OCTOBER 2002

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 2002

No cases were filed in which Review was granted during the month of October:

No cases were filed in which Review was denied during the month of October:

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-39-D
on behalf of Terry McGill,	:	BIRM CD 99-04
Complainant	:	
	:	
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC.,	:	Mine ID 01-00851
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDER OF DISMISSAL

Before: Judge Weisberger

This Discrimination Proceeding is before me based upon a decision of the Commission, 23 FMSHRC 981, remanding the case to me for further proceedings consistent with its decision. Upon receipt of the decision, the undersigned contacted the parties to explore the possibility of resolving by way of settlement, the issues raised by the Commission's decision. The parties engaged in extensive and protracted negotiations, and, on October 4, 2002, filed a joint motion to approve settlement.

I find that the terms of the settlement are appropriate under the terms of the Federal Mine Safety and Health Act and I approve it. I therefore grant the motion to approve settlement.

It is **Ordered** that the parties abide by all terms of the settlement; that Respondent will pay to Mr. McGill the amount of $200.00 for expenses that arose from Respondent's termination of his employment and $42.00 as interest on these expenses; that Respondent will forward a check or money order in the amount of $242.00 payable to Terry McGill to the office of the Solicitor, 61 Forsyth Street, Room 7T10, Atlanta, Georgia 30303, within 30 days of this Order; that the Office of the Solicitor will forward the check to Mr. McGill; and that Respondent shall pay $2,500.00 in full settlement of the civil money penalty sought by the Secretary in this matter. Such payment shall be made within 30 days of this decision.

It is **Further Ordered** that this case be **Dismissed**.

Avram Weisberger
Administrative Law Judge

Distribution List:

Larry A. Auerbach, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, N.W., Atlanta, Georgia, 30303

Anthony Jeselnik, Esq., U.S. Steel Mining Company, Law Department, 600 Grant Street, Pittsburgh, PA 15219-2749

/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVE., N.W., Suite 9500
WASHINGTON, D.C. 20001

October 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-330-M
Petitioner	:	A.C. No. 41-03894-05504
v.	:	
	:	
HAMILTON PIPELINE, INC.,	:	
Respondent	:	Plant 530

DECISION

Appearances: Christopher V. Grier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
William H. Sommers, Esq., The Gardner Law Firm, San Antonio, Texas, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Hamilton Pipeline, Inc., is liable for 15 violations of mandatory safety and health standards applicable to surface metal and nonmetal mines.[1] A hearing was held in San Antonio, Texas. The parties submitted briefs following receipt of the transcript. Neither party submitted a reply brief. At the commencement of the hearing, the Secretary vacated two of the citations. The Secretary also modified two of the remaining citations and Respondent agreed to pay reduced penalties in the amount of $110.00. Respondent withdrew its notices of contest as to three of the remaining citations. The Secretary proposes civil penalties totaling $1,310.00 for the eight alleged violations remaining at issue. For the reasons set forth below, I find that Hamilton committed four of the alleged violations and impose civil penalties totaling $384.00.

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[1] Citation No. 7896144 is listed on the assessment control sheet attached to the petition, but a copy of that citation was not included in the papers filed with the Commission. Respondent advised that that citation was not contested and had been paid, which the Secretary confirmed following the hearing. Citation No. 7896144 is not at issue in this proceeding.

Respondent, Hamilton Pipeline Inc., operates a portable crusher, screens and related equipment, producing crushed stone for use in highway construction and other paving projects. In 1988, the equipment had been moved from Del Rio, Texas, to a site near Brackettville, Texas, to produce crushed stone for a highway paving project in that area. When that project was completed in June of 2000, the equipment was moved back to Del Rio. The crusher is operated intermittently, as product is ordered or needed, and such operations are inspected annually by the Department of Labor's Mine Safety and Health Administration (MSHA).

MSHA Inspector, Danny Ellis, arrived at the Del Rio site at approximately 8:30 a.m., on August 22, 2000, to conduct the annual inspection. A locked gate prevented access to the facility. He telephoned the corporate office, some 100 miles away, and waited until approximately 12:30 p.m., for a Hamilton employee, Carlos Caballos, to arrive and unlock the gate. Two men were working at the site that day, but there was no means to contact them. The two men at the site spoke only Spanish. Caballos spoke Spanish and limited English. Ellis spoke only English. His inquiries to the men at the site were translated by Caballos. Based upon the responses to his inquiries and his observations, Ellis concluded that the crusher had been operated for the two month period following the move from Brackettville. Respondent maintains that the plant was in the process of being set up following the move, and that Ellis' conclusion that it had been operated for two months was erroneous.

In the course of the inspection, Ellis issued sixteen citations for alleged violations of safety and health standards, which deviated markedly from the results of previous inspections. A history of violations submitted by the Secretary showed that only two, non-significant and substantial, violations had been issued to Respondent within the 24 month period preceding August 22, 2000. Ellis had inspected the crusher on three prior occasions. Some of the citations he issued on August 22, 2000, were for conditions that neither he, nor other MSHA inspectors, had cited in the past.

The citations at issue will be discussed in the order that evidence was presented at the hearing.

Citation No. 7896146

Citation No. 7896146 alleged a violation of 30 C.F.R. § 56.14112(b), which requires that guards to protect persons from moving machine parts "shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The conditions noted on the citation were:

> The finned tail pulley on the belt under the crusher was not guarded. The guards had been removed when the crusher was moved from the Brackettville pit approximately two months ago and not replaced. The guards were found under

the crusher motor's fuel tank, in a container.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

Ellis issued the citation because he observed that the guard had been removed and he believed, at the time, that the crusher had been in operation for two months. He was informed that the guard had been removed when the crusher was relocated to Del Rio and had not been replaced. Tr. 46. He also had been informed that the move had taken place about two months before the inspection, and he believed that the plant had been operated during that time. He initially testified that he had been informed that "the plant had been in operation for approximately two months." Tr. 49. Those facts lead him to conclude that the violation was due to the operator's high negligence. Tr. 55, ex. P-2.

In preparation for the hearing, Ellis had an opportunity to examine records maintained by James R. Hamilton, Respondent's President, that showed that key components of the crusher equipment had been moved to the site only shortly before the inspection. Tr. 61. He did not recall the specific wording of his inquiries during the inspection, but realized at the time of his testimony that he probably had been informed only that the crusher had been at the Del Rio site for about two months -- not that the crusher had been in operation for two months. Tr. 73, 78-79, 176. However, he continued to believe that the plant had been operated for production purposes without the guard in place because of the presence of stockpiles and build-ups of material under the plant and belts. He felt that there would have been no reason for one of the men to have been shoveling in the area if there hadn't been significant spillage from operation of the equipment. Tr. 55-56.

Respondent does not contest the fact that the guard had been removed at the time of the inspection. It contends that the plant was in the process of being set up after the move to Del Rio, and that the guard had been removed to make adjustments to the pulley and conveyor belt, which was permissible under the regulation.

The crusher had been moved to the Del Rio site in late June. However, other equipment had not been relocated until shortly before the inspection. The generator, which powered the electrically driven conveyor belts, had been delivered on July 13, 2000, and a new battery was purchased for it on July 14, 2000. Tr. 255-56. The move was not completed until Saturday, August 19, 2000, just three days before the inspection. Tr. 61, 257-61. Setting-up of the equipment was delayed because of a need to modify the "rock box," a stationary funnel-like device into which rock is dumped and fed to the crusher. Modifications to the crusher, done at Brackettville, required changes at Del Rio before the crusher could be positioned under the rock

box. Tr. 262-63. This work proceeded at a somewhat leisurely pace because there were adequate stockpiles of material at the site, remaining from when the crusher had last been operated there two years before, and there was no reason to hurry the installation. Tr. 250, 301-02.

The plant consists of two main pieces of equipment -- the crusher and screens. The product, crushed stone, is moved between the equipment and to stockpiles by conveyor belts. The final set-up of the equipment is depicted in Exhibits R-1 and R-6. The heaviest piece of equipment, the crusher, must first be positioned under the rock box. The various conveyor belts and the screen are then positioned to facilitate the flow of material. The conveyor belt frames are welded in place after being leveled and positioned with relation to the crusher and screen. Tr. 263-66. The pulleys on the conveyor belts must then be adjusted so that the belt remains on the pulleys and transports the material with a minimum of spillage. James Hamilton explained that new set-ups generally require multiple adjustments to the belts, and the most efficient way to perform the adjustments is to remove the guards and adjust them sequentially, first without material and then when they are loaded. Tr. 266-70, 305-06. The guard in question, along with guards on other belts, had been removed on August 21, 2000, so that the pulleys could be adjusted. Tr. 223.

I reject the Secretary's argument that the plant had been operated for production purposes without the guard in place. Ellis admitted that his initial conclusion that the plant had been in operation for two months was erroneous and apparently had been the product of communication difficulties. His attempt to buttress his conclusion that the plant had been operated by reference to stockpiles and a build-up of material is unconvincing. He had no recollection of the size of the stockpiles that had been left at the site when the plant had been moved from Del Rio two years previously. Tr. 87. Nor did he know how much of the stockpiles remained when the equipment was moved back to Del Rio. The presence of stockpiles does not tend to prove that the plant was operated after it was moved back to the Del Rio site. As to build-up of material, Ellis first testified that the pictures taken during the inspection showed a build-up of material under the plant and belts and that some of it was shown in the picture included in Exhibit P-3. Tr. 56. However, he later conceded that there was no build-up of material shown in that exhibit, but maintained that the build-up was shown in other photographs. Tr. 68, 78-79. However, there was no testimony regarding a build-up of material depicted in other photographs taken at the time of the inspection. Those photographs appear to depict equipment and surrounding areas that are relatively clean, indicating that the crusher had not been operated.

Respondent contends that the power sources of the plant were red-tagged and locked-out of service on the day of the inspection. It is clear, however, that the plant had been operated prior to the inspection. The purchase of a battery for the generator evidences that the electrical power was functional as early as July 14, 2000, and pulleys for conveyor belts were being adjusted on August 21, 2000. Tr. 221. I find that the plant had been operated while at the Del Rio site, but only for the purpose of setting it up, not for running production. I further find that the guard had been removed for the purpose of making adjustments to the pulley, which could not be performed without removal of the guard. Accordingly, I find that the Secretary has failed to carry

her burden of proving that Respondent violated the regulation, as alleged in the citation.

Citation No. 7896147

Citation No. 7896147 alleged a violation of 30 C.F.R. § 56.14107(a), which requires that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The conditions noted on the citation were:

> The . . . finned tail pulley on the oversize belt was not sufficiently guarded. The guard would not prevent anyone from accidentally contacting the tail pulley. The end of the guard was almost even with where the tail pulley started. The tail pulley was at the end of the steps that lead to the belt's catwalk. There was a step that was broken that a person could slip on, propelling [him] into the tail pulley.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $184.00 is proposed.

The Violation

The condition observed by Ellis is shown in a picture included in Exhibit P-4. A guard had been installed preventing access to the tail pulley. However, the pulley was near the end of the guard and the belt/pulley pinch point was relatively accessible. Ellis determined that a miner could encounter the pinch point accidently while servicing the pulley, cleaning up the area, or in the course of falling from adjacent steps, one of which was tilted at approximately a 45 degree angle. Tr. 100-01. He assessed the operator's negligence as moderate because he believed that the guard had likely been adequate when first installed, and that the hazardous condition developed over time as adjustments were made to the belt and pulley. Tr. 105.

Respondent's defense to the alleged violation is similar to its defense to the previous citation. Respondent elicited from Ellis on cross-examination that he did not know whether the belt had been finally adjusted at the time of the inspection, suggesting that the pulley might have been less accessible by the time the plant was operating for production purposes. Tr. 108. However, Respondent introduced no evidence that subsequent adjustments to the pulley corrected the dangerous condition, which would have supported its argument that this condition was temporary in nature, pending final adjustment of the belt. In any event, the plant was operated in this condition during the set-up process and miners were exposed to the hazard. Ellis also confirmed that he had not identified this condition as a violation in previous inspections. Tr. 109-10. However, he noted that that particular condition, which would have varied over time as the belt was adjusted and repaired, may not have existed during prior inspections. Tr. 112-13.

I find that the guard was inadequate and that the condition violated the regulation. I also concur with Ellis' determinations that the violation was a result of the operator's moderate negligence and that one person was affected.

Significant and Substantial

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

The Commission has explained that:

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

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

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

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation.

Texasgulf, Inc., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Whether this violation was S&S turns upon the likelihood of injury. It could hardly be disputed that the violation contributed to a discrete safety hazard and that an injury caused by an encounter with the pinch point of the pulley would be serious. I find that there was a reasonable likelihood that the violation would result in an injury. A miner working in the immediate area of the pulley, cleaning up spillage from the belt, could inadvertently contact the pinch point. Ellis also postulated that inadvertent contact might occur when the pulley was serviced. While it appears that the belt would not generally be running when the catwalk was accessed, a miner could access the catwalk and the tilted stair, while the belt was running and encounter the pulley while trying to prevent a fall. I find that the violation was significant and substantial.

Citation No. 7896148

Citation No. 7896148 alleged a violation of 30 C.F.R. § 56.14112(b), *supra*. The conditions noted on the citation were:

> The guard on the finned tail pulley on the stacker belt had been removed on the side facing the road, and not replaced. The guard had been removed when the crusher was moved from the Brackettville plant approximately two months ago. The tail pulley was approximately 60 inches from the ground. A person could accidentally contact the tail pulley.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

Respondent's defense to this alleged violation is identical to its defense to Citation No. 7896146, i.e., that the guard had been removed so that the pulley could be adjusted during the set-up process. While Ellis was of the opinion that removal of the guard on only one side of the pulley tended to indicate that adjustments to the pulley were not being made, he conceded that it might be possible to adjust the pulley by removing only one guard. Tr. 119-20, 122-23. Hamilton explained that it was difficult to access the other side of the pulley, and it was not improper to attempt to adjust the pulley by removing the guard on only one side. Tr. 282-83.

For the reasons discussed with respect to Citation No. 7896146, I find that the guard in question had been removed for the purpose of making adjustments to the pulley and that Respondent did not violate the regulation.

Citation No. 7896149

Citation No. 7896149 alleged a violation of 30 C.F.R. § 56.14107(a), *supra*. The conditions noted on the citation were:

> The v-belt drive on the oversize belt head pulley was not guarded on the backside. The v-belt was approximately 18 inches from the end of the catwalk. A person could reach and contact the pinch points.

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

The Violation

The "oversize belt" transports material that has been screened out as being too large back to the crusher for reprocessing. A catwalk runs along the belt up to the v-belt drive pulley which is some 15 feet above ground level. The pulley is located approximately two feet beyond the end of the catwalk. It was guarded on one side, but the side nearest the conveyor belt was not guarded. Ellis estimated the distance from the end of the catwalk to the v-belt pulley to be about 18 inches and determined that it was possible for someone standing at the end of the catwalk to reach outward and down to the pinch point, i.e., where the belt engaged the pulley. He concluded that a laceration, fracture, dislocation or amputation of a finger might result, but that an injury was unlikely because the area was accessed only once per week and a miner would have to reach out to contact the pinch point to sustain an injury. Tr. 131-34; ex. P-6.

Ellis admitted that this condition had likely existed since the plant was in operation, and he conceded that he had inspected the plant, and that specific condition, on three previous occasions and had not issued a citation. Tr. 135, 138. Nor was he aware of any citation issued for that condition by other MSHA inspectors. When the plant was first set up after it was acquired several years earlier, Hamilton requested that MSHA conduct a "courtesy inspection," wherein MSHA inspects the equipment, noting any potential violations, or other matters of interest, but does not issue citations or take enforcement action. This condition was not identified as a deficiency during that inspection. Nor was the condition cited during any other formal inspection by MSHA over the 5-8 years that the equipment had been operated in its present configuration. Tr. 284-86.

In construing an analogous standard[2] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094,

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[2] 30 C.F.R. § 77.400

(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine

2097 (Sept. 1984), the Commission stated:

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

The potential hazard at issue here was 15 feet above ground and was not located near or adjacent to any work area. There was no realistic possibility of inadvertent contact. As Ellis testified, "[i]t is not something that [a miner] would accidently fall into contact with." Tr. 133. A miner would likely be in the area about once per week. However, the evidence reflects that the catwalk was used only to change the belt or service the pulley. In either case, Hamilton testified, the belt drive would be shut off and locked out. Tr. 285-87. Numerous MSHA inspectors, including Ellis, had inspected that condition on prior occasions and determined that the regulation did not require a guard to be installed on that side of the belt drive.

Considering all of the factors discussed in *Thompson Bros.*, I find that the absence of a guard on the conveyor-side of the v-belt drive was not a violation of the regulation. The virtual inaccessibility of the pinch point, and the fact that the belt drive would typically not be operating during the limited time that a miner would be at the end of the catwalk reduce the likelihood of injury well below the "reasonably possible" benchmark.

The Secretary introduced an excerpt from a publication identified as "the guarding handbook," presumably an MSHA guideline on guarding, indicating that "Where contact is possible from both sides, the belts and pulleys must be totally enclosed." Tr. 129-30; ex. P-7. An illustration depicts a v-belt drive that is at ground level with a worker servicing machinery in proximity to the unguarded side of the belt drive. Here, the belt drive was located approximately 15 feet in the air and was accessible only by a catwalk that ended approximately two feet from the drive. There is no evidence that reaching near the unguarded side of the drive was necessary to perform servicing and, in any event, the drive would not be operating when service was performed. While it is feasible that a person could lean over or through the railing of the catwalk and reach to the pinch point, there is nothing in the record to indicate that there is even a remote

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> parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

possibility that that would occur.[3]

Citation No. 7896152

Citation No. 7896152 alleged a violation of 30 C.F.R. § 56.14107(a), *supra*. The conditions noted on the citation were:

> The head pulley on the stacker belt was not guarded. The head pulley was approximately 18 inches from the end of the catwalk. A person could reach and contact the pinch point.

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

The Violation

This alleged violation presents issues nearly identical to those presented with respect to Citation No. 7896149. Tr. 152. The condition cited as hazardous was inaccessible from the ground and was not located near or adjacent to any work area. A miner would have to reach from the end of the catwalk to contact the pinch point of the pulley. Tr. 146-47. There was virtually no possibility of inadvertent contact. The belt would generally not be operating during the limited time that a miner would be on the catwalk. Other MSHA inspectors, including Ellis, had inspected the condition on prior occasions and determined that the regulation did not require installation of a guard. For the reasons discussed with respect to Citation No. 7896149, I find that Respondent did not violate the regulation, as alleged.

Citation No. 7896153

Citation No. 7896153 alleged a violation of 30 C.F.R. § 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." The conditions noted on the citation were:

> The third step, top step, going to the oversize belt catwalk was broken and laying at approximately a 45 degree angle. A person could slip and fall and contact the

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[3] Respondent did not specifically argue that enforcement of the regulation, as proposed by the Secretary, would contravene the fair notice concept of due process. MSHA's failure to identify the need for a guard during the courtesy inspection and numerous subsequent regular inspections could well give rise to a due process defense. *See Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002); *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan 1998); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

ground approximately 3 feet [below], or could fall and contact the unguarded finned tail pulley on the oversize belt.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $184.00 is proposed.

The Violation

The lower end of the catwalk running along the oversize belt, approximately 3-4 feet above ground level, is accessed by a set of ladder-like steps, the top of which is attached to the catwalk by hooks. The angle of the ladder, and the treads of the steps, is adjusted by blocking at the bottoms of the side rails. The ladder is depicted in photographs included in Exhibits P-4 and P-9. Whether the step in question, the top step, was welded in place or loose, is disputed. Tr. 165, 280.

Respondent suggested that the angle of the step would have been corrected by final adjustments before operations commenced. Tr. 279-80. However, it appears that the lower steps are nearly horizontal, or at a mild slope, similar to that of the catwalk. The top step is at a significantly greater angle, and the hazard presented by it would not have been alleviated by an adjustment to the slope of the ladder. It is also apparent that the steps were used by miners while the plant was being operated during the start-up procedure, as belts were adjusted and other tasks performed. Tr. 226.

Regardless of the ladder's design or whether the top step was securely welded, it was tilted at approximately a 45 degree angle and presented an obvious slip and fall hazard to any miner accessing the catwalk. I find that the condition violated the regulation and I agree with Ellis' determinations that the condition was the result of the operator's moderate negligence, and that one miner was affected.

Significant & Substantial

Ellis testified that, in addition to typical injuries that might result from a fall, a miner might also encounter the inadequately guarded tail pulley of the oversize belt and suffer a severe injury as described in the discussion of Citation No. 7896147. However, as noted in that discussion, the oversize belt was not typically running while a miner would access the catwalk to service the head pulley or replace the belt. Consequently, there was little risk of a miner falling and encountering an operating tail pulley. Ellis testified that if the risk of severe injury from the tail pulley were eliminated, an injury caused by the violation would most likely result in lost work days or restricted duty, and maintained that the violation would still be S&S.

I disagree. The ladder was narrow, relatively short, extending only 3-4 feet up to the

catwalk, and had railings on both sides. While the violation presented a reasonable likelihood that an injury would occur, the probability of a serious injury occurring as a result of the violation was too remote to render the violation S&S. I find that any injury would likely have resulted in no lost work days.

Citation No. 7896157

Citation No. 7896157 alleged a violation of 30 C.F.R. § 56.18002(b), which requires that "A record that such examinations [of working places] were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative." The conditions noted on the citation were:

> A record that each work place is being examined at least once each shift for conditions that may adversely affect safety and health is not being kept. This is evidenced by the numerous citations written for conditions that would adversely affect the safety of the miners.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

When nothing was produced in response to his request for workplace examination records, Ellis issued the citation. At the time, he was under the impression that the plant had been operating for production purposes for two months and that workplace examinations had not been conducted. Tr. 176. He candidly admitted, however, that Respondent's employees may not have understood what he had asked for, especially in light of the communication difficulty. Tr. 184-85.

Respondent introduced evidence that records of workplace examinations had been kept for January through June of 2000. Ex. R-4. Presumably, those records were available and would have been produced in response to Ellis' request, if it had been understood. It appears that Respondent was performing workplace examinations and keeping a record of them during the time that the plant was in operation at the Brackettville site. However, such examinations are to be performed, and records kept, for each shift that a miner is working, regardless of whether the plant is being operated. Tr. 182. Consequently, records of workplace examinations should have been kept for each day that miners were engaged in setting up the plant at the Del Rio site. It appears that no such records were kept. There were no work place examination records for July or August included in Exhibit R-4. When asked why there were no records for July or August, Vicente Guerrero explained that work was not performed at the plant all the time, and that he "now" keeps a record reflecting "no work" when they are not at the plant. Tr. 237. While his

response does not directly address the status of records for days when men were at the plant engaged in the set-up process, he made no claim that records for the July-August period existed, and Respondent introduced no evidence of the existence of such records.

Respondent was required to maintain work place examination records for each day that miners worked at the Del Rio site, setting up the crusher, screens and conveyors. I find that no records were kept for those days and that the regulation was violated.

Significant and Substantial

Ellis' S&S determination was based upon his mistaken belief that the plant had been operated for two months, during which miners were exposed to numerous serious safety hazards. Tr. 174, 184-85. As noted above, the plant was not operated for production purposes prior to the inspection. The plant, or portions of it, were operated only for short periods on intermittent days while it was being set up. In addition, many of the alleged violations that Ellis determined to be S&S were eventually determined to be less serious. Of the 15 citations originally at issue in this proceeding, nine were alleged to have been S&S. Of the eight other S&S violations, the Secretary vacated one citation and agreed to modify two others to non-S&S violations, and two citations are vacated and one modified to non-S&S by this Decision. One of the remaining S&S violations had nothing to do with work place examinations.[4] Consequently, only one violation that had relevance to records of work place examinations actually posed a risk of serious injury to a miner.

I find that the violation was not S&S and was unlikely to result in an injury.

Citation No. 7896159

Citation No. 7896159 alleged a violation of 30 C.F.R. § 56.12028, which requires that:

> Continuity and resistence of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistence measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative."

The conditions noted on the citation were:

> There is no record that a test has been done of the continuity and resistence of the grounding system since the plant was moved from Brackettville approximately two months ago.

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[4] Respondent withdrew its contest to Citation No. 7896150, which charged an S&S violation for the failure of two employees to wear protective footwear.

Ellis concluded that it was unlikely that the violation would result in an injury that would be fatal, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $55.00 is proposed.

The Violation

Ellis testified that he determined that the regulation had been violated because no record of continuity and resistence testing was produced in response to his request. He admitted, however, that it was likely that Respondent's employees were not familiar with the test or records associated with it and did not understand what he had asked for. Tr. 192-94. At the hearing, Respondent produced a record of testing that had purportedly been conducted on the grounding system on August 15, 2000. Ex. R-7. That record, written on a piece of cardboard, purports to show a resistence of one ohm or less in circuits connecting 14 motors and other electrical devices. The Secretary appears to concede that the record existed at the time of the inspection, was not produced due to the communication difficulty noted above, and would not pursue this alleged violation if the record satisfied the regulatory requirement.

The Secretary contends that the record does not satisfy the regulation because it is a record only of a continuity test between the plant's various electrical devices and the main grounding electrode. The resistence test required by the regulation is considerably more involved and is intended to demonstrate that the grounding electrode, itself, is effectively in contact with the ground, i.e., that there is a low resistence in the connection of the grounding electrode to the earth. Respondent argues that Ellis was merely speculating about the meaning of its record, and that the last entry shows the results of the ground earth resistence test, and reads "motor loop grounded." Tr. 292.

A proper resistence test of the ground-to-earth connection, as described by Ellis, involves driving metal rods at equal intervals from the grounding electrode and measuring the resistence between the various rods and the grounding electrode. The resistence at 62.5% of the longest distance should be less than five ohms. Tr. 202, 211. The entry relied upon by Respondent does not appear to reflect the results of such a test. Rather, it reflects only the results of continuity tests showing low resistence between the various electrical devices and the grounding electrode.

I find that the record maintained by Respondent of electrical testing done on August 15, 2000, did not include a record of testing the resistence of the grounding system, and that the regulation was violated. I agree with Ellis' assessment of the gravity and negligence factors.

The Appropriate Civil Penalties

Hamilton Pipeline had only two non-S&S assessed violations in the two year period preceding August 22, 2000. Respondent does not contend that imposition of the proposed penalties would threaten its ability to remain in business, and it is not disputed that Respondent

demonstrated good faith in achieving compliance with the regulations. The gravity and negligence assessments with respect to each violation are discussed above.

Respondent does contend that no penalty can be imposed because the Secretary failed to introduce evidence on one of the factors required to be taken into account in the assessment of any civil penalty – " the appropriateness of the penalty to the size of the business of the operator charged." 30 U.S.C. § 820(i). However, the record does contain evidence of the size of the mine and the operator. The Del Rio plant is operated intermittently, and on days that it is operated, only two employees work for one shift. Ex. P-2. Respondent also operates one other crusher and its employees work at different sites, depending upon product demand. Tr. 221, 247-48, 304. Respondent clearly falls into the category of a small operator, the most beneficial category for purposes of penalty assessment.

Citation No. 7896147 is affirmed as a significant and substantial violation. The Secretary proposes a penalty of $184.00. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of $184.00.

Citation No. 7896153 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be reasonably likely to result in an injury resulting in no lost work days. A civil penalty of $184.00 is proposed by the Secretary. I impose a penalty in the amount of $90.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 7896157 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be unlikely to result in an injury. A civil penalty of $259.00 is proposed by the Secretary. I impose a penalty in the amount of $55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 7896159 is affirmed in all respects. The Secretary proposes a penalty of $55.00. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of $55.00.

The Settlement

At the commencement of the hearing, the parties announced that they had negotiated an agreed resolution of two of the citations and, by motion, sought approval of the settlement agreement. The Secretary agreed to modify Citation Nos. 7896154 and 7896155 to specify that an injury was unlikely to occur, that the violations were not significant and substantial and that the violations were the result of the operator's moderate negligence. It is proposed that the total penalty for those violations be reduced from $455.00 to $110.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

As to the citations vacated by the Secretary, Citation Nos. 7896151 and 7896158, the petition is **DISMISSED**.

As to the citations that the parties have agreed to settle, Citation Nos. 7896154 and 7896155, the motion to approve settlement is **GRANTED**, and Respondent is directed to pay a civil penalty of $110.00 within 45 days.

The citations that Respondent no longer contests, Citation Nos. 7896145, 7896150 and 7896156, are **AFFIRMED**, and Respondent is directed to pay a civil penalty of $306.00 within 45 days.

Citation Nos. 7896146, 7896148, 7896149 and 7896152 are hereby **VACATED**, and the petition as to them is **DISMISSED**.

Citation Nos. 7896147 and 7896159 are **AFFIRMED**, and Citation Nos. 7896153 and 7896157 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $384.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Christopher V. Grier, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202 (Certified Mail)

William H. Sommers, Esq., The Gardner Law Firm, 745 E. Mulberry Ave., Suite 100, San Antonio, TX 78212 (Certified Mail)

/mh

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

October 18, 2002

UNITED MINE WORKERS OF AMERICA, LOCAL 2368, DISTRICT 20, on behalf of miners, Applicant	:	COMPENSATION PROCEEDING
v.	:	Docket No. SE 2002-22-C
JIM WALTER RESOURCES, INC., Respondent	:	No. 5 Mine Mine ID 01-01322

DECISION

Appearances: Darryl Dewberry, United Mine Workers of America, District 20, Birmingham, Alabama, and Joyce A. Hanula, Esq., United Mine Workers of America, Fairfax, Virginia (on the brief), on behalf of the Applicant;
David M. Smith, Esq. and William M. Campbell, Esq., Maynard, Cooper & Gale, P.C. Birmingham, Alabama, and Harold D. Rice, Esq. Jim Walter Resources, Inc., Brookwood, Alabama, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon an Application for Compensation filed by the United Mine Workers of America, Local 2368, District 20 (UMWA), pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the "Act" seeking compensation from Jim Walter Resources Inc. (JWR) for miners it represents who were idled following several explosions at JWR's No. 5 Mine on September 23, 2001.[1]

It is undisputed that on September 23, 2001, at approximately 5:30 p.m., a portion of the roof in the No. 4 section at JWR's No. 5 Mine fell, followed by an explosion. At approximately 6:15 p.m., there was a second explosion and all miners who had not already been told to do so were told to evacuate the mine. Thirteen miners died and a number of others suffered injuries as a result of the explosions. At approximately 6:05 p.m. on that date a JWR employee contacted Department of Labor, Mine Safety and Health Administration (MSHA) field supervisor, Charles

[1] Section 111 of the Act provides in relevant part that if a mine or area of a mine is "closed by an order issued under Section 103 . . . [and] such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift."

Terry Langley, and informed him of the first explosion. Mr. Langley then called the mine and spoke with Harry House, a salaried JWR employee, who confirmed that there had been an ignition or explosion on either the No. 4 or the No. 6 section of the mine. Around 7 p.m., JWR mine officials decided to close the mine and, beginning around 7:30 p.m., JWR employee Rodney McMinn began notifying miners on later shifts that the mine was closed and not to report for work.

A team of MSHA inspectors arrived at the mine around 7:15 p.m. and, at 8:15 p.m., MSHA inspector Edward Nicholson issued Order No. 767687 pursuant to Section 103(k) of the Act.[2] The order stated that "a non-fatal, injury explosion has occurred on the No. 4 section, this being issued to protect the miners until and [*sic*] investigation is completed." The order was initially limited to the No. 4 section but was modified at 8:58 p.m., extending it to the entire No. 5 mine. The order was terminated on June 11, 2002.

In this case the UMWA seeks, pursuant to Section 111 of the Act, four hours of compensation for the miners who were scheduled to work underground on the "owl" shift (11 p.m., September 23, 2001, to 7 a.m., September 24, 2001). JWR argues that the miners are not entitled to "Section 111" compensation based on the Commission's decision in *Local Union 1261, District 22, UMWA v. Consolidation Coal Company*, 11 FMSHRC 1609 (September 1989) *aff'd*, 917 F.2d, 42 (D.C. Cir. 1990). As noted, Section 111 of the Act provides that if a mine or area of a mine is "closed by an order issued under Section 103 . . . [and] such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift." In the *Local Union 1261* case the Commission held, however, that since the mine operator in that case had voluntarily withdrawn all miners for their safety before the issuance of the withdrawal order and since the operator advised miners on later shifts that the mine was "idle until further notice"none of those for whom compensation was claimed were on "the next working shift." The Commission accordingly held that the miners in that case were not entitled to compensation.

The rationale for this holding was stated by the Commission therein as follows:

> Here, the record shows immediate action on the part of a mine operator to remove all afternoon shift employees from the mine because of rising gas levels -

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[2] Section 103(k) of the Act provides as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return to the areas of such mine to normal.

- clearly a threat to the health and safety of the miners. The wisdom of this action was attested by the action of MSHA inspectors who, after being summoned by the operator, issued a control order on the following morning, officially closing the mine and thereby confirming the evacuation order issued during the previous evening by the mine operator. Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspector arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here.

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. At 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners. Here, however, the operator unilaterally and voluntarily withdrew its own miners and notified all shifts that the mine would be closed until further notice. Obviously, under such circumstances, no inhibitions would have attached to the inspector's enforcement actions taken twelve house later when the mine was empty. The need to insulate the inspector from any purported miner animus had by then evaporated.

The UMWA notes, however, that the Commission, in *Local Union 1261,* also observed that the case did not involve an attempt to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by the Secretary and suggested a different result if that were the case. *Local Union 1261*, 1614 n.6. The issue before me then is whether the owl shift was cancelled and the mine closed down in this case for the safety of the miners before the issuance of the withdrawal order or whether the closure of the mine on the owl shift was only an attempt to avoid "Section 111" liability by closing the mine in anticipation of withdrawal action by the Secretary. Based on the uncontradicted and credible testimony of mine manager Jesse Cooley, it is abundantly clear that his decision around 7 p.m. on September 23, 2001, to close the mine and notify all miners on subsequent shifts that the mine would be closed until further notice, was

based only upon consideration for the safety of the miners.

On September 23, 2001, Cooley was mine manager of the No. 5 mine and had been for a total of about 8 years. He had 35 years experience in the mining industry and 29 years of that experience was in a supervisory capacity for JWR. Cooley retired in March 2002. Cooley testified, without contradiction, that he was the person who made the decision around 7 p.m. on September 23, 2001, to withdraw all miners (except for the properly equipped and trained rescue teams) and to close the underground area of the mine. At that time he also made the decision to cancel the 11 p.m. to 7 a.m. owl shift. He instructed other mine officials to see that the underground owl shift miners were notified not to report to work. Beginning around 7:30 p.m. miners scheduled to work on subsequent shifts were notified that the mine would be closed until further notice.

Cooley testified that, after he learned of the explosion on his cell phone around 5:45 p.m., he immediately reported to the mine. He arrived around 6:30 p.m. Survivors were then still exiting the mine and were being taken to ambulances. They had bruises and abrasions and appeared to be in shock. He was able to confirm that there indeed had been an explosion in the No. 4 and/or No. 6 sections destroying stoppings and other ventilation controls to such an extent that mining could not, in any event, safely be continued. Fan chart readings confirmed that the ventilation controls had been destroyed. Around this time he learned of the second explosion and that 13 miners were unaccounted for. Cooley also learned that all of the carbon monoxide (CO) monitors had been destroyed in the Nos. 4 and 6 sections and that other CO monitors in the mine showed such high levels of the gas that only specially equipped and trained rescue team members could enter the mine.[3] Based on reports from some of the exiting survivors, Cooley also believed that a fire was continuing to burn in the mine. Cooley was also told by other observers that, at the time of the second explosion, a fireball and smoke came out of the No. 59 intake shaft. Based on this information, Cooley determined that the underground mine could only be entered by properly equipped and trained mine rescue personnel. Accordingly the underground mine was closed to all but such persons. Cooley also determined around 7 p.m. on September 23, that it would be unsafe to allow the owl shift miners to proceed underground and that such shift would therefore have to be canceled. He accordingly directed that the owl shift miners be telephoned and told not to report to work. Cooley also credibly testified that at no time before he made these decisions did it ever "cross his mind" to close down the owl shift to avoid paying compensation or because a withdrawal order might be issued by MSHA.

David Thrasher, then deputy mine manager, corroborated Cooley regarding the conditions extant before Cooley announced his decision to shut down the owl shift. He recalls that there were reports of flames coming out of the shaft and that major ventilation controls had been damaged. Thrasher further testified that at no time before Cooley made the decision to shut

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[3] Administrative notice may be taken that carbon monoxide is a colorless, odorless, very toxic gas which is formed during fires and explosions. See *Dictionary of Mining, Mineral, and Related Terms*, Second Edition, American Geological Institute, 1997.

down the owl shift was there any discussion with Cooley about the possibility of a "K-order" or about compensation for the owl shift miners.

Within this framework of credible and uncontradicted evidence it is clear that mine manager Cooley decided, around 7 p.m. on September 23, 2001, to withdraw the underground miners on the evening shift and to shut down the owl shift based on the safety of the miners and without consideration that, by closing down the owl shift, he might very well avoid payment of "Section 111" compensation to those miners. Therefore, and in accordance with the *Local 1261* decision, the owl shift miners are not entitled to Section 111 compensation. This finding is entirely consistent with the rationale cited in *Local 1261* and previously quoted herein.

In reaching the conclusions herein, I have not disregarded the UMWA's argument that JWR management, including Mr. Cooley, were aware that it was MSHA's practice at this mine to issue "Section 103(k)" control orders following mine ignitions. The suggestion is that Cooley therefore would have anticipated the issuance of a 103(k) order and therefore shut down the owl shift, not for safety reasons, but only to avoid to paying Section 111 compensation. In light of Cooley's credible and uncontradicted testimony and the overwhelming evidence that, following two mine explosions, the destruction of ventilation controls, the presence of high levels of toxic carbon monoxide gas, the fact that the 13 underground miners were still missing, and evidence of fire continuing to burn in the mine, I find little difficulty in concluding that Cooley's decision was indeed dictated by the recognition that it would clearly have been unsafe to allow the owl shift miners to proceed underground.

The UMWA also attempts to distinguish *Local 1261* by arguing that JWR's closure of the No. 5 Mine was not "voluntary" at all but rather that JWR had "no option" but to cease coal production once the explosions occurred. The UMWA misconstrues *Local 1261* however, in that the critical distinction in that case was whether the decision to close the mine was made by the mine operator on his own for the safety of miners before any withdrawal order compelled such closure.

The UMWA also argues that the instant case is distinguishable because the explosions and injuries had already occurred. This argument fails however to account for the continuing hazardous conditions and the fact that additional injuries and fatalities would likely have occurred if the mine were not closed. In addition, the likelihood, or even certainty that a 103(k) control order would be issued following the two explosions only makes the Commission's rationale in *Local 1261* even more persuasive. The more dangerous the mine conditions, the more persuasive is the rationale for prompt withdrawal action by the mine operator.

Under all the circumstances this application for compensation must be denied.

ORDER

Docket No. SE 2002-22-C is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Joyce Hanula, Esq., United Mine Workers of America, 8315 Lee Highway, Fairfax, VA 22031

Darryl Dewberry, United Mine Workers of America, 1200 4th Avenue South, Birmingham, AL 35233

David M. Smith, Esq., William L. Campbell, Jr., Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203

Harold Rice, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444

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

October 31, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2002-86-M A. C. No. 01-01401-04392 A
v.	:	
WILLIAM EUGENE AVERETTE, employed by JIM WALTER RESOURCES, INC., Respondent	:	No. 7 Mine

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
William L. Campbell, Jr., Esq., & David M. Smith, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the "Act" charging William E. Averette, as an agent of corporate mine operator Jim Walter Resources, Inc., (JWR) with "knowingly authorizing, ordering, or carrying out" a violation on July 11, 2000, of the mandatory standard at 30 C.F.R. § 75.400. The general issue before me is whether Mr. Averette, indeed, knowingly authorized, ordered or carried out the noted violation and, if so, what is the appropriate civil penalty to be assessed considering the relevant criteria under Section 110(i) of the Act.

Section 110(c) provides that whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew, or had reason to know, of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord, Freeman United Coal Mining Co., v. FMSHRC,* 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish Section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992), citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). An individual acts knowingly when he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to

know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1245 (August 1992).

It is undisputed that, during relevant times, Mr. Averette was an agent of corporate operator JWR. The underlying violation as set forth in Citation No. 7674474, is also undisputed. That citation, which was issued at 9:45 a.m., on July 11, 2000, charges as follows:

> Float coal dust, including float coal dust deposited on rock dusted surfaces, was present, in a very substantial amount, in the No. 1 Longwall section tailgate entry. The float coal dust was deposited on the roof, ribs, floor and ribs for approximately 200 feet outby the longwall face, and for an undetermined distance inby the longwall face into the gob area. The floor, ribs and timbers were black throughout the described area and no apparent effort had been made to apply rock dust after production had started on the owl shift, 7-09-2000.

The critical issue remaining for disposition then, is whether Averette, as an agent of JWR, knew or had reason to know of the violative condition and failed to act to correct the condition before it was cited. Kenneth Cannon, an inside laborer for JWR, with 22 years of mining experience, testified that on July 11, 2000, he was acting as the alternate union safety committeeman accompanying Inspector Greer of the Department of Labor's Mine Safety and Health Administration (MSHA) on the 7 a.m. to 3 p.m. day shift. At the tailgate area of the No. 1 Longwall, at around 9:50 a.m., he observed that for over 200 feet the tailgate area was dark black in color from rib to rib. Based on this evidence and Cannon's experience, he opined that no rock dust had been applied to the area. In addition, neither he nor the inspector could find any dates, times or initials evidencing the presence of a preshift mine examination in that area for the preceding owl shift.

Cannon subsequently came upon the pod duster (a mechanical rock duster) and observed that although its unit with its air compressor were working, the lines were leaking so severely that no rock dust was reaching the tailgate. Cannon also observed that there were no piles of rock dust at the joints where it had been leaking before the inspector had instructed that it be turned on, - - the inference being that the pod duster was not capable of being used and had not been used. Cannon also observed that there were ignition sources at the tailgate area, including an electrical motor and lights along the face. Based on his experience Cannon opined, from the conditions of the tailgate area, that those conditions had been there for a while.

Averette, was the "owl" shift longwall foreman on July 11, 2000, and was responsible for conducting the preshift mine examination on that date.[1] He testified that he performed that

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[1] The "owl" shift began at 11:00 p.m., on July 10, 2000, and ended at 7:00 or 8:00 a.m. on July 11, 2000. For a foreman, like Averette, the shift ordinarily begins at 10:00 p.m. and ends around 9:00 a.m.

preshift exam between 5 a.m. and 6 a.m., on July 11, 2000, and reported no hazardous conditions in the examination book. There is no dispute that his preshift exam was required to include the cited No. 1 Longwall section tailgate entry. Averette testified that he began his preshift examination on July 11, at 5 a.m., at the tailgate area. While acknowledging that it was common practice to place the date, time and initials in the tailgate area following such an exam, he claims, but without explanation, that on this occasion he placed his initials and the date and time of his examination at the No. 134 Longwall shield located about 100 feet from the tailgate. He also maintained that he personally rock dusted 100 feet of the tailgate area by hand while he was conducting this preshift examination. He maintains that bags of rock dust had been placed there and that when he left the area it was white in color. Averette also testified however that the rock dust he used was gray in color right out of the bag, not the customary white. He claims that when he last saw the tailgate area it was white in color and that he believed it was then properly rock dusted.

I find the testimony of Kenneth Cannon to be credible and sufficient alone to establish that Mr. Averette had reason to know of the cited violative condition. From this credible evidence and the undisputed allegations in Citation No. 7674474, it is clear that substantial amounts of float coal dust were found on the roof, ribs and floor in the No. 1 Longwall section tailgate entry and for 200 feet outby the longwall face at the time the inspection party arrived at that area at approximately 9:50 a.m., on July 11, 2000. I give Mr. Cannon's opinion significant weight that, based on the amount of float coal dust, its black coloration throughout this area and the absence of any evidence of rock dust, that the cited coal dust had indeed also existed in violative amounts at the time Mr. Averette purportedly conducted his preshift examination at that area around 5 a.m., on July 11, 2000. In reaching this conclusion I have not disregarded the evidence that the longwall shear cut coal on two additional passes following Averette's purported 5 a.m. preshift examination. However, it may reasonably be inferred from the absence of any rock dust in the cited area, that rock dust had not been applied even before these additional cuts.

I also have credibility concerns with Averette's testimony. For example, while claiming that he had spread rock dust by hand that was gray in color, he also claimed that when he left that area it was white in color. In addition, Averette's claims that the pod duster and its lines were functioning are in clear contradiction to the essentially undisputed evidence that the equipment was in fact not capable of delivering rock dust to the tailgate area because of severe leakage. The fact that Averette placed his initials and the date and time of his purported examination some 100 feet away from the tailgate area while admitting that he ordinarily did so within the tailgate area, also suggests guilty knowledge and an attempt to avoid responsibility for the violative coal dust.

Within this framework of evidence I find that the Secretary has met her burden of proving that Averette knew of the existence of violative coal dust conditions at the time of his preshift examination on the morning of July 11, 2000, and that he failed to take adequate corrective action. Accordingly I find that the charges against Mr. Averette have been sustained.

In assessing a civil penalty under Section 110(i) of the Act the Commission and its judges must 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." With respect to individuals charged under Section 110(c) the criteria regarding the effect and appropriateness of a penalty can be applied by analogy. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997). In this case I find Averette's negligence to be high as this has been established as a "knowing" violation. The violation was of high gravity based on the credible evidence that the subject mine was a "gassy" mine emanating significant amounts of methane and had a history of methane ignitions. In addition, there is undisputed testimony establishing the existence of ignition sources in the vicinity of the cited float coal dust. The evidence shows that should a methane ignition or explosion occur, the float coal dust could become suspended thereby enhancing the volatility of any such explosion with the attendant likelihood of fatalities. The Respondent produced no evidence regarding his income, support obligations, ability to pay or the appropriateness of the penalty in light of his job responsibilities. See *Sunny Ridge* at 272 and *Wayne Steen*, 20 FMSHRC 381, 385 (April 1998). The Commission has previously held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 19 FMSHRC 673, 677 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). There does not appear to be any reason that the same presumption should not apply as well to 110(c) respondents. There is no evidence that Mr. Averette had any prior history of violations. According to the citation, adequate rock dusting was applied to the cited area and the citation was abated by 11:15 a.m., on July 11, 2000. Within this framework of evidence I find that the civil penalty of $650.00, as proposed by the Secretary, is appropriate.

ORDER

William Eugene Averette is hereby directed to pay a civil penalty of $650.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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

William L. Campbell, Jr., Esq., & David M. Smith, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2002

HANSON PERMANENTE CEMENT, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2002-370-RM
v.	:	Order No. 6333431; 3/20/2002
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	:	Docket No. WEST 2002-317-RM
	:	Order No. 6333432; 3/20/2002
Respondent	:	Docket No. WEST 2002-372-RM
	:	Order No. 6333433; 3/20/2002
	:	
	:	Mine: Permanente Plant
	:	Mine: ID 04-04075

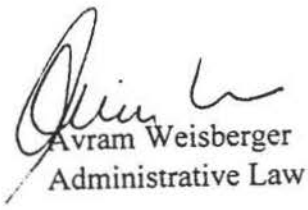
ORDER OF DISMISSAL

Appearances: Michael T. Heenan, Esq., Heenan, Althen & Roles LLP, Washington, D.C., for the Contestant;
Christopher B. Wilkinson, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for the Secretary.

Before: Judge Weisberger

The above captioned notices of contest were scheduled for hearing on October 8 and 9, 2002. In the course of the second day of the trial, the parties engaged in extensive negotiations, and reached a settlement resolving all issues raised by the notices of contest. Pursuant to the settlement, contestant moved to withdraw its pleading, the Notice of Contest in Docket No. WEST 2002-372, and based on the settlement, the motion was granted In addition, the Secretary made a motion, which was not opposed by contestant, to dismiss Docket Nos. WEST 2002-370 and WEST 2002-371. Based on the lack of opposition, and the parties' settlement, the motion was granted.

It is **Ordered** that Docket Nos. WEST 2002-370, WEST 2002-371 and WEST 2002-372 be **Dismissed**. It is **further Ordered** that the parties shall abide by all the terms of their settlement.



Avram Weisberger
Administrative Law Judge

Distribution:

Michael T. Heenan, Esq., Heenan, Althen & Roles LLP, 1110 Vermont Avenue, NW, Suite 400, Washington, DC 20005

Christopher B. Wilkinson, Esq., U.S. Department of Labor, Office of the Solicitor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 18, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-269-M
Petitioner	:	A.C. No. 26-00789-05527
v.	:	
	:	
PAIUTE AGGREGATES INC.,	:	Mine: Paiute Aggregates
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent has moved that the petition be dismissed on grounds that the Secretary did not notify it of the proposed civil penalties within a reasonable time after completion of the investigation. The Secretary has opposed the motion, relying in part on an affidavit of MSHA's Director of Assessments describing a number of factors that affected the processing of penalty assessments during the relevant time period. Respondent does not claim prejudice resulting from the alleged delay. For the reasons set forth below, Respondent's Motion to Dismiss is denied.

Facts

On February 16, 2001, a fatal accident occurred at Respondent's mine in Wadsworth, Nevada. MSHA commenced an investigation of the accident that day. On March 20, 2001, MSHA issued eight citations and orders, two of which are the subject of this penalty proceeding.[1] Respondent filed Notices of Contest as to the alleged violations on April 19, 2001. Those cases were stayed, with Respondent's consent, pending the filing of civil penalty proceedings. MSHA issued its final investigative report on April 12, 2001. The citations and orders were transmitted to MSHA's Special Assessments Section on May 29, 2001. A related special investigation to determine whether enforcement proceedings would be initiated against individual agents of Respondent pursuant to section 110(c) of the Act was completed by August 2, 2001. MSHA issued its proposed penalty assessments for the two alleged violations at issue here on January 4, 2002.

The time consumed by MSHA in issuing the proposed assessments, over nine months

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[1] Three other alleged violations are at issue in Commission Docket No. WEST 2002-441-M. A similar motion to dismiss has been filed in that case.

from the completion of the initial investigation and five months after the closure of the special investigation, was the result of a number of factors that the Secretary describes as "staffing constraints of an Agency with too much work for too few employees." Opposition, at p. 3. MSHA's Director of Assessments, executed an affidavit citing MSHA's policy program manual, which specifies that penalty proposals in cases involving a fatality be issued within eighteen months after the investigation report is issued, and noting that the office's goal is to issue such penalty assessments within 180 days. He explained that from March 2001 to May 2002, of the four people employed to process all special assessment cases, one was on extended leave and another was involved in training for much of 2001. In addition, the supervisor of the special assessments group was heavily involved in the development of MSHA's Standardized Information System, a multi-year project. In calendar year 2001, the office considered 2,153 citations and orders for "routine" special assessments, 217 fatal/serious injury-related special assessments and 204 assessments for section 110(c) violations. In the first nine months of calendar year 2002, 1,949 citations and orders were considered for routine special assessments, 183 fatal/serious injury-related special assessments and 158 assessments for 110(c) violation were considered. Over 2,500 special assessment referrals were processed in 2001 and it is projected that 3,000 such requests will be processed in 2002.

Applicable Law

Section 105(a) of the Act, 30 U.S.C. § 815(a), provides, in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104 [814], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . .

The Commission addressed the Secretary's obligation to issue proposed assessments in *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996)[2], stating that:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181,

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[2] While *Steele Branch Mining* was a split decision, all four Commissioners who participated agreed on this issue.

95th Cong. 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steele Branch Mining involved a period of 11 months between termination of the citation and issuance of the proposed penalty assessment. The Secretary did not offer any explanation for the time that elapsed. Nevertheless, the Commission took "official notice" of the fact that the Secretary had an unusually high case load in 1992, and found that to be an "adequate reason for the delay." *Id. Rhone Poulenc*, and *Salt Lake County* involved failures by the Secretary to comply with the 45-day time limit for filing a petition for assessment of civil penalties established by Commission Procedural Rules. In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing. Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. 3 FMSHRC at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id.*

Analysis

The statute's term "within a reasonable time" has not been further defined by Commission Rule. The Secretary's interpretation, as reflected in MSHA's program policy manual, is that assessments issued within 18 months of the completion of an investigation satisfy the "reasonable time" standard. However, the Commission, in *Steele Branch Mining*, characterized as "delay" an 11 month period between termination of a citation and issuance of a proposed penalty assessment. Here slightly more than nine months elapsed between completion of the investigation and the assessment. While it would be difficult to describe that as a "prompt" proposal of a penalty, it appears to fall within the range of a "reasonable time" as required by the statute. The incident that triggered the investigation, a fatal accident, was extremely serious, and several citations and orders were referred for special assessment. Careful scrutiny of the facts and consideration of the factors statutorily required to be considered in the formulation of a penalty assessment and the processing of the recommendation for final approval

were appropriately part of a deliberative process that consumed considerable time.[3]

Assuming, arguendo, that the nine month period did not satisfy the "reasonable time" standard, the Secretary has demonstrated adequate cause for whatever portion of that period could be characterized as delay. The special assessments office handles a considerable volume of cases, each of which must be considered on its own merits. Four persons are employed to process those assessments and during the pertinent time period one was on extended leave and another spent considerable time in training. The supervisor's ability to assist was considerably reduced by involvement in a comprehensive multi-year project. Under the circumstances, considering the period of time involved, this justification constitutes adequate cause for any delay beyond a reasonable time.

While claims of excessive work load have often been found to satisfy the adequate cause requirement, the Commission has made clear that such claims will not receive blanket approval. *Steele Branch Mining*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC at 1717. The "excessive work load" argument advanced here is substantially different from that found to have justified delays in *Steele Branch* and *Rhone-Poulenc*. In the 1991-92 time period involved in those cases, there was an almost 300% increase in cases, coupled with an "unusually high volume of penalty reassessments." *Rhone-Poulenc*, 15 FMSHRC at 2094. The increase in special assessments during the time period pertinent here was considerably more modest, approximately 20%. While two of the four employees assigned to the special assessments office were unavailable for significant portions of the period, the reason for one's extended leave was not explained and the absence of another for training purposes appears to have been a voluntary staffing decision by MSHA. The Secretary has also not disclosed whether efforts were made to transfer or detail other MSHA staff to remedy these staffing shortages and/or why those efforts were unsuccessful.

The showing necessary to establish adequate cause for delay will necessarily vary depending upon the length and circumstances of the delay. Here, I have found that the penalty assessment was issued within a reasonable time, i.e., that there was no "delay." Alternatively, if a portion of the period could be classified as delay, on the facts of this case, the justification advanced by the Secretary constitutes adequate cause. A case involving egregious delay will require a greater justification to meet the adequate cause test. As the Commission recognized in *Rhone-Poulenc*, unanticipated significant increases in work load can easily overwhelm an office whose budget is formulated years in advance. However, chronic under staffing may be the result of deliberate choices in allocating resources and, especially if compounded by voluntary staffing decisions, might well fail to establish adequate cause.

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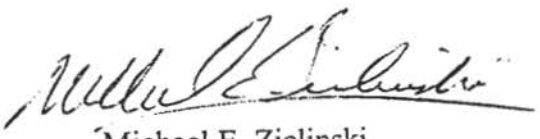
[3] A related special investigation was completed only 5 months before the proposed assessment was issued. The Secretary has not claimed that the assessment process was justifiably suspended pending completion of that investigation, though it may have been reasonable to do so.

Respondent makes no claim that its ability to defend the Secretary's allegations has been prejudiced and the Secretary argues convincingly that it could not have been. Respondent was, no doubt, involved in the investigation, and was served with the citations and orders a little over a month after the accident occurred. The parties have engaged in discovery during the pendency of the contest proceedings.

ORDER

On the facts of this case, I find that the proposed penalty assessments were issued within a reasonable time after the investigation was completed. In the alternative, I find that the Secretary has fulfilled her burden of showing adequate cause for any portion of that period that might be characterized as delay. Respondent makes no claim of prejudice attributable to the delay. Accordingly, Respondent's Motion to Dismiss is **Denied**.



Michael E. Zielinski
Administrative Law Judge
202-434-9981

Distribution:

Laura Beverage, Esq., Jackson & Kelly, PLLC, 1660 Lincoln, Suite 2710, Denver, CO 80264

Sue Gillett-Kumli, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVE., N.W., Suite 9500
WASHINGTON, D.C. 20001

October 21, 2002

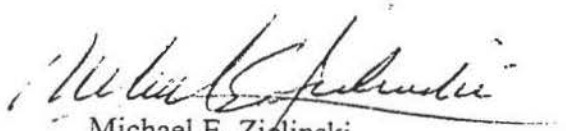
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-114-D
on behalf of Jimmy Caudill and	:	BARB CD 2001-11
and Jerry Michael Caudill,	:	
Complainants	:	
v.	:	
	:	
LEECO, INC., and BLUE DIAMOND	:	No. 75
COAL COMPANY,	:	
Respondents	:	

ORDER DENYING SECRETARY'S MOTION TO OPEN SEALED DOCUMENT

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Secretary has filed a motion seeking to open a portion of a record that was ordered sealed in another case. Respondent opposes the motion.

The record at issue, a settlement agreement entered into by Jerry Michael Caudill and Respondent in Commission Docket No. KENT 98-128-D, was ordered sealed by Commission ALJ Barbour, in a May 28, 1998, Decision Approving Settlement. *Sec'y of Labor on behalf of Caudill v. Leeco, Inc.*, 20 FMSHRC 532 (May 1998). As Respondent correctly points out, a Commission ALJ's jurisdiction terminates when a decision has been issued. 29 C.F.R. § 2700.69(b). The Secretary's motion seeks relief from that final order of the Commission. Neither Chief Judge Barbour, nor the undersigned, has jurisdiction to grant the relief requested.

Accordingly, the Secretary's Motion to Open Sealed Document is **DENIED**.



Michael E. Zielinski
Administrative Law Judge
202-434-9981

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215-2862

Stephen A. Sanders, Esq., Appalachian Citizens Law Center, Inc., 207 W. Court St. Suite 202, Prestonsburg, KY 41653-7725

Melanie J, Kilpatrick, Esq., Wyatt, Tarrant & Combs, LLP, 250 West Main Street, Suite 1700, Lexington, KY 40507-1746

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-441-M
Petitioner	:	A.C. No. 26-00789-05528
v.	:	
	:	
PAIUTE AGGREGATES INC.,	:	Mine: Paiute Aggregates
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent has moved that the petition be dismissed on grounds that the Secretary did not notify it of the proposed civil penalties within a reasonable time after completion of the investigation. The Secretary has opposed the motion, relying in part on an affidavit of MSHA's Director of Assessments describing a number of factors that affected the processing of penalty assessments during the relevant time period. Respondent does not assert a colorable claim prejudice resulting from the alleged delay. For the reasons set forth below, Respondent's Motion to Dismiss is denied.

Facts

On February 16, 2001, a fatal accident occurred at Respondent's mine in Wadsworth, Nevada. MSHA commenced an investigation of the accident that day. On March 20, 2001, MSHA issued eight citations and orders, three of which are the subject of this penalty proceeding.[1] Respondent filed Notices of Contest as to the alleged violations on April 19, 2001. Those cases were stayed, with Respondent's consent, pending the filing of civil penalty proceedings. MSHA issued its final investigative report on April 12, 2001. The citations and orders were transmitted to MSHA's Special Assessments Section on May 29, 2001. A related special investigation to determine whether enforcement proceedings would be initiated against individual agents of Respondent pursuant to section 110(c) of the Act was completed by August 2, 2001. MSHA issued its proposed penalty assessments for the three alleged violations at issue here on May 31, 2002.

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[1] Two other alleged violations are at issue in Commission Docket No. WEST 2002-269-M. A similar motion to dismiss, filed in that case, was denied by Order dated, October 18, 2002.

The time consumed by MSHA in issuing the proposed assessments, over 13 months from the completion of the initial investigation and almost 10 months after the closure of the special investigation, was the result of a number of factors that the Secretary describes as "staffing constraints of an Agency with too much work for too few employees." Opposition, at p. 3. MSHA's Director of Assessments, executed an affidavit citing MSHA's policy program manual, which specifies that penalty proposals in cases involving a fatality be issued within eighteen months after the investigation report is issued, and noting that the office's goal is to issue such penalty assessments within 180 days. He explained that from March 2001 to May 2002, of the four people employed to process all special assessment cases, one was on extended leave and another was involved in training for much of 2001. In addition, the supervisor of the special assessments group was heavily involved in the development of MSHA's Standardized Information System, a multi-year project. In calendar year 2001, the office considered 2,153 citations and orders for "routine" special assessments, 217 fatal/serious injury-related special assessments and 204 assessments for section 110(c) violations. In the first nine months of calendar year 2002, 1,949 citations and orders were considered for routine special assessments, 183 fatal/serious injury-related special assessments and 158 assessments for 110(c) violation were considered. Over 2,500 special assessment referrals were processed in 2001 and it is projected that 3,000 such requests will be processed in 2002.

Applicable Law

Section 105(a) of the Act, 30 U.S.C. § 815(a), provides, in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104 [814], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . .

The Commission addressed the Secretary's obligation to issue proposed assessments in *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996)[2], stating that:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty

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[2] While *Steele Branch Mining* was a split decision, all four Commissioners who participated agreed on this issue.

> with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong. 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steele Branch Mining involved a period of 11 months between termination of the citation and issuance of the proposed penalty assessment. The Secretary did not offer any explanation for the time that elapsed. Nevertheless, the Commission took "official notice" of the fact that the Secretary had an unusually high case load in 1992, and found that to be an "adequate reason for the delay." *Id. Rhone Poulenc*, and *Salt Lake County* involved failures by the Secretary to comply with the 45-day time limit for filing a petition for assessment of civil penalties established by Commission Procedural Rules. In *Salt Lake County*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing. Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. 3 FMSHRC at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id.*

Analysis

The statute's term "within a reasonable time" has not been further defined by Commission Rule. The Secretary's interpretation, as reflected in MSHA's program policy manual, is that assessments issued within 18 months of the completion of an investigation satisfy the "reasonable time" standard. However, the Commission, in *Steele Branch Mining*, characterized as "delay" an 11 month period between termination of a citation and issuance of a proposed penalty assessment. Here more than 13 months elapsed between completion of the investigation and the assessment. Because Respondent does not make a colorable claim of prejudice, the issue to be decided is whether the Secretary has established adequate cause for the delay.

While claims of excessive work load have often been found to satisfy the adequate cause requirement, the Commission has made clear that such claims will not receive blanket approval. *Steele Branch Mining*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC at 1717.

The "excessive work load" argument advanced here is substantially different from that found to have justified delays in *Steele Branch* and *Rhone-Poulenc*. In the 1991-92 time period involved in those cases, there was an almost 300% increase in cases, coupled with an "unusually high volume of penalty reassessments." *Rhone-Poulenc*, 15 FMSHRC at 2094. The increase in special assessments during the time period pertinent here was considerably more modest, approximately 20%. While two of the four employees assigned to the special assessments office were unavailable for significant portions of the period, the reason for one's extended leave was not explained and the absence of another for training purposes appears to have been a voluntary staffing decision by MSHA. The Secretary has also not disclosed whether efforts were made to transfer or detail other MSHA staff to remedy these staffing shortages and/or why any such efforts were unsuccessful.

Despite these shortcomings in the Secretary's explanation of the delay, I find that adequate cause has been established. The incident that triggered the investigation, a fatal accident, was extremely serious, and several citations and orders were referred for special assessment. Careful scrutiny of the facts and consideration of the factors statutorily required to be considered in the formulation of a penalty assessment and the processing of the recommendation for final approval were appropriately part of a deliberative process that consumed considerable time.[3] The special assessments office handles a large volume of cases, each of which must be considered on its own merits. Staff resources in the office were significantly reduced during the pertinent time period, and the supervisor's ability to assist was considerably reduced by involvement in a comprehensive multi-year project.

Respondent made no claim of prejudice in its motion. However, in its reply, Respondent asserted that the delay was inherently prejudicial to its ability to defend the Secretary's allegations, and speculated that witnesses' memories made have faded and/or that witnesses may have become unavailable. Respondent was, no doubt, involved in the investigation, and was served with the citations and orders a little over a month after the accident occurred. It was on notice that it was alleged to have committed several violations of mandatory health and safety standards and, because of the seriousness of the incident, could and should have anticipated that significant civil penalties would be proposed. Respondent was free to take whatever steps it desired to preserve witnesses' recollections and/or testimony and there is no indication that it failed to do so. The parties have engaged in discovery during the pendency of the contest proceedings. Respondent's assertions of possible prejudice to its case fall far short of establishing that it has suffered actual prejudice because of the delay in issuance of the penalty assessments.

Respondent has pointed out some of the deficiencies in the Secretary's explanation of the

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[3] A related special investigation was completed almost 4 months after issuance of the investigative report as to these alleged violations against the operator. The Secretary has not claimed that the assessment process was justifiably suspended pending completion of that investigation, though it may have been reasonable to do so.

delay, and I agree that the Secretary's explanation does not establish that every week or day of the nearly 14 month period was necessitated by factors beyond the Secretary's control. However, Congress clearly intended that delays in proposing penalties should not nullify penalty proceedings and the Commission's decision in *Salt Lake County* was premised, in part, on the "basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of procedural error, absent a showing or prejudice." 3 FMSHRC at 1716. On the facts of this case, the Secretary's explanation of the reasons for the delay satisfies the adequate cause portion of the test. A showing that the delay resulted in actual material prejudice to Respondent's ability to defend against the allegations could justify dismissal of the case. Respondent has failed to make such a demonstration.

The facts in this case are comparable to those in other cases decided by Commission Administrative Law Judges where essentially the same justification has been found to establish adequate cause. *See BGS Const., Inc.*, 24 FMSHRC 787 (May 2002) (ALJ) (over 14 months, fatality); *Cactus Canyon Quarries of Texas, Inc.*, 24 FMSHRC 604 (June 2002) (ALJ) (12 months, no serious accident involved). While these decisions do not constitute Commission precedent, I note that this case is more comparable to *BGS Construction* than other cases relied upon by Respondent.

ORDER

On the facts of this case, I find that the Secretary has fulfilled her burden of showing adequate cause for the delay in issuing the proposed penalty assessment. Respondent has not demonstrated that it has suffered prejudice attributable to the delay. Accordingly, Respondent's Motion to Dismiss is **Denied**.

Michael E. Zielinski
Administrative Law Judge
202-434-9981

Distribution:

Laura Beverage, Esq., Jackson & Kelly, PLLC, 1660 Lincoln, Suite 2710, Denver, CO 80264

Sue Gillett-Kumli, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, Suite 9500
WASHINGTON, D.C. 20001

October 23, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of Billy R. Begley,	:	Docket No. KENT 2002-195-D
Complainant	:	PIKE CD 2001-08
v.	:	
	:	Red Star No. 1 Mine
COASTAL COAL CO., LLC.,	:	Mine ID 15-18306
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL
AND
DIRECTING THAT DOCUMENTS BE PLACED UNDER SEAL

Respondent has moved to compel production of portions of the MSHA investigative report, notes of witness interviews and memoranda of witness interviews that were not produced in response to its discovery requests. The Secretary asserted that the documents, and portions of documents withheld were protected from disclosure by the work product, investigative file, deliberative process and informant's privileges. The Secretary opposed the motion. A telephonic discussion was held on October 17, 2002, which clarified the issues.

The Secretary, in essence, had waived the work product privilege. She produced unredacted copies of memoranda of interviews of Respondent's management employees, the miner-complainant's statements, and most of the investigative report. The report consists almost entirely of essentially verbatim recitals of memoranda of witness interviews. The portions of the investigative report that were withheld consisted of information tending to identify miner informants, which was withheld on a claim of the informant's privilege, and the evaluation and recommendation of the MSHA investigator, which was withheld on a claim of the deliberative process privilege. The informant's privilege protects from disclosure the identity of the informant, not the contents of a statement except those portions that would tend to identify the informant. *See Sec'y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984). The deliberative process privilege protects from disclosure pre-decisional deliberative information. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992). Neither privilege protects factual information that can be segregated from the protected information.

As stated in Respondent's motion and clarified by counsel during the telephonic discussion, Respondent does not seek to compel production of material that is legitimately protected by either privilege. Respondent seeks only factual information related by witnesses or

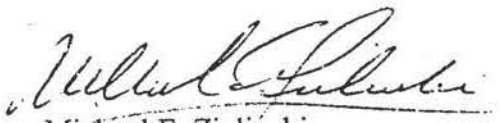
contained in the investigative report. The dispute has condensed down to a question of whether the Secretary's redactions to the investigative report were properly made.

In order to assure that the Secretary had withheld only information protected by the respective privileges, I directed that unredacted copies of the investigative report and miner witness statements be submitted for *in camera* review. The Secretary promptly responded to the directive and submitted documents contained in three attachments. Attachment "A" consisted of the Secretary's Supplemental Response to Respondent's First Request for Production of Documents, including a redacted copy of the investigative report and unredacted copies of memoranda of interviews of management employees. Attachment "B" consisted of an unredacted copy of the investigative report. Attachment "C" consisted of unredacted memoranda of interviews of four miner witnesses.

I have reviewed the documents submitted and am satisfied that the Secretary's redactions to the investigative report were entirely proper. The memoranda of interviews of the miner witnesses were included, virtually verbatim, in the report, and the only portions withheld were those identifying, or tending to identify, the miner informants. The only other redactions consisted of certain organizational information, and the evaluation and recommendation of the investigator.

ORDER

Respondent's motion to compel is **DENIED**. Attachments "B" and "C" to the Secretary of Labor's Response to the Bench Order on the Respondent's Motion to Compel Discovery shall be **FILED UNDER SEAL and shall not be disclosed except on order of the Commission or a reviewing court.**



Michael E. Zielinski
Administrative Law Judge

Distribution:

Brian Dougherty, Esq. Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

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

Billy R. Begley, 2467 Right Fork Road, Viper, KY 41774

/mh