## NOVEMBER AND DECEMBER 2008

### COMMISSION ORDERS



### ADMINISTRATIVE LAW JUDGE DECISIONS



### ADMINISTRATIVE LAW JUDGE ORDERS

## NOVEMBER AND DECEMBER 2008

Review was granted in the following cases during the months of November and December 2008:

Secretary of Labor, MSHA v. Musser Engineering, Inc., and PBS Coals, Inc., Docket Nos. PENN 2004-152 and PENN 2004-158. (Chief Judge Lesnick, November 4, 2008)

Secretary of Labor on behalf of Peter J. Phillips v. A & S Construction Co., Docket No. WEST 2008-1057-DM. (Judge Barbour's dissolution of an Order of Temporary Reinstatement, November 26, 2008)

Review was denied in the following case during the months of November and December 2008:

Jessee Satterfield v. Consol Pennsylvania Coal Company, Docket No. PENN 2007-283-D. (Judge Melick, October 17, 2007)

# COMMISSION DECISIONS AND ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 6, 2008

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | |
| v. | :<br>: | Docket No. WEVA 2008-425<br>A.C. No. 46-05649-118643 C479 |
| MASS TRANSPORT, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 2, 2008, the Commission received from Mass Transport Inc. ("Mass Transport") a motion by counsel requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On May 23, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000118643 to Mass Transport, a contractor, for various violations that allegedly occurred at the Delbarton Preparation Plant ("Delbarton"). On January 18, 2008, the operator filed a motion to reopen the assessment, stating that it had failed to timely contest the proposed assessment with respect to Citation No. 7244548 and Order Nos. 7244549, 7244550, and 7244552 because the proposed assessment had been sent to an incorrect address.

Although the Secretary did not oppose the request to reopen, she noted that the proposed penalty assessment and the delinquency notice were mailed to the address of record at the time of

assessment. The Secretary stated that Mass Transport should check the mailing address it provided to MSHA to be sure that it is up-to-date.

On June 18, 2008, the Commission issued an order denying the operator's motion. The Commission explained that the operator's counsel set forth conflicting and confused information regarding the identity of the movant in both the caption and body of the motion, and that the operator's counsel failed to establish that the movant, as identified in the motion to reopen, had standing to make the request.

On July 2, 2008, the Commission received from Mass Transport a second request to reopen. Counsel, who states that she represents both Mass Transport and Delbarton, acknowledges that she misidentified the movant as Delbarton instead of Mass Transport in the style of the motion to reopen.[1] Counsel explains that she mistakenly believed that the citation, orders and Proposed Assessment had been issued to Delbarton because the mine I.D on the citation and orders and the Proposed Assessment identifies Delbarton as the mine.

In its second request, Mass Transport reiterates that it failed to timely contest the proposed assessment because the proposed assessment had been mailed to an incorrect address. In response to the Secretary's prior submission that MSHA had mailed the proposed assessment and delinquency notice to Mass Transport's address of record at the time of the assessment, Mass Transport states that the proposed assessment had been mailed to an address that was not the mailing address or physical address of either Delbarton or Mass Transport. Mass Transport asserts that, in fact, MSHA has Mass Transport's correct address because MSHA previously has mailed correspondence to Mass Transport at the correct address and lists the correct address in MSHA's data retrieval system on its website.[2]

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

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[1] Although counsel acknowledges that she misidentified the movant in the style of the motion to reopen, as the Commission previously indicated, such misidentification existed throughout the body of the motion as well.

[2] In the second request to reopen, counsel for Mass Transport identifies the address that MSHA had correctly mailed correspondence to as P.O. Box 1117, Holden, WV 25625. Mot. at 2-3. Later in the same motion, counsel inexplicably identifies the correct mailing address as a different post-office box, that is, P.O. Box 1098. *Id.* at 3.

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

It is an operator's responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Mass Transport's official address of record at the time of assessment and whether Mass Transport maintained its correct address with MSHA. If MSHA sent the proposed assessment to Mass Transport's official address of record, grounds may exist for denying Mass Transport's request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Mass Transport's request may be moot.

Having reviewed Mass Transport's motion, we remand this matter to the Chief Administrative Law Judge for a determination of whether Mass Transport timely contested the penalty proposal. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Mass Transport's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

November 6, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. LAKE 2008-447 |
| v. | : | A.C. No. 12-02249-129078 |
| FIVE STAR MINING, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 30, 2008, the Commission received from Five Star Mining, Inc. ("Five Star") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 15, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000129078 to Five Star, proposing penalties for a citation and two orders that had been issued to the company in February and March of 2007. Five Star states that its counsel received the proposed penalty assessment from it on November 14, 2007, and that an e-mail in counsel's file indicates that he initially believed that Five Star had already contested Citation No. 6668861 and that the proposed assessment had not been issued until November 13, 2007. Five Star further states that its counsel thereafter filed a notice of contest regarding the proposed assessment for that citation on November 27, 2007, which was untimely.

The Secretary initially responded to the motion by noting that it merely states that a mistake was made, without explaining why the mistake was made or why it should be excused. The Secretary also pointed out that the operator had failed to address why it did not file its motion until four and one-half months after MSHA had notified it in January 2008 that it was delinquent in paying the assessment for the citation and two orders. The Secretary requested that we not rule on the motion until Five Star had the opportunity to supply the missing information.

Five Star thereafter filed a reply in which it explains that the late filing was due to counsel misreading the assessment he had received from the operator and consequently erroneously calculating the deadline for contest. Further, Five Star explains that the delinquency letter from MSHA went to its accounting department, and not to either the mine safety manager or counsel, who each believed that the citation in question had been contested. According to Five Star, it was not until late April 2008, when the Treasury Department contacted its accounting department regarding the unpaid assessment, that counsel was alerted to the fact that the contest he filed might not have been timely. The Secretary thereafter filed a letter stating that, in light of Five Star's reply, she does not oppose the motion to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Five Star's motion and reply and the Secretary's responses, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Five Star's failure to timely contest the penalty proposal and whether relief from the final order should be granted.[1] If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] Five Star appears to be suggesting that the January 2008 MSHA notice to its accounting department was insufficient to put the company on notice that MSHA was not treating its contest as effective. However, the receipt of the MSHA delinquency notice by the accounting department should have triggered a response by the company, but that appears not to be the case. Moreover, that delinquency notice was for all three penalties, including the two penalties that Five Star does not seek to contest. Five Star does not explain in either its original motion or its reply why it did not pay any of the penalties until Treasury Department action may have forced the issue.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 7, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. LAKE 2008-345-M<br>A.C. No. 47-02043-140232 |
| | : | Docket No. LAKE 2008-346-M<br>A.C. No. 47-02940-140235 |
| v. | : | |
| | : | Docket No. LAKE 2008-347-M<br>A.C. No. 47-03245-140241 |
| PITLICK & WICK, INC. | : | Docket No. LAKE 2008-348-M<br>A.C. No. 47-03367-140245 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 14, 2008, the Commission received from Pitlick & Wick, Inc. ("Pitlick") motions from counsel seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2008-345-M, LAKE 2008-346-M, LAKE 2008-347-M and LAKE 2008-348-M, all captioned *Pitlick & Wick, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

On February 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the four proposed penalty assessments at issue to Pitlick. The affidavit of Pitlick's Safety Director states that Pitlick failed to contest the penalty assessments within the required 30 days "due to mistake and inadvertent administrative error due to clerical error which failed to bring the assessment to [his] attention in a timely fashion." The Secretary does not oppose the reopening of the assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Pitlick's request and the Secretary's response, we determine that Pitlick has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Pitlick's conclusory statement that a clerical error resulted in its failing to timely contest the assessments does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Pitlick's request. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392 (May 2008); *James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).[2]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[2] In the event Pitlick chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 7, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. LAKE 2008-349-M<br>A.C. No. 47-03165-140238 |
| v. | : | Docket No. LAKE 2008-350-M<br>A.C. No. 47-03191-140239 |
| NORTHERN LAKES CONCRETE, INC. | : | Docket No. LAKE 2008-351-M<br>A.C. No. 47-03330-140242 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On April 14, 2008, the Commission received from Northern Lakes Concrete, Inc. ("Northern Lakes") motions by counsel seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three proposed penalty assessments to Northern Lakes for Citations Nos. 6188577, 6188578, 6189190, 6189191, and 6189192. Northern Lakes asserts that it had previously contested all of the underlying citations. The affidavit of Northern Lakes' Safety Director states that it failed to contest the penalty assessments within the required 30 days "due to

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2008-349-M, LAKE 2008-350-M, and LAKE 2008-351-M, all captioned *Northern Lakes Concrete, Inc.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

mistake and inadvertent administrative error due to a clerical error which failed to bring the assessment to [his] attention in a timely fashion." The Secretary states that she does not oppose the reopening of the assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Northern Lake's request, we determine that Northern Lakes has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Northern Lakes' conclusory statement that a clerical error resulted in its failing to timely contest the assessments does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Northern Lakes's request. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392 (May 2008); *James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).[2]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[2] In the event Northern Lakes chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 7, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2008-1478 |
| v. | : | A.C. No. 46-08582-134591 H946 |
| DANBI, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 15, 2008, the Commission received from Danbi, Inc. ("Danbi") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 4, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment of $34,100 that arose from two unwarrantable failure orders issued to Danbi. In an affidavit submitted by Danbi's president, the operator stated that the assessment was never received because it was mailed to an address with an incorrect zip code. Danbi states that the zip code was incorrectly typed when Danbi submitted its legal identification form to MSHA in 2004, and that Danbi had made several attempts to correct the address, and did not realize that these attempts had been unsuccessful until after the penalty assessments had become final. Danbi further states that it had always intended to contest the orders and had filed notices of contest of the orders in 2007. In response, the Secretary states that she does not oppose the reopening of the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Danbi's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Danbi's failure to timely contest the penalty proposals and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 10, 2008

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | |
| v. | : | Docket No. LAKE 2008-569<br>A.C. No. 12-02215-148226 A01 |
| FRONTIER-KEMPER<br>CONSTRUCTORS INC. | :<br>: | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 30, 2008, the Commission received from Frontier-Kemper Constructors Inc. ("Frontier-Kemper") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 29, 2008, the Department of Labor's Mine Safety and Health Administration (MSHA) issued citations to Frontier-Kemper that it subsequently contested. The contest proceedings were stayed pending issuance of proposed penalties. On April 23, 2008, MSHA issued a proposed assessment for the citations that Frontier-Kemper had contested. According to Frontier-Kemper, due to a "clerical error and misunderstanding" by one of its employees, who thought it was unnecessary to contest the penalties since the citations had already been contested, the proposed assessment form was never returned to MSHA. On July 21, 2008, Frontier-Kemper received a delinquency notice regarding the penalties of the citations that it had contested. The Secretary states that she does not oppose Frontier-Kemper's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Frontier-Kemper's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Frontier-Kemper's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 10. 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. KENT 2008-1294 |
| | : | A.C. No. 15-00008-120878 A |
| KEVIN PHILLIPS, EMPLOYED BY REOSTONE, LLC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 14, 2008, the Commission received from Kevin Phillips ("Phillips") a letter in which he seeks to reopen a penalty assessment under section 110(c) of the Mine Act that had become final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

On June 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment of $4150 as a result of six citations issued to Phillips. It is unclear when Phillips actually received the assessment. In a letter dated January 30, 2008, to MSHA's Civil Penalty Compliance Office, Phillips stated that he wanted to contest the proposed penalties and apparently attached the assessment form. In response, the Secretary states that she does not object to the reopening of the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Phillips' request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Phillips' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 14, 2008

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. SE 2008-843-M |
| | : | A.C. No. 22-00585-1145711 |
| KRYSTAL GRAVEL | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 7, 2008, the Commission received from Krystal Gravel ("Krystal") a letter seeking to reopen an assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On April 3, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Krystal a proposed assessment as a result of 18 citations that were issued in February 2008. On April 22, Krystal mailed a letter to MSHA's Civil Penalty Compliance Office in which Krystal stated that it did not contest the violations but that it needed "help on the assessment amounts" and that penalties were "calculated wrong and are too high."[1] In response,

[1] MSHA's proposed assessment form instructs an operator "to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment." Later in the form, MSHA states, "If you wish to contest and have a formal hearing on just *some* of the violations listed in the Proposed Assessment, check the specific violation numbers in the first column and mail a

the Secretary states that she does not oppose reopening the proposed assessment but that Krystal's letter was not adequate to contest a proposed assessment.

Having reviewed Krystal's request and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Krystal effectively timely contested it. We deny Krystal's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[2] *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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copy[.]" (Emphasis added). Because Krystal wished to contest *all* the citations listed on the proposed assessment, its letter to MSHA should have been sufficient notification in light of MSHA's instructions.

[2] Under Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), the Secretary has 45 days following the contest of a proposed penalty assessment to file a petition of assessment with the Commission. Given our disposition in this proceeding, we deem that the time period for filing a petition of assessment should run from the date of issuance of this order.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. SE 2008-805-M |
| | : | A.C. No. 09-00024-143360 |
| LAFARGE AGGREGATES SOUTHEAST, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 30, 2008, the Commission received from Lafarge Aggregates Southeast, Inc. ("Lafarge") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The penalty assessment at issue, No. 000143360, proposed penalties for seven citations issued to the operator in February 2008 by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Prior to receiving the assessment, Lafarge's Safety Director had contacted the local MSHA office to urge the agency to reduce its findings with respect to one of the citations. On March 11, 2008, MSHA issued the proposed assessment. Lafarge states that shortly thereafter the Safety Director contacted Lafarge's counsel, informing him of the attempt to have the findings reduced and instructing him to contest the proposed penalties with respect to all of the citations. However, according to Lafarge, a different assessment, No. 000143326, was attached to the e-mail to counsel. Lafarge states that counsel did not recognize that the wrong assessment had been forwarded, and that consequently no contest to No. 000143360 was ever

filed. The Secretary states that she does not oppose Lafarge's request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Lafarge's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lafarge's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW
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November 24, 2008

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. KENT 2008-1346 |
| ADMINISTRATION (MSHA) | : | A.C. No. 15-18594-150594 |
| | : | |
| v. | : | Docket No. KENT 2008-1347 |
| | : | A.C. No. 15-18594-147288 |
| EMBER CONTRACTING | : | |
| CORPORATION | : | Docket No. KENT 2008-1348 |
| | : | A.C. No. 15-18594-139998 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 25, 2008, the Commission received from Ember Contracting Corporation ("Ember") a letter from its president in which he requests to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In February, April, and May 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three proposed assessments with penalties totaling $157,861. According to Ember's president, Ember did not receive the proposed assessments and first

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2008-1346, KENT 2008-1347, and KENT 2008-1348, all captioned *Ember Contracting Corp.* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

learned of these penalties on July 16, 2008, when they appeared as "outstanding" on a proposed assessment that Ember received.

In response, the Secretary states that the proposed assessments at issue were sent to the address of record but were returned because they could not be delivered at that address. The Secretary further states that she does not oppose Ember's request to reopen in this proceeding.[2]

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

It is an operator's responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Ember's official address of record at the time of assessment and whether Ember maintained its correct address with MSHA. If MSHA sent the proposed assessment to Ember's official address of record, grounds may exist for denying Ember's request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Ember's request may be moot.

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[2] The Secretary urges Ember to take all steps necessary to ensure that future penalty assessments are "received, processed and contested in a timely manner." The Secretary states that she may oppose future motions to reopen penalty assessments if they are not timely contested.

Having reviewed Ember's request and the Secretary's response, we remand this matter to the Chief Administrative Law Judge for a determination of whether Ember timely contested the penalty proposal. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Ember's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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November 24, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. KENT 2008-1179 |
| v. | : | A.C. No. 15-18747-152513 |
| SOLAR COAL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 24, 2008, the Commission received from Solar Coal Company ("Solar") a letter requesting reopening of eight penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] That request will the subject of a future Commission order in Docket Nos. KENT 2008-1207 through 2008-1214.

Attached to Solar's request was a copy of two pages of a ninth proposed penalty assessment, No. 000152513, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on June 5, 2008. On those pages, Solar had indicated that it was contesting all of the penalties proposed. The assessment was construed as also the subject of Solar's request to reopen, and the above docket number was assigned to it.

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

The Secretary subsequently informed the Commission that Assessment No. 000152513 is being treated by MSHA as a validly contested assessment. Consequently, there is no final Commission order with respect to this assessment to reopen, and this docket is dismissed.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 25, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. WEST 2008-861 |
| | : | A.C. No. 42-01715-127742 |
| v. | : | |
| GENWAL RESOURCES INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 18, 2008, the Commission received from Genwal Resources, Inc. ("Genwal") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 21, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000127742 to Genwal, proposing a penalty for Citation No. 7286499 that previously had been issued to the company's Crandall Canyon Mine. In its motion, Genwal asserts that because of two major accidents that occurred at the mine in August 2007, which resulted in nine fatalities, mining operations ceased entirely. In an accompanying declaration, James Poulson, the safety manager of Genwal's parent company, states that the mine's safety director was reassigned to another mine within a week or two after the August accidents and that, as a result, the proposed penalty assessment that was issued in September was misplaced until April 2, 2008, when Mr. Poulson discovered it among some unrelated personnel files. The Secretary does not oppose the motion to reopen the penalty

assessment but indicates that a notice of delinquency was mailed to Genwal on December 13, 2007.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Genwal's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Genwal's failure to timely contest the penalty proposal and whether relief from the final order should be granted. In making that determination, the judge should consider that the proposed assessment was not sent until September 21, 2007, three weeks after rescue attempts had ceased. We also direct the judge to obtain from Genwal evidence regarding why it waited four months to respond to the delinquency notice dated December 13, 2007. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 25, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. CENT 2008-591-M<br>A.C. No. 03-01723-135548 |
| PINE BLUFF SAND & GRAVEL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 13, 2008, the Commission received from Pine Bluff Sand & Gravel Company ("Pine Bluff") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 9, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000135548 to Pine Bluff, proposing penalties for three citations that had been issued to the company in September 2007 for violations at its River Mountain Quarry location ("River Mountain"). Pine Bluff states that prior to that, its River Mountain representative had participated with an MSHA representative in a conference that Pine Bluff had requested regarding one of those citations, No. 7851308. Pine Bluff further states that consequently it did not believe it needed to contest the assessment as to that citation until it received the results of the conference, which its original motion states it had yet to receive. Pine Bluff's motion includes evidence showing that it timely paid the penalties for the other two citations.

The Secretary opposes reopening on the ground that Pine Bluff has failed to demonstrate the exceptional circumstances necessary to support reopening. The Secretary states that the penalty assessment, MSHA's regulations, and the Commission's regulations all unequivocally provide for 30 days in which to contest a proposed penalty, and that there was nothing that would have led an experienced operator like Pine Bluff to believe that the conference that was held suspended the 30-day requirement. The Secretary also includes an affidavit from its representative stating that he left a telephone message two days after the conference was held informing Pine Bluff that there would be no changes in the citation. The Secretary also points out that MSHA notified Pine Bluff of the delinquency of the penalty payment over two months before Pine Bluff filed its motion to reopen.

Pine Bluff responded to the Secretary's opposition to reopening with affidavits of two of its River Mountain representatives. River Mountain's Human Resources Director, Lloyd Baker, states that he does not recall receiving the phone message from the MSHA representative that the citation would not be changed. In addition, both Baker and John Regenhardt, General Manager of River Mountain, state that when they received the delinquency notice in April 2008, they believed it was a result of MSHA incorrectly allocating the payment that Pine Bluff had submitted on the two penalties it had paid. The two state that it was only the following month, after they had pursued correction with MSHA, that they realized that the delinquency notice was for the penalty assessment that had never been formally contested.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Pine Bluff's motion, the Secretary's opposition, and Pine Bluff's response to the opposition, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Pine Bluff's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

December 8, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. SE 2009-61-M |
| v. | : | A.C. No. 08-00768-154205 B96 |
| CCC GROUP, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 17, 2008, the Commission received from CCC Group, Inc. ("CCC") a letter maintaining that it had filed a timely contest of a proposed penalty assessment that the Department of Labor's Mine Safety and Health Administration ("MSHA") was treating as untimely. Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

CCC's letter was originally docketed here as a motion to reopen, but the Secretary of Labor submitted a response to CCC's letter stating that MSHA had erred in taking its original position, that CCC's contest was in fact timely filed, and that the Secretary will file a petition for assessment of penalty petition with the Commission and CCC within 45 days. Having reviewed CCC's letter and the Secretary's response, we conclude that the proposed assessment at

issue has not become a final order of the Commission because CCC timely contested it. Consequently, this docket is dismissed.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW
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December 10, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. KENT 2008-1214 |
| v. | : | A.C. No. 15-18747-089953 |
| SOLAR COAL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 14, 2008, the Commission received from Solar Coal Company ("Solar") a letter from its owner that was subsequently amended to make clear that Solar is seeking to reopen eight penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). This order addresses the request to reopen the eighth of those assessments.[1]

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

In her letter to the Commission, in connection with asserting that the proposed penalty amount in a pending proceeding is more than the company can afford to pay, Solar's owner states that "[a]fter examining past citations and reviewing the compan[y's] financial records, I ask that the following cases be reopened and contested to a lower amount due to their outstanding balances." The eighth case listed is a proposed penalty assessment that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Solar on June 1, 2006

[1] The request to reopen the other seven assessments is the subject of a separate, concurrently issued, consolidated order.

(A.C. No. 089953). In response, the Secretary states that inability to pay a penalty is not a grounds for reopening under Rule 60(b) of the Federal Rules of Civil Procedure, and notes that the assessment at issue cannot be reopened because it became a final order more than one year before Solar filed its reopening request.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

We have been presented with Solar's failure to timely contest the proposed penalty assessment. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Because the proposed penalty assessment was issued on June 1, 2006, and Solar waited nearly two years to seek relief, its request is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Solar's request is denied.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 10, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. KENT 2008-1207 |
| | : | A.C. No. 15-18747-145685 |
| | : | |
| | : | Docket No. KENT 2008-1208 |
| | : | A.C. No. 15-18747-142094 |
| | : | |
| | : | Docket No. KENT 2008-1209 |
| | : | A.C. No. 15-18747-138070 |
| | : | |
| | : | Docket No. KENT 2008-1210 |
| v. | : | A.C. No. 15-18747-135133 |
| | : | |
| | : | Docket No. KENT 2008-1211 |
| | : | A.C. No. 15-18747-132889 |
| | : | |
| | : | Docket No. KENT 2008-1212 |
| | : | A.C. No. 15-18747-130570 |
| | : | |
| SOLAR COAL COMPANY | : | Docket No. KENT 2008-1213 |
| | : | A.C. No. 15-18747-128271 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 14, 2008, the Commission received from Solar Coal Company ("Solar") a letter from its owner that was subsequently amended to make clear that Solar is seeking to reopen eight penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). This order addresses the request to reopen as to seven of the assessments.[1]

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2008-1207, KENT 2008-1208, KENT 2008-1209, KENT

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

In her letter to the Commission, in connection with asserting that the proposed penalty amount in a pending proceeding is more than the company can afford to pay, Solar's owner states that "[a]fter examining past citations and reviewing the compan[y's] financial records, I ask that the following cases be reopened and contested to a lower amount due to their outstanding balances." The first seven cases listed are proposed penalty assessments that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Solar on April 3, 2008 (A.C. No. 145685), on February 28, 2008 (A.C. No. 142094), on January 31, 2008 (A.C. No. 138070), on January 3, 2008 (A.C. No. 135133), on November 29, 2007 (A.C. No. 132889), on November 1, 2007 (A.C. No. 130570), and on October 4, 2007 (A.C. No. 128271).

In response, the Secretary states that inability to pay a penalty is not a grounds for reopening under Rule 60(b) of the Federal Rules of Civil Procedure, and notes that if the operator wishes to set up a payment plan, it should contact MSHA's Office of Assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Because Solar's request for relief does not explain the company's failure to contest the proposed assessments on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Solar may submit

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2008-1210, KENT 2008-1211, KENT 2008-1212, and KENT 2008-1213, all captioned *Solar Coal Company* and involving similar procedural issues. 29 C.F.R. § 2700.12. The request to reopen the eighth assessment is docketed at KENT 2008-1214, and is the subject of a separate, concurrently issued, order.

another request to reopen the cases so that it can contest specific citations and penalty assessments.[2]

In the meantime, in order to narrow the potential scope of a refiled request to reopen, the Secretary should address with Solar whether Solar's letter, dated May 11, 2008, and sent to MSHA at its address for contests, will be treated by the Secretary as a timely contest of Assessment No. 145685, dated April 3, 2008, and the subject of Docket No. KENT 2008-1207. If Solar's letter was sent to MSHA within 30 days of Solar's receipt of that assessment (a date MSHA should have in its records), the letter would not have been an untimely response to the assessment.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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[2] If Solar submits another request to reopen, it must identify the specific citations and assessments it seeks to contest. Solar must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Solar should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Solar from responding within the time limits provided in the Mine Act, as part of its request to reopen. Solar should also submit copies of supporting documents with its request to reopen.

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December 10, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. PENN 2008-487 |
| | : | A.C. No. 36-02022-150443 |
| S & M COAL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 18, 2008, the Commission received from S & M Coal Company ("S&M") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On May 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment of $58,100 that arose from eight citations and orders issued on September 26, 2007. In his affidavit, S&M's president states that he had always intended to contest both the penalties and the underlying citations that had been previously docketed. He further states that he failed to return the assessment form because of "inadvertent administrative oversight" and that he believed that the citations were already contested. In its motion, S&M through counsel asserts that it discovered the mistake on July 11, 2008, when the assessment form was discovered in a file where it had been "misplaced."

The Secretary opposes S&M's motion to reopen. The Secretary argues that S&M has not made a showing of exceptional circumstances justifying relief; rather, the Secretary asserts that the operator has made a conclusory assertion that is insufficient to justify the reopening of a final order. Further, the Secretary states that S&M's motion is not supported by the accompanying affidavit because the operator's motion states a factual assertion which is not contained in the affidavit. Finally, the Secretary asserts that S&M has been delinquent in paying every penalty associated with 88 violations over the last four years. Therefore, the Secretary concludes that S&M has not acted in good faith.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed S&M's request and the Secretary's response, we determine that S&M has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. S&M's president's conclusory statement that an inadvertent administrative oversight resulted in failing to timely contest the penalties does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice S&M's request. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] In the event S&M chooses to refile its request to reopen, it should disclose with specificity its grounds for relief and address the issue of good faith in seeking relief.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 15, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Docket No. WEST 2008-1314-M<br>A.C. No. 26-01621-140819 HS6 |
| v. | : | |
| LANG EXPLORATORY DRILLING | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 3, 2008, the Commission received from Lang Exploratory Drilling ("Lang") a request by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 19, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Lang. On February 19, 2008, MSHA issued a proposed penalty assessment as a result of the citation. Lang asserts that the director of its parent company, who is responsible for reviewing and determining a course of action on penalty proposals, never received the proposed assessment. According to the director,[1] Lang had always

[1] In an affidavit attached to the motion, Tom Joiner, who is identified as a management systems director of Boart Longyear Co. ("Boart"), states that Lang is "a wholly owned subsidiary of Boart." The citation, proposed assessment, and delinquency notice were all issued to Lang.

intended to contest the citation and the related penalty. Lang further states that on May 21, 2008, it received a letter from MSHA's Civil Penalty Compliance Office stating that the penalty was delinquent.

In response, the Secretary states that it opposes the request to reopen. The Secretary states that its records show that it sent the assessment to the operator's address of record and that it was signed for. Accordingly, the Secretary notes that the operator's statement that it did not receive the assessment is inaccurate.[2]

Lang filed a reply to the Secretary in which it states that the assessment was sent to the address of record, that it was received and signed for by an employee unfamiliar with MSHA procedures, and consequently that the operator failed to file a timely notice of contest. Lang further states that, when it received the notice of delinquency, it filed its "Notice of Opposition," which has been treated as a request to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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[2] The assessment form indicates that it was sent to Lang, rather than Boart. Lang does not explain what type of system it had for forwarding mail to Boart and its director, who was responsible for reviewing penalty assessments.

Having reviewed Lang's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lang's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 17, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. WEVA 2008-273 |
| | : | A.C. No. 46-09030-120039 |
| v. | : | |
| PINNACLE MINING COMPANY, LLC | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 26, 2007, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In February 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations to Pinnacle. MSHA later issued Proposed Assessment No. 000120039, which proposed penalties for those citations. Mot. at 1. Pinnacle states that in September 2007, MSHA sent a letter stating that the corresponding civil penalties had become delinquent. Aff. of James Bennett at 1. It asks us to reopen the penalty assessment that had become a final order of the Commission, stating that it failed to timely respond to the assessment notice because it had not established a reliable mail delivery system. Mot. at 1-3. In particular, Pinnacle's safety director acknowledges that at the time, the mail was picked up from the Post Office infrequently and by different individuals, and that it was not always delivered to the correct office or individual in time to respond in a timely manner. Aff. of James Bennett at 2.

He notes that the post office box used by the mine was located 12 to 16 miles from the mine site. *Id.* The Secretary, while not opposing the request to reopen, notes that both the penalty assessment and delinquency letter were sent to the mine address of record. Letter from W. Christian Schumann (Dec. 17, 2007).

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

We conclude that relief is not warranted in this case. Although a party may be entitled to relief from a final order on the basis of inadvertence or mistake, neither are apparent here. Rather, even if the operator's assertions are accepted as true, they demonstrate only that it had tolerated a mail delivery system that clearly had the potential to cause haphazard and untimely receipt of important mail.[1] Consequently, we find that the excuse proffered is a hollow one. Indeed, after receiving two citations, the operator should have realized that inevitably a subsequent time-sensitive penalty assessment would arrive in the mail. Nonetheless, it failed to create a mechanism to ensure that it would routinely and effectively receive mail when it was delivered. Relief should not be granted in such a case. *See Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was taken does not constitute default through excusable neglect).

The Commission has recognized that Rule 60(b) "'is a tool which . . . courts are to use sparingly . . . .'" *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). Relief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.

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[1] Although in his affidavit, Bennett alleges that mail was sometimes delivered late, he does not claim that Pinnacle failed to receive its mail at all. Thus, assuming that the proposed assessment eventually was received, Pinnacle could have taken some action. However, there is nothing in the record to indicate that the operator responded in any manner to the penalty assessment for the February 2006 citations until it received the delinquency letter in September 2007. Shortly thereafter, in October 2007, it paid the assessment in full, according to the Secretary. Inexplicably, it then filed the pending motion to reopen the final order in November 2007.

Accordingly, we deny Pinnacle's motion.

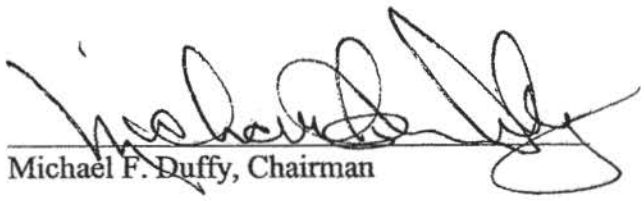
Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

Given that the Secretary does not oppose Pinnacle's request to reopen, I would normally remand this matter to the Chief Administrative Law Judge for a determination of whether relief should be granted. However, because the operator waited over two months after receiving the delinquency notice to request reopening, I would deny its request to reopen. I would specify that dismissal was without prejudice, so that Pinnacle could provide an explanation for the delay if it chose to renew its request to reopen.



Michael F. Duffy, Chairman

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2008-272 |
| v. | : | A.C. No. 46-95868-120025 |
| PINNACLE MINING COMPANY, LLC | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 26, 2007, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In August 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and five orders to Pinnacle. MSHA later issued Proposed Assessment No. 000120025, which proposed penalties for the citation and orders. Mot. at 1. Pinnacle states that in September 2007, MSHA sent a letter stating that the corresponding civil penalties had become delinquent. Aff. of James Bennett at 1. It asks us to reopen the penalty assessment that had become a final order of the Commission, stating that it failed to timely respond to the assessment notice because it had not established a reliable mail delivery system. Mot. at 1-3. In particular, Pinnacle's safety director acknowledges that at the time, the mail was picked up from the Post Office infrequently and by different individuals, and that it was not always delivered to the correct office or individual in time to respond in a timely manner. Aff. of

James Bennett at 2. He notes that the post office box used by the mine was located 12 to 16 miles from the mine site. *Id.* The Secretary, while not opposing the request to reopen, notes that both the penalty assessment and delinquency letter were sent to the mine address of record. Letter from W. Christian Schumann (Dec. 17, 2007). Pinnacle neither contested nor paid the penalties.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

We conclude that relief is not warranted in this case. Although a party may be entitled to relief from a final order on the basis of inadvertence or mistake, neither are apparent here. Rather, even if the operator's assertions are accepted as true, they demonstrate only that it had tolerated a mail delivery system that clearly had the potential to cause haphazard and untimely receipt of important mail.[1] Consequently, we find that the excuse proffered is a hollow one. Indeed, after receiving a citation and five orders, the operator should have realized that inevitably a subsequent time-sensitive penalty assessment would arrive in the mail. Nonetheless, it failed to create a mechanism to ensure that it would routinely and effectively receive mail when it was delivered. Relief should not be granted in such a case. *See Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was taken does not constitute default through excusable neglect).

The Commission has recognized that Rule 60(b) "'is a tool which . . . courts are to use sparingly . . . .'" *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). Relief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.

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[1] Although in his affidavit Bennett alleges that mail was sometimes delivered late, he does not claim that Pinnacle failed to receive its mail at all. Thus, assuming that the proposed assessment eventually was received, Pinnacle could have taken some action. However, there is nothing in the record to indicate that the operator responded in any manner to the penalty assessment for the August 2006 citation and orders until it requested reopening of the final order two months after receiving the delinquency letter in September 2007.

Accordingly, we deny Pinnacle's motion.

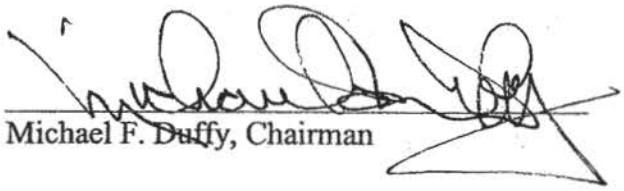
Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

Given that the Secretary does not oppose Pinnacle's request to reopen, I would normally remand this matter to the Chief Administrative Law Judge for a determination of whether relief should be granted. However, because the operator waited over two months after receiving the delinquency notice to request reopening, I would deny its request to reopen. I would specify that dismissal was without prejudice, so that Pinnacle could provide an explanation for the delay if it chose to renew its request to reopen.



Michael F. Duffy, Chairman

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

December 17, 2008

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | Docket No. WEVA 2008-927<br>A.C. No. 46-01816-122324 |
| | : | Docket No. WEVA 2008-928<br>A.C. No. 46-01816-133987 |
| | : | Docket No. WEVA 2008-929<br>A.C. No. 46-01816-125080 |
| | : | Docket No. WEVA 2008-930<br>A.C. No. 46-05868-125081 |
| v. | : | Docket No. WEVA 2008-931<br>A.C. No. 46-09030-122333 |
| | : | Docket No. WEVA 2008-1360<br>A.C. No. 46-01816-129390 |
| | : | Docket No. WEVA 2008-1361<br>A.C. No. 46-01816-131799 |
| | : | Docket No. WEVA 2008-1362<br>A.C. No. 46-09030-134000 |
| | : | Docket No. WEVA 2008-1363<br>A.C. No. 46-09030-140219 |
| PINNACLE MINING COMPANY, LLC | : | Docket No. WEVA 2008-1364<br>A.C. No. 46-09030-144941 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 15, 2008, the Commission received from Pinnacle Mining Company ("Pinnacle") motions by counsel seeking to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30

U.S.C. § 815(a), Docket Nos. WEVA 2008-927, WEVA 2008-928, WEVA 2008-929, WEVA 2008-930, and WEVA 2008-931. On June 25, 2008, the Commission received from Pinnacle motions by counsel seeking to reopen five penalty assessments that had similarly become final orders of the Commission, Docket Nos. WEVA 2008-1360, WEVA 2008-1361, WEVA 2008-1362, WEVA 2008-1363, and WEVA 2008-1364.[1]

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the ten proposed penalty assessments to Pinnacle on July 17, 2007 (A.C. Nos. 122333 and 122324), on August 15, 2007 (A.C. Nos. 0125080 and 0125081), on October 17, 2007 (A.C. No. 129390), on November 14, 2007 (A.C. No. 131799), on December 12, 2007 (A.C. Nos 133987 and 134000), on February 13, 2008 (A.C. No. 140219), and on March 31, 2008 (A.C. No. 144941). In each proposed penalty assessment MSHA stated:

> Pursuant to 30 [C.F.R. §] 100.7, you have 30 days from the receipt of this proposed assessment to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment and that you request a hearing on the violations in question before the Federal Mine Safety and Health Review Commission. If you do not exercise the right herein described within 30 days of receipt of this proposed assessment, this proposed assessment will become a final order of the Commission and will be enforced under provisions of the Federal Mine Safety and Health Act of 1977.

On October 26, 2007, MSHA sent delinquency notices informing Pinnacle that it had not responded to penalty Assessment Case Nos. 122333 and 122324 in a timely manner and that payments were now due. On November 15, 2007, MSHA sent Pinnacle delinquency notices for Assessment Case Nos. 125080 and 125081. On January 9, 2008, MSHA sent a delinquency notice for Assessment Case No. 129390. On March 6, 2008, MSHA sent Pinnacle a delinquency notice for Assessment Case No. 133987. On April 24, 2008, MSHA sent Pinnacle delinquency notices for Assessment Case Nos. 131799 and 134000. On May 7, 2008, MSHA sent Pinnacle a delinquency notice for Assessment Case No. 140219.

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2008-927, WEVA 2008-928, WEVA 2008-929, WEVA 2008-930, WEVA 2008-931, WEVA 2008-1360, WEVA 2008-1361, WEVA 2008-1362, WEVA 2008-1363, and WEVA 2008-1364, all captioned *Pinnacle Mining Company* and involving similar procedural issues. 29 C.F.R. § 2700.12.

Pinnacle asserts that it failed to contest the penalty assessments within the required 30 days because its Safety Director, James Bennett, believed that the proposed penalties were already contested. In affidavits accompanying these 10 motions, which are virtually identical except for the case number references, Mr. Bennett states that as Safety Director, he is responsible for dealing with MSHA enforcement actions including the filing of civil penalty contests. Mr. Bennett also states in each affidavit that upon receiving notice that the various enforcement actions in each case "were not considered by MSHA to be in contest," he "conducted an investigation and requested that the accompanying Motion to Reopen Civil Penalty Proceeding be filed." In the affidavits accompanying Docket Nos. 2008-1360 through 2008-1364, Mr. Bennett also states that during the time the proposed assessments were issued, "Pinnacle was undergoing a management and ownership transfer." Pinnacle asserts in all ten motions that it is entitled to the reopening of the penalty assessments contained in these final orders because of either "excusable neglect or perhaps a failure on MSHA's part."

In response, the Secretary states that the operator failed to adequately explain its failure to timely contest the proposed penalty assessment. The Secretary states that MSHA has no record that it ever received contests for any of the penalty assessments in question. She further asserts in Docket Nos. WEVA 2008-927 through WEVA 2008-931 that Pinnacle in its April 15, 2008, motions to reopen failed to explain why it did not seek reopening within a reasonable period of time when four of the five delinquency notices in this case were sent in October and November of 2007.[2] In Docket Nos. WEVA 2008-927 through WEVA 2008-931 Pinnacle filed a response to the Secretary's pleadings which did not provide any additional facts for the Commission to consider.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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[2] In Docket Nos. WEVA 2008-927 through 2008-931, the Secretary also brought a motion to file her responses out of time, which was opposed by Pinnacle. Given that the Secretary's delay was only one week and these dockets involve 175 violations which the Secretary needed to research, we grant the Secretary's motion and accept her Opposition to Motion to Reopen Penalty Assessments.

Having reviewed Pinnacle's motion to reopen and the Secretary's response thereto, we agree with the Secretary that Pinnacle has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. In these consolidated cases in ten dockets, Pinnacle requests that we reopen, by Pinnacle's count, 278 citations or orders with final penalty assessments totaling over $264,000. Pinnacle's claims that it believed, erroneously, it had properly contested 10 sets of proposed assessments during a period of over nine months are conclusory, essentially identical, and do not provide the Commission an adequate basis to justify reopening. Pinnacle's further claims that, although it first was sent a delinquency notice in October 2007 and did not submit its first set of motions for reopening until April 2008, its Safety Director took prompt action to investigate and seek reopening of each delinquency upon learning of it, are similarly conclusory. Accordingly, we deny without prejudice Pinnacle's request. *See Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

In light of the number of citations and orders at issue, the delay in seeking reopenings, and the absence of explanation in its motions, the Commission would expect Pinnacle to provide, in verified affidavits with relevant documents attached, detailed evidence of: (1) the circumstances supporting the claim that the Safety Manager believed that each of the proposed assessments had been properly contested; (2) what Pinnacle did after receiving the various notices of delinquency; and (3) the Safety Manager's investigations.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 22, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. WEST 2008-934-M<br>A.C. No. 45-03338-113621 |
| v. | : | |
| PALMER COKING COAL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 1, 2008, the Commission received from Palmer Coking Coal Company ("Palmer") a letter, dated April 25, 2008, seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On March 15, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000113621 to Palmer, which proposed civil penalties for four citations, including Citation Nos. 6396248 and 6396249. Palmer states that on March 26, 2007, its manager mailed its contest of the proposed penalties for Citation Nos. 6396248 and 6396249 to MSHA. MSHA issued a delinquency notice to Palmer on June 22, 2007. Palmer has submitted a copy of a letter to MSHA dated June 25, 2007, in which it alleged that it timely contested the proposed assessment.[1] Palmer alleges further that in October 2007, it

[1] Palmer did not include a copy of its March 26, 2007 submission to MSHA in its submission to the Commission.

received a notice from the U.S. Department of the Treasury stating that it failed to timely contest Proposed Assessment No. 000113621. Palmer submits that it responded by mailing letters to the U.S. Department of the Treasury and to MSHA explaining that its contest had been timely filed.

While the Secretary states that she does not oppose Palmer's request to reopen, she states that she has no record of receiving Palmer's contest of the penalty assessment.

On the record presently before us, we are unable to determine whether Palmer timely contested the proposed penalty assessment. Specifically, it is unclear on what date, between March 15 and 26, 2007, Palmer received the proposed penalty assessment. It is also unclear on what date Palmer contested the proposed assessment, particularly since the Secretary indicates that she has no record of receiving such a contest. If the company timely contested the proposed assessment, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot. *DS Mine & Dev. LLC*, 28 FMSHRC 462, 463 (July 2006).

If Palmer failed to timely contest the proposed assessment, however, the Commission may not be able to grant the relief requested. *Id.* Under Rule 60(b) of the Federal Rules of Civil Procedure,[2] any motion for relief from a final order must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Depending upon the date that Palmer received the proposed assessment, the proposed assessment could have become a final Commission order between April 14 and April 25, 2007. Palmer's letter requesting a reopening of the proposed assessment is dated April 25, 2008.[3] Thus, Palmer may have requested a reopening of the proposed assessment more than one year after it became a final Commission order. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

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[2] We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *Id.* at 787.

[3] MSHA's delinquency notice to the operator lists a final order date of April 29, 2007. There is no indication, however, regarding the manner in which that date was calculated.

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Palmer timely contested the proposed penalty assessment at issue. In making this determination, the Chief Administrative Law Judge should obtain from Palmer any proof of mailing of its March 26, 2007, contest of the proposed assessment, or any other documentation (*e.g.*, an affidavit) that supports the operator's assertion that it was mailed on that date. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Palmer failed to timely contest the proposed assessment, the Chief Judge shall determine whether to dismiss this proceeding, or whether good cause exists for granting relief from the final order.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 22, 2008

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2008-1082 |
| v. | : | A.C. No. 46-08224-134590 H332 |
| STOWERS TRUCKING, LLC | : | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 8, 2008, the Commission received from Stowers Trucking, LLC ("Stowers") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 20, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000134590 to Stowers, proposing civil penalties for one citation and four orders. In an affidavit, Stowers' office manager states that on January 3, 2008, she faxed the proposed assessment to counsel, requesting that the citation and orders and associated proposed penalties be contested. Stowers states that, rather than contesting the proposed assessment, counsel inadvertently placed the proposed assessment form in a file. The mistake was apparently not discovered until a meeting between Stowers and counsel in March 2008, after the proposed assessment had become a final order of the Commission. The Secretary states that she does not oppose Stowers' request to reopen the proposed assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Stowers' request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stowers' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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December 22, 2008

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. WEVA 2008-1083 |
| ADMINISTRATION (MSHA) | : | A.C. No. 46-07366-135717 |
| | : | |
| v. | : | |
| | : | Docket No. WEVA 2008-1084 |
| RUSCAT ENTERPRISES, INC. | : | A.C. No. 46-07366-138992 |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On May 12, 2008, the Commission received from Ruscat Enterprises, Inc. ("Ruscat") a letter seeking to reopen penalty assessments that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 9, and February 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000135717 and 000138992, respectively, to Ruscat, proposing civil penalties for several citations. Ruscat states that it never received the original proposed assessment forms. It alleges that it received copies of the proposed assessments only after it received delinquency notices from MSHA seeking payment of the penalties. While the Secretary states that she does not oppose Ruscat's request to reopen, she

[1] Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. WEVA 2008-1083 and WEVA 2008-1084, as both dockets involve similar procedural issues and similar factual backgrounds.

notes that the proposed assessments were sent by Federal Express to Ruscat's address of record, but were returned undelivered because of an incorrect address.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

It is an operator's responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Ruscat's official address of record at the time of assessment and whether Ruscat maintained its correct address with MSHA. If MSHA sent the proposed assessment to Ruscat's official address of record, grounds may exist for denying Ruscat's request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Ruscat's request may be moot.

Having reviewed Ruscat's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Ruscat timely contested the penalty proposals. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Ruscat's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Mass Transport, Inc.*, 30 FMSHRC ___, slip op. at 3-4, No. WEVA 2008-425 (Nov. 6, 2008).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

# ADMINISTRATIVE LAW JUDGE DECISIONS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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November 3, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. PENN 2004-158<br>A. C. No. 36-08746-26477 LVY |
| v. | : | |
| PBS COALS, INC., Respondent | : | Quecreek No. 1 Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. PENN 2004-152<br>A. C. No. 36-08746-26478 KQN |
| v. | : | |
| MUSSER ENGINEERING, INC., Respondent | : | Quecreek No. 1 Mine |

## DECISION

These consolidated proceedings were brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (hereinafter the "Mine Act" or "the Act"), following a July 24, 2002 nonfatal entrapment accident at the Quecreek No. 1 Mine, located in Somerset County, Pennsylvania. In a prior ruling on cross motions for summary decision, I concluded that Respondents PBS Coal, Inc. ("PBS") and Musser Engineering, Inc. ("Musser") violated 30 C.F.R. § 75.1200[1] as alleged by the Secretary. *Black Wolf Coal Co.*, 28 FMSHRC 699,

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[1] 30 C.F.R. § 75.1200 provides:

The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:

(a) The active workings;
(b) All pillared, worked out, and abandoned areas, except as provided in this section;
(c) Entries and aircourses with the direction of airflow indicated by arrows;
(d) Contour lines of all elevations;

709, 716 (July 2006).[2] I further concluded that as to the civil penalties proposed by the Secretary, outstanding questions of material fact precluded a summary decision. *Id.* at 711, 717. There were insufficient uncontroverted stipulations of fact to allow me to determine whether PBS's reliance on a mine map prepared by Consolidation Coal Co. ("Consol") was reasonable, *id.* at 711, and whether Musser knew or had reason to know that its permit map would serve as the basis for the MSHA section 75.1200 map of the Quecreek No. 1 Mine, *id.* at 717.

A hearing on these questions was held from August 28 to August 31, 2007, at the Somerset County Court House in Somerset, Pennsylvania. The parties filed post-hearing briefs, which I have considered in reaching my decision. For the reasons that follow, I conclude that the penalties initially proposed by the Secretary against PBS and Musser would not adequately effectuate "the deterrent purpose underlying the Act's penalty assessment scheme." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). I reach this decision based on my conclusion that PBS and Musser abjectly failed to meet the level of care required of them under section 75.1200, and that their failure to do so constitutes a very high level of negligence. I also base my decision on the extreme gravity associated with the violations of section 75.1200 committed by PBS and Musser.

In my prior decision, I set forth the procedural background of these proceedings and summarized the relevant uncontroverted facts as set forth in the parties' joint stipulations of fact. 28 FMSHRC at 700-704. For purposes of this decision, I hereby incorporate by reference my prior findings. Further findings of fact based upon evidence adduced at trial are set forth below.

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(e) Elevations of all main and cross or side entries;
(f) Dip of the coalbed;
(g) Escapeways;
(h) Adjacent mine workings within 1,000 feet;
(i) Mines above or below;
(j) Water pools above; and
(k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and,
(l) Such other information as the Secretary may require. Such map shall identify those areas of the mine which have been pillared, worked out, or abandoned, which are inaccessible or cannot be entered safely and on which no information is available.

[2] Black Wolf Coal Company, Inc. ("Black Wolf") originally was a party to these proceedings (PENN 2004-157), but following my ruling Black Wolf separately entered into a settlement agreement with the Secretary. I have approved the settlement in an order being issued concurrently with this decision.

## Findings of Fact

1. Musser was aware that the map prepared for the Quecreek No. 1 Mine permit had to show among other things an outline of abandoned mines adjacent to the proposed mine being permitted. Tr. 150 (testimony of Edwin Secor, former Musser supervising engineer).

2. After Musser requested Consol to provide it with any maps of the Harrison No. 2 Mine (*see* Stip. 65), Consol provided a map to Musser that was later determined to be inaccurate because it showed reserves that had already been mined. Tr. 44-45.

3. Musser and PBS subsequently obtained another map from Consol (Stip. 65) that was not dated, marked final, or certified by a professional engineer or surveyor. Gov't Ex. 3 (hereinafter "Consol Map 2").

4. Musser used the Consol Map 2 as the basis for delineating the boundary of the Harrison No. 2 Mine. Tr. 59, 577, 192-93.

5. Musser's delineation of the boundary of the Harrison No. 2 Mine in turn defined the extent of mining in the Quecreek No. 1 Mine, the limit of which was a 200-foot barrier between development in the Quecreek No. 1 Mine and what was believed to be the furthest extent of the Harrison No. 2 Mine. Stip. 66.

6. PBS was aware that Musser used the Consol Map 2 in delineating the boundary of the Harrison No. 2 Mine, and raised no objections. Tr. 43, 58-59, 106-07, 192-93.

7. The Quecreek No. 1 Mine map Musser prepared that was based on the Consol Map 2 was certified by Edwin Secor, a Musser supervising engineer, and submitted on behalf of Quecreek Mining Company ("Quecreek") to the Commonwealth of Pennsylvania Department of Environmental Protection as part of the initial permit package for the Quecreek No. 1 Mine. Tr. 91-92, 107-08, 137-38, 143-45; Gov't Ex. 5.

8. Musser and PBS knew that it was standard practice for an environmental permit map such as the one Musser prepared and submitted on behalf of Quecreek to be used as the base map from which a mine map required by MSHA would be drawn. Tr. 32-33, 59-60, 335-36, 575.

9. The location of adjacent mines does not change once they are plotted on a permit map, but are simply transferred over to the mine map required by MSHA. Tr. 33, 196, 336.

10. PBS prepared all of the maps of the Quecreek No. 1 Mine by transferring the boundary of the Harrison No. 2 Mine as delineated on the permit map prepared by Musser. Tr. 198, 203-04.

11. PBS prepared and provided mine maps to Black Wolf, the production operator of the mine, based on the environmental permit map that showed the incorrect boundary of the Harrison

No. 2 Mine. Tr. 271-3.

12. If Black Wolf "had known that the boundary line of the [Harrison No. 2 Mine] had been established by the use of an uncertified undated property map of Consol, . . .[Black Wolf] would have done something different. . . ." Tr. 279-80 (testimony of David Rebuck, president of Black Wolf Coal Company).

13. Mine maps commonly depict uncertainty over the extent of workings through the use of dashed or dotted lines, Tr. 522-36, 569, Gov't Exs. 10-13, and both Musser and PBS were aware of this mine mapping convention, Tr. 203, 598-99.

**Discussion**

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

30 U.S.C. § 820(I) (brackets added).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the [six] statutory penalty criteria must be made" by its judges. *Sellersburg*, 5 FMSHRC at 292. Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000) ("Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act"). In exercising this discretion, the Commission has recently reiterated that in determining the amount of a penalty, a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008) (citing *Sellersburg*, 5 FMSHRC at 291). The Commission also emphasized that when a judge's penalty determinations "substantially diverge from those originally proposed, it behooves [the judge] to provide a sufficient explanation of the bases underlying the penalties assessed by the [judge]." *Id.* The Commission warned in *Sellersburg* that without an explanation for such a divergence,

"the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." 5 FMSHRC at 293.

Here, there is no dispute as to the facts relating to several of the statutory penalty criteria. Both of the Respondents and the Secretary have stipulated as to both PBS and Musser that (1) the Respondents have no significant history of previous violations, (2) the proposed penalties are appropriate to the size of the Respondents' businesses, (3) the proposed penalties will not affect the ability of the Respondents to continue in business, and (4) the Respondents abated the violations at issue in good faith. Trial Stip. 1; Gov't Exs. 1-2. I accept the stipulations made by the parties and as to the four criteria, I find that PBS and Musser are both small operators with negligible histories of previous violations, that any penalty imposed under the Mine Act will not affect the ability of either PBS or Musser to continue in business, and that PBS and Musser abated the violations in good faith. There remain two criteria on which I must make findings of fact - - the degree to which PBS and Musser acted negligently in violating section 75.1200, and the gravity of their violations.

**Gravity**

In a 1996 *Consolidation Coal Co.* decision, the Commission stated: "The gravity penalty criterion under section 110(I) of the Mine Act . . . is often viewed in terms of the seriousness of the violation. . . . The focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on *the effect of the hazard if it occurs*." 18 FMSHRC 1541, 1549-50 (Sept. 1996) (emphasis added) (affirming judge's finding that a violation was "serious" based upon evidence of what *could have occurred* given the conditions present).

On July 24, 2002, eighteen miners were working underground in the Quecreek Mine. As a consequence of an inaccurate map, the wet conditions at the No. 6 entry were not perceived as a warning of impending disaster. At approximately 8:45 p.m., water broke through the working face of the No. 6 entry of the Quecreek No. 1 Mine, and nine miners were trapped underground by the resulting inundation. Stip. 29. Nine other miners narrowly escaped a similar fate. The effect of the hazard in this instance was both potentially and actually no less than catastrophic for these miners. Seventy two million gallons of water rushed into the mine. Tr. 391, 397. As a result of the flooding all miners underground faced the possibilities of grievous bodily injury from the force of the water entering the mine, blocked escapeways, severely compromised ventilation, and hypothermia. Tr. 397. In addition, those trapped underground faced and prepared for the ultimate consequence, death. They tied themselves together so that they would be found as a group after the flood waters rose, and they wrote notes to their loved ones and placed them in a waterproof container. Tr. 395-97. These miners surely would have died but for a rescue that was nothing short of miraculous. *See* Sec'y Br. at 10 (the miners "miraculously

escaped being seriously or fatally injured").[3] The fact that the nine miners were rescued, however, in no way diminishes the seriousness of the violation that led to their predicament.

Accordingly, I find that the violations of section 75.1200 committed by PBS and Musser were of the utmost gravity.

**Negligence**

The Mine Act states unequivocally that "the first priority and concern of all in the coal . . . mining industry *must* be the health and safety of its most precious resource – *the miner*." 30 U.S.C. § 801(a) (*emphasis added*). Furthermore, mine operators and their contractors have an absolute duty to maintain an accurate mine map, including a duty to show all adjacent mine workings within 1,000 feet. 30 C.F.R. § 75.1200. As I have already determined, the Quecreek mine map was inaccurate on the day of the inundation, and therefore, PBS and Musser violated section 75.1200.

In determining the degree to which PBS and Musser were negligent, I turn for guidance to the Secretary's regulations, which state:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). Under this same standard, high negligence is found if an "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* at Table X. The Secretary's Part 100 regulations do not go beyond high negligence.

In my prior decision, I stated that the facts as stipulated to by the parties were insufficient to determine the key questions of "whether PBS's reliance on the Consol map was reasonable," and "whether Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map." 28 FMSHRC at 711, 717. After hearing the evidence and considering the arguments of the parties on these questions, I conclude that PBS and Musser were not merely moderately negligent as suggested by the Secretary, but instead acted in a very

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[3] I take judicial notice that the facts regarding the miners' ordeal and rescue as set forth by MSHA engineer Stanley Joseph Michalek and counsel for the secretary were reported without contradiction by the local and national media that descended within hours of the inundation on the farm of William and Lori Arnold located 250 feet above the Quecreek No. 1 Mine.

highly negligent manner when they violated section 75.1200.

I begin by noting that according to one commentator, "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984). I find the record in this matter replete with instances of PBS and Musser failing to act conservatively and to err on the side of safety. To the contrary, the attitude here was one of "[w]e permit as much as we can." Tr. 57. Another witness testified that "you permitted as much as you can to the 200-foot [limit]." Tr. 67. Contrary to the Secretary's statement that "it is a sin of omission that forms the basis of [PBS and Musser's] negligence," Sec'y Reply Br. at 6, I find that the Respondents committed sins of commission, that they knowingly mapped the Quecreek No. 1 Mine based upon questionable information, knowingly placed their production agenda ahead of caution, and then directed their miners into areas that could tragically turn out to be "undiscovered country, from whose bourn / No traveler returns." *Hamlet*, Act III, scene 1. We can only be thankful that the nine miners did miraculously return from their would be grave, the Quecreek Mine.

I find that Musser and PBS searched for maps of mines adjacent to the Quecreek No. 1 Mine, in particular the Harrison No. 2 Mine, and in consultation with each other, agreed to base the boundary of the Harrison No. 2 Mine on a map provided to them by Consol. Tr. 43-44, 58-59, 61-62, 106-07, 192-93. The trouble was this was the second map Consol provided – the first Consol map contained outdated information, showing as reserves areas that had in fact been mined. Tr. 45. Nor was this second map upon which Musser and PBS based their actions dated, marked final, or certified by a professional engineer or surveyor. Gov't Ex. 3. As one witness for the Respondents testified, the second Consol map "was the best we had at the time" despite the fact that they *did not consider it an accurate rendition*. Tr. 57-58 (testimony of Musser engineer David Lucas). When asked whether he considered the second Consol map to be "an accurate rendition" of the boundaries of the Harrison No. 2 Mine, Lucas responded: "No." *Id.* Lucas went on to acknowledge that he was, in fact, "unsatisfied" with the second Consol map. *Id.* In the face of all good judgment and common sense, Musser and PBS decided to accept the second Consol map as an adequate basis upon which to delineate the boundaries of the Harrison No. 2 Mine. They assumed the map from Consol was accurate because they had asked for "the best map available." Tr. 105.

Having received two contradictory maps from Consol ought to have put the Respondents on notice that all was not right, an indication that "these guys [Consol] don't have their system down like they used to." Tr. 458. Even Musser's expert witness agreed that getting an unreliable map would raise doubts about other maps obtained from the same source. Tr. 651-52. Moreover, it was common knowledge that final, certified mine maps were a rare commodity in Somerset County, Pennsylvania. Tr. 77, 218. One thing the Respondents knew, however, was that the Harrison No. 2 Mine was full of water and updip from the proposed Quecreek No. 1 Mine. I find that under these circumstances, a reasonably prudent person would have erred on the side of safety and taken additional precautions. The Respondents took no such precautions, choosing instead to

play Russian roulette with the lives of miners. As one MSHA witness stated: a reasonably prudent engineer would "ma[ke] it known that there's a potential for something out there, even if you didn't find it," and that this would serve as "a fair warning for everyone down the road that looks at that map that there could be a problem." Tr. 431.

Given all this, I find it incomprehensible that Musser and PBS failed to place any type of warning on the section 75.1200 map.[4] Just as unexplored areas of the Earth were often shown on maps as great voids of either lightness or darkness, the boundary between the old Harrison No. 2 Mine and the Quecreek Mine could have been shown as just such undiscovered country. The Secretary introduced into evidence mine maps that used dashed or dotted lines where the extent of workings were unknown. Tr. 522-36, 569; Gov't Ex. 10-13. Witnesses for the Respondents admitted to having seen maps with such markings, Tr. 203, 598-99, and even acknowledged that uncertain boundaries should be noted on mine maps, Tr. 386, 666-67.

In light of the foregoing discussion, I conclude that Musser and PBS acted in a grossly negligent manner.

**Significant and Substantial**

In their posthearing briefs, the parties address the issue of whether the violations of section 75.1200 at issue here were significant and substantial (S&S). *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). I find that the violations were indeed significant and substantial.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to "significant and substantial," i.e., more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In the *Mathies* case, the Commission further explained:

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

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[4] Contrary to Musser's argument that the company "had all the available information and there was no reason to suspect that the mapping of the Harrison No. 2 boundary was inaccurate," Musser Br. at 13, I find ample record evidence establishes that Musser was on notice that at best, the boundary to the Harrison No. 2 Mine was uncertain, [Tr. 57-58], and that given this uncertainty, Musser had a higher duty of care to err on the side of caution.

6 FMSHRC at 3-4 (footnote omitted). Although the Commission has also held that an evaluation of the reasonable likelihood of injury should be made assuming continued "normal" mining operations, *see U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985), in this case mining operations ceased due to the enormity of the accident that occurred.

Here, it is self evident that the elements of *Mathies* have been established. In my prior decision, I found that Musser and PBS violated section 75.1200 when they prepared an inaccurate map of the Quecreek No. 1 Mine, then used that map to prepare the maps upon which production mining was based. 28 FMSHRC at 709, 716. I find that these violations contributed to the inundation of the Quecreek No. 1 Mine that occurred on July 24, 2002. Musser knew the risk. PBS knew the risk. Only the 18 miners who entered the Quecreek No. 1 mine on July 24, 2002, were deprived of this knowledge. Indeed, the inundation would not have occurred had maps been prepared that allowed an adequate warning of the lack of certainty regarding the boundaries of the mine that was breached and from which the inundation flowed. As for the final *Mathies* elements, I have already found that the consequences of the inaccurate map placed 18 miners in peril of their lives. Quite compelling evidence was adduced at trial as to the near certainty – but for a miraculous rescue – of the deaths of nine miners trapped underground with no daylight for three long days and four long nights. Tr. 389-98.

Accordingly, I find that the violations of 30 C.F.R. § 75.1200 committed by PBS and Musser were S&S.

**Penalty Assessments**

At the time of the Quecreek Mine inundation, the maximum penalty for a violation of the Mine Act or the Secretary's regulations thereunder was $55,000. 30 C.F.R. § 100.3(a) (2002). In these proceedings, the Secretary's penalty proposal has been something of a moving target. She initially proposed that the Commission assess penalties of $5,000 against each Respondent. Sec'y Br. at 31. In her reply brief, however, she states: "Given the seriousness of the violations, it is appropriate for the judge to impose the maximum civil penalties in this case. The Secretary respectfully requests an Order requiring Respondents PBS and Musser to pay civil penalties in the amount of the statutory maximums of $55,000." Sec'y Reply Br. at 23-24.

As I have already noted, I am not bound by the Secretary's penalty proposals but must instead make a de novo determination of an appropriate penalty based on the six statutory criteria specified in section 110(I) of the Mine Act. *Sellersburg*, 5 FMSHRC at 291. In light of my findings that the Respondents exhibited a very high level of negligence, and that the gravity of their violations was also very high, I find that it is appropriate to depart from and increase substantially the Secretary's original penalty proposal.

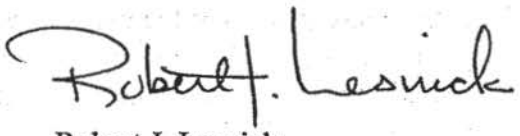
Accordingly, having considered the six statutory penalty criteria, and finding significant aggravating factors as to the high negligence of Musser and PBS, as well as to the gravity of their violations, I find that a penalty of $55,000 is appropriate for each of the Respondents' violations of 30 C.F.R. § 75.1200.

**Order**

Consistent with this Decision, **IT IS ORDERED** that PBS Coals, Inc., shall pay a total civil penalty of $55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322488.

**IT IS FURTHER ORDERED** that Musser Engineering, Inc., shall pay a total civil penalty of $55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322487.

Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters **ARE DISMISSED.**



Robert J. Lesnick
Chief Administrative Law Judge

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

November 6, 2008

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|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2008-104 |
| Petitioner | : | A.C. No. 15-02709-128890-02 |
| | : | |
| v. | : | Docket No. KENT 2008-106 |
| | : | A.C. No. 15-02709-128890-04 |
| HIGHLAND MINING CO., LLC, | : | |
| Respondent | : | Mine: Highland 9 |

## DECISION

Appearances: Jennifer Booth, Esq., and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner; Michael Cimino, Esq, Jackson Kelly, PLLC, Charleston, West Virginia, and Eric Walker, Esq., Waverly, Kentucky, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Highland Mining Company, LLC, (Highland) with 28 violations of mandatory standards and proposing civil penalties of $74,232.00 for the violations. The general issue before me is whether Highland violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings held September 17, 2008, in Evansville, Indiana, the parties advised that all but three of the charging documents at issue had been settled. A motion confirming that settlement was filed post-hearing. Considering the representations and documentation submitted respect with that settlement, I am able to conclude that the proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act. That settlement will be incorporated in this decision. The three citations remaining at issue are addressed below.

*Citation Number 6692779*

This citation, issued August 14, 2007, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400, and charges as follows:

> The Getman Construction Tractor, Co. No. 09 had accumulations of oil on the engine due to the valve cover gaskets leaking. At the time of discovery, the Getman tractor had overheated and shut off.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

At hearings, Highland acknowledged the violation as charged and challenged only the Secretary's "significant and substantial" and gravity findings and the amount of her proposed civil penalty. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

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

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

Since the Secretary has also claimed in these cases that the violations are also "significant and substantial" because of certain alleged health hazards it is necessary to further evaluate those claims in light of additional Commission precedent. In this regard the Commission, in *Secretary v. Consolidation Coal Company*, 8 FMSHRC 890, 897 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987), applied the *Mathies* test to a violation of a mandatory health standard. Consolidation

Coal Company had received a citation for a violation of 30 C.F.R. § 70.100 (a) which requires that the average concentration of respirable dust in the mine atmosphere during each shift to which a miner is exposed be maintained at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device. In that case sampling results showed that miners had been exposed to an average dust concentration of 4.1 milligrams per cubic meter of air. The Commission held that the violation was "significant and substantial" concluding that any exposure above the 2.0 milligrams per cubic meter designated occupational sampling would satisfy the second element of the *Mathies* "significant and substantial" test and that therefore the violation posed a measure of danger to health. The Commission also found that there was a reasonable likelihood that the health hazard contributed to would result in an illness *Id.* 899. The Commission recognized that the development and progress of respiratory diseases are due to the cumulative doses of dust a miner inhales, and that proof of a single incident of overexposure does not, by itself, conclusively establish a reasonable likelihood that respirable dust will result. *Id.* 898. The Commission recognized that, although overexposure to respirable dust clearly can result in chronic bronchitis and preunocomosis, the effect of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms, and that assessing the precise contribution that a particular overexposure will make to the development of respiratory disease is not possible.

Because of these considerations, the Commission stated that "[g]iven the nature of the health hazard at issue, the potentially devastating consequences for affected miners, and the strong concern expressed by Congress for eliminating respiratory illnesses in miners, we hold that if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the "significant and substantial" test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been established *Id.* at 899.

The fourth element of the "significant and substantial" test i.e., whether a reasonable likelihood that the illness in question will be of a reasonably serious nature, was not seriously disputed. The Commission in the *Consolidation Coal (Consol)* case held that when the Secretary proves that an overexposure in violation of 30 C.F.R. § 70.100(a), based upon designated occupation samples, a presumption arises that the violation is "significant and substantial". Significantly, however, the Commission also held that the operator may rebut this presumption by establishing that miners in the designated occupation were not exposed to the hazard presented by the excessive concentration of respirable dust.

Anthony Fazzolare, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), and an experienced underground coal miner and mechanic, testified that on August 14, 2007, during an inspection of the subject mine, he found the cited tractor shut down with an accumulation of motor oil on the engine. According to Fazzolare, the oil came from leakage in the valve cover gasket. There is no dispute that there was oil leakage and that the cited tractor overheated and had shut down.

Fazzolare testified, in support of his "significant and substantial" findings, that he was "concerned that the oil was going to ignite due to the fact that the engine had overheated" (Tr. 20). He further testified that he "thought" that the vehicle operator would suffer a "lost time injury because oil has been proven to be a cancer causing agent. If he's breathing oil fumes - - oil smoke in his lungs" (Tr. 20-21).

On cross examination, the inspector acknowledged that although the cited tractor had shut down from overheating, the oil did not ignite, burn or smoke. He further acknowledged that he did not measure the amount of oil or the temperature of that oil or the temperature of the engine. He testified, and it is undisputed, that the engine had an automatic shut down device triggered at a certain temperature and that he had no knowledge of any defect in that device.

James Allen, Highland's Mine Safety Manager with more than 35 years of underground mining experience, testified, without contradiction, that the cited tractor uses Conoco 10W30 motor oil which has a flash point (ignition temperature) of 383 degrees Fahrenheit (See Exhibit R-1). Allen also checked the temperature of the engine block at various points after the tractor had pulled a supply train and found the highest temperature to be 150 degrees Fahrenheit. He further observed that the tractor was equipped with a Murphy high-temperature-heat-sensor-shut-off switch which cannot be set at temperatures above 250 degrees Fahrenheit. It is not disputed that if the Murphy sensor is broken or removed, the engine will not operate.

Highland safety department employee, Tommy Watkins, accompanied Inspector Fazzolare on the subject inspection. He too observed a couple of streams of oil leaking from the engine and noted that the oil had poured into a tray below the engine. He also noted that the oil was not smoking or on fire and that the engine had shut down from overheating. Watkins also observed that the subject tractor was equipped with a dry chemical fire suppression system.

Based on this essentially undisputed evidence it is clear that there was no reasonable likelihood that the cited oil could have been ignited. Inspector Fazzalore identified heat from the tractor's engine as the sole ignition source that could potentially ignite the oil. The undisputed evidence establishes however that the engine oil used in the subject tractor had a minimum flash point or ignition temperature of 383 degrees Fahrenheit. The additional undisputed evidence establishes that the cited tractor had a heat sensor shutdown switch which monitors the temperature of the engine block, and which has a maximum setting of 250 degrees Fahrenheit. Furthermore, if the switch is disconnected or not functioning, the engine will not run. Thus it is not likely that the cited engine oil could reach its ignition temperature. It is further noted that the cited tractor had a functioning dry chemical fire suppression system which would be triggered in the event of any fire on the tractor.

I further find that even assuming, *arguendo*, that the oil could ignite, the Secretary has failed to sustain her burden of proving that anyone was exposed to smoke. In the *Consol* case the Commission required actual exposure to violative amounts of respirable coal dust in order to create a "significant and substantial" violation. Moreover the Secretary failed to prove that even

future exposure of the vehicle operator to smoke from an ignition of oil would inflict him with cancer. Inspector Fazzalore's bare assertion that "oil has been proven to be a cancer causing agent" is simply not sufficient in this regard. He is admittedly not a medical expert (Tr. 15) and even if he was, a bare assertion resting solely on the authority of even an expert is insufficient. See *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997).

Under the circumstances I find the violation to also be of low to moderate gravity.

*Citation Number 6695241*

This citation also alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> The operator has allowed hydraulic oil to accumulate in the Stamler Feeder, Co. No. 01, located in MMU 061-0, 7th Panel North off of the Main West Panel. The oil was located under and near the Dodge Coupling. The feeder was running at the time of discovery.

As with the prior citation, Highland does not dispute the violation and challenges only the "significant and substantial" and gravity findings and the amount of the proposed civil penalties. According to Inspector Fazzolare, during his inspection of the subject mine on August 14, 2007, there were accumulations of hydraulic oil under and near the Dodge Coupling on the Number 1 Stamler Feeder. There is no dispute that the feeder was operating at the time of this inspection and that the Dodge Coupling was the heat source of concern. The inspector's testimony that the violation was "significant and substantial" is that he "was concerned with heat building up in [the Dodge Coupling] due to the movement of the two rotating shafts and the low reduced air flow in that area" (Tr. 65). He was, more particularly, concerned with smoke inhalation by the ram car operator if the oil was to ignite (Tr. 65).

Under cross examination, Fazzolare testified that he was concerned about the possible combustion of the hydraulic oil. He acknowledged, however, that he did not measure the amount of hydraulic oil present, he could not estimate how far the oil was located below the Dodge Coupling and that he did not measure the temperature of the oil, the feeder or the Dodge Coupling. Indeed the inspector did not even determine whether the feeder was "hot" to the touch. He further admitted that he did not know whether the oil was anywhere near its ignition temperature.

Highland's safety manager, James Allen, testified without contradiction that the cited feeder utilizes Conoco 320 gear oil (a hydraulic oil) which has a flash point at 450 degrees Fahrenheit and "typically" a flash point of 490 degrees Fahrenheit (Exhibit R-2, page 4). Allen measured the temperature of the cited feeder on September 10, 2008, after it had been operating for about three hours and found a maximum temperature of 169 degrees Fahrenheit 15 feet from the location of the oil. He took four readings at the Dodge Coupling ranging from 73 degrees Fahrenheit to 110 degrees Fahrenheit. He testified without contradiction that the plate on which

the oil was found was located some 14 to 18 inches below the coupling.

Highland employee Tommy Watkins accompanied Fazzolare on his inspection. He noted that the cited feeder had been operating for about 2 ½ hours by the time the citation was issued and that it was not hot. He testified that the only oil he observed lay on the clay mine bottom three feet below the feeder. The oil was not hot, smoking or on fire.

Considering, in particular, the location of the hydraulic oil some14 to 18 inches below the heat-generating Dodge Coupling, the ignition temperature of hydraulic oil and the temperature of the Dodge Coupling (well below that of the ignition point of the hydraulic oil), I do not find that the Secretary has met her burden of proving that the violation was "significant and substantial" or of high gravity.

*Citation Number 6695248*

The captioned citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.325(f)(3) and charges as follows:

> The operator failed to provide the quantity of air, 3500 cfm, required by the engine approval plate #07-ENA05001 on the Wallace Lube truck located at cross-cut #158 on the Main West supply road. No movement was noticeable using a chemical smoke tube.

The cited standard provides as follows:

> The minimum ventilating air quantity for an individual unit of diesel-powered equipment being operating shall be at least that specified on the approval plate for that equipment. Such air quantity shall be maintained-... (3) in any entry where the equipment is being operated out-by the section loading point and areas of the mine developed on or after April 25, 1997.

The violation charged herein is undisputed. Highland challenges only the "significant and substantial" and gravity findings and the amount of proposed civil penalty. It is undisputed that the required ventilation of 3,500 cubic feet per minute of ventilating air was not present at the cited Wallace Lube Truck when found at cross-cut number 158 on the main west supply road and that Inspector Fazzolare was unable to detect any air movement with his anemometer or by the release of chemical smoke.

Fazzolare based his "significant and substantial" findings on the lube truck operator's potential exposure to diesel "particulate" material emanating from the lube truck exhaust system. He identified the hazardous "particulates" as carbon monoxide (CO) and nitrogen dioxide ($NO_2$) gases. Fazzolare testified in this regard as follows:

"[d]ue to the reports that I've read indicates [sic] that the diesel particulates have been

determined to be cancer causing agents" (Tr. 117).

As previously noted, however, the Secretary concedes that Fazzalore is not a medical expert qualified to render such an opinion (Tr. 116). In addition, although he had with him a "spotter" used for the detection of these and other gases he detected no carbon monoxide or nitrogen dioxide in the surrounding atmosphere.

In defense, Highland cites the daily reports of its Wallace diesel trucks on the day of the citation and for the two preceding days. i.e. August 20 through August 22, 2007. These reports show no emissions above the stipulated MSHA established threshold limits of 25 parts per million of carbon monoxide or three parts per million of nitrogen dioxide.

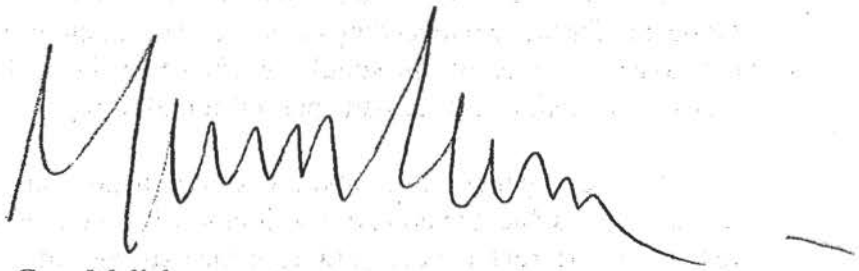
In asserting that the violation was "significant and substantial" and of high gravity, the Secretary argues that the potential emissions of carbon monoxide and nitrogen dioxide from the cited diesel lube truck are comparable to the existence of the violative respirable coal dust found in the *Consol* case. The instant case can be clearly distinguished from the *Consol* case, however, in that no carbon monoxide or nitrogen dioxide, the purported cancer causing agents, were detected herein. Moreover, based upon the undisputed records of the Wallace diesel trucks, none were, in any event, emitting carbon monoxide or nitrogen dioxide above the threshold limit values established by MSHA. The Secretary has failed to establish in this case that any violative emissions were present at the time the citation was issued. Accordingly the violation charged herein was neither "significant and substantial" nor of high gravity.

*Civil Penalties*

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the subject mine is a large mine and has a significant history of violations. There is no dispute that the violative conditions herein were abated in a timely manner and there is no evidence that the penalties imposed herein would affect the operators ability to continue in business. The reduced gravity findings have previously been discussed and the moderate negligence findings have not been challenged by the operator. Under the circumstances, I find that penalties of $300.00 for the violation found in Citation Number 6692779, $300.00 for the violation found in Citation Number 695241 and $200.00 for the violation found in Citation Number 6695248, are appropriate.

## ORDER

Citation numbers 6692779, 6695241 and 6695248 are affirmed without "significant and substantial" findings. Considering the penalties assessed for the three violations at issue herein in conjunction with the amount approved in settlement of the remaining violations at issue herein, it is hereby ordered that Respondent pay penalties of $25,376.00 within 40 days of the date of this order.



Gary Melick
Administrative Law Judge
(202) 434-9977

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/lh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 17, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2008-267<br>A.C. No. 15-19097-130857 |
| v. | : | |
| PROCESS ENERGY, Respondent | : | Mine #1 |

## DECISION

Appearances: Jennifer D. Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Carol Ann Marunich, Esq., Dinsmore & Shohl LLP, Morgantown, West Virginia, for the Respondent.

Before: Judge Feldman

This single citation civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Process Energy. The petition seeks to impose a civil penalty of $585.00 for an alleged violation of the Secretary's mandatory safety standard in 30 C.F.R. § 77.400(a) governing guarding of mechanical equipment located at surface locations of underground coal mines.

At the time Citation No. 6655616 was issued on September 17, 2007, Process Energy was developing its No. 1 Mine located in Pike County, Kentucky. The cited condition concerns a four inch piece of steel welded to, and protruding from, an unguarded side discharge roller shaft. (Gov. Ex. 1). The steel appendage serves to engage a clutch to prevent the backwards slippage of the belt in the event of a loss of power. The unguarded shaft is not located on the travel side of the belt structure. Rather, it is located on the offside of the conveyor, in close proximity to the highwall, an area infrequently traveled and only accessible by a crossover constructed over the beltline. The cited violative condition was designated as significant and substantial (S&S) in

nature.[1] At trial, counsel for Process Energy stipulated to the fact of the violation. (Tr. 81). The remaining issues are whether the violation was properly designated as significant and substantial, and the appropriate civil penalty to be imposed.

This matter was heard on September 9, 2008, in Pikeville, Kentucky. At the culmination of the hearing I advised the parties that I would defer my ruling pending post-hearing briefs, or, issue a bench decision if the parties elected to waive their right to file post-hearing briefs. If the parties waived the filing of briefs in favor of a bench decision, they would be required to submit written stipulations of fact based on the uncontested testimony. The parties elected to submit written stipulations of fact and to waive post-hearing briefs. (Tr. 157-59). The parties' stipulations of fact was received on November 7, 2008, at which time the record was closed. This decision contains a summary of the stipulated facts, as well as the edited bench decision that is supplemented with pertinent case law.

## I. Stipulations of Fact

On September 17, 2007, Process Energy was in the process of developing a slope on an eight percent grade for the descent into the coal mine. Their intent was to descend inby 2,000 feet. Process Energy had advanced approximately 1,500 feet at the time the citation was issued. Advancement underground was accomplished by transporting the extracted rock and debris on a belt conveyor to the surface.

On the surface, at the end of the beltline was the discharge roller in question. On the offside of the belt drive was a starter box that was located approximately nine to ten feet from the belt, and approximately 12 to 15 feet from the discharge draft. A highwall was next to the offside of the belt. There was a crossover from the travelway side of the belt that miners used to traverse over the belt to access the starter box area. (Gov. Ex. 4).

The unguarded discharge roller was suspended five to seven feet above the ground on the offside of the belt. There was a truck dump located at the top of the slope approximately 20 to 30 feet from the discharge roller. (Gov. Ex. 4). The extracted material that was carried from underground up the slope on the conveyor accumulated as it fell off of the belt to the ground at the discharge roller. The accumulated debris was gathered and removed by a front-end loader operator, using the highwall as a backstop to load the rock into the shovel. The material was loaded in dump trucks for removal from the site.

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[1] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

The only disagreement between the parties is the distance from the discharge roller to the highwall. The issuing Mine Safety and Health Administration (MSHA) Inspector recalled that the distance was approximately three to four feet. Process Energy's chief electrician testified the clearance between the highwall and the discharge roller was approximately one foot. The electrician recalled that he had to lie on the belt to access the roller to install a guard because of a lack of clearance between the belt structure and the highwall. What is not in dispute is that the relatively narrow area between the cited discharge roller and the highwall was not a travelway, or otherwise used by miners to walk to the truck dump or any other destination.

## II. Pertinent Penalty Criteria

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

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

The parties stipulated that Process Energy is a mine operator that is subject to the jurisdiction of the Mine Act. It is not contended that the proposed penalty will affect Process Energy's ongoing business operations, and Process Energy promptly abated the cited violation. It has neither been contended nor shown that Process Energy's history of violations is an aggravating factor in determining the appropriate civil penalty to be assessed in this proceeding. The remaining civil penalty criteria regarding gravity and negligence will be addressed in the disposition of this case.

## III. Relevant Case Law

### Significant and Substantial

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum, supra*, at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4. *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, the Commission explained its *Mathies* criteria as follows:

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

7 FMSHRC 1125, 1129 (August 1985) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

## IV. Further Findings and Conclusions

The following is a summary of the bench decision, with editorial additions including supporting case law, that was issued upon completion of the relevant testimony :

Process Energy has stipulated to the fact of the violation. Thus, the remaining issues are whether the cited guarding violation was properly designated as significant and substantial and the appropriate civil penalty. The Secretary proposes a civil penalty of $585.00 for Citation No. 6655616. Determining the appropriate civil penalty requires determining the degrees of gravity and negligence associated with the subject violation.

Section 77.400(a) states that: "Gears; sprockets; chains; drive heads; tail; and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a).

The controlling case on guarding violations is the Commission's decision in *Thompson Brothers Coal Co.*, 6 FMSHRC 2094 (Sept. 1984). The Commission stated:

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

6 FMSHRC at 2097.

Resolving the issue of significant and substantial requires determining whether it is reasonably likely that this unguarded shaft **will result in an event**, *i.e.*, inadvertent contact, resulting in injuries of a serious nature. Undoubtedly, accidental contact could reasonably cause serious injury or death. However, the dispositive issue is the likelihood of such inadvertent contact. There is a positive correlation between the likelihood of contact and the frequency of exposure to unguarded pinch points. As the Commission noted in *Thompson*, such factors as accessability, ingress and egress, and work duties are relevant considerations.

Regarding accessibility, the area where the unguarded shaft is located is only accessible by traversing a crossover. In addition, the cited shaft is on the offside of the belt rather than on the travelway side. Finally, the unguarded shaft is located in a corner where the highwall's close proximity to the belt structure precludes travel. (Gov. Ex. 4).

With regard to ingress and egress, I credit the testimony of Process Energy's chief electrician that the clearance between the shaft and the highwall was only one foot, rather than the distance of three to four feet recalled by the issuing mine inspector. I reach this conclusion because of the chief electrician's familiarity with the mine conditions, and because the inspector did not make any contemporaneous notations of the clearance distance in his inspection notes or in Citation No. 6655616. In addition, the narrow clearance between the shaft and the highwall prevents foot travel that would pose a significant risk of exposure to contact.

Finally, the nature of the front end loader operator's work duties, using a loader to remove debris from under a belt structure that is suspended as high as seven feet above the ground, diminishes the likelihood of inadvertent contact. In short, consistent with *Thompson*, the Secretary has failed to satisfy her burden of demonstrating, by a preponderance of the evidence, that the hazard posed by this condition creates a reasonable likelihood that serious injury will occur. Thus, the S&S designation in Citation No. 6655616 shall be deleted.

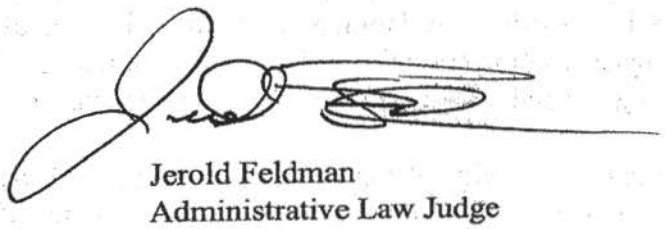
Given the narrow clearance between the shaft and the highwall, the relative inaccessibility of the shaft due to its remote location and elevation, and the non-S&S nature of the violation, I find that the violation is attributable to no more than a moderate degree of negligence. The violation affects one person. The degree of gravity is moderate in that, although there is a potential for serious injury, an injury causing event is not reasonably likely. Consistent with the statutory civil penalty criteria, a penalty of $100.00 shall be assessed for Citation No. 6655616. (Tr. 159-68).

## ORDER

In view of the above, **IT IS ORDERED** that Citation No. 6655616 **IS MODIFIED** by deleting the significant and substantial designation.

**IT IS FURTHER ORDERED** that Process Energy shall pay a civil penalty of $100.00 in satisfaction of Citation No. 6655616.

Payment is to be made to The Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, this civil penalty proceeding **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/sr

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 26, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 2007-350-M<br>A.C. No. 40-00811-122454 |
| v. | : | |
| SANGRAVL COMPANY, INC., Respondent | : | Sangravl Company, Inc. |

## DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Robert A. Simms, Conference and Litigation Representative, and Kirby G. Smith, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Madisonville, Kentucky, for Petitioner;
John B. Herbert, President, Sangravl Company, Inc., New Johnsonville, Tennessee, *pro se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Sangravl Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $4,097.00. A hearing was held in Nashville, Tennessee. For the reasons set forth below, I vacate one citation, affirm the four remaining citations, while modifying three of them, and assess a penalty of $1,626.00.

## Background

Sangravl Company, Inc., operates a sand and gravel plant on the banks of the Tennessee River near New Johnsonville, Tennessee. It was inspected by MSHA Inspector Paul Scott on March 19, 2007. The plant was not running on the day it was inspected due to a shortage of sand. (Tr. 17)

On the day of the inspection four employees were working at the plant. (Tr. 18.) One of the employees operates a large crane with a "clam shell" bucket used to dig for gravel and sand as well as load it on the truck. (Tr. 18.) Another employee is the plant operator, who is situated at the top of the plant. (Tr. 18.) The remaining employees are a truck driver and a front-end

loader/operator who is responsible for loading trucks and other miscellaneous tasks. (Tr. 18-19.) Mr. Parnell is the foreman at Sangravl. (Tr. 19.)

## Findings of Facts and Conclusions of Law

Citation No. 6097267

The citation alleges a violation of section 56.14107(a) of the Secretary's regulations, 30 C.F.R. § 56.14107(a). The "Condition or Practice" alleged to result in this violation was stated as: "A return roller located on the No. 9 conveyor in the screening plant was not guarded. The moving parts were approximately 4 to 5 feet above ground level and the roller was 4 to 5 inches in diameter." Section 56.14107(a) requires that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

On his March 19, 2007, inspection, Inspector Scott observed a return roller on the No. 9 conveyor that was not properly guarded. (Tr. 19.) As shown in the photograph taken by the inspector, the return roller was protected by a partial guard on each side of the conveyor, but the bottom portion of the roller was unguarded. (Govt Ex. 3.) The inspector believed that miners working in the area, or who were in the area to clean or to fix the roller, could have a limb or loose clothing become entangled in the roller causing serious injury. (Tr. 20-21.)

John Herbert, President of Sangravl, stated that the existing guarding had been approved by a previous inspector. (Tr. 67.) He further testified that "we don't clean up or work on or go under the plant while it's running." (Tr. 68.)

The chance of a miner inadvertently coming in contact with the roller, while not impossible, was extremely unlikely. There is no evidence that the roller was worked on while it was operating. As previously noted, there were only four miners in the entire operation. Each had a specific job and not one was located near the roller. The chances of one of them checking the roller, doing a workplace inspection while it was operating, or just walking by, falling and coming in contact with the roller were remote at best.

Moreover, the operator did not have notice that the roller was not properly guarded. The Commission has held, with respect to notice, that in determining whether a broadly worded standard that is intended to be applied to many factual situations, applies to a specific situation, "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted).

The evidence supports the company's assertion that the previous inspector had approved the guard. The negligence in this citation was modified from "high" to "moderate" because "[t]hey had been told by the previous inspector how to guard this and they complied." (Govt. Ex.

2 at 2.) Thus, the operator guarded the roller in the manner advised by the inspector, a person familiar with the mining industry and the protective purpose of the standard, and until he was advised by the new inspector that additional guarding was needed, there was no way the operator knew, or should have known, that his guarding was inadequate.

To abate the violation, the operator added additional guarding to the roller as required by Inspector Scott. Nonetheless, in view of the operator's lack of notice, I will vacate the citation.

Citation No. 6097268

This citation also alleges a violation of section 56.14107(a). The "Condition or Practice" alleged to result in this violation was stated as: "The south side portion of the No. 8 conveyor head pulley was not guarded. The 24 inch diameter roller was approximately 4 to 5 feet above ground level. Bolts holding the bushing in place were protruding from the pulley. The concrete had loose gravel near the moving parts." (Govt. Ex. 5.)

Inspector Scott testified that he observed that a portion of a pulley on the No. 8 conveyor had an exposed head roller, which was about 24 inches in diameter. (Tr. 26.) He said that the exposed parts could be easily contacted by those walking by. (Tr. 26.) In addition, there were bolts which held the flange and axle that were protruding. (Tr. 26.) Mr. Herbert did not dispute that there was a violation, rather he disputed the significant and substantial designation. (Tr. 67-68.) Consequently, I find that Sangravl violated section 56.14107(a) as alleged.

*Significant and Substantial*

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *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). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

While Inspector Scott speculated that miners would be in the area of the No. 8 conveyor to observe for proper operation of the equipment, he did not testify that it was in the regular work area of any of the four employees. (Tr. 28.) Mr. Herbert testified that employees do not frequent this area when the plant is running. (Tr. 68.) When the plant is running water flows over the top of this equipment. (Tr. 67.) In an effort to stay dry, employees actively avoid the equipment. (Tr. 68.) Based on this testimony, I conclude that employees will infrequently be found in proximity to the No. 8 conveyor head pulley. Therefore, it is unlikely that a miner would contact the machine parts. The violation is not reasonably likely to cause injury. Accordingly, the violation is not "significant and substantial."

Citation No. 6097269

This citation alleges a violation of section 56.14100(b) of the Secretary's regulations, 30 C.F.R. § 56.14100(b). The "Condition or Practice" alleged to result in this violation was stated as:

> An unsafe condition exists at the screening tower in the plant. An eight inch steel "H" beam was badly deteriorated with rust. This beam is part of the over-all support system for the tower. The tail sections for two conveyors were supported by the beam. Employees are in the plant regularly to perform service, maintenance and clean up as needed.

(Govt. Ex. 8.) Section 56.14100(b) requires that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Inspector Scott testified that on the day of the inspection he observed that the H beam had accumulated significant rust in the area between the two lateral runners. (Tr. 38-39.) The beam is about 15 feet above the ground. (Tr. 43.) When whole, the web is about 3/8 inches deep and prevents the beam from going sideways or sagging. (Tr. 38- 39.) A 10 to 12 foot long section of the webbing was missing entirely. (Tr. 38.) Inspector Scott speculated the beam was probably in this state for six months, given the wet conditions. (Tr. 45.) The violative condition was visible, although the mine had not been issued a citation for the beam in the past. (Tr. 44.) It was abated the next day through replacing the beam with two pieces of channel (two types of metal bolted together). (Tr. 45.) I find that the condition of the beam was in violation of the regulation.

*Significant and Substantial*

Inspector Scott testified that if the beam continued to rust it could fall. (Tr. 41.) The plant operator worked from a control house, located approximately 15 feet above the H beam and a few feet to the south. (Tr. 40.) Inspector Scott testified that the area would collapse if the beam failed.

(Tr. 40.) There was an electrical box next to the control house. (Tr. 41.) The collapse of the control house could result in an electrical hazard. (Tr. 41.) The plant operator would be the only person affected. (Tr. 43.) Additionally, the inspector theorized that a collapsing beam could injure an employee who happened to be walking under it when it collapsed. (Tr. 40.)

Mr. Herbert testified that the beam was not necessary to support the control plant. (Tr. 68.) The Secretary did not offer any evidence to the contrary. Moreover, the redundance of the beam was demonstrated when it was replaced, for no additional measures were taken to secure the control house. (Tr. 68.) The replacement of the beam did not result in the toppling of the control house. Mr. Herbert's assertion that additional support was not necessary during the replacement of the beam gives credence to his argument that the beam was not supportive of the control house. I find that it is unlikely that the violative condition would result in the collapse of the control house and the creation of an electrical hazard. Even less likely is the striking of an employee, who did not work in the area, by a falling beam. Therefore, I conclude that the violation was not "significant and substantial."

Citation No. 6097270

The citation alleges a violation of section 56.14107(a) of the Secretary's regulations. The "Condition or Practice" alleged to result in this violation was stated as:

> The tail pulley guard on the north side of the conveyor feeding the twin screens in the plant was not covering all the moving parts. The tail pulley was approximately 1 to 2 feet above the walk way and was 14 to 16 inches in diameter. The pinch point between the pulley and the conveyor belt could be contacted.

(Govt. Ex. 10.)

Inspector Scott observed an unguarded tail pulley in the screening plant. (Tr. 48.) A partial guard was located between the walkway and the tail pulley. (Tr. 50.) However, the inspector testified that: "There is enough room between this guard and the belt for a person, their hand, to go in, down to the very bottom of this roller, and be pulled into this . . . ." (Tr. 50.) Inspector Scott determined that the violation existed for a minimum of four to six shifts. (Tr. 53.) The screen bar mesh in the lower left corner and upper section had been removed, and the exposed parts were covered with sand dust. (Tr. 53.) The condition was abated when the moving parts were covered with screen wire. (Tr. 54.) I find that the company violated the regulation as alleged.

*Significant and Substantial*

The main operator passes by this condition on the way to work each day. (Tr. 49.) Inspector Scott testified that enough room exits for a person to get stuck in the roller. (Tr. 50.) He hypothesized that if a person was to become stuck in the pinch point, they would be enveloped around the tail pulley and crushed to death. (Tr. 52.) Inspector Scott testified that tail pulleys,

head pulleys, and return rollers are the biggest killers in concern to moving machine parts. (Tr. 51.)

The Secretary has established that an employee would regularly be in the area proximate to the violative condition since the main operator passes by the tail pulley on a daily basis. The loose sand and gravel in the area could cause a person to slip. (Tr. 50.) If he slipped on the loose gravel he could fall into the unguarded portion of the tail pulley. In the context of continued normal mining operations, it was reasonably likely that the violative condition would contribute to a serious accident. Accordingly, I find that the violation was "significant and substantial."

Citation No. 6097271

This citation alleges a violation of section 56.14132(a) of the Secretary's regulations, 30 C.F.R. § 56.14132(a). The "Condition or Practice" alleged to result in this violation was stated as:

> The automatic reverse-activated signal alarm provided on the Caterpillar front end loader, model 980G, was not maintained. The alarm would not sound when the reverse gear was used. The operator of the loader has an obstructed view to the rear and there is no one posted to tell him when it is safe to back up. The loader is used to load customer trucks, move stock piles and other chores as needed. The work areas are shared with other company equipment, customer trucks and employees on foot.

(Govt. Ex. 14.) Section 56.14132(a) requires that: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The front-end loader was located between the shop and the main screening plant at the time it was inspected. (Tr. 59.) Inspector Scott testified that when the operator put the machine in reverse, the automatic reverse alarm signal did not work. (Tr. 57.) There was a signal on the loader, but it was not operational. (Tr. 57.) This piece of equipment was used all over the plant, around both employees and customers. (Tr. 57.) On occasion a customer might come in to pickup a load of sand or gravel accompanied by small children. (Tr. 57.) From his seat, the operator had an obstructed view to the rear. (Tr. 58.) If the loader ran over someone the injury would be fatal. (Tr. 61.) The condition was abated when a new back-up alarm was installed. (Tr. 63.)

Mr. Herbert does not dispute the violation of section 56.14132(a). Instead, he testified that the noise of the back-up alarm is so pervasive at the plant that it becomes background noise. (Tr. 69.) He speculated that the load operator may not have noticed that the back-up alarm was not operating. (Tr. 69.) The citation is affirmed as written.

## Civil Penalty Assessment

The Secretary has proposed penalties of $3,379.00 for the four violations being affirmed. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-484 (Apr. 1996).

In this connection, I find that the Sangravl is a very small company operating a very small mine. I further find from the Assessed Violation History Report that the operator has a poor history of previous violations. (Govt. Ex. 1.) The parties have stipulated that payment of these penalties will not adversely affect the company's ability to remain in business and I so find. (Tr. 9-10.) There is no evidence that the operator did not demonstrate good faith in attempting to abate the violations, so I find that the company did demonstrate good faith.

Turning to gravity, I find that Citation Nos. 6097268, 6097269 and 6097271 are not very serious. Citation No. 6097270, however, is a more serious violation that could result in a significant injury. I agree with the inspector's assessment that the negligence involved in Citation Nos. 6097269 and 6097271 was "moderate" and "low," respectively. I disagree with his assessment of Citation Nos. 6097268 and 6097270, finding that in both cases the negligence was only "moderate."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 6097268, $325.00; (2) Citation No. 6097269, $290.00; (3) Citation No. 6097270, $725.00; and (4) Citation No. 6097271, $286.00.

## Order

In view of the above, Citation No. 6097267 is **VACATED**; Citation No. 6097271 is **AFFIRMED**; Citation No. 6097268 is **MODIFIED**, by deleting the "significant and substantial" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Citation No. 6097269 is **MODIFIED**, by deleting the "significant and substantial" designation, and is **AFFIRMED** as modified; and Citation No. 6097270 is **MODIFIED**, by reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified. Sangravl Company, Inc., is **ORDERED TO PAY** a civil penalty of **$1,626.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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John B. Herbert, President, SanGravl Company, Inc, 900 Herbert Road, New Johnsonville, TN 37134

/sr

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 26, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MSHA, on behalf of PETER J. PHILLIPS, Complainant | : | TEMPORARY REINSTATEMENT PROCEEDING |
| v. | : | Docket No. WEST 2008-1057-DM<br>RM MD 2008-05 |
| A & S CONSTRUCTION CO., Respondent | : | Mine ID: 05-04875<br>Portable Crusher No. 4 |

Appearances: Thomas A. Paige, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Complainant
Richard P. Ranson, Esq., Ranson & Kane, P.C., Colorado Springs, Colorado, on behalf of the Respondent

Before: Judge Barbour

## DISSOLUTION OF ORDER OF TEMPORARY ECONOMIC REINSTATEMENT AND DISMISSAL OF PROCEEDING

In this proceeding arising under Section 105(c ), 30 U.S.C. § 815(c), of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 801, *et. seq.,* the Secretary of Labor, through her Mine Safety and Health Administration (MSHA) and on behalf of Peter J. Phillips, applied for the temporary reinstatement of Mr. Phillips, an employee of A&S Construction Company (A&S). Mr. Phillips was discharged by A&S on September 13, 2007. On February 11, 2008, Mr. Phillips filed a complaint with MSHA alleging his discharge was motivated by protected safety complaints. MSHA conducted a preliminary special investigation of Mr. Phillips' complaint and determined it was not frivolous. The finding resulted in the Secretary's temporary reinstatement application. The Commission received the application on May 22, 2008.

On May 23, 2008, the application was assigned to me. On May 27, 2008, I scheduled the matter to be heard on June 4, in Pueblo, Colorado. Subsequently, counsels conferred and reached an agreement to economically reinstate Mr. Phillips. They further agreed a hearing on the Secretary's application was unnecessary. Therefore, the hearing was canceled, and on June 6, 2006, I ordered Mr. Phillips' economic reinstatement "at the same rate of pay, with the same benefits, and for the same work period he held prior to his discharge." Order of Temporary Economic Reinstatement. As part of the economic reinstatement, the parties and I agreed the

Secretary would promptly investigate Mr. Phillips' underlying discrimination complaint and determine whether she would bring a complaint of discrimination on behalf of Mr. Phillips under section 105(c)(2) of the Act. (A&S was, of course, obligated to pay Mr. Phillips while the investigation was ongoing.) I requested then counsel for the Secretary, James Crawford, to advise me periodically of the status of the investigation. Pursuant to my request, on July 2, 2008, counsel stated a final determination was anticipated "within the next few weeks to a month, if not sooner." Secretary's Update on Merits Determination (Update) 1-2. On August 1, 2008, counsel stated a final determination "will be made within the next two weeks." Update 1-2. On September 10, 2008, counsel stated a determination would be made "as soon as possible." Update 2. Following the September update, Mr. Crawford retired, and the matter was transferred to Thomas Paige.

On November 10, 2008, the Commission received a notice from Mr. Paige that the Secretary did not intend to proceed under Section 105(c)(2) of the Act on Mr. Phillips' behalf. Mr. Paige further stated Mr. Phillips had been notified by letter dated November 3, 2008, of the Secretary's decision and of his right to file a complaint on his own behalf under Section 105(c)(3). 30 U.S.C. § 815(c)(3). Counsel also stated:

> [I]t is the Secretary's position that the . . . Order of Temporary Economic Reinstatement . . . remains in effect until there is a final order of the Commission disposing of Mr. Phillips's case, and that such order cannot be dissolved before that time without violating the clear language of the statute. The Order of Temporary Economic Reinstatement must remain in effect if Mr. Phillips decides to proceed on his own behalf. [T]he Secretary . . . will oppose any motion . . . [to dismiss] the order of temporary [economic] reinstatement prior to the date the complaint is finally disposed of.

Notice of the Secretary's Intent Not to Proceed 1-2. Attached to the Secretary's notice was the November 3 letter to Mr. Phillips in which the Assistant Director of MSHA's Technical Compliance and Investigation Office advised Mr. Phillips MSHA had "determined that facts disclosed during the investigation do not constitute a violation of Section 105(c)" and "[t]herefore, discrimination, within the confines of the Mine Act, did not occur." *Id.*, Exh. A.

On November 10, the Commission also received a request from A&S to schedule a hearing to determine, in view of the Secretary's conclusion Mr. Phillips' termination did not violate the Act, whether Mr. Phillips' complaint was frivolously brought and/or whether the reinstatement proceeding should be dismissed and the order of temporary economic reinstatement rescinded. Respondent's Request to Set Matter for Hearing [and] Motion to Dismiss.

On November 14, following discussions with counsels and with the agreement of Mr. Phillips, I scheduled a telephonic oral argument on A&S's request and motion. I stated in part, "At issue is the effect of the Secretary's Notice of Intent Not to Proceed Under Section 105(c)(2) of the Act on the . . . Order of Temporary Economic Reinstatement." Order Scheduling Oral Argument. Because of the need for a speedy resolution of the issue, I advised the parties I would orally rule on the request and motion and, once I received the transcript, I would confirm the ruling in writing. I added, "The written ruling will be the basis for any appeal to the Commission." *Id.*

On November 18, 2008, the argument went forward as scheduled. Counsels and Mr. Phillips participated. At the conclusion of the argument I held as follows:

> The fundamental issue before me is the continuing viability of an order of temporary reinstatement once the Secretary has decided the facts under[ly]ing . . . [a] miner's complaint . . . [do] not constitute a violation of Section 105(d). With all due respect . . . , I disagree with the Secretary's position [– as ably argued by her counsel – ] that the [O]rder of Temporary Economic Reinstatement must remain in effect if Mr. Phillips decides to proceed on his own behalf.
>
> As I read the Act, the authority to issue an order of temporary reinstatement arises under Section 105(c)(2)[,] [which] states . . . [that an] order of temporary reinstatement remains in effect "pending final order on the complaint." [In my view] the complaint referenced in this quote is the miner's complaint as made to and investigated by the Secretary. [A] ["]final order["] on the miner's complaint is reached when the Secretary [advises] the miner[,] as she has done in this proceeding[,] that "Your complaint of discrimination under Section 105( c) has been investigated. A careful review of the information gathered during the investigation has been made. On the basis of that record, MSHA has determined that facts disclosed during the investigation . . . [do] not constitute a violation of section 105(c)."
>
> With regard to the complaint the miner has filed with the Secretary[, w]hat could be more final? The Secretary's involvement with the complaint has ended. The temporary reinstatement proceeding has ended. [As the Act states,][ i]f the miner wishes to proceed on his [or her] own behalf, under Section 105(c)(3) . . . [h]e [or she] must "file an action on his [or her] own behalf before the Commission." It is worth

noting Section 105(c)(2), which authorizes temporary reinstatement, speaks to the Secretary. Section 105(c)(3), which does not authorize temporary reinstatement, speaks to the miner. While I am cognizant of counsel for the Secretary's argument that I must defer to the Secretary's interpretation of Section 105(c)(2) and Section 105(c)(3), I do not find the[se] provisions ambiguous [and therefore obligating deference]. To me, they clearly stand for the proposition that an order of temporary reinstatement must end once the Secretary decides not to proceed.

The Commission's rules in this regard [t]rack the statute. Under . . . Rule 40(b), for a miner to proceed on . . . [his or her] own behalf, a new complaint must be filed . . . . This complaint is a new action, one separate from the Secretary's application for temporary reinstatement. Not only do the Act and Commission's rules treat miner's complaints and the Secretary's application for temporary reinstatement as separate and distinct from the miner's complaint on his [or her] own behalf under Section 105(c)(3), so does the Commission[']s docket office, which long has docketed actions for temporary reinstatement separate from actions brought under Section 105(c)(3). Moreover, and more importantly, the remedies available to the miner under Section 105(c)(3) do not, and I emphasize "not", include temporary reinstatement. Rather, if he or she prevails, the miner is made economically whole in part by back pay and interest.

The remedial provisions in Section 105(c)(2) and [Section] 105(c)(3) represent a balancing . . . of interests . . . [underlying] [C]ongress's desire to encourage [miners] to actively participate in furthering health and safety under the Act. Congress recognized [miners] have an interest in being protected against possible discrimination they may suffer as a result of . . . activities on behalf of health[,] . . . safety and enforcement[,]. . . Congress also recognize[d] . . . operators have an interest . . . [in] control[ling] their workforce. By providing temporary reinstatement under Section 105(c)(2), [C]ongress determined . . . operators should bear the greater burden while the Secretary concludes whether, in her view, a miner's complaint of discrimination

has [merit]. But [C]ongress also recognize[d] the operator's interest in controlling its workforce by making reinstatement [and its resulting burden] temporary[.] [A]s the 11th Circuit noted, deprivation of an employer's right to control the makeup of its . . . workforce is ["only a] *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or [by] a decision on the merits in the employe[r]'s favor.["] . . . [*Jim Walter Resources v. Federal Mine Safety and Health Review Commission*, 920 F.2d738, 748 n. 11 (emphasis in original)]. It seems clear to me the Court believed the temporary nature of reinstatement under Section 105(c)(2) meant . . . reinstatement could end with, as the Court stated, "[t]he Secretary's decision not to bring a formal complaint" [*Id.*], and the right of the operator to control its workforce could be returned [to the operator] as the miner contemplated whether or not to proceed on his or her own behalf under Section 105(c)(3).

For these reasons, and given the Secretary's conclusion . . . [based on] the information gathered during her in-investigation of Mr. Phillips' complaint . . . [that Mr. Phillips suffered] no discrimination within the confines of the Act[,] I conclude the [O]rder of Temporary [Economic] Reinstatement entered on June 5, 2008, should be dissolved and this matter should be dismissed.

I will dissolve the order and dismiss this proceeding in a written order confirming this . . . [oral ruling]. Until such written order is issued, the order of temporary economic reinstatement will remain in effect.

Tr. 25-30 (editorial changes added).

**ORDER**

For the reasons stated above, the Order of Temporary Economic Reinstatement entered by me on June 6, 2008, **IS DISSOLVED** and this proceeding **IS DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail & by Facsimile)

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/ej

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 19, 2008

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|---|---|---|
| ROCKHOUSE ENERGY MINING CO., Contestant | : | CONTEST PROCEEDINGS |
| | : | Docket No. KENT 2008-1483-R |
| | : | Citation No. 8216019; 07/23/2008 |
| | : | Docket No. KENT 2008-1484-R |
| | : | Citation No. 8216020; 07/23/2008 |
| | : | Docket No. KENT 2008-1485-R |
| | : | Citation No. 8216024; 07/24/2008 |
| | : | Docket No. KENT 2008-1486-R |
| | : | Citation No. 8216025; 07/24/2008 |
| | : | Docket No. KENT 2008-1487-R |
| | : | Citation No. 8216033; 07/25/2008 |
| | : | Docket No. KENT 2008-1488-R |
| v. | : | Citation No. 8216034; 07/25/2008 |
| | : | Docket No. KENT 2008-1489-R |
| | : | Citation No. 6660866; 07/31/2008 |
| | : | Docket No. KENT 2008-1496-R |
| | : | Citation No. 6660752; 07/02/2008 |
| | : | Docket No. KENT 2008-1497-R |
| | : | Citation No. 6660753; 07/02/2008 |
| | : | Docket No. KENT 2008-1498-R |
| | : | Citation No. 6657617; 07/11/2008 |
| | : | Docket No. KENT 2008-1499-R |
| | : | Citation No. 6657618; 07/11/2008 |
| SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, (MSHA), Respondent | : | Docket No. KENT 2008-1500-R<br>Citation No. 6657619; 07/11/2008 |

: Docket No. KENT 2008-1501-R
: Citation No. 8216001; 07/11/2008
:
: Docket No. KENT 2008-1552-R
: Citation No. 8216067; 08/25/2008
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: Docket No. KENT 2008-1553-R
: Citation No. 8216068; 08/25/2008
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: Docket No. KENT 2008-1554-R
: Citation No. 8216072; 08/25/2008
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: Docket No. KENT 2008-1555-R
: Citation No. 8216073; 08/25/2008
:
: Docket No. KENT 2008-1556-R
: Citation No. 8216075; 08/25/2008
:
: Docket No. KENT 2008-1557-R
: Citation No. 8216082; 09/02/2008
:
: Docket No. KENT 2008-1558-R
: Citation No. 8216083; 09/02/2008
:
: Docket No. KENT 2008-1559-R
: Citation No. 8216084; 09/03/2008
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: Docket No. KENT 2008-1616-R
: Citation No. 8216088; 09/08/2008
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: Docket No. KENT 2008-1617-R
: Citation No. 8216089; 09/08/2008
:
: Mine No. 1
: Mine ID 15-17651

## DECISION

Appearances: Brian W. Dougherty, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Respondent
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of the Contestant

Before: Judge Barbour

These cases are before me on Notices of Contest filed by Rockhouse Energy Mining Co. ("Rockhouse") against the Secretary of Labor, acting on behalf of her Mine Safety and Health Administration ("MSHA") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act") (30 U.S.C. § 815(d)). In the contests, Rockhouse challenged the validity of 23 citations issued pursuant to section 104(a) of the Act at its Mine No. 1, an underground bituminous coal mine located in Pike County, Kentucky.[1] In each of the citations MSHA alleged a particular safety standard had been violated and each alleged violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary answered, asserting the citations were properly issued in all respects.

Because of the potential consequences resulting from the inspectors' S&S findings – consequences described below – Rockhouse moved its contests be heard on an expedited basis.[2] The contests were assigned to me, and I denied the motion. Order (September 19, 2007).

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[1]Section 104(a) provides if an inspector:

> believes that an operator of a coal . . . mine . . . has violated . . . any mandatory health or safety standard . . . promulgated pursuant to this Act, he [or she] shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation.

30 U.S.C. § 814(d).

Section 104(d)(1) of the Act provides, in describing the nature of the violation, an inspector may find the violation is "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." 30 U.S.C. § 814 (d)(1).

[2]Commission Rule 52 states that a party may request expedition of proceedings, and if the request is granted, the hearing on the merits of the case shall be held not less than four days thereafter. 29 C.F.R. 2700.52.

However, in denying expedited review, I stated I believed Rockhouse was nevertheless entitled to as speedy a hearing as was consistent with orderly proceedings. Accordingly, and with agreement of counsels, I scheduled the matters to be heard on October 7, 2008, in Pikeville, Kentucky. (Most of the contests were received in the Commission's Docket Office on August 21, 2008, and were assigned to me on September 15 and 19, 2008.) The matters needed to be heard and decided promptly because the S&S findings contained in the contested citations were a key factor in the Administrator of MSHA's pending decision whether or not to designate Rockhouse and its Mine No. 1 as exhibiting a "pattern of violations" ("POV"), a designation with potentially onerous consequences for the company.[3]

## THE POSSIBLE "PATTERN" DESIGNATION AND ITS RELATIONSHIP TO THE CONTESTED CITATIONS

In contesting the citations, Rockhouse maintained it was subject to initial screening pursuant to 30 C.F.R. § 104.2 and § 104.3 for a POV designation, and MSHA would base its final POV determination in part on the validity of the contested citations and their S&S findings.[4] Timeliness Motion 1.

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[3]Section 104(e) of the Act states in part:

> If an operator has a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

Once given a POV notice, an operator is subject to an order of withdrawal each time an inspector cites it for an S&S violation until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e).

[4]The agency's procedures for determining whether an operator has exhibited a POV are set forth at 30 C.F.R. § 104.1, *et seq.* Section 104.2 specifies the information MSHA reviews in its annual initial screening process, including information regarding "The mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1). Section 104.3 specifies the information MSHA uses to identify mines with a potential pattern of violations. It states:

> (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator

Rockhouse's contentions and concerns raised questions about how to proceed. Neither I nor counsels knew of any guiding precedents. In part this was because while MSHA has had the statutory authority to put mines under a POV designation since the passage of the Act, the agency only recently has begun to exercise that authority by promulgating and by implementing 30 C.F.R. § 104, *et seq.* I think it fair to state these procedures and the policy behind them are little understood by many in industry and the bar, and I include myself among those who have had difficulty comprehending the POV process.[5]

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> may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:
>
> (1) A history of repeated [S&S] violations of a particular standard;
>
> (2) A history of repeated [S&S] violations of standards related to the same hazard; or
>
> (3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.
>
> (b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential [POV].

[5]30 C.F.R. § 104 establishes a four-step POV designation and termination procedure: (1) Initial screening (section 104.2); (2) Identification by MSHA of mines with a potential POV through application of the regulatory criteria (section 104.3); (3) Designation of POV status and issuance of the designation to the operator (section 104.4); and (4) Termination of POV status (section 104.5). For operators the critical steps in the process are: (l) The initial screening; (2) Identification as having a potential POV; and (3) The designation of POV status.

With regard to S&S violations, in steps 1 and 2, MSHA's Office of Assessments reviews a 24-month violation history of a mine to determine if it exhibits a potential POV. Among the criteria for making a potential POV determination are all alleged S&S violations cited at the mine in the previous 24 months. According to section 104.3(b), "[O]nly citations and orders . . . **that have become final** shall be used to identify mines with a potential pattern of violations" (emphasis added). Thus, an operator may be notified its mine exhibits a potential POV only on the basis of final S&S allegations. If an operator is issued a notification its mine exhibits a potential POV, the operator has not more than 20 days within which to do the following: (1) Review all documents on which it has been evaluated for the designation and provide additional

Rockhouse's position, as I understood it, was that its Mine No. 1 had been identified by MSHA as having a potential POV, and the company had been given written notification to that effect. In response, Rockhouse had submitted a corrective action plan to avoid repeated S&S violations. Following implementation of the plan, MSHA had conducted a complete inspection of the mine to determine whether or not pursuant to the plan Rockhouse had achieved a 30% reduction in its S&S rate or whether its S&S rate was at or below the industry average. During the inspection, 32 S&S citations were issued, of which the subject 23 were contested. Given issuance of the 32 citations, the company had not achieved a 30 % reduction, and its average rate of S&S violations was above the industry's rate. However, if four of the contested S&S allegations were found to be invalid, the mine would meet the 30% reduction goal.

According to MSHA's procedures summary, once the inspection was completed and the calculation was made, the District Manager would report to the Administrator, and the calculation would be one of the bases upon which the Administrator would decide whether to issue a Notice of POV to Rockhouse. In this instance, the District Manager's report had to be sent to the Administrator by September 25, 2008. In turn, the Administrator had to decide whether or not to issue a Notice of POV within 30 days of his receipt of the Report. Pattern of Violations Procedures Summary3-4; *www.MSHA.gov/POV/POV procedures.* It, therefore, seemed reasonable to expect the Administrator's decision to be made on or shortly after October 27, 2008 (October 26 was a Saturday).

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information to MSHA; (2) Submit a written request for a conference with the MSHA District Manager; and/or (3) Provide a written corrective action plan to institute a program to avoid repeated S&S violations. *See* Pattern of Violations Procedures Summary, *www.MSHA.gov/POV/POVprocedures.pdf.* If an operator chooses not to submit an improvement plan to MSHA within 60 days of the operator's receipt of notification of a potential POV designation, MSHA will conduct a complete inspection of the mine and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average. (If the operator chooses to submit an improvement plan, MSHA will conduct the complete inspection no later than 90 days from the date the operator submitted the plan, and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average.) The frequency rates for S&S violations will be based on the S&S designation in all citations and orders issued since the receipt of notification or since the receipt of the improvement plan. **The citations and orders need not be final orders of the Commission**. *Id.* Based on a report he or she receives from the District Manager concerning the results of the complete inspection, MSHA's Administrator will then decide whether to issue a Notice of Pattern of Violations to the operator. Such a notice officially places the operator under the strictures of section 104(e). *Id.*

This was the primary reason Rockhouse's counsel moved for an expedited hearing. Although counsel for the Secretary opposed an expedited hearing, he did not oppose one that was convened expeditiously. Because I believed Rockhouse had an compelling interest in determining whether it would be faced with the repeated closures inherent in a Notice of POV, and because it was likely a POV decision would be made on or shortly after October 27, I accelerated the trial schedule so the cases could be heard and at least informally decided before the time the Administrator had to act on the District Manager's POV recommendation. With the concurrence of counsels, I scheduled the hearing to commence on October 7, and I advised counsels I would issue bench decisions on the issues at the close of the taking of the evidence on each contested citation. I further advised them the bench decisions would not be final until they were confirmed in writing. Counsel for the Secretary stated MSHA's POV considerations would be bound by the oral bench decisions. Whether or not this was the best way to proceed is certainly open to question. Other counsels and judges may well find different approaches more satisfactory.

For these reasons the contests were tried and orally decided October 7 - October 9, 2008. The results of the trial follow. Editorial changes have been made in some of the oral decisions.

**KENT 2008-1483-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216019 | July 23, 2008 | 75.1725(a) |

The citation states in part:

> The roof bolter . . . being used on the 008-0 MMU is not being maintained in a safe operating condition. The tram levers in the operator[']s compartment will "over-lap" each other by one inch. This condition exposes miners on a daily basis to hazards of being crushed against the mine rib when the wrong lever is activated. Miners work in close proximity to this machine while it is operated and often place themselves between the machine and the mine rib during the "normal mining cycle."

Gov't Exh. 1.

Section 75.1725(a) requires, "Mobile equipment . . . [to] be maintained in safe operating condition and . . . equipment in unsafe condition shall be removed from service immediately."

With regard to the citation, I stated:

> Based on the testimony of . . . [I]nspector [Kenny

Fleming], which I credit[,] I find the tram levers in fact overlapped as described in the citation. I note the testimony establishe[d] the equipment [i]s manufactured with a two-inch space between the levers[,] . . .[a]nd I find it improbabl[e] that the inspector knowing this would have been mistaken about a condition that was otherwise.

I also find it unlikely, as Rockhouse's foreman John Adams believed, that Fleming . . . pushed the levers together so they overlapped. Certainly[,] no one has suggested a motive for him to cause the citation condition.

Having found the levers overlap[ped], the next question is whether the overlapping levers created an unsafe condition. I conclude the answer is ["]yes["], because I accept the testimony of Inspector Fleming that overlapping levers can result in the roof bolter operator causing the equipment to suddenly move in an unintended direction through a mistaken activation of the wrong lever. Mr. Adams testified believably that roof bolter operators can use one hand to push levers and thus retain full control. But there was no showing all roof bolter operators always use one hand, and it is clear the tramming mechanism is designed for two hands.

Certainly, at least some of the roof bolter operators must operate the roof bolter as designed. Sudden unintended movement of large equipment like a roof bolter is unsafe. And I therefore find the overlapping tram levers represented an unsafe condition within the meaning of the standard.

A violation is properly designated S&S if based on the particular facts surrounding the violation there exists a reasonable likelihood the hazard contributed to will result in an injury of a reasonably serious nature. All agreed the feared hazard was of a miner being caught between the rib and the roof bolter by a sudden and unexpected movement. I accept

> Inspector Fleming's testimony that miners sometimes walk beside the roof bolter when it's being trammed. And even if miners are not supposed to, sometimes [they] place themselves on the offside [of the roof bolter (the side opposite the roof bolter operator)], between the ribs and the roof bolter. Inspector Fleming believably testified he has seen . . . miners where they were not supposed to be. Indeed, Rockhouse recognizes the hazard and warns its miners . . . [about] it. But the sad fact is that miners, like all of us, do what they shouldn't do at times and [they] subject themselves to danger.
>
> Given the fact the roof bolter operator's vision of the offside is frequently at least partially obstructed, and given the fact miners occasionally place themselves between the ribs and the roof bolter, I conclude the violation directly contributed to the hazard of miners being struck and injured by a sudden and unexpected movement of the roof bolter . . . [ a]nd that such an injury was reasonably likely [to occur] as mining continued.
>
> If such an accident happened . . . [the result] was . . . reasonably likely to be serious, even deadly. And for these reasons, I find the violation was S&S. The violation also was serious; and, as counsel for Rockhouse agreed, if the violation existed the operator was[,] as found by Inspector Fleming[,] moderately negligent.

Tr. 396-399.

**KENT 2008-1484-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216020 | July 23, 2008 | 75.517 |

The citation states in part:

> The energized . . . cable supplying power to the roof bolter . . . being used on the 008-0 MMU has an opening in the outer jacket exposing the inside,

> insulated, phase conductors. The MMU floor is wet at various locations and the cable is frequently handled by the miners on a regular basis. This condition exposes them to hazards associated with electrical shock. This condition is evident approximately 100 feet from the roof bolting machine.
>
> Given these "confluence of factors" and "continued normal mining operations" along with the rugged abuse that these cables are exposed to, this condition is at least reasonably likely to result in a lost time injury.

Gov't Exh. 2.

Section 75.517 requires trailing cables to be: "insulated adequately and fully protected."

With regard to the citation, I stated:

> The citation alleges Rockhouse violated 30 [C.F.R. §] 75.517 wherein an energized cable to the roof bolter . . . was found to have an opening in its outer jacket, thus exposing the inside insulated conductors. In her closing argument, [c]ounsel [for Rockhouse] conceded the violation[, a]nd I find . . . it occurred as alleged . . . . [T]he next question . . . is whether the citation was S&S, and I find it was. While location of the fingernail-size opening is disputed, I find Inspector Fleming's testimony more credible in this regard. He unequivocally stated the opening he found was 100 feet from the roof bolter. This meant[,] and I find[,] the opening was on the floor as he testified, and I also find as he testified that the floor was moist and wet and muddy.
>
> Inspector Fleming believed as mining continu[ed] miners would handle the cable to suspend it since it is prohibited to run over the cable. Moreover, he testified that continuing stress and strain on the cable subjected the insulation of the phase conductors to damage, and that something as small

as a pinhole could subject those handling the cable to severe shock injury or even to electrocution. I credit all of . . . [his] testimony [in this regard].

I do not accept the Secretary's argument that the increased daily inspections Rockhouse instituted as a result of being under scrutiny for a . . . [POV designation] are irrelevant. It strikes me that it would be strange indeed if meeting one of the goals of the . . . [POV] provision of the Act – that is, heightened . . . [vigilance] to ensure compliance . . . [were] found . . . irrelevant. Certainly, at least in my view, such . . . [vigilance] should be considered when determining the reasonable likelihood [of whether] the hazard created . . . [will] result in an injury. However, here the testimony reveals . . . [the company's vigilance] was defective. At the beginning the shift, Rockhouse personnel visually examined the cable by walking it. Given the small size of the opening, given the mud and the water on the mine floor, I find there was little chance the inspection would have decreased the likelihood of an injury.

Therefore, . . . [in view of] this and the fact that as Inspector Fleming testified the opening was likely to grow larger as mining continued and the interior conductors and the insulation would be subject[ed] to even more stress, I [find] . . . there was a reasonable likelihood the opening would result in a miner being subjected to a shock injury.

In addition, I find the injury was reasonably likely to be severe, even to be fatal[, a]nd that the wet conditions increased this likelihood[.] [T]herefore, the violation was serious. I also note [c]ounsel for Rockhouse's agreement that should I find . . . [a] violation, the inspector['s finding of moderate negligence . . . [on] the company's part should stand[, a]nd I therefore so find.

Tr. 399-400.

**KENT 2008-1485-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216024 | July 24, 2008 | 75.1403 |

The citation states in part:

> Extraneous materials in the form of 4, 3 inch, 20 [foot] long sections of water-line have been allowed to exist at the outby scoop charging station at the # 8 belt drive. This material exists lying on the mine floor, parallel with the scoop that is being charged, with one end near the operator[']s compartment. This condition exposes the scoop operator to hazards associated with being imp[ailed] or struck by this debris when [the debris is run] over. This scoop is readily available for use to the miners in the outby air courses. Given the "vagaries of human conduct" in [the] context of "continued normal mining operations" [and] absent the intervention of an MSHA official, this condition is reasonably likely to result in a lost time accident.

Gov't Exh. 5.

The citation alleges the cited condition is a violation of Notice to Provide Safeguards No. 7415705, issued at the mine on March 30, 2005. *Id.* Section 75.1403 provides "[o]ther safeguards . . . to minimize hazards with respect to transportation of men and materials shall be provided." Once a safeguard has been required, it is enforceable as a mandatory safety standard at the subject mine. *See Southern Ohio Coal Company*, 14 FMSHRC 1, 8 (January 1992); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985).

With regard to the contested citation, I stated:

> If I take as a given that an S&S finding can be lawfully made for an alleged violation of Section 75.1403, and this is an issue that is currently before Commission Administrative Law Judge Michael Zielinski, [[6]] . . . to find a violation [of section

[6]On November 4, 2008, Judge Zielinski ruled an S&S finding could not be made for an alleged violation of section 75.1403 (*Order Granting Respondent's Motion For Partial Summary Decision, Big Ridge, Inc.* 30 FMSHRC ____ (November 2008), Docket No. Lake 2008-68, etc.), and on December 24, 2008, he issued a similar ruling. *Order Granting Respondent's Motion For*

75.1403] I must conclude the facts of the citation fit squarely within the notice to provide safeguards. Because I do not believe the Secretary has born[e] her burden of proof in this regard, I find she has not established a violation.

* * *

The notice to provide safeguard was issued when a fatal accident occurred. The accident involved a battery tractor backing into a crosscut and the right rear tire of the tractor running over a 14-foot length of metal channel, causing the channel to enter the [tractor] operator's compartment and kill the operator.

The notice [to provide safeguard] makes clear [that] extraneous material was observed along the roadway in addition to the metal channel. This extraneous material included jacks, belt structures, crib blocks, concrete blocks and track ties. The notice requires . . . all roadways where mobile equipment [is] operated to be maintained free from such extraneous materials causing a hazard to equipment operators. The wording of the notice . . . on its face seems clearly to relate to material[s] that are not supposed to be in a roadway; in other words[,] materials that are extraneous. While Inspector Fleming convinced me the cited scoop was indeed in a roadway, he did not convince me . . . the waterlines were the type of material covered by the safeguard. Rather than being where they were not supposed to be, I credit Mr. Ward's testimony . . . the lines were placed in the charging station area purposefully. The charging station was . . . a staging area for supplies[,] [a]nd Mr. Ward testified without [dispute] that the waterlines were purposefully placed there to be moved by the scoop. They were not in[,] other words, ["]extraneous material.["]

Moreover, even if the facts fit the safeguard, there was no reasonable likelihood that the hazard to which they contributed would have caused an injury. The waterlines were placed on the ground next to the scoop after the scoop had entered the area. They [had not] been driven over[;] nor were they likely to be driven over since the testimony established

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*Partial Summary Decision, Cumberland Coal Resources, LP*, 30 FMSRHC ___ (December 2008) Docket No. PENN 2008-318.

. . . they were to be moved by the scoop. And even if they [were not] moved, the scoop operator had to step on them to enter the operator's compartment. He or she would, therefore, have been fully aware of the lines and their location. [It is] reasonable to assume that he or she would have taken steps to avoid them as he or she backed out from the charging station. Also[,] if other equipment came in to the charging station, the equipment would, as Mr. Ward credibly testified . . . [have to enter] slowly. And the waterlines were readily visible. For these reasons . . . if I found that a violation existed, I would not find it [was] S&S.

However, I would find it serious[,] because I agree with the inspector that if one of the pipes had been run over and was somehow in some way propelled or moved in a fashion that would cause it to strike the operator, the injury the operator would suffer would range from concussions[,] to fractures[,] to even death.

Finally, if I found a violation, I would find, based on the agreement of counsel for Rockhouse, that the company's negligence in allowing . . . [the violation] to exist was moderate.

Tr. 405-409.

**KENT 2008-1486-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216025 | July 24, 2008 | 75.503 |

The citation states in part:

The scoop . . . being used in the outby air ways is not being maintained in permissible condition as per 30 C.F.R., Part 18.31. An opening in excess of .003 of an inch is present beneath the plane flange joint cover of the "Ocenco" brand light on the operator[']s side, bucket end of the scoop. The empty internal volume of the explosion proof enclosure measures less than 45 cubic inches. This mine is on a [section] 103(i), 15 day spot inspection and has a history of liberating methane. [This] "confluence of factors" expose

> the miners to hazards associated with a methane ignition such as smoke inhalation or burns.

Gov't Exh. 8.[7]

Section 75.503 requires the operator "to maintain in permissible condition all electric face equipment required . . . to be permissible which is taken into or used inby the last open crosscut" of the mine.

With regard to the citation, I stated:

> The citation alleges . . . a scoop was not being maintained in a permissible condition, in that there was an opening in excess of .003 of an inch beneath the flange joint cover of the side light at the bucket end of the scoop.
>
> As I understand Rockhouse's closing argument, [c]ounsel concedes the violation[.] in that she agrees the opening was in excess of the permissible limit. I'll add here that I conclude the proper standard – that is [s]ection 75.503 – was in fact cited. The scoop was manufactured in permissible condition so that it could be used in face areas of the mine. This is enough[,] in my opinion, to require it to be so maintained. I also credit Inspector Fleming's contemporaneous notes that the scoop was used in . . . return [air]. Fleming wrote the notes when his memory was fresh[,] [a]nd his testimony fully supports what he wrote.
>
> Despite Rockhouse's protest that the logistics of getting the scoop into the return were prohibit[ive] . . . in my opinion the statement Fleming recorded is entitled to more weight than Mr. Ward's later testimony that having to go through the stoppings to get into the return represented a prohibit[ive] challenge. I also note the testimony reveals it was possible, albeit inconvenient, to transport the scoop to the nearest working section.
>
> I[,] therefore[,] conclude as mining continue[d], . . . [it was] reasonably likely . . . the scoop would have been used either in the next working section or in the [return]. As [Inspector] Fleming testified, there

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[7]Section 103(i) mandates, *inter alia*, the Secretary require a minimum of one spot inspection of all or part of a mine when the Secretary finds the mine liberates more than two hundred thousand cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i).

was an ignition source, . . . [it] being the internal electrical [components] of the light. Moreover the mine clearly was subject to . . . large methane releases. Therefore, I find . . . as mining continue[d], it was reasonably likely an ignition or explosion [could have] occurred that could have [seriously] injured [or killed] the scoop operator.

In addition to being S&S, the violation was also serious. [T]he least serious consequences . . . suffered from an ignition or an explosion would have been . . . a flashburn, but the most serious . . . [would] have been death. And finally, for the reasons stated with regard to the previous citations, I find the violation [was due] to Rockhouse['s] negligence.

Tr. 409-411.

**KENT 2008-1487-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216033 | July 25, 2008 | 75.517 |

The citation states in part:

The energized #2 . . . cable supplying power to the roof bolter . . . being used on the 010-0 MMU has two . . . openings in the outer jacket exposing the inside, insulated phase conductors. The MMU floor is wet at various locations and the cable is frequently handled by the miners on a regular basis. This condition exposes them to hazards associated with electrical shock. This condition is evident approximately 100 and 200 feet from the roof bolting machine.

Given these "confluence of factors" and "continuing normal mining operations[,]" along with the rugged abuse that these cables are exposed to, this condition is at least reasonably likely to result in a lost time injury.

[[8]]

[8]The citation, which inadvertently was not admitted as an exhibit, is nonetheless part of the record and is found as an attachment to Rockhouse's Notice of Contest, Docket No. KENT 08-1487-R.

As noted above, section 75.517 requires trailing cables to be: "insulated adequately and fully protected."

With regard to the citation I stated [[9] ]:

> The citation was issued when the inspector found two openings in the outer jacket of . . . a roof bolt[ing machine's] trailing cable. [T]he opening[s] exposed the insulated phase conductors, and the floor in which the roof bolt[ing machine] was located was wet and muddy.
>
> The standard [cited] required the trailing cable to be insulated adequately. Everyone agreed . . . the openings existed [, that t]he damage to the cable exposed the insulated inner conductors, and that the cable was not adequately insulated. Thus[,] the violation existed as charged.
>
> The next question is whether it was S&S. Here, I find Mr. Ward's testimony to be credible . . . . [Inspector] Fleming and Mr. Ward were at odds over the location of the two defects. I find that the two defects were much closer together than . . . [Inspector] Fleming believed. It strikes me as inherently reasonable and logical that Rockhouse would not have had the cable spliced had the defects in fact been . . . [one] hundred feet apart as . . . [Inspector] Fleming maintained. Mr. Ward recalled them as ten to15 feet apart[,][a]nd while they may . . . in fact [have] been somewhat more [apart], I . . . [conclude] that [Mr.] Ward's testimony was accurate. I also find, as Mr. Ward testified, that because the power center had recently been moved up, the defects in the cable would have been on the [cable] reel, not on the floor for the next shift, and perhaps for up to two shifts beyond.
>
> I agree with Mr. Ward that under these circumstances, miners would not be likely to handle the cable anywhere near the defects. I note parenthetically, however, that the fact . . . rubber gloves were available to miners if they wanted to wear them has no bearing . . . on the S&S issue.
>
> It is also important, in my opinion, that Rockhouse changed

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[9]In delivering the bench decision[,] I incorrectly stated the citation number as 8216300 rather than 8216033. Tr. 402.

> its [trailing cable] inspection procedures. [P]rior to a shift[,] the entire cable was inspected with a hands-on inspection. This means it was being inspected three times every 24 hours [rather] than one time a week. Not only is it likely the damaged parts of the cable would not have been on the wet and muddy mine floor [because they were on the cable reel], it is reasonably likely the damage would have been detected and corrected before the roof bolt[ing machine] moved so far from the power center . . . the damaged places would have been on the floor.
>
> For these reasons [,] I conclude the Secretary has failed to establish it was reasonably likely the damaged cable would have caused a shock injury at the time it was cited[,] or as mining continue[d] and before the defects were corrected.
>
> Despite the fact the violation was not S&S, it was serious. Had an injury occurred[,] a miner would have received [a] serious shock or even . . . been killed.
>
> [Finally, as] the company['s] counsel agreed . . . [the violation was] due to the company's moderate negligence.

Tr. 402-405.

**KENT 2008-1488-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216034 | July 25, 2008 | 75.517 |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1489-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 6660866 | July 31, 2008 | 75.1722(a) |

The citation states in part:

> The speed reducer shafts and drive rollers on the CO # 4 belt [are] not provided with adequate guarding to prevent person[s] from coming into contact with [the moving parts]. The drive rollers and the speed reducer shafts turn at a

> high rate of speed. The speed reducer shafts are two feet wide, and easily accessible from either the end of the head drive. This belt is traveled once per shift by the on[-] shift belt examiner and serviced every other day.

Gov't Exh. 10.

Section 75.1722(a) requires in part, "Gears, sprockets, chains, drive, head, tail and takeup pulleys . . . and similar exposed moving machine parts which may be contacted by persons and which may cause injury . . . shall be guarded."

With regard to the citation[,] I stated:

> MSHA Inspector James McIntosh cited the company for not providing adequate guarding on the speed reducer shafts and drive rolls of the . . . mine[']s main conveyor belt drive.
>
> Specifically, McIntosh asserted there were two openings through which miners could enter [the area containing the moving parts]; one being 12 inches across, and one being two feet across. The head drive itself was guarded by a fence. However, these two openings, one at either . . . end of the fence, in McIntosh's view justified finding . . . [the] violation. I conclude McIntosh was right. There is really no dispute the 12-inch opening existed. Although a person would have to squeeze . . . to get . . . [through] it, as . . . [Inspector] McIntosh testified, I . . . [find] it could be done.
>
> I further find that once past the opening, contact with the moving parts was possible. True, a person would have to step up on the frame [of the drive] to achieve contact, but it could . . . [be] done.
>
> I [also] accept . . . McIntosh's testimony that once inside the two-foot opening[,] access to the moving parts of the head drive . . . [was] possible. His testimony that some of the moving parts were within arm's . . . [length] was . . . credible. ["A]rm's length["] . . . is a frequently used colloquial unit of measure . . . [a]nd the lack of a more precise measurement . . . does not discredit the inspector's testimony.
>
> As with the other opening, once access [to the moving

> parts] was gained, a person would have to step up on the frame to reach the . . . part[s]; but it could be done. For . . . [these] reasons[,] I find the violation existed as charged. I also find it was S&S. The evidence establishes the area of the head drive was traveled two times a day by miners. In addition, miners would from time to time be assigned to service [equipment] and clean up the area. I find it . . . [was] reasonably likely[,] as mining continued a miner would enter the area, and having gained access, would be entangled or otherwise have contact with the head drive's moving parts.
>
> Clearly, miners were not supposed to enter the inadequately guarded area while the hear drive was operating. But as [c]ounsel for the Secretary pointed out [in his closing argument], miners do not always do what they are supposed to do. By this I mean that as mining continued it was reasonably likely the day would come when a miner would decide to enter the inadequately guarded area to better undertake a . . . repair, cleanup or inspection function, would step up on the frame and would become entangled in the moving parts or would otherwise contact them.
>
> When such contact occurred, the results were reasonably likely to be serious . . . [ranging] from cuts[,] to broken bones[,] to dismemberment[,] to death . . . . Because of the gravity of the possible resulting injuries, I also . . . conclude . . . [the violation] was serious.

Tr. 810-813.

> Finally . . . and with the agreement of counsel for Rockhouse, I find the [inspector] accurately found Rockhouse was moderately negligent.

Tr. 817

**KENT 2008-1496-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 6660752 | July 2, 2008 | 75.340(a)(1) |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1497-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 6660753 | July 2, 2008 | 75. 203(a) |

The citation states in part:

> [The m]ethod of mining on the 010-0 MMU is exposing miners to the hazards of excessive widths. A five[-]way intersection has been developed in the No. 3 entry 70 feet inby [S]urvey [S]pad # 30903. The intersection measured 32 ft. and 5 inches wide. This condition exposes miners to injuries related to roof falls, excessive rib sloughing and draw rock. This section was not producing at the time but three mechanics were working in the area during this inspection. The foreman dangered off the area until proper roof control could be installed.

Gov't Exh. 11.

Section 75.203(a) requires in part "the method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries . . . . Pillar dimensions shall be compatible with effective control of the roof, face and ribs and coal or rock bursts."

With regard to the citation[,] I stated:

> MSHA Inspector Billy Meddings cited the company for exposing miners to the hazards of excessive widths at a five-way intersection developed in the number three entry.
>
> The hazards the inspector cited related primarily to draw rock and to rib sloughage. To be frank, I found the evidence . . . hard to follow and confusing. And although this was true of both sides, it was particularly true . . . in the case made by Rockhouse. This stated, I found the argument presented by [the] Secretary's [c]ounsel, the essence of which was to focus on the facts the inspector found when he cited the violation and . . . the concerns he had at that time to be the most helpful in resolving the relatively simple issues presented.
>
> I stated . . . [the issues] are ["] relatively simple["] because Rockhouse's [c]ounsel concedes the violation existed. [Thus,] Rockhouse was indeed employing a mining method that resulted in excessive widths, as testified to by Inspector

Meddings. And . . . [Inspector Meddings also] testified those [excessive] widths were accompanied by certain visual [indications] of hazards.

In this regard, I credit Inspector Meddings' testimony that he observed draw rock in the roof. He described what he saw and he identified its location on a map. . . . I also credit his testimony he observed sloughing ribs at two different corners of the odd heading. Again, he described what he saw and he identified where he saw it on a map. . . . .

As is well known, sloughing can be an indication the ribs are taking excessive weight. Meddings believed the sloughing reflected this . . . . And given the conditions at the five-way intersection, I find his belief was reasonable. I [also] agree with the inspector that the laminated shale roof . . . was subject to increase[d] pressure from the excessive widths . . . . [T]his in turn put pressure on the draw rock, making the . . . [draw rock] more likely to fall.

Further, I accept . . . [Inspector] Meddings testimony that his examination of the test hole revealed a horizontal shift in the roof strata . . . and this, in turn, meant the weight from the excessive widths was causing the shift, making draw rook falls and rib rolls more likely.

[T]he measures taken by Rockhouse to help support the entire roof of the entry[– a]nd here I'm referring primarily to leaving two large pillars and to installing cable bolts [–] while . . . commendable and no doubt necessary for overall roof support . . . did not adequately address the more particular hazards that rightfully concerned the inspector.

As the citation states, and as the testimony reveals, three miners worked in the area when the inspection took place. Had the conditions cited by Inspector Meddings continued, I conclude it was reasonably likely one [or more] of . . . [the miners] would have been injured by falling draw rock and/or by a rib roll. I[,] therefore[,] find this violation was S&S. I also find it was serious. Being hit by falling rock can easily cause a disabling injury.

Finally . . . and with the agreement of [c]ounsel for Rockhouse, I find the inspector accurately found Rockhouse was moderately

negligent.

Tr. 814-817.

**KENT 2008-1498-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 66657617 | July 11, 2008 | 75.1403 |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1499-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 66657618 | July 11, 2008 | 75.503 |

The citation states in part:

> The bolter S/N 96057 being used on the 001-0 MMU is not being maintained in permissible condition. The cable and conduit supplying 120 volts AC power to the rear spot lights has been but exposing the energized, bare copper wires. This mine is on a 103(i),15-day spot inspection with a history of liberating methane. Methane concentrations have been found on this MMU on this date of up to .2%. This damaged cable is also covered in hydraulic oil from a ruptured hose. This condition exposes the MMU employees to hazards associated with methane ignition on a daily basis.

Gov't Exh. 9.

Section 75.503 requires the operator "to maintain in permissible condition all electric face equipment required . . . to be permissible which is taken into or used inby the last open crosscut" of the mine.

With regard to the citation[,] I stated:

> [I]nspector Kenny Fleming cited the company for exposed energized wires leading to the rear spotlight[s] of an energized roof bolter located on the 001-0 MMU on July 11, 2008. He also found the cited [condition] constituted a[n]

. . . [S&S] violation.

While the company concedes the roof bolter was in violation of the standard, it emphatically disagrees with the inspector as to how the roof bolter violated the standard. The inspector maintains the two copper wires conducting electricity to the lights were exposed through a damaged conduit. The company, relying on the testimony of Dan Blackburn, [its] . . . superintendent and the company official who traveled with Inspector Fleming, maintains only the neutral ground wire was exposed.

The way the conflicting testimony is resolved is important, because[,] in my view, it [is] critical to the inspector's S&S finding. Having listened carefully to the testimony of both Inspector Fleming and Mr. Blackburn, I credit the . . . superintendent's version of the state of the cited wires. In so doing, I am in no way implying Inspector Fleming was less than truthful and forthright. Clearly[,] the inspector is a well-qualified representative of the Secretary[,] . . . [a person] committed to carrying out his duties in a fair and impartial manner.

This stated[,] experience has repeatedly shown that two very competent[,] knowledgeable people can look at the same situation and see and remember very different things. Inspector Fleming repeatedly testified he viewed the conductors and that both were exposed. Mr. Blackburn was equally adamant that only the neutral ground wire was exposed. [Blackburn, like Fleming] . . . had viewed the damaged wires, and . . . [Blackburn] emphasized the ground wire was green. Inspector Fleming did not indicate in his [testimony or his] notes the color of the wires that were [exposed]. He did agree neutral ground wire and the conductors were twisted inside the conduit.

It seems reasonable to me that what I view as the inspector's misidentification of the severed wire[s] may have been facilitated by the twisted nature of the wires. Without a particular identifying feature, the twisting of the wires [made] confusion more likely. Mr. Blackburn was certain that the neutral ground wire was the only one exposed. Why[?] [B]ecause he could easily identify it [by its green color]. More than that[,] Mr. Blackburn unhesitatingly affirmed that the rear spotlights . . . [of] the scoop were turned on before the damage was repaired.

* * *

> I accept Mr. Blackburn's testimony . . . [that] the lights were turned on before the violation was abated. Mr. Blackburn was clear and unequivocal about this, and he was convincing. Moreover, the fact the lights were illuminated . . . before abatement means the conductors were not . . . severed. [T]hus, it is my belief Mr. Blackburn was right when he testified it was the neutral ground wire that was exposed.
>
> Inspector Fleming agreed, and I find that[,] standing alone, an exposed ground wire would not be an ignition source. [W]ithout an ignition source there could be no reasonable likelihood of a hazard coming to fruition. In making this finding I am not disregarding the Secretary's observation that damage to the conduit [might] have weakened the conductors . . .[a]nd the conductors might[,] therefore[,] act as an ignition source as mining continued.
>
> However, I view the possibility of future damage [to the conductors making them an ignition source] as too speculative. The situation with the spotlight conductors is not analogous to the situation . . . [of] . . . trailing cable conductors . . . in that there . . . [was] no showing the spotlight conductors were subject to the repeated stresses and strains endured by . . . trailing [cable conductors]. For all of these reasons, I find the violation was not S&S.
>
> I also find the violation was non-serious. The exposed neutral ground wire did not pose an ignition hazard or a shock hazard either for that matter.[10]

Tr. 806-810.

**KENT 2008-1500-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 66657619 | July 11, 2008 | 75.400 |

The citation alleged accumulations of combustible material in the form of float coal dust soaked with hydraulic oil existed on the same roof bolting machine involved in the preceding citation (Citation No. 6657618). Following my finding that an ignition source did not exist with regard to Citation No. 6657618, counsel for the Secretary stated the Secretary would modify

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[10]I neglected to state as part of the bench decision that counsel for Rockhouse agreed the violation was due to the company's moderate negligence as found by Inspector Fleming, and I now so find.

Citation No. 6657619 "to a non[-]S&S citation."[11] Tr. 826. Counsel for Rockhouse then agreed to withdraw the company's contest of Citation No. 6657619. I approved the withdrawal and dismissed the contest. Tr. 826-827.

**KENT 2008-1501-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216001 | July 11, 2008 | 75.507 |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1552-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216067 | August 25, 2008 | 75.1725(a) |

The citation states in part:

> The . . . # 12 belt conveyor is not being maintained in a safe operating condition. The bottom belt is rubbing hard against eight . . . return side bottom roller hangers [one] cross cut outby the belt conveyor tailpiece. These bottom roller hangers are hot to touch with an ungloved hand and . . . [the rubbing] has discolored the metal hangers from frictional heat. Fine pieces of dry belt string are present around the mid axle of the bottom rollers. This belt has also been cited during today'sinspection for allowing accumulations and not having the required 50 [feet per minute] [FPM] of air. [This] confluence of factors expose[s] miners to hazards associated with fire and smoke inhalation on [a] daily basis.

Gov't Exh. 14 at 2.

Section 75.1725 requires in part "mobile and stationary machinery and equipment shall be maintained in safe operating condition."

---

[11]Prior to this, counsel for Rockhouse had agreed that should a violation exist, it was caused by the company's moderate negligence as indicated by the inspector, and I so find. Tr. 805-806.

**KENT 2008-1553-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216068 | August 25, 2008 | 75.400 |

The citation states in part:

> Accumulations of combustible material in the form of black float coal dust [have] been allowed to accumulate along the . . . #12 belt conveyor. These accumulations are paper-thin and exist in the belt entry, extending into both adjacent entry cross cuts, for an approximate distance of 490 feet. This belt conveyor has been [c]ited on this date for the unsafe operating condition of allowing the bottom belt to rub hard against the bottom roller hangers[,] creating frictional heat and not having the required 50 FPM of air. [This] confluence of factors exposes miners to hazards associated with fire and smoke inhalation on a daily basis.

Gov't Exh. 14 at 1.

Section 75.400 prohibits accumulations of "coal dust, float coal dust . . . loose coal and other combustible materials . . . in active workings . . . or on electric equipment therein."

With regard to the two citations[,] I stated:

> Citations [No.] 86216068 and 6216067 are closely linked factually and issue-wise, and I'll decide them together. Citation [No.] 8316068 alleges extensive accumulations of float coal dust were allowed to accumulate along the [No.] 12 belt conveyor and into adjoining crosscuts. Citation [No.] 8216067 alleges the belt conveyor itself was not maintained in safe operating condition, in that the bottom belt was rubbing against eight return roller hangers, one crosscut outby the tail piece. It additionally charges . . . fine pieces of . . . ["]string["], which were really shredded pieces of belt[,] were present along the mid-axle of the bottom rollers. Inspector Fleming, who issued the citations, found the cited conditions . . . [were S&S].
>
> Having heard the testimony, I fully agree with the inspector on every finding he made. I conclude from the testimony

the inspector indeed smelled rubber and oil getting hot as he approached the belt. His testimony in this regard was unequivocal. I likewise conclude he saw all eight places where the belt was rubbing the belt hangers, and he touched [the hangers] and confirmed . . . [they] were hot. Even Mr. Thacker[,] [the company's chief electrician,] agreed the hangers were warm. Moreover, there was no showing Mr. Thacker touched the same hangers as . . . [Inspector] Fleming . . . . The hangers [were] hot enough to burn . . . [Inspector] Fleming's ungloved hand had he touched the hangers for a longer time[.] [This establishes] them as ignition sources, in my opinion.

The hangers did not need to be glowing to present a reasonably likely hazard. The hot hangers existed in the immediate vicinity of float coal dust accumulations about which . . . [Inspector] Fleming . . . persuasively testified. Not only did he describe the color and the location of the float coal dust, he noted he was able to put it into suspension by kicking it or otherwise by touching it. His testimony was not refuted in this regard.

The accumulated float coal dust was a violation of [s]ection 75.400; and in combination with the hot hangers, created a reasonably likely scenario for a mine fire or explosion. Moreover, the lack of ventilation in the cited area ensured any mine fire might not be detected by the CO sensors until it had gotten out of control. And if the float coal dust propagated an explosion, the result would . . . [have been] even more severe than a fire.

I agree with the inspector; all miners [on] the section were endangered as were the belt examiners and the scoop operators who traveled by or through the area. As mining continued, I believe burns and smoke inhalation were a reasonably likely result for these miners. Thus . . . the violations were not only S&S, they were [also] serious.

In reaching this conclusion I have given no consideration to the strings of shredded belt material embedded around the rollers, nor have I considered the testimony of Mr. Thacker that a pin might have . . . come out of a defective belt splice and . . . thus[,] stopped the belt. As

> [c]ross [e]xamination revealed, it might [or it might not] have done so before the reasonably likely result of the violations . . . . There is really no way to know.
>
> Finally, I do not find the fact Rockhouse had miners monitoring the belt and the ventilation to be .. . [determinative]. The men might have detected the conditions in time or . . . [they] might not. [Again,] there is . . . no way to know. And in the event of an explosion or fire[,] the [miners] . . . would only be able to try to contain an already extremely dangerous situation.
>
> For all of these reasons, I affirm the inspector's findings of violation [and] his S&S findings, and I conclude the violations were serious. I also find, pursuant to [c]ounsel[']s agreement, that they were the result of [Rockhouse's] moderate negligence.

Tr. 1105-1109.

**KENT 2008-1554-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216072 | August 25, 2008 | 75.1725(a) |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 23-24.

**KENT 2008-1556-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216073 | August 25, 2008 | 75.400 |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1556-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216075 | August 25, 2008 | 75.1725(a) |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 24.

**KENT 2008-1557-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216082 | September 2, 2008 | 75.503 |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr. 412-413.

**KENT 2008-1558-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216083 | September 2, 2008 | 75.202(a) |

Counsel for Rockhouse stated the company wished to withdraw its contest.[12] Tr. 828.

**KENT 2008-1559-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216084 | September 3, 2008 | 75.1403 |

The citation states in part:

> The sanding devices provided for the . . . # 14 rail mounted mantrip . . . are not being maintained in an operative condition. When tested, [two] of the sanding mechanisms failed to operate on the end facing the outside. The track travelway this equipment is operated on has steep terrain, sharp turns, and is frequently wet from moisture due to the humidity during this time of year. This condition exposes the occupants of this mantrip to hazards associated with not maintaining traction and/or control while in operation 3 shifts per day.

Gov't Exh. 16.

The citation alleges the cited condition was a violation of Notice to Provide Safeguards No. 4509445, issued at the mine on February 27, 1996. *Id.* The requirements of section 75.1403 have been set forth above.

With regard to the citation, I stated:

---

[12]I neglected to approve the withdrawal and dismiss the case on the record. I will do so at the end of this decision.

Inspector Fleming allege[s] two [sanding] devices . . . [on a mantrip] . . . were not maintained in opera[ble] condition; [in] that the holes in the bottom of the sand reservoirs were packed with mud and wet sand. Assuming that an S&S violation may be cited for a violation of [s]ection 75.1403, I conclude Inspector Fleming's testimony regarding the manner in which he asked the chief electrician to activate the cited sanders and the [sanders'] resulting malfunction [–] testimony that was not refuted [–] establishes the violation.

I also find the violation was S&S. Inspector Fleming's testimony was simply more credible to me than that offered by Rockhouse.

Mr. Williamson, Rockhouse's safety director, agreed with Inspector Fleming that there were two pronounced dips in the track bed . . . [t]he mantrip had to travel . . . as well as at least once pronounced S curve. I do not find Mr. Williamson's testimony[,] that in most instances the sanders were used only when the track was wet[,] to be determinative . . . because it is clear to me wet track was not an uncommon occurrence at this mine.

Moreover, while I believe increased efforts to achieve compliance in response to a potential notice . . . of pattern of violations can be relevant when determining the S&S nature of [a] violation, I [find] Rockhouse's efforts to establish its heightened compliance deficient. It would have been much more persuasive . . . if Rockhouse had a miner who actually carried out the [asserted increased] inspections of the sanders . . . testif[y].

The mantrip was energized [when the inspector saw it]. It was reasonable for Mr. Fleming to assume it would be used . . . [in the condition] he found it as mining continued. And as mining continued, the mantrip would have encountered places where the outby sanders were required [to be used]; most likely . . wet rails in the dips . . . [or] on an S curve [where] the track was wet.

The lack of operable sanders subjected those then riding in the mantrip to injuries from a derailment or a collision. Contusions and/or fractures were likely to result. For all of

these reasons I find the violation was both S&S and serious. I also find, pursuant to [the] agreement of [counsels], that Rockhouse's negligence in causing the violation was low.

Tr. 1109-1112.

**KENT 2008-1616-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216088 | September 8, 2008 | 75.202(a) |

The citation states in part:

> The roof and ribs of areas where persons work and travel are not being supported or otherwise controlled to protect persons from hazards related to falls of the roof, ribs or coal/rock bursts along the track travel way on the . . . # 2 belt conveyor. Portions of loose ribs are present along this track travelway (Southeast Mains) beginning at Break # 25 (near the dip) and extending inby to the . . . #2 belt conveyor belt drive approximately 15 crosscuts inby. These loose portions of ribs are at various locations and are gapped away from the coal/ rib line, leaning out toward the track. The average height of these areas . . . [is] 6 feet, with the top half being predominantly rock. This condition exposes employees who travel these areas to hazards associated with falls of the roof and ribs on a daily basis.

Gov't Exh. 13; Gov't Exh. 16.

Section 75.202(a) requires "[t]he roof, face and ribs of areas where persons work or travel" to be "supported or otherwise controlled to protect persons from hazards related to falls of the roof, face and ribs and coal or rock bursts."

With regard to the citation, I stated:

> The loose ribs [along the track] were at intermittent locations where the ribs had gapped away from the coal rib line. The inspector found the condition constituted a violation of . . . [s]ection 75.202(a), which requires [in part that the] ribs . . . where persons work or travel . . . be supported to protect those persons from falls of the ribs. The inspector also found that the [condition was an] . . . [S&S] contribution

to a mine safety hazard.

I accept the inspector's description of the cited ribs as in places being gapped and leaning out. I also accept his testimony that the leaning ribs could pitch [out] and fall. And[,] in fact, a fall in a portion of the cited area could create a domino effect, pulling down the entire gapped rib. I conclude from the inspector's testimony the violation existed as charged. I further find the violation was . . . [S&S] and was serious.

I believe [the testimony of Rockhouse's belt foreman, Benjamin Workman, that] . . . he tried manually to pull down some of the ribs with a slate bar after the violation was cited. And when this failed . . . [he and his crew] had to resort to using a forklift. But while this perhaps indicates the stability of the portions of the ribs on which . . . [Mr. Workman] worked, it does not speak to all of the cited and gapped ribs . . . . Mr. Workman [did not] testify he tried to pull down all of the cited ribs. Further Mr. Workman's testimony does not take account of the . . .[effect of] time on the ribs as mining continue[d].

The most reasonable assumption to make – and [it is] one I . . . make – is that without further support, the ribs would have continued to deteriorate until they fell. In making this finding[,] I note the grill work or fencing installed on the . . . [roof and ribs] to prevent the fall of . . . draw rock[,] . . . [but the grill work and fencing] did not cover all areas of the gapped ribs. Indeed, it covered very little. The testimony revealed the cited area was traveled by miners both on foot and in vehicles. These miners, especially those on foot, were, in my opinion, reasonably likely to be struck by falling pieces of the rib.

I . . . find [compelling] Inspector Fleming's testimony that belt examiners who walked the cited area would walk . . . as the inspector put it, [in areas] of ["]least resistance["]. This observation reflects a truism of human nature. And since some of [the] areas of . . . ["]least resistance["] . . . were bound to be close to the ribs, I find the belt examiners in particular were reasonably likely to be injured.

I will add that while those riding in vehicles were protected by canopies to a certain extent, they were also subject to a hazard. As I understand the testimony, not all vehicles traveling in the cited area were equipped with canopies. And even those that were

had open sides.

Finally, being hit by falling ribs was reasonably likely to cause a serious injury, including cuts and broken bones. I also will note . . . the violation was the result of the operator's low negligence.

Tr. 1024-1027.

**KENT 2008-1617-R**

| CITATION NO. | DATE | 30 C.F.R. § |
|---|---|---|
| 8216089 | September 8, 2008 | 75.202(a) |

Counsel for Rockhouse stated the company wished to withdraw its contest. I approved the withdrawal and dismissed the case. Tr.829, 831.

**ORDER**

The foregoing considered, it **IS ORDERED** that Citations No. 8216019, 8216020, 8216025, 6660866, 6660753, 8216067, 8216068, 8216084 and 8216088 **ARE AFFIRMED.** The contests **ARE DENIED** and the cases **ARE DISMISSED**.

It **IS FURTHER ORDERED** that Citations No. 8216084 and 8216033 **ARE MODIFIED** to delete the S&S findings. The contests **ARE GRANTED IN PART** and the cases **ARE DISMISSED**.

It **IS FURTHER ORDERED** that Citation No. 66657618 **IS MODIFIED** to delete the S&S finding and to change the injury or illness finding to "unlikely." The contest **IS GRANTED IN PART** and the case **IS DISMISSED**.

Further, the Secretary **IS ORDERED** to modify Citation No. 66657619 to a "non-S&S citation" as agreed to at the hearing. The contest **IS GRANTED IN PART,** and upon modification of the citation, the case **IS DISMISSED.** Tr. 826.

Finally, based on the approved withdrawal of Rockhouse's contests for Citations No. 8216034, 6660752, 66657617, 8216001, 8216072, 8216073; 8216075, 8216082, 8216083 and 8216089, the contests **ARE DENIED** and the cases **ARE DISMISSED.**

David F. Barbour
Administrative Law Judge

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/ej

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**601 NEW JERSEY AVENUE N.W., SUITE 9500**
**WASHINGTON, D.C. 20001**
**(202) 434-9958**

December 23, 2008

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|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. WEVA 2006-654 |
| Petitioner | : | A.C. No. 46-08801-087351-01 |
| v. | : | |
| | : | Docket No. WEVA 2006-655 |
| ARACOMA COAL COMPANY, INC., | : | A.C. No. 46-08801-087351-02 |
| Respondent | : | |
| | : | Docket No. WEVA 2006-656 |
| | : | A.C. No. 46-08801-087351-03 |
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| | : | A.C. No. 46-08801-090231-01 |
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: A.C. No. 46-08801-142965-02
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: A.C. No. 46-08801-151759

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: A.C. No. 46-08801-155441-02
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: A.C. No. 46-08801-155953
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: Aracoma Alma Mine #1
: Mine ID 46-08801
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: Docket No. WEVA 2006-803
: A.C. No. 46-08802-090232-01
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: A.C. No. 46-08802-092751
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: A.C. No. 46-08802-097672-01
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: A.C. No. 46-08802-097672-02
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: A.C. No. 46-08802-100296
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: A.C. No. 46-08802-010749-01

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: A.C. No. 46-08802-124354-02
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: Docket No. WEVA 2008-905
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: Docket No. WEVA 2008-1054
: A.C. No. 46-08802-146531
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: A.C. No. 46-08802-149962
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: Docket No. WEVA 2008-1567
: A.C. No. 46-08802-155442-01
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: Docket No. WEVA 2008-1568
: A.C. No. 46-08802-155442-02

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: Hernshaw Mine
: Mine ID 46-08802

**DECISION APPROVING SETTLEMENT**
**ORDER TO PAY**

Appearances: Edward Clair, Esq.; Douglas White, Esq.; Heidi Strassler, Esq.; Keith Bell, Esq.; Jerald Feingold, Esq.; W. Christian Schumann, Esq.; Francine Serafin, Esq.; Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor

Mark Heath, Esq., for the Respondent

Before: Judge Lesnick

These cases are before me upon petitions for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. These proceedings consist of 102 penalty dockets and 1,302 citations and orders. The parties have filed a joint motion to approve a global settlement of citations incorporated in the above captioned dockets with a total proposed penalty of $2,806,027. The parties propose to reduce the total penalty to $1,700,000.[1] The alleged violations in these proceedings involve several mandatory standards and include 25 violations designated as contributory to the January 19, 2006, fire at Aracoma's Alma Mine #1 that resulted in the death of two miners. In relation to the civil penalty settlement of the designated contributory violations, the Secretary recognizes that Aracoma has agreed to pay the United States an additional $2,500,000 in fines for criminal violations related to the fire. I held a hearing in this matter on December 22, 2008, limited to issues raised in the joint motion.

In support of the proposed settlement, the parties agree that Aracoma will (outside the pattern of violations procedures set forth at 30 C.F.R. Part 104) be given a one-time opportunity to voluntarily provide MSHA with plans to reduce and/or maintain the rate of Significant and Substantial ("S&S") violations at both the Alma Mine #1 and the Hernshaw Mine to a rate at or below 125% of the national S&S issuance rate at all underground bituminous coal mines during that quarter.[2] MSHA will monitor the S&S issuance rate

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[1] The civil penalty is to be apportioned in payment of each covered citation and order in the same proportion as $1,700,000 is to the total assessment of $2,806,027.

[2] Under this provision, an S&S reduction plan adopted at the Alma Mine #1 and/or Hernshaw Mine will remain in effect only as long as the mine remains in immediate jeopardy of receiving a potential pattern warning letter after the plan's adoption. Upon the first MSHA pattern review in which it is determined that either mine is no longer in jeopardy of receiving a potential pattern warning letter because the mine does not meet the screening criteria set

quarterly commencing with the first full calendar quarter beginning after this settlement becomes final, commencing April 1, 2009.

The parties acknowledge that the goals for the Alma Mine #1 and the Hernshaw Mine are to reduce the number of S&S violations to a level at which the mines are not in jeopardy of receiving a potential pattern warning letter. The Alma Mine #1 goals are based on an incremental 30% reduction from the 15.6 S&S citations and orders issued per 100 on-site inspection hours at the mine during the baseline 24 months ending on the last day of June 2008. The goals for the Alma Mine #1 are set forth below:

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|---|---|
| First Quarter | 10.9 |
| Second Quarter | 7.6 or 125% of the National Average for all Underground Bituminous Coal Mines this Quarter, whichever is higher. |
| Each Subsequent Quarter | 125% of the National Average for all Underground Bituminous Coal Mines this Quarter |

The S&S issuance rate for all underground bituminous coal mines during the baseline 24 months ending on the last day of June 2008 was 7.1 issuances per 100 on-site inspection hours. The Hernshaw Mine's S&S issuance rate per 100 on-site inspection hours during the 24 months ending on the last day of June 2008 was 8.9. The Hernshaw Mine short-term goal is to achieve and/or maintain an S&S issuance rate of 125% of the 7.1 national rate, which is 8.9 S&S citations and orders issued per 100 on-site inspection hours for the first full calendar quarter beginning after this settlement becomes final. Thereafter, MSHA will measure the mine's S&S issuance rate against the S&S issuance rate for all underground bituminous coal mines each quarter. As long as the mine's S&S issuance rate remains at or below 125% of the national average for that quarter, the mine will not be considered to be exhibiting a potential pattern of violations.

If Aracoma chooses to adopt such voluntary S&S reduction plans, it will submit such plans to MSHA within 30 days of the date that this settlement becomes final. As long as each mine continues to achieve and maintain the goals described above, that mine will be able to remain on its S&S reduction plan indefinitely and MSHA will forego issuing potential pattern warning letters. If either mine fails to achieve the quarterly goals described herein, that mine will be eligible to receive a potential pattern warning letter during all subsequent MSHA pattern of violation reviews. Under no circumstances will MSHA issue these mines

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forth at http://www.msha.gov/pov/POVScreeningCriteria.pdf, that mine will no longer qualify for participation in the voluntary S&S reduction plan described herein, and will thereafter be evaluated, along with all other mines, under MSHA's normal pattern of violations process.

pattern of violation notices until after MSHA has instituted the pattern procedures under Part 104 against those mines.

In further support of the motion, the parties aver that in addition to the civil penalties referenced above, Aracoma has reached an agreement with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the January 19, 2006, Alma Mine #1 accident, and to pay a criminal fine of Two and One-Half Million Dollars ($2,500,000) to the United States of America. In addition, as a condition of probation, Aracoma has agreed to pay restitution as ordered by the Court.

The parties agree that, in light of the factual circumstances of the violations at issue, defenses that might be available to Aracoma, and the deterrent effect of both the civil and criminal penalties that are to be imposed, the amounts agreed upon by the parties herein are appropriate in light of the criteria set forth at Section 110(i) of the Mine Act and promote the purposes of the Act. The Secretary's assertions of the gravity of the violations and Aracoma's negligence are set forth in each of the citations and orders. Aracoma contends that it might be able to produce evidence to mitigate the Secretary's assertions and that several citations and orders are overlapping as to penalties assessed. The parties agree that the uncertainty of resolution of any such issues supports a reduction in the Secretary's proposed penalties. Although I held a hearing in this matter, it was not a full hearing on the merits; consequently, I must rely upon counsels' representations.

The parties also agree that the violations were abated in good faith. They stipulate that Aracoma is a large operator which, prior to January 19, 2006, had an average history of previous violations (see Exs. A attached to the penalty petitions), and that payment of the proposed penalty amount will not adversely affect Aracoma's ability to continue in business.

Based upon the review of the facts and the assessment procedures at 30 C.F.R. Part 100, the parties believe that the agreed upon civil penalty of $1,700,000 for the citations and orders set forth in Addenda 1 and 2 of the settlement motion is reasonable, and that payment of this amount will serve to effect the intent and purpose of the Act.

The parties note that, pursuant to this settlement agreement and the criminal plea expected to be entered in District Court, Aracoma will pay the United States of America a total of $4,200,000, all relating to conduct involved in the violations at issue here. The criminal fine, in conjunction with the civil penalties, serves an additional deterrent purpose and will encourage Aracoma's future compliance with the Mine Act and its mandatory standards.

Although I grant the settlement motion proffered by the parties, I do so reluctantly. The Commission has noted: "In determining whether to approve a proposed settlement a judge must consider, *inter alia*, whether the amount proposed will accomplish the underlying purpose of a civil penalty – to encourage and induce compliance with the Mine Act and its standards." *Madison Branch Management*, 17 FMSHRC 859, 867 (June 1995) (citations

omitted).[3] Moreover, in reviewing settlement agreements, Commission Judges must also "accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects . . . [to] determine whether it is 'fair, adequate and reasonable' . . . [and] 'adequately protects the public interest.'" *Id.* at 868 (citations omitted).

Here, the parties have agreed that Aracoma will pay a Mine Act penalty of $1.7 million dollars, which is approximately 61 percent of the penalty originally proposed by the Secretary. In contrast, the Chairman, Chief Executive Officer, and President of Massey Energy Company, Aracoma's parent company, received in 2007 a compensation package that probably exceeded $23 million. *Massey CEO's pay increased more than 35 percent in 2007*, Herald-Dispatch (Huntington, West Virginia), April 15, 2008.[4] I question whether a penalty of $1.7 million is adequate in light of Aracoma's enormous size as indicated by the compensation of its leader. However, I must look beyond the Mine Act penalty and consider "'all relief'" in determining whether the settlement "is consistent with the public interest." 17 FMSHRC at 868. I have thus determined that the penalty to which the parties have agreed is appropriate in light of the criminal sanctions Aracoma has agreed to pay in federal court proceedings. Mot. at 8 (noting that Aracoma "has reached an agreement with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the January 19, 2006, Alma Mine #1 accident, and to pay a criminal fine of Two and One-Half Million Dollars ($2,500,000) to the United States of America. In addition, as a condition of probation, Aracoma has agreed to pay restitution as ordered by the Court."). In approving the settlement motion, I have also deferred to the prosecutorial discretion of the Secretary with the understanding that the settlement may reflect problems of proof and questions of resource allocation.

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

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[3] In *Wilmot Mining Co.*, the Commission stated: as follows: "Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k) . . . A judge's oversight of the settlement process 'is an adjudicative function that necessarily involves wide discretion.'" 9 FMSHRC 684 (1987) (citations omitted).

[4] The Herald-Dispatch article is available online at: www.herald-dispatch.com/business/x1615608967. The $23,000,000 estimate may be conservative. The AFL-CIO Executive Paywatch Database estimates that Massey's CEO received $37,059,912 in total 2007 compensation. http://www.aflcio.org/corporatewatch/paywatch/ceou/database.cfm.

**WHEREFORE,** the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of $1,700,000 within 60 days of this order. Upon receipt of payment, this matter is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

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/ro, mvw

# ADMINISTRATIVE LAW JUDGE ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
202-434-9981/tele 202-434-9949/fax

November 24, 2008

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. LAKE 2008-68<br>A.C. No. 11-03054-130199-01 |
| v. | : | Docket No. LAKE 2008-69<br>A.C. No. 11-03054-130199-02 |
| BIG RIDGE, INCORPORATED, Respondent | : | Mine: Willow Lake Portal |

**ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING THE SECRETARY'S MOTION TO AMEND**

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Big Ridge, Inc., pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The specific citations at issue, Citation Nos. 6667365 and 6667393, allege significant and substantial ("S&S") violations of notices to provide safeguards issued pursuant to the Secretary's regulations applicable to underground coal mines. 30 C.F.R. §§ 75.1403, 75.1403-5(g) and 75.1403-10(i). Big Ridge filed a motion for partial summary decision challenging the findings that the violations were S&S. The Secretary countered by moving to amend the citations to allege violations of 30 C.F.R. §75.1403. Big Ridge opposed the motion to amend, contending that, even if allowed, the amendment would not defeat its motion. For the reasons set forth below, I find that there exists no genuine issue as to any material fact, and that Big Ridge is entitled to summary decision as a matter of law on the issue of whether the violations can be designated S&S.[1] The Secretary's motions to amend the citations will be denied. Accordingly, Citation Nos. 6667365 and 6667393 will be amended to specify that the violations were not significant and substantial.

Facts

On September 20, 2007, a coal mine inspector for MSHA, inspected Big Ridge's Willow

[1] Commission Procedural Rule 67 provides that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

Lake Portal Mine in Saline County, Illinois. Willow Lake is a large underground mine that extracts bituminous coal. During the inspection, he observed that the travelway along either side of the 2-A belt conveyor was obstructed, and issued Citation No. 6667365, alleging a violation of safeguard no. 7581365, which had been issued on May 5, 2005, based upon criteria set forth in 30 C.F.R. § 75.1403-5(g). Resp. Mot., Ex. 1. The mine was inspected again on October 5, 2007. Muddy conditions and bottom irregularities on the 5-C travel road were observed, for which Citation No. 6667393 was issued, alleging a violation of safeguard no. 7581412, which had been issued on August 2, 2005, based upon criteria set forth in 30 C.F.R. §75.1403-10(i). Resp. Mot., Ex. 2. Both citations allege that the violations were S&S.

Big Ridge timely contested the civil penalties assessed for the violations, and the Secretary filed petitions for assessment of civil penalties. Big Ridge filed answers to the petitions, and a motion for partial summary decision on the S&S issue. The Secretary opposed the motion and moved to amend the citations. Big Ridge opposed the Secretary's motion, and both parties filed supplemental memoranda of law on the issues.

Analysis

Big Ridge contends that, under section 104(d)(1) of the Act, only violations of mandatory safety standards can be designated S&S and, because neither the safeguards allegedly violated, nor sections 75.1403-5(g) and 75.1403-10(i), are mandatory standards, the violations cannot be designated S&S. Big Ridge further argues that amending the citations to allege violations of section 75.1403 would have no effect on the primary issue, because it was cited for violating the underlying safeguard notices, not for violating section 75.1403.

The Secretary argues that the violations alleged in the citations are, in effect, violations of 30 C.F.R. §75.1403, which is taken directly from section 314(b) of Title III of the Act, and which grants her authority to issue safeguards. Because section 301(a) states that: "The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines," and section 802(l) defines the term "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of this Act," she contends that section 75.1403 is a mandatory safety standard. Consequently, she asserts that the violations can properly be designated S&S, and Big Ridge's motion for partial summary decision should be denied.

Section 104(d)(1) of the Act states, in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds that there has been a violation of any mandatory health or safety standard, and if he also finds that,* while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard,* and if he finds such violation to be caused by an

> unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. (emphasis added)

30 U.S.C. §814(d)(1). A "mandatory health or safety standard" is defined as "the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this chapter." 30 U.S.C. 802(l).

In *Cyprus Emerald Res. Corp.*, 195 F.3d 42 (D.C. Cir. 1999), the court held that the language of section 104(d)(1) was clear on its face, and permitted a designation of S&S only for violations of mandatory health or safety standards. It reversed a holding by the Commission that a violation of a Part 50 regulation could be designated S&S, even though the regulation was not a mandatory health or safety standard. The question to be decided, therefore, is whether or not the subject citations allege violations of mandatory health or safety standards.

Section 314 of the Act specifies a number of safety requirements for "Hoisting and Mantrips" equipment. For example, section 314(c) provides:

> (c) Hoists shall have rated capacities consistent with the loads handled and the recommended safety factors of the ropes used. An accurate and reliable indicator of the position of the cage, platform, skip, bucket, or cars shall be provided.

30 U.S.C. § 874(c). Those specific requirements are mandatory safety standards pursuant to section 301(a) of the Act.[2] 30 U.S.C. §§ 861 and 961(b).

In addition to the specific safety requirements in sub-sections 314(a) and (c) through (f), section 314(b) grants the Secretary broad discretion to issue safeguards in order to guard against all hazards attendant upon haulage and transportation in coal mining. *Southern Ohio Coal Co.*,

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[2] Section 301(a) of the Act states:

> The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act.

In addition, section 301(b)(1) of the Addendum to the 1977 Mine Act, specified that "standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. § 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards" under the 1977 Act. 30 U.S.C. § 961(b).

7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"); *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*"); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (Apr. 1985). Section 314(b) of the Act provides:

> (b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b). The Secretary promulgated the current regulations addressing safeguards in 1970. 30 C.F.R. §§ 75.1403 – 75.1403-11. The initial provision, section 75.1403, repeats, verbatim, the language of section 314(b) of the Act. Section 75-1403-1 sets forth procedures for the issuance of safeguards and explains that sections 75-1403-2 through 75.1403-11 set out the criteria by which MSHA inspectors are to be guided in requiring safeguards on a mine-by-mine basis.[3]

> § 75.1403-1 General Criteria
>
> (a) Sections 75-1404-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.
>
> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator under section 104 of the Act.

30 C.F.R. § 75.1403-1(a) and (b).

Under this regulatory scheme issuance of a notice to provide safeguard requires that an inspector: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. *SOCCO II*, 14 FMSHRC at 8.

In *SOCCO I*, the Commission discussed the unique nature of safeguards.

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[3] MSHA's Program Policy Manual recognizes that the guideline criteria set forth in the regulations are not mandatory, and that safeguard notices must address hazards that are not covered by a mandatory safety standard. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 125 (2003).

> [i]t is of paramount importance to recognize the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to 'safeguard notices' issued by [her] inspector . . . Mandatory standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Mine Act. Section 314(b) of the Mine Act, on the other hand, grants the Secretary a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards.

*SOCCO I*, 7 FMSHRC at 512.

A notice of safeguard is an order to comply with a specific safety requirement within a fixed time frame, and to continue to comply with it thereafter. As orders issued pursuant to section 314(b) of the Act, they are enforceable under section 104(a) of the Act. Violations of a safeguard are enforced by issuance section 104(a) citations and, upon an operator's failure to timely abate a violation, by issuance of withdrawal orders pursuant to section 104(b). While not always consistent in use of language, Commission decisions have made clear that it is the violation of the written safeguard that subjects an operator to liability for penalties and sanctions imposed pursuant to sections 104(b) and 110 of the Act. *SOCCO I*, 7 FMSHRC at 513 (operator not given sufficient notice that conditions "would violate the underlying safeguard notice's terms"); *SOCCO II*, 14 FMSHRC at 14 (on remand the judge should "determine whether the safeguard was violated"). As the Secretary recognized in her papers, "the actual issue to be litigated . . . is whether the operator complied with the underlying safeguard." Sec'y Mem. of Law at 4.

The Commission, in its later-reversed *Cyprus Emerald* decision, discussed *Mathies Coal*, the seminal case interpreting the S&S language.[4] It noted that the citation involved in *Mathies* alleged a failure to comply with a safeguard notice, and that: "A safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22. (Aug. 1998). In reversing the Commission, the circuit court made clear that regulations or other provisions that are not mandatory health or safety standards cannot be designated S&S. The safeguards at issue in these cases were issued in 2005 by MSHA inspectors, and are not mandatory safety standards promulgated pursuant to Title I of the Act. Consequently, the subject citations, which allege violations of those safeguards, do not allege violations of mandatory health or safety standards.

The Secretary argues that because section 314(b) of the Act, pursuant to which the

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[4] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

safeguards were issued, is included in Title III, which establishes mandatory safety standards, that it is a mandatory safety standard. She has also moved to amend the citations to specify that they allege violations of section 75.1403, the regulatory counterpart to section 314(b) of the Act. However, neither section 75.1403, nor section 314(b) of the Act, establish mandatory standards that could be violated by a mine operator. Section 314(b), as previously noted, is a grant of regulatory authority to the Secretary. To hold that a specific written safeguard is a mandatory safety standard, because the grant of regulatory authority to issue it is contained in Title III of the Act, would impremissably elevate form over substance.[5] As the Commission observed in its *Cyprus Emerald* decision, safeguards are not mandatory health or safety standards. Regardless of the regulatory or statutory provision referenced in the citation, the actual violation alleged is that the operator failed to comply with a notice of safeguard issued by an MSHA inspector.

The Secretary has argued in a related case that holding that safeguard violations cannot be S&S would deprive the Secretary of an important enforcement tool, and would be at odds with Congress' intent to create a flexible mine-specific enforcement system responsive to the unique hazards related to mine transportation.[6] The same argument was made, and rejected, in *Cyprus Emerald*, where the court observed that section 107(a) imminent danger withdrawal orders, section 104(a) citations and section 110 penalties provide "adequate" means of enforcement.[7] 195 F.3d at 46. Withdrawal orders, issued pursuant to section 104(b), also provide a powerful tool to ensure that any violation of a safeguard is promptly remedied.

The Secretary also argues that any ambiguity in the statute must be resolved by according deference to her interpretation. However, as in *Cyprus Emerald*, the argument is rejected, because the statutory language is not ambiguous. That section 314(b) is contained in Title III of the Act does not alter its fundamental nature, and transform the grant of regulatory authority into a mandatory safety standard. To the extent that ambiguity could be found, the Secretary's attempted transformation of section 314(b) into a mandatory safety standard would be

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[5] In *SOCCO II* the Commission noted that section 314(b) "is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Unlike other provisions of Title III of the Mine act, section 314 contains few specific mandatory standards. The specific mandatory standards in section 314 concern hoists, brakes on rail equipment and automatic couplers." Id. at 5.

[6] Only mandatory health and safety standards can be enforced through the issuance of withdrawal orders pursuant to section 104(d) of the Act. In addition, operators who engage in a pattern of committing S&S violations may be subject to enhanced enforcement provisions of section 104(e) of the Act. 30 U.S.C. § 814(d) and (e).

[7] Imminent danger withdrawal orders, issued pursuant to section 107(a) of the Act, can be issued to address immediately dangerous conditions, regardless of whether the danger violates the Mine Act or the Secretary's regulations. *Utah Power & Light, Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

unreasonable.

The subject citations allege violations of safeguards issued by MSHA inspectors. They do not allege violations of mandatory safety standards, and they cannot be designated S&S.[8]

The Secretary's Motion to Amend the Citations

The Secretary has moved to amend Citation Nos. 6667365 and 6667393 to allege violations of section 75.1403. She asserts that the amendments would more accurately reflect the actual violations cited than references to the guideline criteria. The citations were issued on the Secretary's standard "Mine Citation/Order" form, "MSHA Form 7000-3, Mar 85 (revised)." That form contains a block numbered 9, entitled "Violation," section "C" of which reads: "Part/Section of Title 30 CFR." In the space allowed, the inspectors inserted "75.1403-5(g)" and "75.1403-10(i)," respectively, the regulatory criteria that were, no doubt, used as guidance in issuance of the safeguards. References to the actual safeguards alleged to have been violated are made in block 14 of the forms, entitled: "Initial Action," where the specific safeguards are identified by number and date of issuance.

The MSHA form is not well-suited to citing violations of safeguard provisions. While a reference in block 9 to the Secretary's regulatory authority to issue safeguards might be somewhat more appropriate than a reference to the guideline criteria, neither would be an accurate description of the violation actually alleged. As noted above, the actual violations alleged in the citations are that Big Ridge failed to comply with a specific notice of safeguard, not that it failed to comply with a regulatory provision.

The Secretary's motions to amend the citations to allege violations of 30 C.F.R. § 75.1403, are denied. The proposed amendments would not accurately state the actual violations alleged in the citations.

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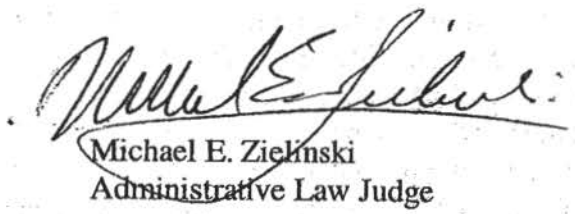
[8] The Secretary has cited several Commission decisions upholding S&S designations of safeguard violations. *See, e.g., Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998). However, the cases were all decided prior to the court's decision in *Cyprus Emerald*.

## ORDER

Based upon the foregoing, The Secretary's Motions to Amend Citations are **DENIED**, the Respondent's Motion for Partial Summary Decision is **GRANTED**, and the gravity designations of Citation Nos. 6667365 and 6667393 are **AMENDED** to "non-significant and substantial."



Michael E. Zielinski
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
202-434-9981/tele 202-434-9949/fax

December 4, 2008

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. PENN 2008-318<br>A.C. No. 36-05018-143487-01 |
| v. | : | |
| CUMBERLAND COAL RESOURCES, LP, Respondent | : | Mine: Cumberland |

## ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor against Cumberland Coal Resources, LP, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The specific citations at issue, Citation Nos. 7013038, 7025471, 7025962 and 7070887, allege significant and substantial ("S&S") violations of notices to provide safeguards issued pursuant to the Secretary's regulations applicable to underground coal mines. 30 C.F.R. § 75.1403. Cumberland filed a motion for partial summary decision challenging the findings that the violations were S&S, and the Secretary filed a response opposing Respondent's motion. For the reasons set forth below, I find that there exists no genuine issue as to any material fact, and that Cumberland is entitled to summary decision as a matter of law on the issue of whether the violations can be designated S&S.[1] Accordingly, Citation Nos. 7013038, 7025471, 7025962 and 7070887 will be amended to specify that the violations were not significant and substantial.

Facts

On October 4, 2007, a coal mine inspector for MSHA, inspected Cumberland Coal 's Cumberland Mine, which is a large underground mine that extracts bituminous coal in Greene

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[1] Commission Procedural Rule 67 provides that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The undersigned Administrative Law Judge recently granted a virtually identical motion filed by mine operator Big Ridge, Incorporated. *Big Ridge Inc.*, Docket Nos. LAKE 2008-68 and LAKE 2008-69, Order Granting Respondent's Motion for Partial Summary Decision and Denying the Secretary's Motion to Amend, November 24, 2008.

County, Pennsylvania. During the inspection, he observed that a clear travelway of at least 24 inches was not being maintained along the 8 Butt coal conveyor belt walk side from the tail piece outby for 25 feet, and issued Citation No. 7025471, alleging a violation of Safeguard No. 7083583, which had been issued on October 17, 2003. Resp. Mot. Ex. 2. On November 5, 2007, an inspector observed that a two foot clear walkway was not being maintained on the tight side of the South Mains Beltline, for which Citation No. 7013038 was issued, also alleging a violation of Safeguard No. 7083583. Resp. Mot. Ex. 1. That same day another inspector issued Citation No. 7025962, for failure to maintain a clear travelway at least 24 inches wide on both sides of the Cumberland West section (MMU 020-0) belt feeder, in violation of Safeguard No. 7025484, issued on October 4, 2007. Resp. Mot. Ex. 3. On December 11, 2007, an inspector observed that Cumberland had failed to maintain a clear travelway of at least 24 inches along the walk side of the feeder on the 029-0 mmu section, and issued Citation No. 7070887, which also alleged a violation of Safeguard No. 7025484. Resp. Mot. Ex. 4. All citations allege that the violations were S&S.

Cumberland timely contested the civil penalties assessed for the violations, and the Secretary filed a petition for assessment of civil penalties. Cumberland filed an answer to the petition, and a motion for partial summary decision on the S&S issue. The Secretary opposed the motion.

Analysis

Cumberland Coal contends that, under section 104(d)(1) of the Act, only violations of mandatory health and safety standards can be designated S&S and, because neither the safeguards allegedly violated, nor section 75.1403, are mandatory standards, the violations cannot be designated S&S.

The Secretary argues that 30 C.F.R. §75.1403 is taken directly from section 314(b) of Title III of the Act, which grants her authority to issue safeguards. Because section 301(a) states that: "The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines," and section 802(l) defines the term "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II and III of this Act," she contends that section 75.1403 is a mandatory safety standard. Consequently, she asserts that the violations can properly be designated S&S, and Cumberland Coal's motion for partial summary decision should be denied.

Section 104(d)(1) of the Act states, in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds that there has been a violation of any mandatory health or safety standard, and if he also finds that,* while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other*

*mine safety or health hazard,* and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. (emphasis added)

30 U.S.C. §814(d)(1). A "mandatory health or safety standard" is defined as "the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this chapter." 30 U.S.C. 802(l).

In *Cyprus Emerald Res. Corp.*, 195 F.3d 42 (D.C. Cir. 1999), the court held that the language of section 104(d)(1) was clear on its face, and permitted a designation of S&S only for violations of mandatory health or safety standards. It reversed a holding by the Commission that a violation of a Part 50 regulation could be designated S&S, even though the regulation was not a mandatory health or safety standard. The question to be decided, therefore, is whether or not the subject citations allege violations of mandatory health or safety standards.

Section 314 of the Act specifies a number of safety requirements for "Hoisting and Mantrips" equipment. For example, section 314(c) provides:

(c) Hoists shall have rated capacities consistent with the loads handled and the recommended safety factors of the ropes used. An accurate and reliable indicator of the position of the cage, platform, skip, bucket, or cars shall be provided.

30 U.S.C. § 874(c). Those specific requirements are mandatory safety standards pursuant to section 301(a) of the Act.[2] 30 U.S.C. §§ 861 and 961(b).

In addition to the specific safety requirements in sub-sections 314(a) and (c) through (f), section 314(b) grants the Secretary broad discretion to issue safeguards in order to guard against

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[2] Section 301(a) of the Act states:

The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act.

In addition, section 301(b)(1) of the Addendum to the 1977 Mine Act, specified that "standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. § 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards" under the 1977 Act. 30 U.S.C. § 961(b).

all hazards attendant upon haulage and transportation in coal mining. *Southern Ohio Coal Co.*, 7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"); *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*"); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (Apr. 1985). Section 314(b) of the Act provides:

> (b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b). The Secretary promulgated the current regulations addressing safeguards in 1970. 30 C.F.R. §§ 75.1403 – 75.1403-11. The initial provision, section 75.1403, repeats, verbatim, the language of section 314(b) of the Act. Section 75-1403-1 sets forth procedures for the issuance of safeguards and explains that sections 75-1403-2 through 75.1403-11 set out the criteria by which MSHA inspectors are to be guided in requiring safeguards on a mine-by-mine basis.[3]

> § 75.1403-1 General Criteria
>
> (a) Sections 75-1404-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.
>
> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator under section 104 of the Act.

30 C.F.R. § 75.1403-1(a) and (b). Under this regulatory scheme issuance of a notice to provide safeguard requires that an inspector: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. *SOCCO II*, 14 FMSHRC at 8.

In *SOCCO I*, the Commission discussed the unique nature of safeguards.

> [i]t is of paramount importance to recognize the crucial difference in the rules of

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[3] MSHA's Program Policy Manual recognizes that the guideline criteria set forth in the regulations are not mandatory, and that safeguard notices must address hazards that are not covered by a mandatory safety standard. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 125 (2003).

> interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to 'safeguard notices' issued by [her] inspector . . . Mandatory standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Mine Act. Section 314(b) of the Mine Act, on the other hand, grants the Secretary a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards.

*SOCCO I*, 7 FMSHRC at 512.

A notice of safeguard is an order to comply with a specific safety requirement within a fixed time frame, and to continue to comply with it thereafter. As orders issued pursuant to section 314(b) of the Act, they are enforceable under section 104(a) of the Act. Violations of a safeguard are enforced by issuance section 104(a) citations and, upon an operator's failure to timely abate a violation, by issuance of withdrawal orders pursuant to section 104(b). While not always consistent in use of language, Commission decisions have made clear that it is the violation of the written safeguard that subjects an operator to liability for penalties and sanctions imposed pursuant to sections 104(b) and 110 of the Act. *SOCCO I*, 7 FMSHRC at 513 (operator not given sufficient notice that conditions "would violate the underlying safeguard notice's terms"); *SOCCO II*, 14 FMSHRC at 14 (on remand the judge should "determine whether the safeguard was violated").

The Commission, in its later-reversed *Cyprus Emerald* decision, discussed *Mathies Coal*, the seminal case interpreting the Act's S&S language.[4] It noted that the citation involved in *Mathies* alleged a failure to comply with a safeguard notice, and that: "A safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22. (Aug. 1998). In reversing the Commission, the circuit court made clear that regulations or other provisions that are not mandatory health or safety standards cannot be designated S&S. The safeguards at issue in this case were issued in 2003 and 2007 by MSHA inspectors, and are not mandatory safety standards promulgated pursuant to Title I of the Act. Consequently, the subject citations, which allege violations of those safeguards, do not allege violations of mandatory health or safety standards.

The Secretary argues that when Congress passed the Act of 1977 it directed that the standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 shall remain in effect as mandatory health or safety standards under the Act of 1977 until the Secretary of Labor promulgates new or revised mandatory standards. As such, because no new or revised

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[4] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

standards were issued, section 75.1403 remains in effect as a mandatory safety standard. Sec'y Resp. at 4. The Secretary further argues that because section 314(b) of the Act, pursuant to which the safeguards were issued, is included in Title III, which establishes mandatory safety standards, that it is a mandatory safety standard.

Neither section 75.1403, nor section 314(b) of the Act, establish mandatory standards that could be violated by a mine operator. Section 314(b), as previously noted, is a grant of regulatory authority to the Secretary. To hold that a specific written safeguard is a mandatory safety standard, because the grant of regulatory authority to issue it is contained in Title III of the Act, would impermissibly elevate form over substance.[5] As the Commission observed in its *Cyprus Emerald* decision, safeguards are not mandatory health or safety standards. Regardless of the regulatory or statutory provision referenced in the citation, the actual violation alleged is that the operator failed to comply with a notice of safeguard issued by an MSHA inspector.

The Secretary argues that holding that safeguard violations cannot be S&S would deprive the Secretary of an important enforcement tool, and would be at odds with Congress' intent to create a flexible mine-specific enforcement system responsive to the unique hazards related to mine transportation.[6] The same argument was made, and rejected, in *Cyprus Emerald*, where the court observed that section 107(a) imminent danger withdrawal orders, section 104(a) citations and section 110 penalties provide "adequate" means of enforcement.[7] 195 F.3d at 46. Withdrawal orders, issued pursuant to section 104(b), also provide a powerful tool to ensure that

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[5] In *SOCCO II* the Commission noted that section 314(b) "is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Unlike other provisions of Title III of the Mine act, section 314 contains few specific mandatory standards. The specific mandatory standards in section 314 concern hoists, brakes on rail equipment and automatic couplers." 14 FMSHRC at 5. The Commission went on to note that the Secretary had recognized in a 1991 regulatory agenda, the need for specific mandatory standards to protect miners from hazards associated with the hoisting and transportation of persons and materials, and "strongly suggest[ed] that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards. *Id.* at 16. Such standards have yet to be promulgated.

[6] Only mandatory health and safety standards can be enforced through the issuance of withdrawal orders pursuant to section 104(d) of the Act. In addition, operators who engage in a pattern of committing S&S violations may be subject to enhanced enforcement provisions of section 104(e) of the Act. 30 U.S.C. § 814(d) and (e).

[7] Imminent danger withdrawal orders, issued pursuant to section 107(a) of the Act, can be issued to address immediately dangerous conditions, regardless of whether the danger violates the Mine Act or the Secretary's regulations. *Utah Power & Light, Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

any violation of a safeguard is promptly remedied.

The Secretary also argues that any ambiguity in the statute must be resolved by according deference to her interpretation. However, as in *Cyprus Emerald*, the argument is rejected, because the statutory language is not ambiguous. That section 314(b) is contained in Title III of the Act does not alter its fundamental nature, and transform the grant of regulatory authority into a mandatory safety standard. To the extent that ambiguity could be found, the Secretary's attempted transformation of section 314(b) into a mandatory safety standard would be unreasonable.

As noted above, the actual violations alleged in the citations are that Cumberland Coal failed to comply with specific notices of safeguard issued by MSHA inspectors, not that it failed to comply with a regulatory provision. Therefore, they do not allege violations of mandatory safety standards, and they cannot be designated S&S.[8]

## ORDER

Based upon the foregoing, the Respondent's Motion for Partial Summary Decision is **GRANTED**, and the gravity designations of Citation Nos. 7013038, 7025471, 7025962 and 7070887 are **AMENDED** to "non-significant and substantial."

Michael E. Zielinski
Administrative Law Judge

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[8] The Secretary has cited several Commission decisions upholding S&S designations of safeguard violations. *See, e.g., Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998). However, the cases were all decided prior to the court's decision in *Cyprus Emerald*.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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December 10, 2008

| | | |
|---|---|---|
| AGAPITO ASSOCIATES, INC., Contestant | : | CONTEST PROCEEDING |
| | : | Docket No. WEST 2008-1451-R |
| | : | Citation No. 7697010; 7/24/2008 |
| v. | : | |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Crandall Canyon Mine Mine ID 42-01715 |

**ORDER GRANTING MOTION FOR RECONSIDERATION**
**ORDER GRANTING LIMITED STAY**

This case is before me on a notice of contest filed by Agapito Associates, Inc. ("Agapito") against the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act"). On September 3, 2008, the Secretary of Labor filed a motion to stay this proceeding because the U.S. Attorney for the District of Utah is conducting a criminal investigation into a fatal accident at the Crandall Canyon Mine (the "Mine"). The case involves a citation issued to Agapito following the coal pillar failure at the Crandall Canyon Mine on August 6, 2007, that resulted in the deaths of six miners. Agapito opposed the motion primarily because it is not seeking an adjudication of the merits of the citation at this time. Instead, it is seeking a ruling that it was not subject to Mine Act jurisdiction at the Mine.[1]

By order dated September 12, 2008, I denied the Secretary's motion to stay. (30 FMSHRC ___ ) On September 29, 2008, the Secretary filed a motion requesting that I reconsider my order denying her motion to stay. The Secretary filed a brief to support her motion and Agapito filed a brief in opposition. I granted the Secretary's request to file a reply to Agapito's opposition and I granted Agapito's motion to file a sur-reply.

## I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary argues that reconsideration is warranted for a number of reasons. First, she argues that, by analogy, a recent U.S. Supreme Court precedent makes clear that whether Agapito falls within the definition of "mine operator" in section 3(d) of the Mine Act is an element of the

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[1] Agapito entered a "special appearance for the purpose of contesting the Federal Mine Safety and Health Review Commission's jurisdiction over the Contestant pursuant to section 3(d) of the" Mine Act.

claim rather than a question of subject matter jurisdiction. As a consequence, this issue should not be adjudicated as a threshold matter but should be considered when adjudicating the merits of the citation. The Secretary also contends that, although she issued a detailed accident investigation report following the accident at the Crandall Canyon Mine, this report was not written to resolve the issue as to whether Agapito was an independent contractor subject to the requirements of the Mine Act. Indeed, several key Agapito officials refused to be interviewed during MSHA's investigation. As a consequence, Agapito's suggestion that the jurisdiction issue should be resolved on the basis of her accident investigation report is not acceptable. Finally, the Secretary states that the facts necessary to resolve the issue of Agapito's status as an independent contractor will inexorably be intertwined with the facts necessary to establish that a violation of a safety standard occurred.[2] She believes that Agapito's arguments require a close examination of the services it provided to the mine owner/operator.[3] The Secretary now asks that the case be stayed for 90 days, rather than for an indefinite period, and she states that she will provide a status report on the progress of the criminal investigation at that time.

Agapito argues that reconsideration of my order denying the motion for a stay is not warranted. There has been no change in controlling law, the order did not contain a clear error of law, and the order will not result in any injustice. Agapito notes that I followed the guidelines set forth in *Buck Creek Coal*, 17 FMSHRC 500 (April 1995) when I determined that the case should not be stayed. Agapito argues that none of the Secretary's arguments necessitate reconsideration of my original order denying the motion for stay. Agapito maintains that the Secretary's jurisdictional authority to cite it as an independent contractor is a threshold matter. In addition, the narrow issue of whether Agapito was an independent contractor can be resolved without interfering with the criminal investigation.

## II. RESOLUTION OF THE ISSUES

I can dispose of the first issue rather quickly. Agapito argues that I should not entertain the motion for reconsideration because the Secretary has not established that reconsideration is warranted. It argues that the Commission has held that reconsideration "should not be granted, absent highly unusual circumstances, unless the . . . court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law." *Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001) (emphasis in original). In that case, however, the Commission was construing Commission Procedural Rule 78, 29 C.F.R. § 2700.78,

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[2] The citation at issue alleges a violation of 30 C.F.R. § 75.203(a). It states that Agapito "inaccurately evaluated the conditions and events at the mine when determining if areas of the mine were safe for mining" and, based on its results, "recommended to the operator that mining methods were safe and pillar and barrier dimensions were appropriate when in fact they were not."

[3] The parties refer to the owner operator as GRI/UEI, which stands for Genwal Resources, Inc., and UtahAmerican Energy, Inc.

which concerns reconsideration of a final decision of the Commission. In the present case, the Secretary is asking for reconsideration of an interim order issued by an administrative law judge at the outset of a case. I find that I have the authority and discretion to reconsider my order of September 12 even where the Secretary has not met the criteria set forth in *Island Creek*. I also find that the Secretary has presented sufficient justification for me to reconsider my order denying the motion for stay. As a consequence, I reject Agapito's argument that I should not consider the Secretary's motion.

A review of the key provisions of the Mine Act is helpful. Section 4 of the Mine Act, entitled "Mines Subject to Act," provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each *operator* of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803 (Emphasis added). Section 104(a) of the Mine Act grants the Secretary the authority to issue a citation if the Secretary's representative believes that "an operator of a coal or other mine subject to this Act" has violated a safety or health standard. The term "operator," as used in the Mine Act, is defined in section 3(d) as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any *independent contractor performing services or construction at such mine*." 30 U.S.C. §802(d) (emphasis added). Section 105(d) of the Mine Act grants jurisdiction to the Commission to adjudicate contests of citations and orders issued by MSHA as well as contests of the Secretary's proposed penalties. 30 U.S.C. § 815(d). Thus, these provisions of the Mine Act grant the Secretary the authority to issue a citation to an independent contractor performing services at a coal or other mine and the Commission has the authority to adjudicate a contest of the citation and the associated civil penalty.

The Crandall Canyon Mine clearly fits within the definition of "coal or other mine" in section 3(h)(1) of the Mine Act. The issue raised by Agapito at this point in this proceeding is whether it was an operator as result of being an "independent contractor performing services at a coal or other mine." Agapito contends that it was not an independent contractor but was a geological consulting firm that provided "advice, analysis, and consultation to mine operators" from its office in Grand Junction, Colorado. (A. Opposition to Sec'y's Motion to Stay). It is clear that Agapito provided services related to underground mining at Crandall Canyon Mine. Agapito would like the independent contractor issue immediately adjudicated before the U.S. Attorney initiates or completes a criminal investigation.

The first question raised by the Secretary in the motion for reconsideration concerns her argument that the issue of Agapito's status as an independent contractor is an element of the claim to be adjudicated in due course rather than a threshold question of subject matter jurisdiction. She relies in large part on the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500; 126 S. Ct. 1235 (2006). She did not discuss this decision in her original motion requesting a stay.

In *Arbaugh*, the Supreme Court discussed the "distinction between two sometimes confused or conflated concepts: federal-court 'subject matter' jurisdiction over a controversy;

and the essential ingredients of a federal claim for relief." 546 U.S. 503, 126 S.Ct. 1238. Ms. Arbaugh prevailed in a case alleging sexual harassment at work under Title VII of the Civil Rights Act of 1964. Two weeks after the trial judge entered judgment on the jury verdict in her favor, the employer moved to dismiss the case for want of federal subject matter jurisdiction. For the first time in the litigation, the employer asserted that it had fewer that 15 employees on its payroll and it was not subject to being sued under Title VII. The trial court stated that it had no choice but to grant the motion because it believed that the 15-employee requirement in Title VII was jurisdictional. The court of appeals affirmed the district court's dismissal of the case.

The Supreme Court reversed because it determined that the employee-numerosity requirement is directly related to the substantive adequacy of Arbaugh's Title VII claim rather than the jurisdiction of the court to hear the case. As a consequence, the employer could not raise this issue after the close of the trial. The court stated that the objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by the court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. An argument that the plaintiff failed to establish an element of a claim, on the other hand, must be made in a pleading, a motion, or at trial on the merits.

The Court recognized that federal courts, including the Supreme Court, have often "been less than meticulous" when analyzing the "subject matter jurisdiction/ingredient-of-claim-for-relief dichotomy." 546 U.S. 511; 126 S. Ct. 1242. The Court stated that the basic statutory grants of jurisdiction for federal courts are 28 U.S.C. §§ 1331 and 1332. The Civil Rights Act of 1964 also contains a provision granting jurisdiction to federal courts. 42 U.S.C. § 2000e-5(f)(3).

The Supreme Court looked at several factors in reaching its conclusion that the 15-employee provision related to the merits of the case. First, subject matter jurisdiction can never be waived and courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. Yet, nothing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met. Second, the trial judge, not the jury, determines whether the court has subject matter jurisdiction in a case. The judge is allowed to review the evidence to resolve a jurisdictional dispute if the facts are contested. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of any contested facts. The court concluded that the factual disputes concerning whether the employer was exempt from liability because of the 15-employee provision in the statute should have been resolved by the trier of fact and not the trial judge.

In the instant case, the Secretary argues that the status of Agapito as an independent contractor is not a question of subject matter jurisdiction. The definition of a mine operator is contained in section 3(d) of the Mine Act and this definition includes independent contractors. It is significant that this definition was not included in the section 105(d) of the Mine Act, which grants the Commission jurisdiction to hear contests of citations, orders, and civil penalties. As a consequence, the Secretary contends that Congress clearly did not intend for the issue whether an

entity is an independent contractor to be a jurisdictional one. The Commission has jurisdiction in this case because Agapito contested a citation that was issued to it by MSHA, not because Agapito is an independent contractor.

Agapito argues that *Arbaugh* is wholly inapplicable to the issues in this case. Federal district courts enjoys broad statutory authority to hear cases arising under federal law under 28 U.S.C. § 1331. The Supreme Court rejected the notion that the district court lacked jurisdiction over a case because of limitations elsewhere in the particular statute involved. The Commission, however, does not have jurisdiction over this case if Agapito is not an operator as that term is used in the statute. Congress did not grant the Commission broad plenary jurisdiction over all issues arising under the Mine Act.

Agapito also argues that, even if the principles set forth in *Arbaugh* are found to apply, that does not end the inquiry. It contends that the court should determine whether Agapito was an independent contractor under the Mine Act as a threshold matter in any event. If Agapito was not an independent contractor, then the citation should be vacated without litigating the merits of the citation. Determining whether Agapito was an independent contractor before adjudicating the merits conserves the resources of the parties and the Commission.

I hold that a resolution of any factual disputes necessary to determine whether Agapito was an independent contractor under the Mine Act is a matter for the trier of fact. In addition, as the administrative law judge assigned this case, I do not have an independent obligation to determine whether a party is an operator or an independent contractor subject to the Mine Act in the absence of a challenge from any party. I may choose to exercise my discretion to raise this issue at a hearing, but I am not obligated to do so. To put it another way, a party contesting a citation cannot seek to have the citation vacated after the administrative law judge's decision has been issued on the basis that it is not an independent contractor if it never previously raised that issue. Thus, the Commission's subject matter jurisdiction over a proceeding does not depend on a party's status as an "operator." Agapito entered a limited appearance to contest the instant citation. As set forth in section 105(d) of the Mine Act, the Commission has jurisdiction in this case because Agapito contested the citation and such jurisdiction is not dependent on Agapito's status as an independent contractor. I am persuaded by the Secretary's arguments on this issue.

The next issue is whether I should determine if Agapito was an independent contractor before reaching the substantive issues alleged in the citation. The Secretary argues that because "the question whether Agapito is an operator is an element of the claim," that issue should be determined "in the due course of the litigation, with the other elements of the claim, rather than as a threshold issue." (S. Br. in support of motion at 8). The Secretary argues that a bifurcation of the case would result in piecemeal litigation that would waste judicial resources and require depositions of the same people multiple times.

In addition, the Secretary states that adjudication of this issue on the basis of the accident report is unworkable because the accident report was never intended to be used to establish

Agapito's status as an independent contractor. This issue is too important to be decided on the basis of a technical accident report, designed to discuss the root causes of the accident, but not designed to serve as a definitive recitation of the facts necessary to establish that Agapito was an independent contractor. Moreover, some of Agapito's agents refused to participate in MSHA's accident investigation. As a consequence, the information in the report is not complete and the Secretary states that she would need to present additional evidence to establish that Agapito was an independent contractor at the time the citation was issued. She believes that she will need to conduct discovery in order to prepare for trial on that issue.

The Secretary argues that "allowing evidence to be obtained and publicly disclosed on this issue . . . would have an adverse impact on the pending criminal investigation." *Id.* The Secretary cites the letter she received from the U.S. Attorney asking that this case be stayed because Agapito is the subject of a criminal investigation. The letter dated September 3, 2008, states:

> The evidence gathered to determine criminal liability may significantly overlap with the evidence needed to prove civil liability. Consequently, this office has an interest in insuring that neither [Agapito] nor any other entity obtain discovery from a civil proceeding that would unduly circumvent the more limited scope of discovery available in criminal matters. *See Sec. & Exch. Comm'n v. Chestman*, 861 F. 2d. 49, 50 (2nd Cir. 1988).

(S. Br. in support of Motion for Stay, Ex. A) The letter goes on to state:

> This interest in limiting civil discovery applies in a civil proceeding involving solely jurisdictional questions. For example, to litigate whether [Agapito] is an operator of a mine, MSHA would have to disclose all relevant information obtained through its investigation about [Agapito's] relationship to the other entities that operated the Crandall Canyon Mine. Given that "relevance" in a civil matter is anything that is "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), allowing discovery on this jurisdictional issue could easily "circumvent the more limited discovery available in criminal matters." *Chestman,* 861 F. 2d at 50. Further, any discovery disclosed in the civil proceeding would provide potential targets with access to witnesses and documents to which they would not otherwise be entitled while the investigation is pending.

*Id.*

The Secretary contends that whether Agapito's activities were covered by the Mine Act is factually intensive because Agapito will argue that this issue depends upon both the location and scope of the services it provided. To counter Agapito's arguments, the Secretary states that she would be required to "introduce evidence relating to what services Agapito contracted to perform, what occurred in practice, and what limitations, understandings, agreements and beliefs Agapito and [the mine owner/operator] had in evaluating the conditions at Crandall Canyon and [in] shaping and modifying the engineering plans." (S. Br. in support of motion at 20). The Secretary contends that specific evidence would have to be introduced relating to the on-site visits Agapito made to the mine and how and why the mining plan was modified following these visits. *Id.* She states that these "substantive questions and the evidence relating to them are precisely what the U.S. Attorney has asked not be prematurely addressed in this proceeding at this time." *Id.*[4]

Agapito maintains that, because the Secretary's investigative and enforcement authority go hand in hand, the accident investigation report may be used to determine whether Agapito was an independent contractor. The fact that several people failed to participate in MSHA's accident investigation is irrelevant. Agapito again states that additional discovery is not necessary to resolve the issue at hand. Agapito states that "the nature of the specific services provided by Agapito and the frequency of visits to the mine . . . are already either in the Secretary's possession, available through a Rule 30(b)(6) deposition of Agapito, or available through the Court-ordered hearing." (A. Response at 20). Agapito states that it is willing to enter into one or more protective orders to preserve the confidentiality of information.

The letter from the U.S. Attorney seems to focus almost exclusively on concerns over discovery taken by Apagito. As the administrative law judge in this case, I have the authority to control and limit discovery, to keep documents under seal, and to enter protective orders. It appears to me that the question whether Agapito was an independent contractor in this instance raises rather simple factual issues. The Commission's and the 10th Circuit's decisions in *Joy Technologies, Inc.* analyze the issues involved. (17 FMSHRC 1303 (August 1995); 99 F.3rd 991 (10th Cir. 1996)). The Secretary maintains that whether Agapito was an independent contractor could possibly turn, at least in part, on what the owner/operator of the Crandall Canyon Mine thought about the engineering plans and whether the owner/operator modified these plans. Although such facts may be important when litigating the underlying citation, I cannot see how

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[4] It is interesting to note that the U.S. Attorney clarified his position on September 5, 2008, to allow the heirs of the disaster victims and injured rescuers to continue to pursue civil litigation against the mine's owners, operators, and consultants. *Mine Safety and Health News*, Vol. 15, No. 16, p. 275, September 15, 2008 (reprinting article from *The Salt Lake Tribune)*. A representative of the U.S. Attorney stated that the stay request applies only to "pending administrative enforcement actions in which MSHA is seeking to obtain monetary penalties against the business organizations associated with the mine." *Id.* It would "not apply to civil court proceedings brought by the victims or their families." *Id.*

these questions will be significant when determining whether Agapito was an independent contractor.

The 10th Circuit's analysis in *Joy Technologies* is rather straightforward. The court held that "independent contractor status is not to be based on the existence of a service contract or control, but on the performance of significant services at the mine. . . ." 99 F3d. at 998. The court rejected the approach set forth in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985) and followed the approach taken in *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir 1990). Chief Judge Robert J. Lesnick adopted the reasoning of the D.C. and Tenth Circuits in finding that an engineering company that prepared mining permits for the owner/operator of an underground coal mine was an independent contractor under the Mine Act. *Black Wolf Coal Co., Inc.*, 28 FMSHRC 699, 711-714 (July 2006). He noted that mining operations require engineering support. He stated that, although the engineering contractor "was not hired to create a map for submission to MSHA, it was hired to perform necessary services required in the overall extraction process." *Id.* Judge Lesnick held that since the engineering contractor "performed significant services rendering more than *de minimis* ties to mining operations" it was an independent contractor. *Id.* at 714. Although this decision is not binding on me, it is a logical application of the 10th and D.C. Circuit decisions to the work of engineering consulting firms at underground coal mines.[5] The Crandall Canyon Mine and Agapito's offices in Grand Junction, Colorado, are in the Tenth Circuit.

The Commission is charged with the responsibility of adjudicating disputes under the Mine Act. In creating the Commission, Congress made it quite clear that it expected the Commission to hear and decide cases in an expeditious manner. For example, the Commission was created with five commissioners with the authority to act in panels of three. The Senate Report made clear that "the Committee strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay in acting upon cases." S. Rep. 95-181, at 48 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 636 (1978). Moreover, in discussing the role of administrative law judges in the adjudication of cases, the Report states that judges must give the parties "every reasonable opportunity to adequately develop the record . . . consistent with [their] duty to resolve matters under dispute in an expeditious manner." *Id.* at 637. Thus, Congress intended the Commission and its judges to act with reasonable promptness. To this end, the Commission stated that its procedural rules "shall be construed to secure the just, speedy, and inexpensive determination of all proceedings . . . ." 29 C.F.R. § 2700.1(c).

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[5] The Seventh Circuit adopted the reasoning of the D.C. and Tenth Circuits when it held that a company that regularly delivered steel to a mine "cannot be characterized as an independent contractor providing services at a mine because the minimal activity performed . . . does not rise to a level that can be construed as services performed at a mine." *Northern Illinois Steel Supply Co. v Sec'y of Labor*, 294 F.3d 844, 849 (7th Cir. 2002).

It has been my experience that criminal investigations in cases involving fatal accidents at the nation's mines are always very time consuming. I have never had such a case out of Utah, but in other instances, the criminal matters were not resolved until a few months before the expiration of the statute of limitations.

I believe that it is in the interest of the parties to determine whether Agapito was an independent contractor before the criminal investigation is completed.[6] In addition, I do not agree with the Secretary's characterization that the issue is factually complex. For example, she states that because Agapito will apparently argue that "its actions did not constitute services if the mine operator could modify them," the Secretary will be required to conduct discovery to determine whether this argument has merit and whether Agapito's services were actually "necessary." (S. Reply Br. at 7). The Secretary contends that such discovery could prejudice the U.S. Attorney's criminal investigation if taken at this time. Whether the services or recommendations provided by Agapito were modified by the owner/operator relates to the allegations in the citation rather than to Agapito's status as an independent contractor. Tenth Circuit and Commission precedent make clear that the issue is whether Agapito provided significant services to the owner/operator with the result that it had more than a *de minimis* association with the coal extraction process or other work taking place at the Crandall Canyon Mine. The status of a mining or engineering consultant as an independent contractor does not change because its recommendations are subsequently rejected or modified by the owner/operator.

The Secretary insists that she needs to take discovery to pin down the key facts. It is clear that the Secretary already has a great deal of information concerning the relationship between Agapito and the mine's owner/operator. In addition, Agapito states that it would not object to the Secretary taking a deposition of the company under Rule 30(b)(6) of the Federal Rules of Civil Procedure. I recognize that MSHA's accident investigation report was not written with the intention of setting forth all of the information necessary to establish that Agapito was acting as an independent contractor as that term has been interpreted under the Mine Act. I credit the Secretary's stated need to take discovery on this issue. Nevertheless, the Secretary has not totally convinced me that her discovery on this narrow issue will seriously interfere with the pending criminal investigation, especially since I have the authority to control discovery and limit the dissemination of information through protective and other orders.[7]

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[6] On September 24, 2008, I denied Agapito's motion for expedited consideration of this issue.

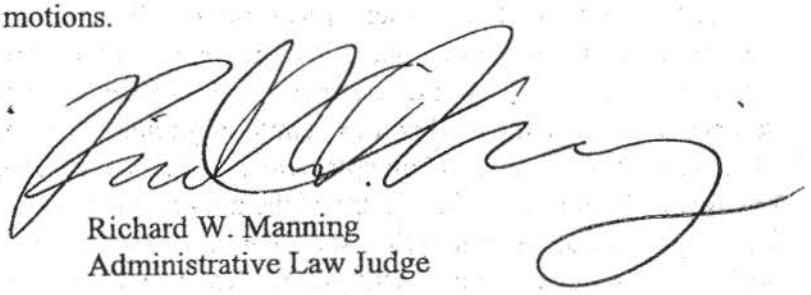
[7] The parties presented many other arguments with respect to the issues presented. Indeed, the total length of the parties' briefs is about 75 pages. As a consequence, I have not addressed every argument or issue raised. For example, Agapito argued that what it calls the "primary administrative jurisdiction doctrine" requires that the Commission decide whether Agapito is an independent contractor before a U.S. District Court may address the issue. This argument is rejected as are all other arguments that are inconsistent with this order.

In my order of September 12, 2008, I evaluated the Secretary's request for a stay using the factors established by the Commission in *Buck Creek Coal, Inc.*, 17 FMSHRC 500 (April 1995). Taking into consideration the information provided by the parties in response to the reconsideration motion, I enter the following additional findings. It is clear that there will be evidentiary information that is common to both this proceeding and the criminal case. The citation at issue here will be at issue in a criminal case. Moreover, whether Agapito was an independent contractor under the Mine Act will be an issue likely to be raised in a criminal proceeding. I do not know whether a criminal indictment is imminent, but the criminal investigation is either imminent or it has already started. The Secretary and the office of the U.S. Attorney state that permitting this case to go forward, even on the limited issue of Agapito's status as an independent contractor, could prejudice the criminal investigation. The Secretary claims that adjudicating the independent contractor issue separately from the merits of the citation will not be an efficient use of the agency's resources. In addition, it is quite possible that key employees of Agapito will assert their privilege against self-incrimination, if the Secretary seeks to depose them, which will prevent her from presenting the evidence she believes that she needs to establish Agapito's independent contractor status. Finally, the public interest favors the expeditious resolution of Commission proceedings, but not if such resolution seriously interferes with criminal proceedings.

Based on the above, I am granting the Secretary's request for reconsideration and I am staying this case until February 27, 2009. No discovery shall be permitted during the stay. The Secretary should understand that I will not automatically extend the stay. On or before February 20, 2009, the Secretary shall file a detailed accounting of the status of the criminal investigation and when it is expected to be completed. At the expiration of this stay, I may require the Secretary to conduct any discovery she determines is necessary on the independent contractor issue while continuing to prohibit Agapito from conducting discovery. Agapito is willing to decide the issues raised on the basis of the MSHA accident investigation report. Moreover, Agapito already knows what services it provided to the owner/operator of the Crandall Canyon Mine. As stated above, the U.S. Attorney is concerned that discovery taken by Agapito, rather than by the Secretary, could interfere with the criminal proceedings. In this same report, due February 20, the Secretary shall raise any objections to this discovery proposal and, if objections are made, explain how discovery taken on the independent contractor issue would interfere with the criminal matter. Agapito will be permitted to respond to this report.

## III. ORDER

For the reasons set forth above, the motion for reconsideration is **GRANTED** and this proceeding is **STAYED** until **February 27, 2009**. The Secretary **SHALL** file the report required in the above paragraph on or before **February 20, 2009**. The parties shall initiate a conference call on or soon after February 27, 2009, to discuss the status of the case and the criminal investigation. The parties shall feel free to initiate a conference call to discuss this case at any time and shall do so before filing any motions.



Richard W. Manning
Administrative Law Judge

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 2008

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. WEVA 2008-804 |
| Petitioner | : | A.C. No. 46-04168-142950 |
| | : | |
| v. | : | |
| | : | |
| | : | Sentinel Mine |
| WOLF RUN MINING, | : | |
| Respondent | : | |

## ORDER DENYING THE SECRETARY'S MOTION TO AMEND AS MOOT AND ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

This matter presents the question of whether safeguard violations citing safeguard criteria in sections 75.1403-2 through 75.1403-11, 30 C.F.R. §§ 75.1403-2-75.1403-11, issued by the Secretary, pursuant to the authority delegated by Congress in section 314(b) of the Federal Mine Safety and Health Act of 1977, as amended ("the Act"), 30 U.S.C. § 874(b), can be properly designated as significant and substantial ("S&S").[1] Section 314 is one of several provisions among the interim safety standards in Title III of the Act that were contained in the initial Coal Mine Health and Safety Act of 1969. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 5 (Jan. 1992) *(SOCCO II)*; 30 U.S.C. § 801 et seq. (1976) ( amended 1977).

The statutory provisions of section 314(b) are repeated verbatim in section 75.1403 of Part 75 of the Secretary's regulations. 30 C.F.R. § 75.1403. Specifically, Congress, in section 314(b), authorized the Secretary to issue and enforce safeguards to minimize hazards associated with the transportation of people and materials. Section 104(d)(1) of the Act limits S&S designations to only violations of "mandatory health or safety standards." 30 U.S.C. 814(d)(1).

[1] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

Statement of the Case

On June 27, 2000, the Secretary issued Safeguard No. 7095089 at the Wolf Run Mining Company ("Wolf Run") Sentinel Mine. Section 75-1403-1 of the Secretary's regulations sets forth procedures for the issuance of safeguards and explains that sections 75-1403-2 through 75.1403-11 set out the criteria by which MSHA inspectors are to be guided in requiring safeguards and issuing safeguard violations on a mine-by-mine basis. 30 C.F.R. §§ 75-1403-2 through 75.1403-11. Safeguard No. 7095089 cited the criteria in section 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts.

Citation No. 6606199 was issued at Wolf Run's Sentinel facility on January 23, 2008. The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided where miners were required to cross over moving conveyor belts. Wolf Run asserts that safeguard violations citing the safeguard criteria provisions cannot be designated as S&S because the safeguard criteria are not mandatory safety standards. Consequently, Wolf Run has filed a Motion for Partial Summary Decision concerning the S&S designation in Citation No. 6606199 based on its contention that neither the safeguard allegedly violated, nor section 75.1403-5(j), are mandatory standards as contemplated by section 104(d)(1) of the Act.[2] The Secretary opposes Wolf Run's motion.

To counteract Wolf Run's motion, the Secretary has filed a Motion to Amend Citation No. 6606199 to reflect that the safeguard violation was issued under section 75.1403, rather than the criteria in section 75.1403-5(j). Wolf Run opposes the Secretary's motion. It argues that "whether the citation lists Section 75.1403-5(j) or Section 75.1403 is immaterial" because Wolf Run is alleged to have violated a safeguard rather than a mandatory standard. (Wolf Run *opp.* at 3).

With respect to the Secretary's Motion to Amend, although Wolf Run contests the propriety of an S&S designation of a safeguard violation, it does not challenge the authority of the Secretary in section 314(b) of the Act, codified in section 75.1403 of the regulations, to issue safeguard violations. The Secretary's exercise of her safeguard authority is inseparable from the safeguard criteria that describe the necessary requirements to maximize transportation safety, the absence of which give rise to the issuance of a citation. In other words, the authority to issue safeguard citations in section 75.1403, and the criteria for issuing safeguard citations in sections 75.1403-2 through 75.1403-11, are not mutually exclusive. Accordingly, the Secretary's motion to amend Citation 6606199 to replace section 75.1403-5(j) with section 75.1403 shall be dismissed as moot.

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[2] Commission Rule 67 provides that a motion for summary decision may be decided if there is "no genuine issue as to any material fact." 29 C.F.R. § 2700.67(b). Wolf Run's request for partial summary decision concerns a question of law rather than questions of fact. Consequently, it is proper to address the issue before me in this summary decision matter.

Turning to Wolf Run's Motion for Partial Summary Decision, section 3(l) of the Act states that a mandatory safety standard promulgated in a Title I rulemaking also means an interim mandatory safety standard promulgated by Congress in Title III. 30 U.S.C. § 802(l). Although safeguards are not mandatory safety standards created as a result of a formal rulemaking under Title I of the Act, they are issued as an interim mandatory safety standard under section 314(b) of Title III of the Act. As such, consistent with the statutory definition in section 3(l), section 301(a) of the Act provides that interim mandatory safety standards are enforceable "... in the same manner and to the same extent as a mandatory safety standard" until superseded in a formal rulemaking. 30 U.S.C. § 861(a). Wolf Run does not contend that the Secretary's failure to supersede the interim standard in section 314(b) of the Act in a formal rulemaking proceeding precludes the enforcement of safeguards as an interim safety standard. Accordingly, as discussed below, Wolf Run's motion shall be denied.

Statutory Framework and Analysis

This matter presents the question of the proper construction of the term "mandatory safety standard" in section 104(d)(1) that is a condition precedent for the assignment of an S&S designation. The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue. *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.,* 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-843. *Accord Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 460 (D.C. Cir. 1994). An interpretation of a statute may not be adopted that "alter[s] the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) (citations omitted). Significantly, the Court of Appeals decision in *Cyprus Emerald Resources Corp.*, 195 F.3d 42, 44 (D.C. Cir 1999), *rev'g Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998), primarily relied on in this matter by Wolf Run, concluded the controlling statutory language concerning mandatory safety standards was unambiguous.

As a general proposition, contrary to Wolf Run's assertion, there is nothing unusual about enforcing standards that are unique to a specific mine, such as safeguards, as mandatory safety standards even though the standards are not explicitly set forth in the Secretary's regulations. *See UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (the law governing the enforcement of mandatory standards is applicable to ventilation and roof control plan provisions). Moreover, the Commission has noted "clear Congressional intent" that "mine by mine compliance plans required by statute or regulation . . . are enforceable as if they were mandatory standards . . . ." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 588 (Aug. 2006) (quoting S. Rep. No. 95-181 at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

Turning to the specific dispositive statutory language, section 104(d)(1) of the Act provides that only violations of mandatory health and safety standards can be designated as S&S. Specifically, section 104(d)(1) of the Act states, in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds that there has been a violation of any mandatory health or safety standard, and if he also finds that,* while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard,* and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator . . . .

(emphasis added) 30 U.S.C. § 814(d)(1).

The statutory scheme in the Act contains two categories of mandatory safety standards, namely a "mandatory health or safety standard" promulgated by the Secretary pursuant to Title I and "interim mandatory health and safety standards" promulgated by Congress pursuant to Titles II and III. By statutory definition, a mandatory health or safety standard includes safety standards promulgated by either the Secretary or Congress. Specifically, section 3(l) of the Act defines "mandatory health or safety standard" as:

> . . . the interim mandatory health or safety standards established by titles II and III of this Act, and standards promulgated pursuant to title I of this Act.

30 U.S.C. § 802(l). Thus, the term "mandatory safety standard" clearly includes an interim mandatory safety standard.

Title I of the Act authorizes the Secretary, through a notice and comment rulemaking, to "... develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a).

In Title II of the Act, Congress promulgated "Interim Mandatory Health Standards" to be enforced by the Secretary "... until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary under the provisions of section 101 of the Act." 30 U.S.C. § 842(a). The interim mandatory health standards are enforceable by the Secretary "... in the same manner and to the same extent as any mandatory health standard promulgated ..." by the Secretary's rulemaking. *Id.*

In Title III of the Act Congress promulgated "Interim Mandatory Safety Standards for Underground Coal Mines," applicable to all underground coal mines, that are also not superseded, in whole or in part, until the Secretary, under the provisions of section 101 of the Act, promulgates superseded mandatory safety standards through rulemaking. 30 U.S.C. § 861(a).

Section 301(a) of the Act, consistent with the statutory definition of a mandatory safety standard in section 3(l), exemplifies the equivalency of safety standards promulgated by the Secretary through rulemaking, and by Congress through the interim safety standards. Section 301(a) of the Act provides:

> The provisions of *sections 302 through 318 of this title shall be interim mandatory safety standards* applicable to all underground coal mines *until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary* under the provisions of section 101 of this Act, *and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act*. Any orders issued in the enforcement of the interim standards set forth in this title shall be subject to review as provided in title I of this Act.

(emphasis added) 30 U.S.C. § 861(a).

The language of section 301(a) is unambiguous, and inclusive. Interim mandatory safety standards in sections 302 to 318 "shall be enforced in the same manner and to the same extent as any mandatory safety standard." *Id.* Interim mandatory standards are included within the definition of mandatory safety standards. 30 U.S.C. § 802(l).

Section 314(b), promulgated under Title III, is an interim mandatory safety standard that authorizes mine inspectors to issue, and subsequently enforce, safeguards to minimize transportation hazards that are specific to a particular mine. Wolf Run has provided no meaningful basis to support the conclusion that the safeguard provisions in section 314(b) do not constitute an interim mandatory safety standard.

Moreover, the Commission has noted that ". . . the language of section 314(b) of the Act is broad and 'manifests a legislative purpose to guard against all hazards attendant upon haulage and transport[ation] in coal mining.'" *SOCCO II*, 14 FMSHRC at 8 (quoting *Jim Walter Resources, Inc.*, 7 FMSHRC at 496). Thus, I decline to view section 314(b) as a diamond in Wolf Run's rough, by narrowly construing, and differentiating, section 314(b) from other interim mandatory safety standards contained in sections 302 to 318 of the Act. 30 U.S.C. §§ 862 - 878.

Case Law Analysis

Although there is no statutory authority for granting the relief that Wolf Run seeks, Wolf Run's reliance on case law for the proposition that safeguards are not mandatory standards as contemplated by section 104(d)(1) of the Act is misplaced. As a threshold matter, the Commission long ago determined that a safeguard violation could be designated S&S. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). The Commission has also noted that "while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures of section 101 of the Act, section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking." *SOCCO II,* 14 FMSHRC at 8 *citing Southern Ohio Coal Co.,* 7 FMSHRC at 512 *(SOCCO I)*. Thus, the Commission has recognized that safeguards may be enforced as mandatory safety standards even in the absence of formal rulemaking. 20 FMSHRC at 809.

Wolf Run's reliance on the Court's decision in *Cyprus Emerald* for the contrary proposition is misplaced. 195 F.3d 42. *Cyprus Emerald* dealt with whether section 50.11(b) of the Secretary's regulations, governing the investigation and reporting of accidents, was a "mandatory safety standard" that could be designated as S&S. The Court held that: "[s]ection 104(d) *unambiguously* authorizes a 'significant and substantial' violation finding for a violation only of a mandatory health or safety standard." (Emphasis added) *Id.* at 44. Thus, the Court concluded section 50.11(b) was not a mandatory safety standard because it was promulgated by Congress under the "Administration" provisions in Title V, section 508 of the Act, rather than by a section 101 rulemaking.[3] 30 U.S.C. § 957. Nothing in *Cyprus Emerald* warrants the conclusion that the Court abrogated the statutory definition in section 3(l) of the Act that explicitly provides that a "mandatory health or safety standard" includes "interim mandatory health or safety standards" promulgated under Title II or III of the Act. 30 U.S.C. § 802(l).

Wolf Run's reliance on the Commission's dicta in its underlying *Cyprus Emerald* decision is likewise unconvincing. 20 FMSHRC 790. Although *Cyprus Emerald* primarily concerned accident reporting requirements in section 50.11(b) of the regulations, the Commission did acknowledge, as Wolf Run suggests, that there was a "crucial difference" in interpreting mandatory standards promulgated in a Title I rulemaking and safeguard notices issued by an inspector. *Id.* at 808. The Commission explained:

> In *SOCCO* I, we held that while mandatory standards "should be construed in a manner that effectuates, rather than frustrates their intended goal[,]" safeguards

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[3] Section 508 provides, "[t]he Secretary, The Secretary of Health, Education, and Welfare and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957.

> are issued without resort to the normally required rulemaking process, and therefore "a narrow construction of the terms of the safeguard and its intended reach is required."

20 FMSHRC at 808 (quoting *SOCCO* I, 7 FMSHRC at 512) (footnote omitted).

Thus, it is the scope of an inspector's unilateral discretion in issuing safeguards, without the benefit of a notice and comment rulemaking to vet a mandatory standard adopted under Title I, that concerns the Commission. It is in this context that the Commission noted that the safeguard criteria in sections 75.1403-2 through 75.1403-11 are not mandatory safety standards. *Id.* at 808-09. However, the Commission ***did not*** conclude that they could not be enforced as Title III interim mandatory safeguard safety standards. On the contrary, the Commission concluded, citing *Mathies*, that safeguards can be cited as S&S. *Id.* at 809.

In the final analysis, Congressional failure to include safeguard criteria in its Title III interim standards is of little import. Obviously, Congress could not identify and enumerate the diverse hazards associated with the movement of underground mine personnel and equipment. However, the Secretary's identification of safeguard criteria in subsections 75.1403-2 through 75.1403-11 of section 75.1403 satisfies a major Commission concern - - that broadly written safety standards must provide mine operators with notice of what conditions are proscribed. *See Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1992); s*ee also U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983). Consequently, safeguard violations are enforceable as mandatory safety standards even when cited as violations of the safeguard criteria in 75.1403.

MSHA Program Policy Manual

Finally, Wolf Run, in its Memorandum of Law in support of its request for partial summary decision, citing MSHA's Program Policy Manual, avers that the Secretary "recognizes" that the safeguard criteria in section 75.1403 are not mandatory health or safety standards. (Mem. of Law, at 6; *see also* Mem. of Law, Ex. 3). While policy statements in MSHA's Program Policy Manual are not binding on the Secretary or the Commission, MSHA's policy statement is not inconsistent with the enforcement of safeguard violations as S&S infractions. See *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996), (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)). The thrust of the policy statement is that safeguard criteria, unlike safety regulations born of rulemaking, are not enforceable until a notice of safeguard is issued. The relevant MSHA policy provisions relied on by Wolf Run do not support the proposition that a 104(a) citation for violation of safeguard criteria may not be designated as S&S after issuance of the safeguard notice. The relevant provisions state:

> It must be remembered that these [safeguard] criteria are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not

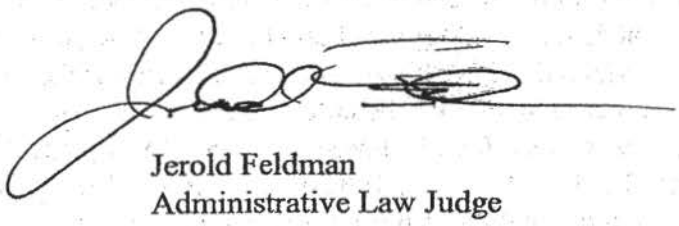
> covered by a mandatory regulation, the authorized representative must issue a safeguard notice, allowing time to comply before a 104(a) citation can be issued . . . .

*MSHA Program Policy Manual,* Vol. V, Subpart O, at 125 (October 2003); *see also* SOCCO II, 14 FMSHRC at 7-8 (safeguards can be enforced like mandatory standards only after mine operators are advised in writing that specific safeguards will be required as of a specified date) . Thus, it is inappropriate to suggest that MSHA recognizes that safeguard criteria cannot be enforced as mandatory safety standards ***after*** a notice of safeguard is issued. Consequently, the Secretary may designate the safeguard violation in 104(a) Citation No. 6606199, alleging a violation of Notice of Safeguard No. 7095089, as S&S in nature.

## ORDER

In sum, the citation in issue cites a violation of an interim mandatory standard in section 314(b) of Title III of the Act. 30 U.S.C. § 874(b). Interim mandatory health and safety standards are defined as mandatory health and safety standards under section 3(l) of the Act. 30 U.S.C. § 802(l). Section 104(d)(1) limits S&S designations only to violations of mandatory health and safety standards. 30 U.S.C. § 814(d)(1). As a safeguard violation is a violation of a mandatory safety standard as defined by the Act, it may be properly designated as an S&S violation. Accordingly, **IT IS ORDERED** that Wolf Run's Motion for Partial Summary Decision **IS DENIED.**[4]

**IT IS FURTHER ORDERED,** consistent with the above, that the Secretary's Motion to Amend Citation No. Citation No. 6606199 to substitute the safeguard criterion in section 75.1403-5(j) with section 75.1403, that repeats verbatim the statutory language in section 314(b) of the Act, **IS Denied** as moot because the sections are indivisible rather than mutually exclusive.



Jerold Feldman
Administrative Law Judge

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[4] In reaching this conclusion I am cognizant that a colleague, Judge Zielinski, reached the opposite decision in cases involving similar facts. *See Big Ridge, Inc.*, Docket Nos. LAKE 2008-68, 69, 30 FMSHRC ___ (ALJ, Nov. 24, 2008); *Cumberland Resources LP*, Docket No. PENN 2008-318, 30 FMSHRC __ (ALJ, Dec. 4, 2008).

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