance with mandatory health and safety standards or with citations, orders, or decisions issued under the 1977 Mine Act.

The D.C. Circuit Court of Appeals has determined that the phrase "physical inspection . . . made pursuant to the provisions of subsection (a)" should be broadly construed to include all inspections pursuant to Section 103(a), not just regular quarterly inspections. *United Mine Workers of America v. FMSHRC,* 671 F.2d 615, 623-27 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 927 (1982). However, the extent to which miners' representatives have a right to receive pay under section 103(f) is not unlimited. For example, section 103(f) limits the right to receive pay to only one miners' representative per inspection party, and only for 103(a) activities.

Here, the settlement terms reflect that the no loss of pay provisions of section 103(f) will not apply to rehabilitation activities in areas unrelated to the accident site that are being observed by MSHA pursuant to its oversight authority under section 103(k). Such activities include pumping water, installing electrical cables, track repair and re-establishing ventilation controls.

Consistent with their agreement, Consol has assured the Secretary that, during the re-entry efforts at the Loveridge Mine, it will either pay miners' representatives who accompany fire and rescue teams at the underground accident site, or, it will pay a miners' representative to be present in the communications center, but not both. Thus, when Union representatives elect not to "physically" accompany rescue teams at a location in proximity to the accident site because it is too dangerous, Consol has agreed to pay a Union representative to accompany MSHA personnel in the communications center. In view of Consol's limited agreement to pay Union officials on the surface during monitoring by MSHA, the question of whether MSHA's monitoring from the mine's surface constitutes a "physical inspection" as contemplated by section 103(f) need not be addressed.

The UMWA objects to the settlement agreement on the grounds that it is overly broad. In this regard, the UMWA asserts miners "remain uncertain about when they would have a right to a 103(f) representative under the terms of the proposed agreement." (*Brief in Opp.,* p.6). Obviously, the parties settlement agreement cannot anticipate or address the myriad of circumstances that may occur in the future that may raise walkaround issues. However, while the provisions of section 103(f) should be broadly construed, the UMWA does not have an unlimited right to paid walkarounds.

As noted above, disposition of the settlement motion must be based on whether the settlement terms constitute a reasonable interpretation and application of the provisions of section 103(f). The settlement terms recognize that section 103(a) inspection and investigation activities give rise to paid walkaround rights. Moreover, ensuring no loss of pay either to Union

walkarounds underground, or to a Union representative monitoring on the surface when paid walkarounds are not underground, is consistent with the language of section 103(f) that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of [section 103(f)]."[6]

Thus, as a general matter, it is apparent that the subject agreement is consistent with the plain meaning of the statutory language that limits paid walkarounds to section 103(a) related MSHA activities. More specifically, with respect to any ambiguity that may exist concerning the Secretary's position that MSHA's section 103(k) actions do not constitute section 103(a) activities giving rise to section 103(f) walkaround rights, the Secretary's interpretation that no enforcement or investigative activities are occurring under the color of section 103(k) is reasonable, and is entitled to deference. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Consequently, the UMWA, as an intervenor in this matter under Commission Rule 4, has failed to provide a basis for denial of the joint settlement motion.

In the future, if the Union believes its rights under section 103(f) are being denied, it can exercise its rights under section 103(g).[7] However, in the final analysis, MSHA must determine whether the facts warrant citing Consol for a section 103(f) violation. The Secretary has expressed her hope that the need for future 103(g) complaints will be eliminated as a result of the settlement reached in this matter. (*Sec.'s Mem.*, p.7). While Union representatives should be encouraged to confer with MSHA if legitimate questions arise, I am confident that the provisions of section 103(g) will not be abused.

As a final note, I am sensitive to the UMWA's desire, as expressed at the hearing and in its opposition, to achieve the broadest possible participation of miners in health and safety matters. (*See, e.g., Brief in Opposition*, p.14). However, the Union's goal of maximizing miner participation does not alter the fact that the Mine Act does not always require a mine operator to pay a walkaround who wishes to accompany MSHA personnel. At the hearing Consol conceded that a Union representative may accompany MSHA inspectors who are in the communications center on an unpaid basis at any time. Unfortunately, miners may be discouraged from participating in walkaround activities not covered by the pay provisions of section 103(f).

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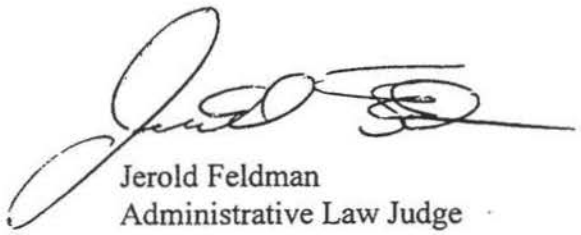
[6] It should be noted that section 103(f) has been interpreted to mean that the mine operator is obligated to pay more than one miners' representative when there are multiple MSHA inspections occurring simultaneously at different underground locations. However, only one representative per inspection party is covered by the provisions of section 103(f). *Magma Copper Company*, 1 FMSHRC 1948, 1951-52 (December 1979), *aff'd Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 475 (1981).

[7] Section 103(g) of the Mine Act authorizes a miners' representative to request an immediate MSHA inspection whenever such representative has "reasonable grounds to believe that a violation of [the] Act . . ." has occurred. 30 U.S.C. § 813(g).

Under such circumstances, perhaps the Union should consider alternative sources of funding.

## ORDER

In view of the above the joint motion to approve the settlement in this matter between the Secretary of Labor and Consolidation Coal Company **IS GRANTED**. Consistent with the parties agreement, **IT IS ORDERED** that 104(a) Citation No. 7143392 **IS AFFIRMED** as modified to reflect the degree of negligence associated with the cited violation is low. **IT IS FURTHER ORDERED** that Consolidation Coal Company shall pay a civil penalty of $55.00 in satisfaction of Citation No. 7143392. **ACCORDINGLY**, the contest proceeding in Docket No. WEVA 2000-110-R **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 2000

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 97-302<br>A.C. No. 15-16478-3602 |
| v. | : | |
| HUBB CORPORATION, Respondent. | : | Mine: Hubb No. 5 |

## DECISION ON REMAND

Appearances: Marybeth Bernui, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Gene Smallwood, Jr., Polly & Smallwood, Whitesburg, Kentucky, for the Respondent.

Before: Judge Weisberger

In the initial decision in this civil penalty proceeding, I found that Hubb violated two mandatory safety standards, and assessed a penalty of $4,000.00 for each violation, 20 FMSHRC 615 (1998).

This case is presently before me based on the Commission's decision in this matter (Secretary v. Hubb Corp., 22 FMSHRC 606 (2000)), which vacated the penalty assessments and remanded for entry of findings regarding each of the criteria set forth in Section 110(i) of the Act.

For the reasons set forth in the initial decision, 20 FMSHRC supra, I find, regarding both violations, that the gravity of these violations was of a high degree, and that Hubb's negligence regarding each violation was more than moderate. I accept the parties' stipulations that Hubb demonstrated good faith in attempting to achieve rapid compliance after notification of these two violations, and that Hubb was a small to medium-sized mine. The parties further agreed that findings regarding Violation History, and Effect on Ability to Continue in Business, be made based on the August 15, 2000, deposition of James Hubbard, Hubb's president since 1991, and which shall be part of the record in this case.

Hubbard testified that Hubb has no income, that the mine was closed on May 16, 2000,

that it has very limited funds, that Hubb has "indebtedness" on the equipment located in the mine at issue, and that there are liens against the equipment, that Hubb does not own any other mines. This testimony was not impeached or rebutted. On cross-examination, Hubbard testified that Hubb pays for four security people,[1] that Hubb hauls coal for Cornettsville Coal Company, and uses this income to pay the security guards and to pay Hubbard a "very small" salary, that the trucks used by Hubb to haul coal are owned by a corporation whose president is Hubbard's wife, and that he (Hubbard) is the president of Cornettsville.

I have considered Hubbard's testimony. However, the best evidence of Hubb's financial condition would be its financial records. None of these were proffered by Hubb. I find that Hubb did not come forward with sufficient evidence to establish that a penalty would have a significant impact on its ability to continue in business. I find that a penalty to be assessed would not have a significant impact on Hubb's ability to continue in business.

Exhibit 21 indicates that, regarding Hubb's history of violation, it had received 32 violations of 30 C.F.R. § 370(a)(1), of which 11 were non S&S. According to Hubb's testimony that was not impeached or contradicted, there were no injuries to any of Hubb's employees or lost work days as a result of these citations. Also, according to Hubb, a "very few" employees filed for Black Lung benefits, but there were no awards to the best of his knowledge. Within this context, I find that Hubb has only a minimal history of violations, considering the minimal consequences of these violations.

Considering all these factors, especially the level of gravity and negligence, but considering also Hubb's size, history of violations, good faith abatement, and weighing the imposition of a penalty on its ability of continue in business, I find that a penalty of $4,000 is appropriate for each violation.

## Order

It is **ORDERED** that the parties shall, within 30 days of this Decision, comply with all the terms of the previously issued Order in this case, 20 FMSHRC, supra.

Avram Weisberger
Administrative Law Judge

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[1]Hubb has other expenses on it's payroll, but is reimbursed from another corporation owned by Hubbard.

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/sct

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 2000

| | | |
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| THE DOE RUN COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. CENT 2000-9-RM |
| | : | Citation No. 7884481; 9/9/99 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Viburnum No. 29 Mine |
| ADMINISTRATION, (MSHA), | : | Mine ID 23-00495 |
| Respondent | : | |
| | : | CENT 2000-14-RM |
| | : | Citation No. 7884492; 9/10/99 |
| | : | |
| | : | Buick Mine/Mill |
| | : | Mine ID 23-00457 |
| | : | |
| | : | CENT 2000-22-RM |
| | : | Citation No. 7884505; 9/13/99 |
| | : | |
| | : | CENT 2000-23-RM |
| | : | Citation No. 7884506; 9/14/99 |
| | : | |
| | : | Brushy Creek Mine/Mill |
| | : | Mine ID 23-00499 |

## DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersol, P.C., Pittsburgh, Pennsylvania, for Contestant;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Zielinski

These cases are before me on notices of contest filed by The Doe Run Company against the Secretary of Labor and her Mine Safety and Health Administration (MSHA) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Act"). The company contests the issuance of four citations alleging violations of a mandatory health and safety standard, 30 C.F.R. § 57.11050(a), which requires that two escapeways be maintained from the "lowest levels" of underground metal and non-metal mines. A hearing was held on

May 31, 2000, in St. Louis, Missouri. Following receipt of the transcript, the parties submitted briefs on August 21, 2000. Contestant submitted a reply brief on August 28, 2000. The Secretary elected not to submit a reply brief. For the reasons set forth below I find that the Secretary's interpretation of the standard is entitled to deference, but, due process considerations preclude enforcement of that interpretation against Doe Run here.

**The Evidence — Findings of Fact**

The relevant facts are not in dispute. Doe Run operates eight underground lead, zinc and copper mines, including the three mines at which the subject citations were issued, Buick, Brushy Creek and Viburnum No. 29. The subject mines extract ore from a deposit known as the viburnum trend, which runs in a north-south direction. While the ore deposit is essentially horizontal, it angles slightly downward as it proceeds south, is somewhat irregular in elevation and varies considerably in thickness. The mines are accessed through shafts. The Buick and Brushy Creek mines have separate production and man shafts and the Viburnum No. 29 Mine has a combined production and man shaft. The Buick and Brushy Creek mines have separate production and haulage levels off of each shaft and the No. 29 mine has only a production level. The production and man shafts, separate escape shafts and connecting mines provide avenues of egress to the surface from the production level of each mine. There is no dispute that, in general, there are at least two separate escapeways from the production level of each of the mines.[1]

The areas at issue here are discreet locations where Doe Run uses what is called "multiple pass mining" to extract ore when the thickness of a deposit substantially exceeds the height of the normal 16-20 foot high drift of the production level. After mining the ore at the production level, Doe Run may make a cut below the production level, an "undercut", or above the production level, an "overcut." An undercut is made by cutting a drift at a downward angle from the production drift and then horizontally into the ore body underneath the production drift. The material between the floor of the production drift and the ceiling of the undercut is called a "sill" and its thickness generally ranges from 15 to 30 feet, occasionally up to 50 or 60 feet. Overcuts are made in the same fashion by angling a drift up from the production drift. Doe Run also accesses other parts of the ore body directly horizontal to the production drifts by cutting a separate drift to such areas, which will be referred to as "side-cuts". When these three types of additional cuts reach the ore body and extraction of the ore begins, they all have one significant characteristic in common. The work areas are accessed only by a single passageway or drift. The distance from the top of the undercut incline to the working face was 250 feet in the Buick Mine and 1,000 feet in the Viburnum No. 29 Mine. No specific distances were specified in the citations of the undercuts at the Brushy Creek Mine. The lengths of single entrances to "side-cuts" ranged up to 2,000 feet, and there appear to be active workings at the southernmost end of the production level of the Brushy Creek Mine that are accessed by a single passageway of a

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[1] Doe Run provides other safety measures for miners who may encounter difficulty exiting a work area. Rescue chambers are provided in certain areas and an emergency hoist with an "escape bullet" is available to remove miners through ventilation bore holes.

comparable distance. The map of the Buick Mine also depicts now-inactive areas at the production level that were accessed by a single passageway several thousand feet long.

Multiple pass mining has become prevalent over the past 6-8 years. The previous method involved accessing the ore body near its top and mining downward in benches, eventually creating a void of considerable height, e.g. 50-60 feet. Problems with scaling that high a roof and drilling pillars for removal rendered that method, in the opinion of Doe Run's managers, more dangerous and less efficient than the multiple pass method. That testimony was not contradicted by the Secretary.

The drifts leading to work areas in undercuts, overcuts and side-cuts serve as the sole means of ingress and egress for miners and equipment working in those areas. The work areas are ventilated, at least initially, by use of a fan and vent bag system, essentially a fabric tube through which air is blown from the main production area. Various types of rubber tired, diesel powered equipment access the work area through the drifts to drill, blast and remove the ore. Each piece of diesel equipment is equipped with two fire extinguishers and possibly a fire suppression system. Potential hazards that could render the drifts unusable as an escapeway, and which would also curtail ventilation, were identified as equipment fires or ground falls. There was one known fire in the mines, involving a truck, that occurred around 1987 or 1988. There was no evidence introduced as to the likelihood of a ground fall or any such past occurrences in the working areas of the mines.[2]

Where the secondary cut becomes extensive, the fan and vent bag system of ventilation eventually becomes inadequate and additional ventilation may be provided by cutting a shaft through the sill from the production drift. Such shafts could provide an additional avenue of egress from undercuts and overcuts, if a ladder was installed in the shaft. Doe Run's witnesses testified that it would take two to three days to cut such a shaft through a sill up to 30 feet thick, if no significant problems were encountered, and that a ladder would cost approximately $1,500.00 to $3,000.00. There were no such shafts cut in the cited areas because ventilation through the access drift was then adequate. The cutting of such a shaft and installation of a ladder would have been feasible in the cited areas in the Viburnum and Brushy Creek mines.

However, it was not feasible in the area cited in the Buick mine, the "area 1 pillar undercut." Where high grade ore is encountered, Doe Run typically extracts the pillars at the main production drift. Where the ore body is less than 150 feet wide, the pillars can simply be removed through the production drift. If wider, however, not all of the pillars can be removed in that manner. Additional roof support is provided by backfilling the mined "rooms" adjoining two or more rows of pillars with rock and similar materials mixed with cement. The pillars that are "trapped" in the backfill are then removed by making an "undercut" below them and drilling and blasting them down into the undercut, where the ore is removed by remote controlled

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[2] There was testimony that there had been roof falls in Doe Run's mines, but the only area specified was where pillars had been removed and no miner was allowed to enter.

loaders. Once pillars are removed, miners are prohibited from entering the area and cutting a ventilation/escapeway shaft from the production drift to the undercut is not feasible. Some pillars had been removed, and others entrapped, at the production level above the "area 1 pillar undercut" in the Buick Mine, prohibiting installation of a ventilation/escapeway shaft through the sill.

Doe Run had used this mining method for several years prior to the issuance of the citations. During that time, MSHA had conducted mandated quarterly inspections of the mines and the "undercut" areas currently in question, which have existed for as many as four years and possibly longer. No citations were issued for violating the two escapeway standard and the propriety of the undercuts was not otherwise questioned.

Doyle D. Fink became manager of MSHA's South Central District in 1995. Because of his concerns about important safety requirements he directed a review of escape and evacuation and ventilation plans of the mines in the District.[3] That review brought to his attention that numerous work areas in Doe Run's mines were accessed only by a single drift. As part of this special review project, he directed that inspections be made. MSHA inspector Robert Seelke, an experienced MSHA inspector who had inspected Doe Run's mines during the 13 years he had been assigned to the South Central District, inspected the mines beginning in July of 1999. After reviewing the results of his inspections, the information gathered from the review of the escape and evacuation and ventilation plans and discussions with mine personnel, MSHA determined to issue citations for violations of 30 C.F.R.§ 57.11050(a), the standard requiring two escapeways in these metal, non-metal mines. A total of 17 citations were issued in September of 1999, citing locations at six of the mines for purported violations of the standard, which provides:

> **§ 57.11050 Escapeways and refuges.**
>
> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface ***from the lowest levels*** which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during exploration or development of an ore body. (emphasis supplied)

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[3] MSHA either had these documents on file, or could readily obtain them. *See*, 30 C.F.R. §§ 57.8520, 57.11053.

Mr. Fink's interpretation of the standard was that it required two escapeways from each work area in the mines.[4] Consequently, citations were issued for all of the areas entered by a single drift -- undercuts, overcuts and side-cuts. The wording of the citations, however, tracked Mr. Fink's interpretation of the standard, rather than the wording of the standard itself. Citation No. 7884481, issued on September 9, 1999, for the Viburnum mine, was typical. It read:

> The working area known as 78V21 and 78V6 was not provided with at least 2 separate properly maintained escape ways ***from that work area.*** This area is accessed by a single entry for approx. 1000' to the working faces. This condition creates the hazard of employees being trapped in the mine should the only provided escapeway become impassable. Rubber tired, diesel powered mobile equipment is used in this area for ground control work, drilling, loading of explosives and to muck ore. Normally 5 or less employees work in this area. (emphasis supplied)

This citation was modified on September 16, 1999, to specify a violation of § 11050(b), which requires refuges in certain situations. Doe Run contested the citations, as modified. After discussions between MSHA and the Secretary's Solicitor's Office, the citation was modified again on December 3, 1999, to specify the applicable standard as § 11050(a), and the highlighted wording was changed to conform to the wording of the standard. The first sentence of Citation No. 7884481 now reads: "The areas known as 78V21 and 78V6 were not provided with at least 2 separate properly maintained escapeways to the surface ***from this lowest level.***" Similar modifications were made to the other three citations.[5] The citations of the 13 areas that did not involve undercuts were vacated, apparently in recognition that they could not be considered "lowest levels" of the mines.

The ultimate issue in these cases is whether the "undercut" areas addressed by the citations constitute "lowest levels" of the mines within the meaning of § 57.11050(a). The Secretary's interpretation of the standard, as applied here, has admittedly not been applied in the

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[4] Contrast the wording of the escapeway standard for metal and non-metal mines with the comparable standards applicable to coal mines which require that separate escapeways be provided "**from each working section**" of the mine. 30 C.F.R. §§ 75.380(b)(1) and 75.381(b).

[5] Citation No. 7884492 cited an undercut at the Buick Mine and read, after modification: "The area known as area 1 pillar undercut was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level." Citation No. 7884505 cited an undercut at the Brushy Creek Mine and read, after modification: "The area known as 76 bottom was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level." Citation No. 7884506 also cited an undercut at the Brushy Creek Mine and read, after modification: "The area known as 9 undercut was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level."

past at any of Doe Run's mines and was developed during litigation of these and the related contest proceedings. While the other areas cited, "overcuts" and "side-cuts", pose virtually the same hazards as these "undercuts", the Secretary has tacitly conceded that there is no viable argument that those areas fall within any reasonable definition of "lowest levels" by vacating the subject citations.[6]

The parties introduced into evidence several definitions of the word "level" and related terms of significance in mining operations. Both parties rely on parts of the definition of the term "level" contained in the U.S. BUREAU OF MINES, A DICTIONARY OF MINING, MINERAL AND RELATED TERMS 638 (1968 ed.) ("Dictionary"), which provides, in pertinent part:

> **level** a. A main underground roadway or passage driven along the level course to afford access to the stopes[7] or workings and to provide ventilation and haulageways for the removal of coal or ore. * * * b. Mines are customarily worked from shafts through horizontal passages or drifts called levels. These are commonly spaced at regular intervals in depth and are either numbered from the surface in regular order or designated by their actual elevation below the top of a shaft. * * * c. In pitch mining, such as anthracite, there may be a number of levels driven from the same shaft, each being known by its depth from the surface or by the name of the bed or seam in which it is driven. * * * e. Applied to seams which run like floors in an office building. Under and above the seam lie the rock strata. * * * j. All openings at each of the different horizons from which the ore body is opened up and mining is started. * * *

Doe Run additionally relies on a definition found in SOCIETY OF MINING ENGINEERS, UNDERGROUND MINING METHODS HANDBOOK 88 (1982 ed.) which provides:

> **Level**: A level is a system of horizontal underground workings that are connected to the shaft. A level forms the basis for excavation of the ore above or below.

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[6] Undercuts could pose an additional hazard in "wet" areas, where water accumulation could drain into the lower elevations. There was one such area involved here, but the additional hazard was minimal and was described as posing a significant flooding problem if a pump would be inoperable for two weeks.

[7] The term "stoping" was defined, in pertinent part, as: "The act of excavating ore, either above or below a level, in a series of steps. In its broadest sense stoping means the act of excavating ore by means of a series of horizontal, vertical, or inclined workings in veins or large, irregular bodies of ore, or by rooms in flat deposits. * * *

A "Safety Rule Book" developed by ASARCO and used by Doe Run, defined "levels" as "worked or working areas of a mine off the shaft."

Witnesses called by the parties relied on various parts of these definitions in testifying that the undercut areas are — or are not — "levels" or "lowest levels" within the meaning of the standard. The Secretary places particular emphasis on the Dictionary's, subpart j, which reads: "All openings at each of the different horizons from which the ore body is opened up and mining is started." Doe Run emphasizes those portions of the various definitions that purport to require that each level be separately connected to a shaft and the portion of the Dictionary definition that refers to stopes as evidencing that undercuts and overcuts are simply workings accessing the ore deposit below or above the single level of the mines. The Secretary counters that levels do not need to be connected to a shaft, noting that there are levels in "adit" mines, which are mines accessed through a horizontal portal or tunnel and have no shafts. She also points out that the undercuts are indirectly connected to a shaft, albeit not separately from the production level.[8]

The Secretary also relies upon an exhibit that apparently originated somewhere in Doe Run's operations that sets forth an explanation of the color scheme used on various mine maps to show workings at different elevations and refers to them as "levels." I place no significance on that exhibit, however, because its relationship to any of the mines at issue here was never established and because there is no evidence that whoever prepared the document intended to use the terms "level" or "levels" other than as a general reference to elevation or with even the remotest relationship to the use of the term "lowest levels" in the standard.

Doe Run argues that even if the "undercuts" are determined to be levels, that they are not the lowest levels of the mines because portions of the production and/or haulage levels at each of the mines are lower in elevation than the cited areas. For example, the lowest elevation of the floor of the cited area in the Viburnum mine was 482 feet above sea level while the floor elevation of the main level off the shaft was 446 feet above sea level, some 36 feet lower in elevation. Such relative positions can occur because, as noted previously, the ore body is irregular in thickness and is not absolutely horizontal. The Secretary's witnesses testified that the term "lowest levels" is defined primarily in functional terms and has little to do with actual elevation.

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[8] The Secretary also argues that since the incline down to an undercut can be referred to as a "ramp" that the undercut is a separate level because the Dictionary defines "ramp" as an "incline connecting two levels." I reject that argument because there is no indication that the use of the word "levels" in that definition has any relationship to the Dictionary's definition of "level." In fact, the portion of the definition relied upon is the last of a series of definitions which have nothing to do with the term "level" and it appears to be referring to "levels" in the most general sense.

## Conclusions of Law

As noted above, the ultimate issue in these cases is whether the cited "undercut" areas are "lowest levels" of the mines within the meaning of the safety and health standard, 30 C.F.R. § 57.11051(a). The legal framework for resolving that issue requires determining whether the regulation is ambiguous, if so, whether the Secretary's interpretation can be afforded deference, and finally, whether Doe Run received fair notice of the interpretation it was cited for violating.

The deference portion of the analysis was described by the Commission in *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998):

> 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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted). *See also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 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.3rd 457, 463 (D.C.Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C.Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock 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." *General Electric Co v. EPA*, 53 F.3d 1324, 1327 (D.C.Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 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 argues that her interpretation of the regulation is entitled to deference in that it is not plainly erroneous or inconsistent with the regulatory language and furthers the purposes of the Act. Doe Run argues, alternatively, that the regulation is not ambiguous and that the Secretary's interpretation is not reasonable and has not been consistently applied. Doe Run also argues that due process precludes application of the Secretary's interpretation in these cases because it was not fairly warned of the "new" interpretation applied here. The Secretary, as previously noted, elected not to file a reply brief and has not directly addressed Doe Run's due process argument.

*Ambiguity*

The term "lowest levels" is not defined in either the Act or the regulations. In light of the various definitions introduced into evidence and the parties respective witnesses' opinions as to whether these "undercuts" were a separate "level" of the mines and whether they were "lowest levels" within the meaning of the regulation, I have little trouble concluding that the regulation is ambiguous when applied to these undercuts. "As the Court stated in *Boston & Maine*, [503 U.S. 407 (1992)] '[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context.'" *Island Creek Coal Co., supra*, 20 FMSHRC at 19. Ambiguity exists when a regulation is capable of being understood by reasonably well-informed persons in two or more different senses. *Id.*

The Secretary's and Doe Run's witnesses, each of whom easily qualified as reasonably well-informed persons, advanced diametrically opposed interpretations of the term "lowest levels" as applied to these undercuts. Moreover, as discussed more fully below, I find that those respective interpretations were reasonable and were formed by reasonably prudent persons familiar with the mining industry and the protective purposes of the standard. It appears, both from the respective definitions and the limited litigation history of the provision, that the term "level" in the mining context includes physical and functional components. *See Savage Zinc, Inc.*, 17 FMSHRC 279 (February 1995); *Magma Copper Co.*, 16 FMSHRC 327 (February 1994). Application of the term "lowest levels" to the "real world" of the undercuts cited in these cases demands interpretation of the term which is highly ambiguous in this context. Doe Run's argument that the regulation is not ambiguous in this context because the "reasonably prudent person" could only conclude that the undercuts were not lowest levels within the meaning of the regulation must be rejected.

*The Secretary's Interpretation - Deference*

It is well-established that the Secretary's interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function. *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), *cert. denied,* 115 S.Ct. 2611 (1995); *Island Creek Coal Co., supra*, and cases cited therein. Doe Run clearly faces an uphill battle in seeking to avoid the Secretary's interpretation of the regulation. As described in *General Electric, supra*, 53 F.3d at 1327:

> In adhering to this policy [of deference], we occasionally defer to "permissible" regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the "best" interpretation of their language. *Cf. American Fed. Gov't Employees v. FLRA*, 778 F.2d 850, 856 (D.C.Cir. 1985) ("As a court of review . . . we are not positioned to choose from plausible readings the interpretation we think best." (internal punctuation and citation omitted)). We may defer where the agency's reading of the statute would

not be obvious to "the most astute reader." *Rollins*,[9] 937 F.2d at 652. And even where the petitioner advances a more plausible reading of the regulations than that offered by the agency, it is "the agency's choice [that] receives substantial deference." *Id.*

As noted above, I find the respective interpretations of the term "lowest levels" offered by the parties to be reasonable. Doe Run's reliance on aspects of the various definitions to urge that the undercuts and overcuts are not separate levels but merely in the nature of stopes where excavation of the ore above or below the production level occurred, is a reasonable interpretation of the regulation.[10] However, the Secretary's reliance upon other aspects of the Dictionary's definitions of the term "level" as including "[a]ll openings at each of the different horizons from which the ore body is opened up and mining is started" is also reasonable. The undercuts can certainly be found to reasonably meet the functional aspects of the definitions of the term "level" because they are passages driven along an essentially level course affording access to the workings and providing ventilation and haulageways for the removal of ore. The Secretary's interpretation of the term "lowest levels" as not being strictly related to elevation, but more of a relative concept with respect to other levels, is also reasonable. The ore body being mined here was irregular, both in thickness and in elevation. It also had a general slope, downward from north to south. The floors of the undercuts at issue here were not the lowest points in the working areas of the mines. Depending upon the layout and topography of a particular mine, interpreting the term "lowest levels" as referring only to the level, a portion of which happened to be the lowest in elevation, could completely eviscerate the standard. Although the parties do not address it, the use of the plural rather than the singular form of the word level, lends further support to the Secretary's interpretation of the standard as applied here and undercuts Doe Run's elevation argument.

There is little question but that the Secretary's interpretation of the regulation is more consistent with the safety promoting purposes of the Act. Requiring two separate escapeways from these undercuts would enhance the safety of miners working in those areas, though the degree to which safety would be enhanced is unclear because of the limited evidence presented on the actual hazards experienced in these mines. Doe Run argues that any safety enhancement attributable to the application of the Secretary's interpretation would be outweighed by the safety risks described with respect to the earlier mining method. That argument misses the mark. It is highly unlikely that enforcement of the Secretary's interpretation would prompt an operator to use the previous method. In many instances, compliance could be achieved by cutting ventilation/escapeway shafts through the relatively thin sills. An operator might also continue to use multiple pass mining, driving the production drift into the lower elevation of an ore body and

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9 *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649 (D.C.Cir. 1991).

10 Doe Run's argument that a "level" must be independently connected to a shaft, is unpersuasive. It would appear that all mines have at least one level, including, "adit" mines, which are accessed through a tunnel and do not have shafts. *See Savage Zinc Co., supra.*

mine the ore above by using an overcut, or a series of overcuts. As noted above, the Secretary has at least tacitly conceded that the standard cannot reasonably be interpreted to apply to overcuts.

Doe Run also argues that the Secretary's interpretation is not entitled to deference here because it was "newly minted during this case," was not announced in any policy memorandum or embodied in any agency document, is inconsistent with other interpretations and has not been consistently applied. However, interpretations first put forward in the course of administrative litigation are, nevertheless, entitled to deference if they "reflect the agency's fair and considered judgment on the matter in question." *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C.Cir. 2000) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) and cases cited therein.

The interpretation advanced here appears to reflect the agency's fair and considered judgment on the matter in question. The testimony of the Secretary's witnesses described the process by which the enforcement action proceeded to this point. The original interpretation was applied to all single access areas, and used wording ("from that work area") inconsistent with the applicable standard. For this administrative litigation, however, that position was reexamined in meetings involving MSHA's administrators and members of the Office of the Solicitor. The result was formulation of an agency interpretation, acceded to by the administrators who had developed the original interpretation.[11] That interpretation was consistently applied to the Secretary's enforcement action and thirteen of the seventeen citations were vacated.

The interpretation relied on here is not a rationalization developed on appeal after administrative litigation had concluded. Contrary to Doe Run's argument, I do not find the Secretary's interpretation substantively inconsistent with interpretations urged by the Secretary in other cases. It is also not inconsistent with any other agency regulations, policy directives or other written materials. While there was conflicting evidence as to whether single access areas existed in other mines, some of which appear to be located within the same MSHA district as Doe Run's mines, this appears to be the first instance in which the Secretary has determined to initiate enforcement action with respect to single access undercuts.

Under the circumstances presented here, the Secretary's interpretation is entitled to deference and Doe Run's arguments to the contrary are rejected. *See National Wildlife Federation v. Browner*, 127 F.3rd 1126, 1129-30 (D.C.Cir. 1997).[12] Doe Run also contends that

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[11] Doyle D. Fink, manager of MSHA's South Central District, in which these mines were located, testified that in his opinion the same safety considerations applied to all single access areas and that there should be two escapeways from such areas. He acknowledged, however, that the standard treated such areas differently and under the interpretation advanced by the Secretary it could be applied only to the undercut areas.

[12] While the Secretary's interpretation is entitled to deference, considerations of due process preclude its application here. It is, therefore, unnecessary to address Doe Run's

the considerations discussed above dictate that the Secretary's interpretation is entitled to less deference than a more established or publicly promulgated pronouncement. *See A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3rd 1107 (9th Cir. 1998). While I disagree, even under a reduced deference standard I would sustain the Secretary's interpretation.

*Due Process -- Fair Notice*

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Electric*, 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

*Island Creek Coal Co., supra,* 20 FMSHRC at 24.

The issues raised by Doe Run on deference have considerably more force in its due process argument. Doe Run's interpretation of the standard as applied to these undercuts is at least as reasonable as the Secretary's. Doe Run had used this method of mining for several years and its interpretation of the standard had never been called into question by the Secretary's MSHA inspectors. Doe Run was aware of other mines that had used this method, also with the apparent acquiescence of MSHA. The Secretary's formulation of her interpretation included at least two prior iterations and was ultimately developed during the course of these proceedings. I have no trouble concluding that a reasonably prudent person familiar with the mining industry and the protective purposes of the Act would not have recognized the specific prohibition of the

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contention that the area 1 pillar undercut at the Buick Mine was an area of development, for which the standard does not require two escapeways.

regulation embodied in the Secretary's interpretation of the standard as applied to these undercuts. The Secretary's determination not to respond to Doe Run's due process argument may well have been prompted by the weight of the evidence in support of its argument.

Principles of due process preclude application of the Secretary's interpretation to these undercuts.

**Order**

The two escapeway standard, as applied to the four "undercuts" at issue here, is ambiguous. The Secretary's interpretation of the standard, advanced for the first time in this litigation, reflects the agency's considered judgement, is reasonable and consistent with the protective purposes of the Act and is entitled to deference. Because Doe Run did not have fair warning of the Secretary's interpretation, however, it cannot be enforced in these instances.[13]

Accordingly, Citations numbered 7884481, 7884492, 7884505 and 7884506, are hereby **Vacated.**

Michael E. Zielinski
Administrative Law Judge

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/mh

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[13] There is little question but that all of the working areas accessible only by a single drift present safety concerns. The Secretary's interpretation of the two escapeway standard permitted her to address only 4 of the 17 cited areas. The precise degree of risk presented, however, remains largely unquantified. Formal rulemaking would appear to be the preferred approach to address those concerns.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2000

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-114-M |
| Petitioner | : | A. C. No. 03-01597-05511 |
| v. | : | |
| | : | Clarksville Quarry |
| CHRISMAN READY-MIX, | : | |
| INCORPORATED, | : | |
| Respondent | : | |

## DECISION

Appearances: David Q. Jones, Esq., Tina Campos, Law Clerk, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Lonnie C. Turner, Esq., Turner & Mainard, Ozark, Arkansas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties filed by the Secretary of Labor (the Secretary) against the respondent, Chrisman Ready-Mix, Inc., pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petition sought to impose a total civil penalty of $571.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. Only one of the nine alleged violative conditions was characterized as significant and substantial (S&S) in nature.[1] This matter was heard on October 3, 2000, in Fayetteville, Arkansas.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the nine citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 58-60). This written decision formalizes the bench decision issued with respect to five of the contested non-S&S citations. The bench decision vacated three citations and affirmed two citations. During the

[1] A violation of a mandatory safety standard is properly characterized as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

course of the hearing, I approved the parties' settlement agreement with respect to the remaining four citations, including the citation that designated the cited violation as S&S. With respect to the four settled citations, the respondent agreed to pay a total civil penalty of $237.00 consisting of a reduced $44.00 civil penalty for each of three non-S&S citations, and a reduced $105.00 civil penalty for the S&S violation. A total civil penalty of $64.00 was imposed for the two citations that were affirmed at the hearing. Thus, the total civil penalty imposed in this matter, including the $237.00 the respondent agreed to pay, is $301.00. This written bench decision is an edited version of the bench decision issued at trial with added references to pertinent case law.

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

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

The respondent, Chrisman Ready-Mix, Inc., is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that the respondent has a good compliance history with respect to previous violations in that it was cited for only seven violations of mandatory health and safety standards during the previous four years preceding the issuance of the citations in issue (Ex. P-12); that the respondent abated the cited conditions in a timely manner; that the $571.00 total civil penalty initially proposed by the Secretary in this matter will not effect the respondent's ability to continue in business; and that the contested non-S&S citations involve conditions that were not serious in gravity. In this regard, the parties have stipulated to the small size of the respondent operator, to the fact that the civil penalties in this matter will not impair its ability to continue in business, and to the respondent's good compliance history. (Tr. 133).

**I. Findings and Conclusions**

Chrisman Ready-Mix, Inc., is a small mine operator that has five employees at its Clarksville quarry. At the quarry, material is extracted from a rock bluff and crushed into various grades of gravel. The gravel is used by the construction industry for such purposes as road construction, concrete, roofing gravel and the installation of septic tanks. The citations that are the subject of this proceeding were issued on October 13, 1999, by Mine Safety and Health Administration (MSHA) Inspector Robert Capps, who is assigned to the Little Rock, Arkansas Field Office. The citations were issued during the course of his regular bi-yearly inspection of the respondent's Clarksville facility.

A. Citation No. 7883242

During the course of inspector Capps' October 13, 1999, inspection, Capps entered the scale house which is a small building that houses the mechanical and electronic components of the truck scale that is used to weigh customer loads. In the scale house, Capps noted a surge protector that was connected to various pieces of mechanical equipment. Generally speaking, a surge protector has a power cable that is connected to the plug on one end, and to the surge protector compartment containing the outlet receptacles on the other end. The power cable has a thick outer jacket that prevents electric shock from contact with the interior copper wires. Inside the thick outer jacket is a thinner inner rubber coated jacket that prevents the copper wires from touching each other and shorting out. The thinner inner rubber coated jacket, like the outer jacket, also provides protection from electric shock injury.

Capps determined the surge protector cable had become separated at the plug end of the cord exposing the inner protective rubber sheathing that surrounds the copper wire conductors. Capps estimated the separation distance of the outer protective cable from the plug to be approximately ½ inch. Steve Hurt, the respondent's crusher foreman, estimated the cable had separated from the plug a distance of approximately ⅛ inch. The outer protective layer of the power cable apparently had worn and had become slightly disconnected from the plug over time as a result repeatedly pulling the cable to disconnect the plug from the electrical outlet.

As a result of his observations, Capps issued Citation No. 7883242 for an alleged violation of the mandatory safety standard in section 56.12004 that requires, in pertinent part, that electrical conductors exposed to mechanical damage shall be protected. 30 C.F.R. § 56.12004. (Ex. P-1). The citation was abated by removing the surge protector from service. Capps concluded the cited violation was not S&S because the cooper wire conductors were not exposed, and the remaining inner rubber sheathing afforded a measure of protection against the electric shock hazard. The Secretary seeks to impose a civil penalty of $55.00 for Citation No. 7883242.

As a threshold matter, the bench decision addressed the respondent's assertion that the scale house, despite its location on mine property, is not a mine subject to Mine Act jurisdiction. The bench decision noted the definition of a "mine" in section 3(h)(1) of the Act is "sweeping," and "expansive." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). Under section 3(h)(1), a "mine" includes "lands, . . . structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, . . . the work of preparing . . . minerals." 30 U.S.C. § 802(h)(1). In view of the expansive nature of the statutory language in section 3(h)(1), it is clear that the scale house is subject to Mine Act jurisdiction.

Notwithstanding its jurisdictional objection, the respondent contends that the citation is defective because Capps issued the citation during the early morning of October 13, 1999, before mining activities occurred. However, an inspector may cite a violation based on his reconstruction of past events. Put another way, an inspector does not have to personally observe a violation of a mandatory safety standard to conclude that a violation had occurred. *Emerald Mines Co. v. FMSHRC*, 863 F. 2d 51, 57 (D.C. Cir. 1988). In this instance, it was appropriate for Capps to conclude that the cited violative condition, that apparently occurred over a period of time as a result of pulling the plug of the power cable from the electrical outlet, existed during mining operations for a substantial period preceding Capps' October 13, 1999, inspection.

Weighing Capps' testimony that the cable had separated approximately ½ inch, and Hurt's testimony that the cable had separated approximately ⅛ inch, I conclude that the damage to the cable was somewhere in between at a distance of approximately ¼ inch. However slight, the damaged cable did compromise the protection of the electrical conductors that is required by the cited mandatory standard. Accordingly, **the Secretary has established the fact of the violation cited in Citation No. 7883242.**

With respect to the negligence associated with the cited violation, I view the ¼ inch damage to the cable as *de minimis* and difficult to detect. Thus, there is virtually no negligence to be attributed to the respondent. However, "[t]he Mine Act is a strict liability statute and an operator may be held liable for violations without regard to fault." *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). The Secretary proposes a $55.00 civil penalty for this non-S&S violation. While I recognize that even *de minimis* violations have the potential to cause serious injury, **the civil penalty for Citation No. 7883242 shall be reduced to $20.00** in recognition of the low gravity, the obscure nature of the cited condition, and the absence of negligence. (Tr. 70-74).

B. Citation No. 7883245

During the course of his inspection, Capps observed a wet wash screening plant used to clean rock material that had a ladder approximately eight feet in length leaning against the metal structure. The ladder provided a means of access to a horizontal metal frame that could be used as a walkway to service or observe the screening facility. The horizontal metal frame was approximately six to eight feet above ground level depending on the amount of spilled rock material on the ground. There was an unguarded v-belt located approximately twelve feet above ground level and four feet above the metal frame walkway. Capps noted spilled material on the surface of the metal frame. Capps was concerned that if someone used the ladder to access the metal frame walkway while the wash screen was in operation, he could slip or fall, and, in so doing, he could contact the moving belt and pulley.

Based on his observations, Capps issued Citation No. 7883245 alleging a non-S&S violation of the mandatory safety standard in section 56.14107(a) that requires moving pulleys and similar pinch points to be guarded to protect against injury. 30 C.F.R. § 56.14107(a). (Ex. P-4). Capps concluded the cited condition was non-S&S because he was told employees did not access the metal frame walkway when the washer screen was operating. Although Capps cited the condition as a section 56.14107(a) violation that requires the guarding of moving parts, the citation was abated by removing the ladder from the metal frame. (Tr. 98-101). Capps admitted the metal walkway was not frequently traveled. He also testified the only time the ladder would be used to access the walkway was to perform maintenance such as greasing and repairing gear boxes. Capps conceded his primary concern was that the washer screen must be de-energized prior to performing maintenance as required by the mandatory safety standard in section 56.12016. 30 C.F.R. § 56.12016.

The bench decision noted that section 56.14107(b) provides that the guarding requirements of section 56.14107(a) do not apply where the exposed moving parts are at least seven feet away from walking or working surfaces. Here the cited unguarded v-belt is approximately 12 feet above the ground. Thus, the question is whether the exception in section 56.14107(b) applies. The Secretary finds herself in the unenviable position of asserting that guarding is required despite permitting abatement of the citation without requiring the installation of guarding.

In determining whether the guarding requirements of section 56.14107(a) apply, the focus must be on the regulation's language that the unguarded condition must be one that "can cause injury." While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be accorded to the Secretary's interpretation if it is plainly wrong and inconsistent with the purpose of the cited regulation. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).

In addressing the question of when guarding is required by the safety standard, it is helpful to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of section 77.400(a), a similar mandatory guarding standard governing coal mining. The Commission stated:

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

6 FMSHRC at 2097.

Thus, stumbling and inadvertent contact are the concerns that the standard addresses. The standard is not intended to require moving parts to be guarded in order to prevent intentional contact by maintenance personnel who have used a ladder to access a walkway that is used for the exclusive purpose of performing maintenance or repair. Of course maintenance personnel must de-energize the washer screen prior to accessing the walkway. The Secretary has the burden of proving the occurrence of a violation. Here it appears that Capps' real concern was that equipment must be de-energized prior to maintenance. The Secretary cannot prevail in a case where it cites an operator for a failure to install guarding while permitting abatement of the citation without the installation of guarding. **Accordingly, Citation No. 7883245 shall be vacated.** (Tr. 104-09).

C. Citation No. 7883247

Capps' inspection included determining if all fire extinguishers had been visually checked on a monthly basis to ensure that they were fully charged and operable as required by the mandatory safety standard in section 56.4201(a)(1). Capps noted two fire extinguishers that were hanging on walls on mine property that had neither been timely checked, nor taken out of service. The tags on the subject fire extinguishers reflected one was last checked in April 1999 and the other was last visually inspected in August 1999. As a result of his findings, Capps issued Citation No. 7883247 citing a non-S&S violation of section 56.4201(a)(1). 30 C.F.R. § 56.4201(a)(1). (Ex. P-6). Capps designated the violation as non-S&S because the cited fire extinguishers appeared to be in good working condition. The respondent asserts the fire extinguishers were in a shed awaiting service.

The bench decision noted that, to be enforceable, the monthly visual inspection requirements section 56.4201(a)(1) must be read in conjunction with section 56.4201(b) that requires written dated certification by the person making the visual inspection. In the absence of evidence that the fire extinguishers were taken out of service by storing them at a location where functioning fire extinguishers would not ordinarily be kept, I have no alternative but to conclude that the fire extinguishers were not removed from service. Moreover, this conclusion is consistent with inspector Capps' testimony that the fire extinguishers were in good working condition. In view of Capps' testimony that the majority of fire extinguishers had been visually inspected on a monthly basis, I am reducing the respondent's degree of negligence from moderate to low. **Accordingly, Citation No. 7883247 is affirmed and the civil penalty imposed is reduced from $55.00 to $44.00.** (Tr. 124-26).

D. Citation No. 7883248

Capps observed the power cord for the No. 2 conveyor motor had been sliced with what he considered to be a thin layer of electrical tape. The cord was located on the east side of the conveyor near the head pulley at a location where the top of the conveyor is approximately

15 feet from the ground. The spliced area of the power cable was approximately ten feet off the ground. Capps noted that electrical plastic or vinyl tape was used to accomplish the splice rather than thicker rubberized electrical tape. However, Capps conceded that because the cable was suspended ten feet above ground, he could not determine the adhesion of the tape or the extent to which the tape was wound around the cable. As a result of his observations, Capps issued Citation No. 7883248 citing a violation of section 56.12013. 30 C.F.R. § 56.12013. (Ex. P-7). This standard requires that splices and repairs to power cables must be "mechanically strong with electrical conductivity as near as possible to that of the original." The standard also requires damage protection and resistance to moisture equal to that of the original. Capps designated the violation as non-S&S because the location of the splice ten feet above ground level was not likely to cause injury.

The bench decision noted that due process requires the Secretary to establish, by a preponderance of the evidence, the fact of a violation. Here Capps' observations of the spliced area of a cable suspended ten feet in the air occurred approximately one year ago. As distinguished from several of the other cited violations where photographs have been admitted depicting the conditions, there is no photograph of the splice to judge whether the splice approaches the functionality of the original cable jacket. Although rubberized electrical tape is thicker than plastic or vinyl electrical tape, it has neither been contended nor shown that splicing with plastic or vinyl tape violates electrical industry standards. The regulatory standard in section 56.12013(a) requires that the splice must provide equal protection "as near as possible to that of the original [cable]." The protective capability of the splice is a function of the adhesion quality of the tape as well as its thickness. On balance, Capps' testimony, based on his observations from the ground, does not adequately demonstrate that the amount and condition of the electrical tape used to accomplish the splice resulted in the requisite diminution of protection contemplated by section 56.12013(a). **Accordingly, Citation No. 7883248 shall be vacated.** (Tr. 153-56).

E. Citation No. 7883250

Capps observed the primary jaw crusher. A photograph of the crusher was admitted at trial. (Ex. P-11). The crusher was driven by a horizontal drive belt located approximately 12 feet above ground level. (Tr. 172-74; Ex. P-11). Capps was concerned that, if the belt snapped, it could fly off the pulleys causing injury to anyone traveling in the vicinity of the crusher. However, Capps testified that there was "[n]o real evidence of foot traffic . . . its a low traffic area normally during crusher hours." (Tr. 177). Capps testified that he was not aware of any previous injuries that had occurred as a result of circumstances and conditions that were similar to the conditions that he observed at respondent's primary jaw crusher. *Id.*

As a result of his observations, Capps issued Citation No. 7883250 citing an alleged violation of the mandatory safety standard in section 56.14108. 30 C.F.R. § 56.14108. This regulatory standard states:

> Overhead drive belts shall be guarded to contain the whipping action of a broken belt **if that action could be hazardous to persons**. (Emphasis added).

Capps designated the cited condition as non-S&S because, as previously noted, there was "no real evidence of foot traffic" in the area. (Tr. 177). The citation was abated by installing a horizontal metal bar under the drive belt. Capps opined that the metal bar would reduce the velocity of the belt if it broke.

The bench decision noted that the provisions of section 56.14108 do not require the guarding of all overhead drive belts to "to contain whipping action." Rather, there is a condition precedent for section 56.14108 to apply. Namely, guarding is required only if a broken belt "could be hazardous to persons." The degree of potential hazard to persons is a function of the height of the drive belt and the amount of foot traffic in the area. In this case, the belt is approximately 12 feet above the ground in an area with "no real evidence" of foot traffic. (Tr. 177). In fact, the degree of hazard was sufficiently remote for inspector Capps to conclude that it was unlikely that an injury would result because of the cited condition.

Section 56.14108 is a broad regulatory standard that applies to overhead drive belts on a case-by-case basis depending on whether the failure to guard the drive belt could pose a hazard to persons. In applying broad regulatory provisions, the Commission looks to whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982).

While the Secretary is not estopped from citing this condition simply because the condition had not been cited as a violation during the past nine years of MSHA inspections at the respondent's Clarksville facility, the failure of MSHA to cite this condition in the past is material in applying the "reasonably prudent person" test. In addition, the height of the subject drive belt 12 feet above the ground, the lack of foot traffic in the area of the crusher, and Capps' admission that injury was unlikely, all support the conclusion that a reasonably prudent person familiar with the mining industry would not have recognized the presence of a hazard requiring corrective action. Accordingly, the Secretary has failed to satisfy her burden of proving the fact of the cited section 56.14108 violation. **Consequently, Citation No. 7883250 shall be vacated.**

F. The Settlement Agreement

As previously noted, at the hearing the parties agreed to settle four of the citations that were in issue in this proceeding for a total civil penalty of $237.00. Specifically, the respondent agreed to pay a reduced total civil penalty of $132.00 consisting of three $44.00 civil penalties for Citation Nos. 7883243, 7883244 and 7883249 that cited, respectively, non-S&S violations for a missing circuit breaker in the scale house, a failure to identify circuit breakers located in the scale house, and a failure to have a weather resistant cover plate on the J-box motor of the primary feed conveyor. Finally, the respondent agreed to pay a reduced $105.00 civil penalty for Citation No. 7883246 that cited an S&S violation for an electrical control cable that was improperly installed through a hole in the frame of an aluminum window.

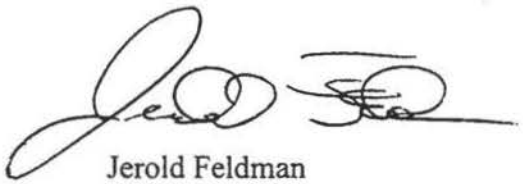
## ORDER

In view of the above, **IT IS ORDERED THAT** Citation Nos. 7883245, 7883248 and 7883250 **ARE VACATED**.

**IT IS FURTHER ORDERED THAT** the respondent shall pay a total civil penalty of $64.00 in satisfaction of Citation Nos. 7883242 and 7883247 that **ARE AFFIRMED**.

**IT IS FURTHER ORDERED THAT**, pursuant to the parties' agreement, the respondent shall pay a total civil penalty of $237.00 in satisfaction of Citation Nos. 7883243, 7883244, 7883246 and 7883249.

Accordingly, the respondent shall pay a total civil penalty of $301.00 within 45 days of the date of this decision. Upon timely receipt of payment, Docket No. WEVA 2000-114-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 30, 2000

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|---|---|---|
| DARWIN STRATTON & SON INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| | : | Docket No. WEST 2000-371-RM |
| | : | Order No. 7966584; 4/24/2000 |
| | : | |
| | : | Docket No. WEST 2000-372-RM |
| | : | Citation No. 7966585; 4/22/2000 |
| | : | |
| | : | Docket No. WEST 2000-373-RM |
| | : | Order No. 7966587; 4/22/2000 |
| v. | : | |
| | : | Docket No. WEST 2000-374-RM |
| | : | Citation No. 7941252; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-375-RM |
| | : | Order No. 7941253; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-376-RM |
| | : | Order No. 7941254; 4/26/2000 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. WEST 2000-377-RM |
| ADMINISTRATION (MSHA), | : | Order No. 7941255; 4/26/2000 |
| Respondent | : | |
| | : | Docket No. WEST 2000-378-RM |
| | : | Order No. 7941256; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-379-RM |
| | : | Order No. 7941257; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-380-RM |
| | : | Order No. 7941258; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-381-RM |
| | : | Citation No. 7941259; 4/26/2000 |
| | : | |
| | : | Docket No. WEST 2000-382-RM |
| | : | Order No. 7941260; 4/26/2000 |

: Docket No. WEST 2000-383-RM
: Citation No. 7941261; 4/26/2000
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: Docket No. WEST 2000-384-RM
: Citation No. 7941262; 4/26/2000
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: Docket No. WEST 2000-385-RM
: Order No. 7941263; 4/26/2000
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: Docket No. WEST 2000-386-RM
: Order No. 7941264; 4/26/2000
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: Docket No. WEST 2000-387-RM
: Order No. 7941265; 4/27/2000
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: Docket No. WEST 2000-388-RM
: Order No. 7941266; 4/26/2000
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: Docket No. WEST 2000-389-RM
: Order No. 7941267; 4/26/2000
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: Docket No. WEST 2000-390-RM
: Order No. 7941268; 4/26/2000
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: Docket No. WEST 2000-391-RM
: Citation No. 7941269; 4/27/2000
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: Docket No. WEST 2000-392-RM
: Citation No. 7941270; 4/27/2000
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: Docket No. WEST 2000-393-RM
: Order No. 7941271; 4/27/2000
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: Docket No. WEST 2000-394-RM
: Order No. 7941272; 4/27/2000
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: Docket No. WEST 2000-395-RM
: Citation No. 7941273; 4/27/2000
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: Docket No. WEST 2000-396-RM
: Citation No. 7941274; 4/27/2000

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| | : | Docket No. WEST 2000-397-RM |
| | : | Order No. 7941275; 4/27/2000 |
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| | : | Docket No. WEST 2000-398-RM |
| | : | Citation No. 7941276; 4/27/2000 |
| | : | |
| | : | Docket No. WEST 2000-443-RM |
| | : | Citation No. 7966588; 4/22/2000 |
| | : | |
| | : | Rattlesnake Pit |
| | : | Mine ID 42-02283 |

**DECISION**

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver Colorado, for Respondent.

Before: Judge Manning

These cases are before me on notices of contest filed by Darwin Stratton and Son, Inc., ("Darwin Stratton") against the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d)(the "Mine Act"). A hearing was held in Washington, Utah, on October 3, 2000, but Darwin Stratton failed to appear at the hearing. The citations and orders at issue in these proceedings were issued following MSHA's investigation of a fatal accident that occurred at the Rattlesnake Pit on April 21, 2000. MSHA was unaware of the existence of the Rattlesnake Pit until this fatal accident.

## I. FINDINGS OF FACT

The Rattlesnake Pit is a small sand and gravel mine owned and operated by Darwin Stratton near Hurricane, Utah, in Washington County. Sand and gravel is extracted from a dry stream bed, transported by truck to an adjacent wash plant, and stockpiled. The stockpiled material is fed into a hopper and conveyed to a single-deck screen where oversized material is separated. The sand is then fed into a screw classifier and mixed with water to remove unwanted material. The finished sand is sold for use in making concrete. (Tr. 14; Ex. 3).

This pit has been operating for about five years, but MSHA was never notified of its existence. As a consequence, the pit was never inspected by MSHA. Darwin Stratton notified Utah-OSHA of the fatal accident. MSHA learned of the accident on the morning of April 22, 2000, when an official from Utah-OSHA called MSHA's Denver office. MSHA began its investigation of the accident later that day. (Tr. 11-12).

Candi Reeve, the accident victim, was the only person working at the pit on April 21. She was fatally injured when she became entangled in the moving conveyor belt tail pulley. There was no guard present to protect persons from contacting the tail pulley. Ms. Reeve arrived at the pit early in the morning on April 21 accompanied by Todd Stratton, the foreman. (Tr. 46). Mr. Stratton re-instructed her on the operation of the front-end loader and the wash plant. He watched her work for a short period and then he left at about 8:30 a.m., leaving her alone to operate the facility. (Tr. 46-47). He also warned her to stay away from the conveyor. (Tr. 64). When Ms. Reeve failed to return to Darwin Stratton's office in Hurricane, Clayton Stratton, president of the company, asked an employee to check on her. At about 4:00 p.m., the employee observed Ms. Reeve caught in the tail pulley. He found no vital signs. County emergency personnel transported her to the Utah Medical Examiner's office. The Medical Examiner determined that her death was caused by asphyxia due to the compression of her neck by her clothing that had become entangled in the conveyor belt assembly. (Ex. 2D).

Based on its investigation, MSHA determined that the accident was caused by "management's failure to install guards on the conveyor tail pulley." (Ex 3, p.5). MSHA further determined that "[a]ssigning the inexperienced victim to work alone in an area where hazardous conditions existed without arranging for scheduled communication contact contributed to the severity of the accident." *Id.*

Darwin Stratton timely contested the citations and orders that are the subject of these proceedings, but otherwise refused to cooperate with the undersigned judge or the Department of Labor's attorney. The Secretary filed a motion to stay these proceedings until civil penalties were proposed. I also asked Darwin Stratton's representative whether he would prefer to stay these cases until MSHA proposed civil penalties for the citations and orders. (Letter dated June 28, 2000). In response, Darwin Stratton's representative objected to any stay in these proceedings and asked that the cases proceed to hearing. (Letters dated June 26 and July 6, 2000). Consequently, I denied the Secretary's motion to stay the proceedings and established a hearing date of October 3, 2000. (Order dated July 11, 2000).

Starting in July 2000, various people who purport to represent Darwin Stratton began writing letters to me stating that MSHA was without jurisdiction to inspect the Rattlesnake Pit. These letters also made demands under various state laws including the Uniform Commercial Code ("UCC"). I responded to these letters by sending several orders and letters to Darwin Stratton explaining how these proceedings would be conducted. I explained that the UCC does not apply to these proceedings and that MSHA's citations and orders raise serious issues that may have significant implications for Darwin Stratton. Darwin Stratton began refusing all mail sent from me and from the Solicitor's office. Mr. Pat Morgan, Darwin Stratton's representative, signed and dated the outside of the envelopes and returned them to me unopened. He also used rubber stamps on the outside of the envelopes with the following messages: "Without Dishonor U.C.C. 3-505" and "Refuse Mail Service to Federal Area/Possession." Darwin Stratton failed to respond to the Secretary's discovery requests, failed to respond to my orders, and also returned all documents sent by the Solicitor's office. Darwin Stratton returned the notice of hearing unopened. The outside of the envelope bears the signature of Pat Morgan.

On August 3, 2000, I sent Darwin Stratton an unmarked envelope containing a copy of all of the letters and orders that I had previously issued, along with a letter explaining Commission procedures and the importance of these cases. I used stamps for postage and supplied no return address in the hope that Mr. Morgan would open it. He returned the envelope, unopened, to the Solicitor's office marked with the same rubber stamps. All of my subsequent letters and orders were returned unopened in the same fashion.

On August 28, 2000, the Secretary filed a motion for expedited hearing on the basis that Darwin Stratton had not abated one of the citations in these cases. When an MSHA inspector returned to the pit in June, another individual was working alone. One of the citations in this case cited Darwin Stratton for allowing a miner to work alone without meeting the requirements set forth at 30 C.F.R. §56.18020. MSHA issued a follow-up citation under section 104(a) so that it could issue a section 104(b) order and assess daily penalties under section 110(b) of the Mine Act if the condition was not abated.

On September 1, 2000, I issued a notice of hearing site in which I set out the exact location for the hearing to commence at 9 a.m. on October 3. I sent a copy of this notice to Pat Morgan and to the two individuals who had sent me letters: "Johnpatrick: Morgan" of Fredonia, Arizona, and "Clayton-Todd: Stratton" of La Verkin, Utah. In each instance, the notice of hearing site was returned unopened. The outside of the envelopes addressed to Pat Morgan and Todd Stratton ("Clayton-Todd: Stratton") bear the signature of the addressee and the same rubber stamps. In the meantime, representatives of Darwin Stratton continued to send letters holding me and the Secretary in default for failing to respond to their letters.

The hearing commenced at 9 a.m. on October 3, 2000, in Washington, Utah, as scheduled. Mr. Rainwater appeared on behalf of the Secretary of Labor but no representatives for Darwin Stratton appeared at the hearing. Mr. Rainwater advised me that he had not been able to make contact with anyone from Darwin Stratton since he first discussed the cases with representatives of Darwin Stratton soon after it contested the citations and orders.

## II. DISCUSSION WITH FINDINGS AND CONCLUSIONS

I hold that MSHA has jurisdiction to inspect the Rattlesnake Pit. The facilities at that pit easily fit within the definition of "coal or other mine" in section 3(h)(1) of the Mine Act. Minerals are extracted from the earth, the extracted minerals are milled at the wash plant, and the resulting product is sold to customers. The milling consists of separating the sand from the unusable material and then cleaning the sand. The functions performed at this pit are the same as are typically found at sand and gravel pits throughout the country. Courts and the Commission have consistently held that sand and gravel pits are subject to MSHA jurisdiction. Because the products of this pit enter or affect commerce, the pit is subject to the provisions of the Mine Act in accordance with section 4 of that act.

I made every attempt to ensure that Darwin Stratton was served with notice of the hearing. Darwin Stratton specifically requested that these cases not be stayed and asked that the

cases proceed to hearing. Yet, it refused to accept any mail from my office or from the Secretary. The citations and orders issued by MSHA raise serious safety issues at the pit. Its failure to cooperate raises questions about its commitment to the safety of its employees.

Under 29 C.F.R. §2700.66(b), I could have simply held Darwin Stratton in default at the commencement of the hearing and dismissed these proceedings with prejudice. Because the cases involve a fatality and the citations and orders raise serious safety issues, I felt it was important to hear the testimony of the MSHA inspectors and to review the exhibits prepared by the Secretary. Consequently, the hearing proceeded without Darwin Stratton being present. A summary of the evidence and my findings with respect to the citations and orders are set forth below.

## A. Accident Investigation

### 1. Citation No. 7966585; WEST 2000-372-RM

This citation, as modified, alleges a violation of 30 C.F.R. §56.14107(a) as follows:

> A wash plant operator was fatally injured at this mine on April 21, 2000, when she was caught in the unguarded tail pulley for the wash plant feed conveyor. The mine operator stated that the pulley was never guarded. This tail pulley was located at ground level....

MSHA Inspector Dennis Harsh determined that the violation was serious, was of a significant and substantial nature ("S&S"), and was caused by Darwin Stratton's unwarrantable failure to comply with the standard. Section 56.14107(a) provides, in pertinent part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys, ... and similar moving machine parts that can cause injury."

I find that the Secretary established a violation based on the testimony of Inspector Harsh as corroborated by the photographs introduced at the hearing. Both sides of the tail pulley are shown in photograph Nos. 7, 8, and 8A in Exhibit 1. No guard was present at the tail pulley. (Tr. 38). The tail pulley is accessible and is not seven or more feet away from a walking or working surface. (Tr. 39). The feeder bin ("hopper") and its support structure above the belt limited the work area around the tail pulley. Clearance between the hopper frame and the belt assembly on the north side of the tail pulley where the accident occurred was about 32 inches. One would have to walk close to the belt or through the support frame for the hopper to access the area. (Ex. 1, photo 6; Ex. 3 p. 4). It is not clear why Ms. Reeve was working in the immediate area of the tail pulley but it is clear that she was close enough to become entangled. (Tr. 40-41). There was spillage in the area of the tail pulley. Ms. Reeve's lunch was still in her truck, so the accident may have occurred relatively early in her shift. (Tr. 49). Darwin Stratton representatives told Inspector Harsh that it did not believe that the exposed tail pulley presented a hazard because the belt moved slowly. (Tr. 43). The safety standard does not provide an

exception for slow moving belts. Slow moving pulleys and belts can injure miners if their clothing becomes entangled or if their hands or feet get close to the moving parts.

I also find that the Secretary established that the violation was serious and 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).

I find that the Secretary met all four elements of the Commission's S&S test. A violation existed that created a discrete safety hazard. There was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued normal operations. Finally, there was a reasonable likelihood that any injury would be of a reasonably serious nature. The cited condition had existed for a considerable length of time and it was only a matter of time before someone was seriously injured by the hazard presented. The violation was very serious.

Finally, I conclude that the violation was the result of Darwin Stratton's unwarrantable failure to comply with the safety standard. The Commission held that unwarrantable failure is aggravated conduct constituting more than 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). The Commission stated that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted). The Commission also takes into consideration the mine operator's knowledge of the existence of the dangerous condition. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994).

The tail pulley had never been guarded at the pit. (Tr. 42-43). The violation was so obvious that I can say without hesitation that if the Rattlesnake Pit had ever been inspected by MSHA, the condition would have been cited by the MSHA inspector and this accident would have never occurred. Darwin Stratton knew that the tail pulley was not guarded and did nothing to correct the condition. The fact that Todd Stratton warned Ms. Reeve to stay away from the conveyor indicates that he knew of the hazard. For the reasons stated above, this citation is affirmed, as modified by MSHA.

**2. Order No. 7966587; WEST 2000-373-RM**

This order alleges a violation of 30 C.F.R. §56.18020 as follows:

> A plant operator was fatally injured at this mine on April 21, 2000, when she was caught in the unguarded wash plant feed conveyer tail pulley. The wash plant operator was assigned, required, or allowed to perform work alone where hazardous conditions existed. The conveyor tail pulley was not guarded and additional safety hazards existed which were cited separately....

Inspector Harsh determined that the violation was serious, was S&S, and was caused by Darwin Stratton's unwarrantable failure to comply with the standard. Section 56.18020 provides that "[n]o employee shall be assigned, or allowed, or required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen."

I find that the Secretary established a violation. Ms. Reeve was 18 years old and had about two weeks of mining experience.[1] She had never been assigned to work alone at the pit before this date. (Tr. 46-47). Her only means of communication was a two-way radio in her truck. (Tr. 48). This truck was parked about 150 feet from the accident site. Although the pit was close to a highway, no representatives from Darwin Stratton checked on her between 8:30 a.m. and about 4 p.m. (Tr. 48-49). She was the only person at the pit for the entire period. Inspector Harsh testified that it is not unusual for people to work alone at wash plants. (Tr. 62-63). In such instances, MSHA requires that the mine establish a means by which the employee can communicate with others in the company. *Id.* If Ms. Reeve had been wearing a communication device, she may have been able to get help when she first became entangled. (Tr. 49-50).

There have been few Commission decisions on "working alone" standards. In *Old Ben Coal Co.*, 4 FMSHRC 1800 (October 1982), the Commission reviewed section 77.1700, a

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[1] Inspector Harsh testified that Darwin Stratton representatives were rather evasive when questioned about Ms. Reeve's experience. (Tr. 46). Inspector Harsh estimated that she had about two weeks experience based on the information given to him. (Tr. 60-61). Ms. Reeve was Clayton Stratton's niece and Todd Stratton's cousin.

similar standard for surface coal mines. In that case the Commission held that when an employee is working alone there must be a means of "communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation." *Id. at* 1803. In *Cotter Corp.*, 8 FMSHRC 1135, 1137 (August 1986), the Commission made clear that the standards do not prohibit working alone. In interpreting the predecessor standard, the Commission held that "an employee assigned a task alone must have sufficient contact with others ... if, and only if, hazardous conditions within the meaning of the regulation are associated with that task." *Id.* The Commission further held that the real issue is "whether the employee's contact with others, which need not be continual, was sufficient to satisfy the protective purposes of the standard." *Id.*

Although the language of the standard cited in this case differs from the standard cited in *Cotter*, the basic principles are the same. I find that hazardous conditions were associated with the tasks that Darwin Stratton assigned Ms. Reeve to perform. One of those hazards was the lack of a guard on the tail pulley. (Tr. 47). Other hazards were present as described in the other citations and orders issued following the accident. Given Ms. Reeve's relative lack of mining experience, the potential hazard was considerable. (Tr. 50). Ms. Reeve did not have any means to call for help, unless she was in her truck. No other employees could see her and her cries for help could not he heard. (Tr. 45). She did not have a communication device on her person. No Darwin Stratton employees checked on her during the shift. Ms. Reeve's contact with others was insufficient to satisfy the protective purposes of the standard. I find that these conditions present a clear violation of the safety standard.

I also find that the violation was S&S. There existed a reasonable likelihood that the hazard contributed by the violation would result in an injury or illness of a reasonably serious nature. In reaching this conclusion, I have considered the experience of the employee, the nature of the hazards present at the pit, and the lack of any reliable means of communication in the event of an emergency. The radio in the truck was insufficient to meet the requirements of the standard in these circumstances.

Finally, I find that the violation was the result of Darwin Stratton's unwarrantable failure to comply with the standard. Darwin Stratton knew that Ms. Reeve was relatively inexperienced at operating the wash plant and that she would be working alone for the entire shift. The operator also knew or had reason to know that she would have no means to call for help if a serious accident occurred unless she could make it to her truck. Darwin Stratton's aggravated conduct is further evidenced by the fact that nobody checked on her during the entire shift. She may have been entangled in the conveyor belt assembly for a considerable length of time. If a means of communication had been available, someone may have been able to rescue her. (Tr. 49-50). For the reasons stated above, this order is affirmed as written.[2]

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[2] As of the date of the hearing, this Order had not been abated. (Tr. 55). MSHA issued Citation No. 7966589 and sent Darwin Stratton a letter about its failure to abate the order. (Exs. 5, 6). The letter stated that MSHA would consider "implementing section 110(b)" and proposing daily

**Citation No. 7966588; WEST 2000-443-RM**

This citation, as modified, alleges a violation of 30 C.F.R. §50.10 as follows:

> A fatal accident occurred at this operation on April 21, 2000. The operator failed to notify MSHA of the fatality despite operating another mine in the area and having knowledge of the reporting requirements.

Inspector Harsh determined that the violation was not serious, was not S&S, and was the result of Darwin Stratton's high negligence. Section 50.10 provides that a mine operator must immediately contact MSHA if an accident occurs at its mine. Section 50.2(h) defines "accident" to include the "death of an individual at a mine."

The Secretary established a violation of this regulation. Darwin Stratton did not notify MSHA of the fatal accident. MSHA was advised of the accident by the State of Utah's occupational safety and health agency. I also find that Darwin Stratton's negligence was high. Darwin Stratton operates the Airport Pit in the same county. (Tr. 67). Because the Airport Pit had been previously inspected by MSHA, Darwin Stratton was aware or should have been aware of the reporting requirements under section 50.10. For the reasons stated above, this citation is affirmed as modified.

**B. Regular Inspection**

The remainder of the citations and orders in these proceedings were issued during a regular inspection conducted by MSHA Inspector Richard Arquette during the accident investigation.[3] These citations and orders are affirmed in all respects as written or modified.

**1. Failure to Notify MSHA of Operation**

Inspector Arquette issued Order No. 7941258 and Citation No. 7941259 because Darwin Stratton failed to notify MSHA that it was operating the Rattlesnake Pit. The inspector alleged a violation of section 56.1000 in the unwarrantable failure order and a violation of section 41.11 in the section 104(a) citation. Section 41.11 requires operators to file a legal identity report providing information on their ownership with the MSHA district manger. Section 56.1000 requires operators to notify the local MSHA office when it starts and stops its operations.

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penalties.

[3] Inspector Harsh also issued Order No. 7966584 under section 103(k) of the Mine Act. Darwin Stratton contested the order in WEST 2000-371-RM. This order is affirmed.

The Darwin Stratton failed to comply with the regulations. (Tr. 90-91, 93-94). Although MSHA was aware of Darwin Stratton's Airport Pit, MSHA did not know that the Rattlesnake Pit existed. Darwin Stratton previously filed a legal identity report for the Airport Pit but not for the Rattlesnake Pit. As a consequence, the Rattlesnake Pit was never inspected for compliance with MSHA safety standards. If Darwin Stratton had complied with sections 41.11 and 56.1000, MSHA would have inspected the Rattlesnake Pit prior to the fatal accident. (Tr. 97). These violations are serious and Darwin Stratton's negligence was high. The citation and order are affirmed as modified by MSHA.

### 2. Workplace Examinations

Inspector Arquette issued Order No. 7941260 because workplace examinations were not being conducted by a competent person at least once each shift as required by section 56.18002. He determined that the violation was S&S and was the result of the operator's unwarrantable failure to comply with the standard. (Tr. 97).

Compliance with this standard is important because such examinations may reveal hazardous conditions. The operator should have known of this requirement because of its experience at its Airport Pit. This violation was S&S and was the result of the operator's unwarrantable failure. The order is affirmed as modified.

Order No. 7941263 alleges that equipment defect records were not being kept for the front-end loader. Inspector Arquette testified that Darwin Stratton had not been making the examinations required under section 56.14100. (Tr. 103-04). Compliance with this standard is important because such examinations may reveal hazardous conditions. The operator should have known of this requirement because of its experience at its Airport Pit. This violation was S&S and was the result of the operator's unwarrantable failure. The order is affirmed as written.

### 3. Electrical Violations

Inspector Arquette issued 12 citations and orders alleging violations of MSHA's electrical standards. Inspector Arquette has an electrical background and was concerned about the pit's electrical system. (Tr. 71). Citation No. 7941252 states that the pit's "electrical system from the portable [generator] to the electrical equipment was not provided with a ground" in violation of section 56.12025. The citation also states that the electrical system was not provided with an overcurrent device. When the inspector tested the system, he found that the electrical system was not properly grounded. (Tr. 75-76). A fault in the system could have transferred current to the frames of electrical equipment and seriously injured or killed an employee. I affirm this S&S citation.

Order No. 7941275 states that the operator had not been testing the continuity and resistance of grounding systems at the pit in violation of section 56.12028. (Tr. 141-42). Such testing would have revealed that the electrical system at the wash plant was not grounded. I affirm this unwarrantable failure order.

Order No. 7941268 states that the electrical control panels at the pit were not labeled to show what equipment each switch controls in violation of section 56.12018. Inspector Arquette testified that the representative of the operator had a difficult time determining which switches to throw to shut down particular pieces of equipment. (Tr. 118-19). He had to follow the electrical cables along the ground from the equipment to the control panel to make this determination. In the event of an emergency, an employee would not be able to quickly shut down equipment. I affirm this order as modified by MSHA. I also find that the Secretary established that the violation was a result of the operator's unwarrantable failure.

Citation Nos. 7941269, 7941273, and 7941274, and Order Nos. 7941266, 7941271, and 7941272 all concern electrical circuits for equipment at the mine. They allege violations of sections 56.12001 and 56.12002. In each instance, Inspector Arquette observed defects in these circuits. Motor starters, fuses, and circuit breakers were not the correct size and heater elements (overcurrent devices) were installed incorrectly. (Tr. 109-13, 121-40). I credit the testimony of Inspector Arquette with respect to these citations and orders. Each citation and order is affirmed as written by Inspector Arquette or subsequently modified by MSHA.

Citation No. 7941276 states that the cabinets for the motor controllers were not designed to be used outside but were made to be used in areas where they would not be exposed to the elements. The citation alleges a violation of section 56.12041. Inspector Arquette testified that this condition created an electric shock hazard because water could get into the electrical circuits. (Tr. 142-44). This citation is affirmed as written.

Order No. 7941267 states that the power cable entering the motor for the sand screw was not equipped with a bushing or fitting. About eight inches of the electrical conductors inside the cable were exposed to mechanical damage. (Tr. 114-17). This condition created an electric shock hazard. The Secretary established a violation of section 56.12004 and the order is affirmed as written.

Citation No. 7941270 states that splices and repairs on the power cable for the screen motor were not mechanically strong, properly insulated, or sufficiently protected against damage, in violation of section 56.12013. Inspector Arquette testified that the cited condition created a shock hazard. (Tr. 128-30). This citation is affirmed.

### 4. Other Citations and Orders

Inspector Arquette issued nine other citations and orders. These citations and orders allege violations of various safety standards. The violations include inadequate berms on elevated roadways, several fire hazards, inadequate guarding on the screen feed belt, inadequate first aid supplies, and equipment defects that affect safety. Based on the evidence presented at the hearing, all of these citations and orders are affirmed as written or modified. All of the citations and orders at issue in these cases are listed below.

## III. LIST OF CITATIONS AND ORDERS AFFIRMED

The following citations and orders are affirmed as written by Inspectors Harsh and Arquette or, if subsequently modified by MSHA, they are affirmed as modified. This list includes all modifications.

| | 30 C.F.R. § | 30 U.S.C. § |
|---|---|---|
| Order No. 7966584 | N/A | §813(k) |
| Citation No. 7966585 | 56.14107 | §814(d)(1) |
| Order No. 7966587 | 56.18020 | §814(d)(1) |
| Citation No. 7966588 | 50.10 | §814(a) |
| Citation No. 7941252 | 56.12025 | §814(a) |
| Order No. 7941253 | 56.9300(b) | §814(d)(1) |
| Order No. 7941254 | 56.9300(b) | §814(d)(1) |
| Order No. 7941255 | 56.4101 | §814(d)(1) |
| Order No. 7941256 | 56.4102 | §814(d)(1) |
| Order No. 7941257 | 56.20008 | §814(d)(1) |
| Order No. 7941258 | 56.1000 | §814(d)(1) |
| Citation No. 7941259 | 41.11 | §814(a) |
| Order No. 7941260 | 56.18002 | §814(d)(1) |
| Citation No. 7941261 | 56.14107(a) | §814(a) |
| Citation No. 7941262 | 56.14132(a) | §814(a) |
| Order No. 7941263 | 56.14100(d) | §814(d)(1) |
| Order No. 7941264 | 56.15001 | §814(d)(1) |
| Order No. 7941265 | 56.11002 | §814(d)(1) |
| Order No. 7941266 | 56.12002 | §814(d)(1) |
| Order No. 7941267 | 56.12004 | §814(d)(1) |
| Order No. 7941268 | 56.12018 | §814(d)(1) |
| Citation No. 7941269 | 56.12001 | §814(a) |
| Citation No. 7941270 | 56.12013 | §814(a) |
| Order No. 7941271 | 56.12001 | §814(d)(1) |
| Order No. 7941272 | 56.12001 | §814(d)(1) |
| Citation No. 7941273 | 56.12002 | §814(a) |
| Citation No. 7941274 | 56.12002 | §814(a) |
| Order No. 7941275 | 56.12028 | §814(d)(1) |
| Citation No. 7941276 | 56.12041 | §814(a) |

## IV. ORDER

For the reasons set above, each citation and order listed above is **AFFIRMED WITH PREJUDICE** and these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

# ADMINISTRATIVE LAW JUDGE ORDERS

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 5, 2000

| | | |
|---|---|---|
| WILLIAM C. GREEN, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | Docket No. VA 2000-16-D |
| v. | : | NORT CD 2000-1 |
| | : | |
| COASTAL COAL COMPANY, LLC, | : | Guess Mountain Mine #2 |
| Respondent | : | Mine ID 44-06807 |

**ORDER**

Respondent, filed a Motion to Dismiss Discrimination Complaint on August 28, 2000, on the grounds that "Complainant's discharge does not violate § 105(c) of the Federal Mine Safety and Health of 1977 ("Mine Act"), and his complaint fails to state a claim upon which relief may be granted under the Mine Act." Specifically, Respondent asserted that Complainant fails to allege protected activity under the Act. By Order to Respond of September 8, 2000, Complainant was directed to respond to Respondent's motion by specifying in detail the reason he believes he was discharged. Complainant timely responded on September 20, 2000.
Respondent replied on October 2, 2000, acknowledging that Complainant had, indeed, alleged protected activity, but renewing its motion to dismiss on the grounds that Complainant failed to file a Prehearing Report, as directed by Order to Show Cause of August 5, 2000, and that he cannot establish a *prima facie* case of discrimination.

*Pro se* litigants are afforded a great deal of latitude in bringing claims before the Commission and under Commission Procedural Rule 42, 29 C.F.R. § 2700.42, are held to setting forth a short and plain statement of the facts constituting the alleged discrimination and a statement of the relief requested. *Ribble v. T & M Development Company*, 22 FMSHRC 593 (May 2000). The Commission continues to caution that they should not be required to begin proving a *prima facie* case at the stage where they are simply held to meeting the Commission's minimal pleading requirements. *Id.* at 595 (quoting *Perry v. Phelps Dodge Morenci, Inc.,* 18 FMSHRC 1918, 1921 (November 1996).

In this case, Complainant has met the Commission's pleading requirements and, in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure, his complaint is construed in the light most favorable to him and his allegations are assumed to be true. Therefore, he must be afforded the opportunity to prove his allegations at hearing.

Accordingly, Respondent's Motion to Dismiss Discrimination Complaint, on both grounds, is hereby **DENIED**, and the hearing set in this matter shall proceed, as scheduled.

Jacqueline R. Bulluck
Administrative Law Judge
(703) 756-6210

Distribution: (Certified Mail)

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Julia K. Shreve, Esq., Jackson & Kelly, PLLC, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2000

| | | |
|---|---|---|
| CEDAR LAKE SAND & GRAVEL CO., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 99-184-RM |
| | : | Citation No. 7832607; 9/11/99 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 99-185-RM |
| ADMINISTRATION (MSHA), | : | Citation No. 7823608; 9/11/99 |
| Respondent | : | |
| | : | Docket No. LAKE 99-186-RM |
| | : | Citation No. 7823609; 9/11/99 |
| | : | |
| | : | Docket No. LAKE 99-187-RM |
| | : | Citation No. 7823610; 9/11/99 |
| | : | |
| | : | Docket No. LAKE 99-188-RM |
| | : | Citation No. 7823611; 9/11/99 |
| | : | |
| | : | Docket No. LAKE 99-189-RM |
| | : | Citation No. 7823612; 9/11/99 |
| | : | |
| | : | Docket No. LAKE 99-190-RM |
| | : | Citation No. 7823613; 9/11/99 |
| | : | |
| | : | Cedar Lake Sand & Gravel |
| | : | Mine ID 47-00792 |

## ORDER GRANTING MOTION TO ALLOW MODIFICATION OF ORDERS

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Heath Act of 1977, 30 U.S.C. § 815(d). They have been on stay since November 15, 1999, pending the filing of the associated civil penalty proceedings. The Secretary has moved to amend Order No. 7832611 in Docket No. LAKE 99-188-RM and Order No. 7832613 in Docket No. LAKE 99-190-RM. The Contestant opposes the modification of Order No. 7832611. For the reasons set forth below, the motion is granted.

Order No. 7832611 alleges a violation of section 56.14100(c) of the Secretary's regulations, 30 C.F.R. § 56.14100(c), because: "A fatal accident occurred at this operation on

August 6, 1999, when a front-end loader slid off an embankment and overturned. The front-end loader had hydraulic system defects which affected the ability to control the loader when dumping or loading. . . ."[1] The Secretary wishes to modify the order by removing the words "hydraulic system" from the alleged condition or practice.

Order No. 7832613 alleges a violation of section 56.9300(b), 30 C.F.R. § 56.9300(b), in that:

> Berms were not maintained to at least mid-axle height of the largest self-propelled mobile equipment that travels on the elevated impoundment roadway. The roadway was about 740 feet in length and averaged about 15 feet wide. A water and silt filled pond bordered the roadway on the south side where a drop off of about ten feet existed. An embankment bordered the north side where a drop off of about 18 feet existed. The height of the berms on both sides ranged from non-existent to 30 inches high. A Cat 980B front-end loader and other mine vehicles traveled the entire length of the roadway on a regular basis to check the discharge area of the wet plant, and to haul and dump the discharge material. The mid-axle height of the loader was 33 inches. Equipment tire tracks and stress cracks were observed along the edge of the roadway in several locations. . . .[2]

The Secretary proposes to delete the fourth sentence, "[a]n embankment bordered the north side where a drop off of about 18 feet existed," and to change the fifth sentence to read: "The height of the berms on the *south side* ranged from non-existent to 30 inches high."

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[1] Section 56.14100(c) provides that:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

[2] Section 56.9300(b) requires that: "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

The Commission has held that the modification of a citation or order is analogous to an amendment of pleadings under Fed. R. Civ. P. 15(a).[3] *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). The Commission has further noted that:

> In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *See* 3 J. Moore, R. Freer, *Moore's Federal Practice*, Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) . . . . And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

*Wyoming Fuel*, 14 FMSHRC at 1290.

In this instance, there is no evidence that the Secretary is acting in bad faith or is seeking modification for the purpose of delay. Further, since the cases are on stay, trial will not be unduly delayed. The Contestant, however, argues that it would be prejudiced by the modification because then "the Government's case would be a secret. Cedar Lake will be left with no earthly idea as to what 'defect' the Secretary believes afflicted the front-end loader . . . ." (Cont. Opp. at 4.) This seems to be somewhat overstating the matter.

While it appears that up until now the Secretary's theory was that the loader's hydraulic system was defective, removing that language does not leave the Contestant totally in the dark. Whatever the defect is, it still is alleged to be on the same front-end loader and it still is alleged to be one "which affected the ability to control the loader when dumping or loading." In view of the Contestant's assertion that "the front-end loader is not now and never has been defective," (*Id.*), the modification should not have much impact on the company's defense. This is not a drastic change in the factual matters in dispute, The issue is the same as it has always been, whether the front-end loader was defective.

On the other hand, it appears that the Contestant's discovery on this issue has been mostly completed and it should not have to revisit all of its discovery on the order. Accordingly, while

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[3] The Commission's Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission's rules, or the Admin. Procedure Act, 5 U.S.C. § 551 *et seq.*, the Commission may apply the Fed. R. Civ. P., insofar as "practicable" and "appropriate." 29 C.F.R. § 2700.1(b)

the Secretary's motion is being granted, the Secretary is directed to furnish the Contestant, within 21 days of the date of this order, a written statement setting out the government's theory with respect to Order Nos. 7832611 and 7832613 and identifying the evidence, testimonial and otherwise, that supports the theory.

**ORDER**

The Secretary's Motion to Allow Modification of Orders is **GRANTED** and the orders are **MODIFIED** as requested in the motion. As a condition to granting the motion, the Secretary is **ORDERED** to provide the Contestant with a Bill of Particulars concerning Order Nos. 7832611 and 7832613, as set out above. In addition, the Contestant may conduct further discovery concerning the orders as it deems necessary.

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2000

| | | |
|---|---|---|
| SECRETARY OF LABOR, MSHA | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2000-58-D |
| ON BEHALF OF GARY DEAN MUNSON, | : | MORG CD 2000-01 |
| Complainant | : | |
| v. | : | |
| | : | |
| EASTERN ASSOCIATED COAL CORP., | : | Federal No. 2 |
| Respondent | : | Mine ID 46-01456 |

## ORDER GRANTING MOTION TO COMPEL AND DENYING MOTION FOR PROTECTIVE ORDER

Before me are two motions addressed to a discovery dispute. Respondent has moved for an order compelling the appearance of Richard L. Eddy, President of District 31, United Mine Workers of America, at a resumption of his deposition. The deponent, Mr. Eddy, through counsel, has opposed that motion and moved for a protective order, barring resumption of the deposition.

Mr. Eddy was served with a subpoena directing him to appear for deposition on October 4, 2000, in the offices of Respondent's counsel, to give testimony regarding the issues in this discrimination proceeding. Mr. Eddy duly appeared, without counsel, and responded to questions. However, when counsel for Respondent attempted to question Mr. Eddy about his definition of a "good employee", a term he had used in an unsworn statement he had provided to the Mine Safety and Health Administration (MSHA), he refused to answer. He objected to counsel's framing of a question as to how he would assess the conduct of one of District 31's employees in a hypothetical situation. Mr. Eddy viewed the question as inquiring into his running of the District office, which he viewed as irrelevant. At that point, he determined that he should be represented by counsel and requested an opportunity to return to his office to contact counsel. The deposition was adjourned.

Respondent served its motion on October 12, 2000, seeking an order compelling Mr. Eddy to appear for a resumption of his deposition, or, alternatively, to bar use of his unsworn statement as evidence in this proceeding. Mr. Eddy has moved for a protective order, requesting that Respondent's motion be denied on grounds that compelling resumption of the deposition would amount to "unjust harassment." The basis for the harassment claim is that the deposition had consumed approximately two hours and that Respondent's counsel had inquired into privileged matters and had improperly terminated the deposition. The basis of the assertion of privilege is not explained, except by a reference to "internal Union affairs."

Deponent's position is not well-founded, either factually or legally. The claim of privilege is unexplained, unsupported by citation to legal authority and is not apparent from the nature of the inquiry. The deposition transcript also makes clear that it was the deponent who requested an adjournment of the deposition in order to return to his office to contact and secure legal representation, presumably for a resumption of the deposition, which could not be accomplished in a matter of days, in part, because of his unavailability. While it is possible that Mr. Eddy would have remained and participated in a continuation of the deposition, that is not at all clear from the record.

Based upon the forgoing, Eddy's motion for a protective order will be denied and Respondent's motion to compel will be granted. All counsel, parties and witnesses are admonished to cooperate in the discovery process. Good faith attempts to rephrase questions can often avoid an objection. Counterproductive attempts to pursue details of questionable significance should be avoided. The particular question that generated the problem here, for example, might be reconsidered. The basis for Mr. Eddy's belief that Complainant was a "good worker" had been explored in some detail. In fact, Respondent's witnesses had been somewhat complimentary of Complainant's work performance at the temporary reinstatement hearing. Hopefully, counsel will find more productive lines of inquiry than pressing Mr. Eddy for a response to a very limited hypothetical question about actions of a District 31 employee.

Counsel are also reminded of the requirements of Fed. R. Civ. P. 30(d), applicable here through Commission Rule 2700.1(b), 30 C.F.R. § 2700.1(b). Objections are to be stated concisely and in a non-argumentative and non-suggestive manner. In most situations, the question should be answered after the objection is noted. A witness can be instructed not to answer only in very limited circumstances, as applicable here, to preserve a privilege or to allow prompt presentation of a motion for a protective order on grounds that the examination is being conducted in bad faith, or such a manner as unreasonably to annoy, embarrass, or oppress the deponent. If privilege is asserted as an objection, the specific privilege claimed should be identified and the basis for asserting it should be explained. Efforts should be made to rephrase the inquiry to avoid a bona fide claim of privilege. As noted above, the unexplained mention of privilege in Deponent's motion does not appear bona fide. And, while the line of inquiry might have been shaped in a more effective or less objectionable manner, it did not approach the level for which relief might be appropriately sought under Rule 30(d)(3).

Based upon the foregoing, Respondent's motion to compel is granted and Deponent's motion for a protective order is denied. Mr. Eddy is directed to appear for resumption of his deposition, in the offices of Respondent's counsel, at the earliest convenience of the parties to this proceeding.

Michael E. Zielinski
Administrative Law Judge
703-756-6232

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