NOVEMBER 1996

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

NOVEMBER 1996

No cases were filed in which review was granted during the month of November

Review was denied in the following case during the month of November:

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 96-112-R. (Judge Fauver, September 27, 1996)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 4, 1996

CONSOLIDATION COAL COMPANY	:	
	:	
v.	:	Docket No. WEVA 94-235-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY: Marks and Riley, Commissioners

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the question of whether Consolidation Coal Company ("Consol") violated 30 C.F.R. § 75.342(b)(2) when the warning light on its methane monitor was not visible to a person who could deenergize the longwall.[2]

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.342, entitled "Methane monitors," provides in part:

> (b)(1) When the methane concentration at any methane monitor reaches 1.0 percent the monitor shall give a warning signal.
>
> (2) The warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted.
>
> (c) The methane monitor shall automatically deenergize the machine on which it is mounted when--
>
> (1) The methane concentration at any methane monitor reaches 2.0 percent . . . .

Administrative Law Judge Arthur J. Amchan determined that Consol had not violated the standard. 16 FMSHRC 1241 (June 1994) (ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Consol operates the Robinson Run No. 95 Mine, an underground coal mine in Harrison County, West Virginia. On April 19, 1994, Virgil Brown, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), traveled to the 2-D longwall headgate to observe normal operating conditions at the mine. 16 FMSHRC at 1241. Methane sensors on the longwall were connected to a methane monitor attached to a master control box at the headgate. Tr. 35, 163, 167-68; C. Exs. 5(c), 6(a). The methane monitor was set to remove power from all equipment electrically connected to the longwall when methane was detected at 1 percent.[3] 16 FMSHRC at 1243. In order to reenergize the longwall, the headgate operator manually reset the methane monitor and master control box. *Id.* at 1243-44. In so doing, the headgate operator would read signals on the monitor and master control box informing him that the deenergization had been caused by the detection of methane. *Id.* at 1244.

Inspector Brown observed that the headgate operator, Bill Bowen, was shoveling a spill near the tailpiece of the conveyor belt, approximately 30 feet away from the methane monitor. *Id.* at 1241-42. The inspector stood next to him and observed that the face of the methane monitor was not visible. Tr. 27. Accordingly, he issued a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of section 75.342(b)(2). 16 FMSHRC at 1242.

Consol contested the citation and the matter proceeded to an expedited hearing before Judge Amchan. At the hearing, the Secretary moved to modify the citation to an order issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), adding an allegation of unwarrantable failure. Tr. 9-10.

The judge determined that Consol had complied with section 75.342(b)(2). 16 FMSHRC at 1245-46. He reasoned that Consol's method of informing the headgate operator that methane levels had reached 1 percent "provides equivalent protection to a warning light that is visible at all times." *Id.* at 1245. The judge noted that, because Consol declined to file a petition for modification under section 101(c) of the Mine Act, 30 U.S.C. § 811(c),[4] he was constrained to

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[3] The methane monitors and face telephone system would not be deenergized. 16 FMSHRC at 1243.

[4] Section 101(c) of the Mine Act provides in part:

> Upon petition by the operator . . . , the Secretary may modify the application of any mandatory safety standard to a . . .,

determine whether the reference in section 75.342(b)(2) to "warning signal device" included a mechanism by which longwall lights are extinguished, equipment stops, and the operator, by going to the headgate control box, learns that the methane monitor has been tripped. *Id.* The judge concluded that the phrase did encompass such a system, and that his interpretation was consistent with the underlying purposes of the Act and did not compromise miner safety. *Id.* at 1245-46. He also noted that his interpretation was not inconsistent with the dictionary meaning of "device." *Id.* at 1246. Accordingly, the judge vacated the citation.[5] *Id.*

The Secretary filed a petition for discretionary review, challenging the judge's determination, which the Commission granted.

II.

Disposition

The Secretary argues that the judge erred in finding that Consol did not violate section 75.342(b)(2). PDR at 2.[6] He asserts that evidence was undisputed that the warning signal device on the methane monitor was not visible to a person who could deenergize the longwall. *Id.* at 2, 4-5. The Secretary contends that the judge in effect transformed the contest proceeding into a petition for modification proceeding, thereby improperly circumventing the procedures set forth in section 101(c) of the Act. *Id.* at 6-7. Consol responds that the judge properly found no violation because its methane monitoring system satisfies the requirements and purpose of the standard by providing a visual warning to the headgate operator through the deenergization of

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> mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard . . . . Upon receipt of such petition the Secretary shall publish notice thereof . . . and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing . . . to enable the operator . . . or other interested party to present information relating to the modification of such standard. Before granting any exception to a . . . standard, the findings of the Secretary . . . shall be made public . . . . The Secretary shall issue a decision incorporating his findings of fact therein . . . .

30 U.S.C. § 811(c).

[5] Given his disposition, the judge did not reach the question of whether the citation should be modified to a section 104(d)(2) order.

[6] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated his petition for discretionary review as his brief.

equipment, extinguishing of lights on the longwall, and the displays visible when the headgate operator manually resets the methane monitor and master control box. C. Br. at 11, 14-15. Consol further argues that it did not receive adequate notice of the Secretary's interpretation and that the Secretary failed to prove that its methane monitoring system was not the kind that a reasonably prudent person would use to comply with the standard. *Id.* at 12-13.

Section 75.342(b) provides that a methane monitor must give a warning signal when the concentration of methane at the monitor reaches 1 percent. 30 C.F.R. § 75.342(b)(1). The warning signal device of the methane monitor must "be visible to a person who can deenergize the equipment on which the monitor is mounted." 30 C.F.R. 75.342(b)(2). As noted by the judge, "[t]hat person must then de-energize the equipment and take steps to reduce the methane concentration pursuant to [30 C.F.R. §] 75.323(b)." 16 FMSHRC at 1242. Section 75.342(c) requires that the methane monitor automatically deenergize the machine on which it is installed at 2 percent methane.

Here, the evidence is undisputed that the warning signal device on Consol's methane monitor was not visible to the headgate operator at the time of the inspection. When Inspector Brown stood next to the headgate operator, who was approximately 30 feet from the methane monitor, he could not see the warning signal device. Tr. 26-27, 52. Inspector Brown and John Burr, Consol's manager of electrical engineering, testified that a headgate operator, in the course of his duties, would typically travel approximately 30 feet in either direction of the master control box, on which the methane monitor was installed. Tr. 36-37, 49-53, 158-59. The inspector estimated that the warning light would be visible to a person only within 15 to 20 feet of it. Tr. 52. Burr also acknowledged that the methane monitor could not be seen by the headgate operator at all times. Tr. 203-04, 208-09. Thus, the warning signal device of Consol's methane monitor was not visible to a person who could deenergize the longwall in violation of the clear requirements of section 75.342(b)(2).

We reject Consol's argument that its methane monitoring system provided a visible warning in compliance with the standard. The Secretary's regulatory scheme requires human intervention when methane levels reach 1 percent and automatic deenergization of equipment at 2 percent methane. Consol has, in effect, eliminated the requirement for human intervention, placing complete reliance on the methane monitor's capability of automatically deenergizing the longwall. While Consol's reliance on such a system may be justified, we are not the proper agency to make that determination. Rather, section 101(c) of the Mine Act requires that such a determination be made by the Secretary through the modification process. Under that process, an operator may petition the Secretary to modify a standard's application on the basis that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection . . . ." 30 U.S.C. § 811(c). The Secretary must then publish notice of such petition, conduct an investigation, provide an opportunity for a public hearing, publish proposed findings, and issue a decision disposing of the petition (*see* n.4). We are adverse to circumventing the protections afforded by the Act's modification procedures. *See Penn Allegh Coal Co.*, 3 FMSHRC 1392, 1398 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (December 1983).

Moreover, we are unpersuaded by Consol's argument that it failed to receive adequate notice that its methane monitoring system did not comply with the requirements of section 75.342(b)(2). As acknowledged by its witnesses, Consol received actual notice from MSHA over the course of approximately one year preceding issuance of the citation that the warning signal on its methane monitor must be visible to a person who could deenergize the equipment. Tr. 212-13, 234-37. Inspector Brown testified that management had been informed in at least seven meetings that Consol was required to have a visible alarm on the methane monitor and that, if it did not, it would be cited under section 75.342. Tr. 39-40, 90-91.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Consol did not violate section 75.342(b)(2). We remand for consideration of the Secretary's motion to modify the citation to a section 104(d)(2) order[7] and for the assessment of a civil penalty.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[7] Consol's reasonable, good faith belief that the cited conduct was the safest method of compliance with section 75.342(b)(2) is relevant to the determination of whether Consol's violation had resulted from its unwarrantable failure to comply with the standard. *See Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994).

Chairman Jordan, dissenting:

I would affirm the judge[1] because, in my view, he correctly determined that Consolidation Coal Company (Consol) complied with the requirements of 30 C.F.R. § 75.342(b)(2). The standard in question provides that "the warning signal device of the methane monitor shall be visible to a person who can deenergize the equipment on which the monitor is mounted." Consol was cited because the MSHA inspector determined that the longwall headgate operator, who was approximately 30 feet from the methane monitor, could not see the yellow light which flashes when the methane concentration reaches 1 percent.[2] 16 FMSHRC at 1242.

Although the headgate operator was not always in sight of the yellow light mounted on the methane monitor, the judge found that Consol had nevertheless provided a "warning signal device" that was visible to the headgate operator at all times. *Id.* at 1245-46. He held that the deenergization of the machinery constituted an adequate visual signal under the standard. *Id.* at 1246.

Under Consol's system, the headgate operator is visually appraised of the fact that methane has reached 1 percent, because the lighting on the longwall face and the longwall shield goes out, and all the equipment electrically connected to the longwall automatically deenergizes except for the methane monitors and face telephone system. *Id.* at 1243. At the moment this occurs, the headgate operator might not know whether the shutdown was due to methane concentration or a power outage. As the judge pointed out, however, this potential ambiguity is removed when the operator goes to the master control box to try and re-energize the longwall. *Id.* at 1246.

If methane caused the shutdown, the operator will see a computer display advising in plain English that there has been a "methane monitor fault," and the methane concentration will be indicated by a digital display. *Id.* at 1244. In addition, the yellow warning light on the monitor will be flashing and the solid red trip light and green "power on" light of the monitor will be on. *Id.*

This can be compared to what the operator will observe upon arriving at the control box after a general power loss. In that situation the control box will be dark, the computer display will be blank and all the lights on the methane monitor will be off. *Id.* There will be no digital display showing the methane concentration, and the main conveyer to the outside (which is not electrically connected to the longwall) will have stopped. *Id.* In the case of a methane shutdown, the conveyor is likely to continue operating. *Id.*

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[1] Because I affirm and find no violation, I do not address the Secretary's or my colleagues' contention that the operator should have applied for a modification of the requirement of the standard.

[2] 30 C.F.R. § 75.342(b)(1) requires that the methane monitor give a warning signal when the methane concentration reaches 1 percent.

The Secretary has not challenged the judge's finding that "if the methane monitor shuts down the longwall, there is no way the operator can mistakenly believe that the power went off for some other reason. . . . [A]s soon as he gets to the headgate control box, it will be readily apparent to him whether the methane monitor tripped or the power went out." *Id.* Thus the judge found, correctly in my view, that Consol provided a "warning signal device" by which the longwall operator is visibly appraised when the methane concentration at any methane monitor reaches 1 percent.

Despite the fact that the standard in question does not refer to any particular kind of "warning signal device," the Secretary contends that only the small factory-installed methane warning light located directly on the methane monitor complies. The MSHA inspector's testimony makes clear that this interpretation was the basis for the enforcement action:

> [T]he condition [for which I issued the citation] was that the Appalachian monitor has a warning light that is built in with the monitor. That is the warning light for that methane monitor, that little light on the unit. . . . And the . . . person who is supposed to de-energize the machine . . . if it would give a warning at one percent was not in a position in his work area where he could visually see that warning light.
>
> . . . .
>
> . . . The warning signal device of the methane monitor . . . [is] a light that comes on inside the unit. It's a yellow warning light.

Tr. 30, 63.

Although the Secretary claims he is enforcing the "plain and unambiguous terms" of the standard, PDR at 5, his crabbed interpretation of "warning signal device" is nowhere supported by a reading of the Mine Act or the regulation. His insistence that a "visible warning device on the methane monitor," *id.*, must be a light is simply not discernible from the plain language of the standard.

In cases where Congress' intent is clear, we must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Unfortunately, the Mine Act provides us no guidance as to the meaning of "warning signal device." When, as here, the statute is silent, we must determine whether the agency interpretation of the regulation is reasonable and entitled to deference. *Id.*; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). I proceed by noting that the regulation refers only to the warning signal device *of* (not *on*) the methane monitor, and in no way suggests that the warning device must be a light. Furthermore, the Secretary has not cited any legislative history supporting his interpretation, nor has he articulated any safety policy

effectuated by his limited application of the term "warning signal device."[3] An interpretation that narrowly restricts a standard beyond its plain meaning and claims no support in either the history or safety-promoting purpose of the Act is not, in my view, a reasonable interpretation entitled to deference.

Finally, my colleagues (but not the Secretary) claim that "[t]he Secretary's regulatory scheme requires human intervention when methane levels reach 1 percent." Slip op. at 4. Since the longwall operator is not "a person who can deenergize the equipment" after being visibly appraised of the presence of methane, they view Consol's warning signal device as violative of section 75.342(b)(2).

The only reason the longwall operator will be unable to deenergize the equipment after being warned of the presence of methane is that the equipment will already be deenergized. There will be no necessity for the operator to turn it off because the equipment will automatically shut down at 1 percent methane concentration. I cannot agree that because the longwall operator will not need to shut down the equipment when the methane concentration reaches 1 percent, Consol's warning signal device does not comply with section 75.342(b)[4]. Moreover, an underlying premise of the current Act and its predecessor, the 1969 Coal Act, is that the risk of explosion is reduced by eliminating ignition sources of methane. S. Rep. No. 411, 91st Cong., 1st Sess. 25 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 151 (1975). Accordingly, I decline to embrace an interpretation which effectively *requires* equipment to remain energized when the methane concentration is between 1 and 2 percent so that human intervention can occur.[5]

Mary Lu Jordan, Chairman

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[3] Indeed, during the trial, government counsel appeared to concede that the warning procedure implemented by Consol provides as much or greater protection than the procedure the Secretary claims is required by the standard. Tr. 260 ("The system devised for Robinson Run reducing the methane monitor trip to one percent may be an inherently safer method than this [regulation].").

[4] Notably, the drafters of the regulation explained the requirement of the visible warning as "allow[ing] the operator of the face equipment, or other person, to deenergize the equipment at 1.0 percent, *if necessary*." 57 Fed. Reg. 20868, 20891 (1992) (emphasis added).

[5] When methane reaches 2 percent, automatic deenergization is required under section 75.342(c).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 22, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 94-391-R
WESTERN FUELS-UTAH, INC.	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the question of whether Western Fuels-Utah, Inc. ("Western Fuels") violated 30 C.F.R. § 75.516-2(c) because additional insulation had not been provided for a communication cable at the point where it crossed over power cables.[2] Administrative Law Judge Richard Manning concluded that Western Fuels

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.516-2, entitled, "Communication wires and cables; installation; insulation; support," provides:

> (a) All communication wires shall be supported on insulated hangars or insulated J-hooks.
>
> (b) All communication cables shall be insulated . . . , and shall either be supported on insulated or uninsulated hangers or J-hooks, . . . or buried, or otherwise protected against mechanical

violated the regulation. 17 FMSHRC 756 (May 1995) (ALJ). For the reasons that follow, we affirm.

I.

Factual and Procedural Background

Western Fuels operates the Deserado Mine, an underground coal mine in Rio Blanco County, Colorado. 17 FMSHRC at 756. On April 21, 1994, during an inspection of the mine, Phillip Gibson, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed that a communication cable crossed over several power cables in the belt conveyor entry of the 9th east longwall section.[3] *Id.* at 756-58.

The communication cable, which was suspended from the ceiling by J hooks and used 24 volts of DC electricity, was connected to a phone approximately 15 feet from where the two circuits crossed. *Id.* at 757; Tr. 17-19, 49. The communication cable contained four shielded conductors. 17 FMSHRC at 757.

The power cables were medium voltage power conductors, supplying approximately 995 volts of AC electricity to the longwall shearing machine and associated equipment. *Id.*; Tr. 18. They hung from cable carriers along a monorail, consisting of a long I-shaped bar, suspended from the mine roof. 17 FMSHRC at 758; W. Ex. 4. The power cables contained three power conductors, two ground conductors, and a conductor for the ground fault monitor. 17 FMSHRC at 758.

The communication cable and power cables were not damaged or worn, and were well insulated and protected against damage by outer jackets. *Id.* Inspector Gibson observed,

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> damage . . . .
>
> (c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.
>
> (d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.

[3] The parties disagreed as to whether the communication cable and the power cables were in contact where they crossed. 17 FMSHRC at 758.

however, that additional insulation had not been provided where the communication cable passed over the power cables. *Id.* at 757; Tr. 17-19. Accordingly, he issued to Western Fuels a citation alleging a violation of section 75.516-2(c). 17 FMSHRC at 756; G. Ex. 1.

Western Fuels contested the citation and the matter proceeded to hearing before Judge Manning. Before the judge, Western Fuels did not dispute that the communication cable passed over the power cables, or that additional insulation had not been provided at that location. 17 FMSHRC at 757. Rather, it argued that the reference to track entries in the first sentence of section 75.516-2(c) limits the requirement for additional insulation in the second sentence to only those communication cables installed in track entries. *Id.* at 759. Western Fuels asserted that it did not violate the standard because the cited communication cable was not in a track entry. *Id.* The Secretary interpreted the standard to require additional insulation at any point where communication cables cross power conductors, regardless of their location. *Id.*

The judge determined that Western Fuels violated section 75.516-2(c). *Id.* at 763. He reasoned that the language of the standard was clear on its face and that the second sentence's requirement for additional insulation applied to the condition cited by Inspector Gibson. *Id.* at 760. The judge rejected Western Fuels' argument that the provisions of section 75.516-2(c) were only applicable to track entries, noting that the second sentence expressly required additional insulation where communication circuits pass over or under "any power conductor." *Id.* He explained that the placement of that sentence after the sentence addressing track entries did not alter its meaning. *Id.* Because he found the standard clear, the judge determined that he did not need to reach whether the Secretary's interpretation was entitled to deference. *Id.* Accordingly, the judge affirmed the citation. *Id.* at 763.

Western Fuels filed a petition for discretionary review, challenging the judge's determination, which the Commission granted.

II.

Disposition

Western Fuels argues that the judge erred in rejecting its argument that the two sentences of section 75.516-2(c) must be read together to require additional insulation only for communication cables that cross power cables in track entries. W. Br. at 9-17. It also asserts that the judge acknowledged the Secretary's interpretation of the standard would divert resources from more serious hazards, and that the judge erred in placing responsibility for correcting the regulation on the Secretary. *Id.* at 17-20. Petitioner explains that the judge has "discretion in correcting errors by . . . [an] agency," and that the "judge should not slavishly accept" the agency's interpretation. *Id.* at 17. The Secretary responds that the judge's interpretation is supported by the clear language of the standard. S. Br. at 8-9. The Secretary also submits that his interpretation of the standard is reasonable and entitled to deference. *Id.* at 6-8.

The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996) (citations omitted). It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc., v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original). We agree with the judge that the language of section 75.516-2(c) is clear and, accordingly, we do not reach the issue of deference.

The first sentence of section 75.516-2(c) requires that "[a]ll communication wires and cables installed in track entries . . . be installed on the side of the entry opposite to trolley wires and trolley feeder wires." 30 C.F.R. § 75.516-2(c). The second sentence provides that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under *any* power conductor." 30 C.F.R. § 75.516-2(c) (emphasis added). Thus, the second sentence, considered separately, clearly requires additional insulation at the location where Western Fuels' communication cable crossed over its power cables.

Contrary to Western Fuels' assertions, the requirement for additional insulation is not altered when the second sentence of the subsection is read within its context. The first and second sentences of section 75.516-2(c) address separate and distinct requirements. The first sentence of the subsection relates to the required location of communication wires and cables in track entries while the second sentence sets forth a requirement for additional insulation for communication circuits at points where they pass over or under any power conductor. The second sentence makes no cross-reference to the first sentence. Moreover, the language of the second sentence is expressly broad, requiring additional insulation where a communication cable crosses "*any* power conductor." 30 C.F.R. § 75.516-2(c) (emphasis added).

Furthermore, reading the second sentence to require additional insulation for communication cables that cross any power conductor, regardless of whether the cables are located in track entries, is consistent with an interpretation of section 75.516-2 as a whole. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (April 1996) (citations omitted) (regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions). The title of the standard, "Communication wires and cables; installation; insulation; support," is worded broadly, suggesting application of the standard's requirements to all communication cables. None of the sentences in the standard, except the first sentence of subsection (c), speak to track entries or trolley wires and, as noted, application of the additional insulation requirement in the second sentence of subsection (c) is expressly broad.

Finally, we reject Western Fuels' argument that the judge erred in accepting the Secretary's interpretation after acknowledging that such an interpretation would divert resources from more serious hazards. W. Br. at 17-20. The judge explicitly declined to reach whether the Secretary's interpretation was entitled to deference but, rather, construed the standard in

accordance with its plain language. 17 FMSHRC at 760. In any event, we find no error in the judge's conclusion that the question of the relative costs and gains of enforcing the standard was beyond his authority and more appropriately addressed to MSHA's Assistant Secretary. *Id.* at 762-63. The Mine Act confers enforcement authority upon the Secretary, rather than upon the Commission. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996), *citing Thunder Basin Coal Co. v. Reich*, 510 U.S. ___, 127 L. Ed. 2d 29, 36, 40 (1994).

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Western Fuels violated section 75.516-2(c).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 27, 1996

CLYDE PERRY	:	
	:	
v.	:	Docket No. WEST 96-64-DM
	:	
PHELPS DODGE MORENCI, INC.	:	

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 26, 1996, former Commission Administrative Law Judge Arthur Amchan granted the motion to dismiss of Phelps Dodge Morenci, Inc. ("Phelps Dodge"), concluding that complainant Clyde Perry failed "to state a claim upon which relief may be granted" under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 18 FMSHRC 643, 646-47 (April 1996) (ALJ). The Commission granted Perry's petition for discretionary review. For the reasons that follow, we vacate the judge's dismissal order and remand for further proceedings.

I.

Factual and Procedural Background

On February 16, 1993, Perry injured his right foot at Phelps Dodge's Morenci Branch Mine. 18 FMSHRC at 643. When he returned to work a month later, he was assigned "light duty" work. *Id.* During October 1993, Perry began working as a truck driver. *Id.* After driving trucks for several months, Perry asked to be reassigned to other work because his foot injury was interfering with his ability to operate a truck by causing him pain in his foot, back, and knee. *Id.* He was not reassigned. *Id.*

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

At some point, Perry complained to his superiors at Phelps Dodge that it was unsafe for him to operate heavy equipment because of his medical condition, after which Perry was harassed continually. Compl. at 1; Am. Compl. at 1.[2] During the early morning hours of January 28, 1995, Perry experienced chest pains while working the graveyard shift. Compl. at 4. He went to the hospital, but could not be treated because he was unable to produce a urine specimen which a doctor requested after Perry told him he (Perry) was taking an over-the-counter medicine. *Id.* Perry subsequently tested negative for drugs and alcohol based on the results of a test performed that evening. *Id.* at 7. On February 3, 1995, Perry was fired "pending arbitration." Perry Br. at 3. Apparently he was fired because, according to Phelps Dodge, he tested positive for drugs or alcohol after being in an area where an accident occurred. Compl. at 8.

Perry filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") on September 14, 1995. On November 6, MSHA notified Perry that, in the agency's opinion, Phelps Dodge had not violated section 105(c) of the Mine Act in its treatment of Perry. 18 FMSHRC at 644. On November 17, Perry filed a complaint with the Commission under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). *Id.*; Compl. at 2. In its answer, filed on February 20, 1996, Phelps Dodge moved that Perry be ordered to provide a more definite statement of his claim. 18 FMSHRC at 644. The judge granted Phelps Dodge's motion and ordered Perry to provide a more definite statement of his claim, including a description of his protected activities and when they occurred, the basis for his belief that Phelps Dodge discriminated against him, the nature of the alleged discrimination and when it occurred, and the relief he sought. *Id.*; Order to Show Cause and To Provide a More Definite Statement (February 29, 1996). Perry filed his amended complaint on March 22, 1996. Phelps Dodge replied to the amended complaint on April 25, 1996, and included in its reply a motion to dismiss on the grounds that Perry failed to properly allege that he had engaged in any protected activity, and that he failed to file his complaint within the 60-day limit set forth in section 105(c).

The judge dismissed Perry's complaint in an order dated April 26, 1996. 18 FMSHRC at 647. Without citing Rule 12(b)(6) of the Federal Rules of Civil Procedure, but using its terminology, the judge dismissed Perry's for failure to state a claim upon which relief may be

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[2] Because this case is before us on an appeal of an order entered pursuant to a motion to dismiss, Perry's allegations are treated as true. *Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776, 1777 (November 1985). Perry's complaint consists of a cover note, a copy of MSHA's letter to Perry regarding its investigation of his complaint, a copy of Perry's original complaint to MSHA, and a note sent to Phelps Dodge informing it that a complaint had been filed. Perry's amended complaint consists of a cover letter, a statement in support of claim, and several attachments. Page references to the complaint and amended complaint are to the documents assembled in the order above.

granted.[3] *Id.* The judge found that Perry had "not alleged that he engaged in any activities protected by the [Mine] Act," and that being injured on the job, inability to perform one's tasks, and refusal to take a drug test or testing positive are not protected activities. *Id.* at 646. The judge also found that Phelps Dodge did not violate section 105(c) when it declined to provide Perry alternative employment after he complained that his continued operation of a truck in his condition posed a threat to himself and others. *Id.*

II.

Disposition

Appearing pro se, Perry alleges that Phelps Dodge "retaliated against me because I gave them a lost time accident and, also, for filing a complaint under the [Mine] Act." Perry Br. at 2. He asserts that, on February 16, 1993, he was seriously injured and, thereafter, complained that it was unsafe for him to operate heavy equipment because of his medical condition. *Id.* at 2-3. Although he resumed his duties as a truck driver, "[e]ver since my accident and the complaint I made, I've been harassed, discriminated against, and almost terminated." *Id.* at 3. Perry further asserts that on January 28, 1995, he was discharged pending investigation following an anxiety attack at work and his subsequent inability to produce a urine sample for drug and alcohol testing. *Id.* He states that on February 3, 1995, he was discharged pending arbitration. *Id.* Phelps Dodge asserts that the judge properly dismissed the complaint because Perry failed to allege that he engaged in protected activity and that, in addition, he failed to file his complaint within the time limit imposed by section 105(c). P.D. Br. at 4-6.

A. The Judge's 12(b)(6) Ruling

It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5A Wright & Miller, Federal Practice & Procedure: Civil § 1357 (2d ed. 1990). The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Additionally, we hold the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (August 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts. *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring).

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[3] Rule 1(b) of the Commission's Procedural Rules provides: "On any procedural question not regulated by [these] Rules . . . the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . ." 29 C.F.R. § 2700.1(b).

Here, Perry was obligated to provide the Commission with "a short and plain statement of the facts, setting forth the alleged . . . discrimination . . . and a statement of the relief requested." 29 C.F.R. § 2700.42. This he did. The judge's finding that Perry failed to allege that he engaged in any protected activity is erroneous. Perry alleged that he complained to Phelps Dodge that, because of medical problems arising from an earlier on-the-job accident, his operation of a truck posed a safety hazard to himself and others. Am. Compl. at 1. Such complaints are activities protected under the Mine Act. *Smith v. Kem Coal Co.*, 14 FMSHRC 67, 71 (January 1992); *cf. Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984) ("a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations"). Perry also alleged that after he complained, he was continually harassed and ultimately fired on grounds that were "made up" by Phelps Dodge. Compl. at 1. According to Perry, Phelps Dodge actually fired him because of his complaints "that it [was] unsafe operating heavy equipment under [his] condition." *Id.* Additionally, Perry alleged that when he compiained, Phelps Dodge refused to give him light duty work such as he was given after his earlier injury, despite the fact that others similarly situated were routinely assigned such duty. *Id.* at 4.

When the judge ordered Perry to provide the basis for his belief that Phelps Dodge discriminated against him, he essentially required Perry to begin proving his prima facie case at a stage in the proceedings when Perry was simply obligated to meet the Commission's minimal pleading requirements. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981), and *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981) (a miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity). To go beyond the pleading requirements of Rule 42 at so early a stage in a case is particularly inappropriate in view of the complainant's burden to establish discriminatory motive. We have often acknowledged the difficulty of establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991), and cases cited therein.

This case demonstrates the difficulty of establishing all the relevant facts strictly on the basis of a pro se complainant's pleadings. But on the record before us, Perry has more than met his burden of alleging discrimination actionable under section 105(c). Accordingly, we vacate the judge's dismissal order and remand the case for further evidentiary proceedings.

B. The Timeliness of Perry's Complaint

We find unpersuasive Phelps Dodge's argument that Perry's complaint should be dismissed because it was filed at least seven and a half months beyond the time limit set forth in section 105(c). Section 105(c) provides that a discrimination complaint may be filed "within 60 days after [a] violation occurs." A miner's late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and

excusable neglect. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (January 1984); *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230-31 (August 1991). Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal. *Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 9 FMSHRC 905, 908 (June 1986). In general, timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984).

Here, on the question of timeliness, Perry never responded to Phelps Dodge's allegations. In this respect, the case presents a question analogous to one we addressed in *Farmer v. Island Creek* (a case also involving a pro se claimant), where we stated:

> Given complainants' silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture.

13 FMSHRC at 1232. After noting "a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure," we held:

> We conclude that good cause [for the complainant's delay] has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution. At that time, the operator will have the opportunity to present evidence of the material legal prejudice, if any, resulting from such delay.

Id. Following the Commission's reasoning in *Farmer*, we remand this matter for the additional purpose of allowing the judge to determine in the first instance whether appropriate circumstances exist to excuse Perry's allegedly late filing of his discrimination complaint.[4]

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[4] Given our disposition, we deny Phelps Dodge's motion for a more definite statement and its motion to dismiss

III.

Conclusion

For all of the foregoing reasons, we vacate the judge's dismissal order and remand this matter to the Chief Administrative Law Judge for assignment to a judge for further evidentiary proceedings consistent with this opinion.[5]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[5] Judge Amchan has since transferred to another agency.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 1, 1996

BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 95-138-R
	:	Citation No. 4259597; 11/21/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Buck Creek Mine Mine ID 12-02033
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 95-185 A.C. No. 12-02033-03661
v.	:	Buck Creek Mine
BUCK CREEK COAL, INC., Respondent	:	
BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 171-R
	:	Citation No. 4259500; 12/8/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Buck Creek Mine Mine ID 12-02033
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket NO. LAKE 95-206 A.C. No. 12-02033-03662
v.	:	Buck Creek Mine
BUCK CREEK COAL, INC., Respondant	:	
BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 95-33-R
	:	Citation No. 4262565; 10/5/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 95-34-R Citation No. 4262566; 10/5/94

	:	Docket No. LAKE 95-36-R
	:	Citation No. 4260185; 10/5/94
	:	
	:	Docket No. LAKE 95-40-R
	:	Citation No. 4260189; 10/6/94
	:	
	:	Docket No. LAKE 95-41-R
	:	Citation No. 4260190; 10/5/94
	:	
	:	Docket No. LAKE 95-42-R
	:	Citation No. 4260191; 10/5/94
	:	
	:	Buck Creek Mine
	:	Mine ID 12-02033
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-214
Petitioner	:	A.C. No. 12-02033-03663
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC.,	:	
Respondent	:	
	:	
BUCK CREEK COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 95-5-R
	:	Citation No. 4262139; 9/20/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 95-62-R
ADMINISTRATION (MSHA),	:	Citation No. 4260205; 10/7/94
Petitioner	:	
	:	Buck Creek Mine
	:	Mine ID 12-02033
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket NO. LAKE 95-215
Petitioner	:	A.C. No. 12-02033-03665
	:	
BUCK CREEK COAL, INC.,	:	Buck Creek Mine
Respondent	:	

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal,

Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 28 violations of the Secretary's mandatory health and safety standards and seek penalties of $50,364.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $50,364.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause**."

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal Inc., in default in these cases. Accordingly, Citation Nos. 4259597, 4259566, 4259545, 4259664, 4259665, 4259666 and 4259667 in Docket Nos. LAKE 95-138-R and LAKE 95-185, Order No. 4260193 and Citation No. 4259500 in Docket Nos. LAKE 95-171-R and LAKE 95-206, Order Nos. 4260185, 4260190, 4260191, 4262565, 4262566, 4260189 and 4260207 and Citation Nos. 4259701, 4259702, and 4259703 in Docket Nos. LAKE 95-33-R, LAKE 95-34-R, LAKE 95-36-R, LAKE 95-40-R, LAKE 95-41-R, LAKE 95-42-R and LAKE 95-214, and

Order No. 4262139 and Citation Nos. 4260205, 4259679, 4259680, 4262681, 4262682, 4262683, 4262684, and 4262685 in Docket Nos. LAKE 95-5-R, LAKE 95-62-R and LAKE 95-215 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$50,364.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

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/lt

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 1 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on BEHALF OF ARTHUR R. OLMSTEAD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket Nos. WEST 96-130-D
	:	DENV CD 95-20
v.	:	Savage Mine
	:	Mine ID 24-00106
KNIFE RIVER COAL MINING CO., Respondent	:	

SUPPLEMENTAL DECISION
AND
FINAL ORDER

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

On June 28, 1996, a decision was issued in this proceeding determining that the Respondent had discriminated against the Complainant by discharging him in violation of section 105(c) of the Federal Mine Safety Act of 1977, 30 U.S.C. § 815(c). *Secretary on behalf of Olmstead v. Knife River Coal Mining Co.*, 18 FMSHRC 1103 (June 1996). The parties were given 30 days to agree on the specific relief due Mr. Olmstead or to submit their separate relief proposals with supporting arguments.

The parties have made various submissions and participated in several telephone conference calls with the judge. However, they have been unable to agree on all of the remedies to which Mr. Olmstead is entitled. Consequently, this decision and order includes both remedies upon which the parties agree and those on which they do not.

Reinstatement

In accordance with the June 28 decision, Mr. Olmstead was reinstated to his Tipple Operator's position on July 15, 1996. However, the parties have agreed that he would have been awarded a Loader Operator position as of August 28, 1995, had he been working at the time. Consequently, after performing a trial period in that position, he was assigned as a Loader Operator on September 16, 1996, and has received Loader Operator's pay since that time.

Back Pay

The parties have agreed that the Complainant's gross back pay is as follows:

June 26 - 30, 1995		$ 638.08
July 1 - August 27, 1995		$ 6,221.28
August 28 - December 7, 1995		$11,995.36
December 8, 1995 - September 15, 1996		$ 1,727.32
Overtime (period unspecified)		$ 369.72
Bonus (period unspecified)		$ 1,103.36
	Total	$22,055.12

This is based on the Complainant's wages as a Tipple Operator, from June 26 through August 27, 1995, of $19.94 per hour, and his wages as a Loader Operator, since August 28, 1995, of $20.54 per hour. Because the Complainant was economically reinstated on December 7, 1995, at his wages as a Tipple Operator, the back pay amount from December 8, 1995, until September 15, 1996, consists only of the $.60 per hour deferential between the two pay rates.

The parties disagree as to how interest should be calculated on the back pay. The Respondent argues that it should be calculated on the "net back pay," which it asserts is the gross back pay less "regular payroll deductions." (Resp. Ltr. Oct. 15, 1996.) The Secretary maintains that the interest should be based on the gross back pay.

I conclude that the Secretary is correct. In *Secretary on behalf of Bailey v. Arkansas-Carbona Company*, 5 FMSHRC 2042, 2052 (December 1983), the Commission held that interest should be calculated on the "net back pay." However, it defined "net back

pay" as the result of subtracting actual interim earnings, earnings by the miner between the time of discharge and the time of reinstatement, from gross back pay, the gross pay the miner would have earned. *Id.* at 2051 n.14. In this case the Complainant's interim earnings as the result of his economic reinstatement from December 8, 1995, until September 15, 1996, have been accounted for in the gross back pay total. Therefore, the Complainant's "net back pay," as defined by the Commission, is the same as his gross back pay.

Accordingly, the Complainant will be awarded interest on his net back pay of $22,055.12. The interest should be calculated using the *Arkansas-Carbona* method, *Id.* at 2052, as modified by the Commission's decision in *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988), which is as follows: *Amount of interest = The quarter's net back pay* x *number of accrued days of interest* (from the last day of that quarter to the date of payment) x *the short-term Federal underpayment rate.*[1]

In addition, the parties have agreed that the Complainant will be credited with other non-monetary benefits as part of the back pay award. He will be credited with 87 hours of accrued vacation time and 35 hours of accrued sick leave. He will be credited with service time for pension benefits for the time he was discharged. Finally, six percent of the back pay award will be withheld and contributed to his 401(k) account and he will receive nine percent interest on this contribution.

Other losses and expenses

The parties have agreed that the Complainant will be reimbursed $120.00 for the purchase of coal he would have received free if he were working for the company; $8.06 for phone calls to the solicitor; and $465.26 for mileage, accommodations and meals while attending the hearing. The Respondent does not agree, however, that Mr. Olmstead is entitled to $1,140.00 in fees paid to his attorney for representation at the company hearing on June 28, 1995, and other work he performed in attempting to get the Complainant reinstated after his discharge. Nor does the Respondent agree that Mr. Olmstead should be reimbursed $340.00 for the assistance of his union and $343.20 in costs for his trips to the union office in Beulah, North Dakota.

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[1] The applicable interest rates and daily interest factors may be obtained from the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

The company cites *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987) in support of its position that the Complainant is not entitled to reimbursement of attorney's fees. That case held that attorney's fees cannot be awarded to private counsel in a discrimination proceeding when the complainant is represented by the Secretary under section 105(c)(2), 30 U.S.C. § 815(c)(2). In this case, however, the Complainant is not seeking an award of attorneys fees for representation by private counsel in the 105(c) proceeding. He is requesting reimbursement for fees expended pursuing other avenues for reinstatement after his discharge.

Although the Secretary has not cited any authority in support of reimbursement, I conclude that the Complainant is entitled to restitution of at least some of the claimed fees. The Commission has not spoken directly on this issue. However, it has made clear from the beginning that the remedial goal of section 105(c) is "to put an employee into the financial position he would have been in but for the discrimination." *Secretary on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982). The Commission stated:

> The central purpose of the Mine Act is to promote safety and health among the nation's miners. To accomplish that goal it is essential that miners be encouraged to report unsafe conditions free from the threat of retaliation and subsequent economic loss. Thus, we are persuaded that upon a finding of discrimination, a presumption of the right to monetary relief arises and such relief should be denied only where "compelling reasons" otherwise dictate. Moreover, if monetary relief is denied, the bases for the failure to make the aggrieved party whole must be articulated.

Id.

In this connection, the Commission has held that complainants are entitled to recover expenses incidental to attending the hearing because they "would not have borne such expenses (and inconvenience) but for [the company's] discrimination." *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 144 (February 1982)(citation omitted). *Cf. Hicks v. Cobra Mining, Inc. et al*, 14 FMSHRC 50 (January 1992) (consequential damages included the fair market value of repossessed pickup truck). Similarly, I conclude that Mr. Olmstead would not have incurred the expenses of hiring an attorney but for Knife River's discrimination. For the same

reason, I conclude that he is entitled to reimbursement of money expended attempting to obtain union representation concerning his discharge.

Having concluded that Mr. Olmstead is entitled to reimbursement of these fees, however, does not mean that he is entitled to the amounts he has claimed. In my June 28 decision, I ordered the parties to "submit their respective positions, concerning those issues on which they cannot agree, *with supporting arguments, case citations and references to the record* . . ." 18 FMSHRC at 1117 (emphasis added). With regard to attorney's fees, the Complainant has submitted copies of several bills from his attorney. No references have been made to the record.

The first bill, dated June 29, 1995, in the amount of $751.00 clearly involves the attorney's representation of Mr. Olmstead at the company hearing. The items dated June 27 and 29, in the amount of $64.00 on the second bill (July 27, 1995) appear also to be related to the company hearing. The remaining entries on that bill are not specific enough to permit determination as to what they involved. Likewise, with the exception of a September 19, 1995, entry for a telephone conference with Jerry Thompson, who investigated Mr. Olmstead's complaint for MSHA, the entries on the remaining bills are not specific enough to support Mr. Olmstead's claim. The charge for the telephone call with Mr. Thompson was $10.00. Accordingly, I conclude that Mr. Olmstead should be reimbursed $825.00 in attorney's fees.

The support for the claim for reimbursement of fees connected with union consists solely of the following:

> "The second matter of disagreement is whether Mr. Olmstead should be compensated for the amounts that he spent in order for the union to represent him in his discharge suit. These amounts total $340.00 for assistance of the union and $343.20 in costs for his trips to the union office in Beulah, North Dakota ($.30/mile for 1144 miles).

(Sec. Ltr. Oct. 9, 1996.) This information is insufficient to permit an informed determination as to when these costs were incurred, why they were incurred, what part the union played in this situation, or whether Mr. Olmstead would have incurred the

expenses if he had not been discharge by Knife River.[2] Consequently, I conclude that the Complainant has failed to provide a basis for reimbursement of these expenses.

ORDER

Having previously found that Knife River Coal Mining Company discriminated against Arthur R. Olmstead by discharging him on June 30, 1995, and on being informed that he was reinstated, as ordered, on July 15, 1996, it is **ORDERED** that:

1. My June 28, 1996, decision in this matter is **FINAL.**

2. The Respondent **PAY** Mr. Olmstead **$22,055.12** in back pay for the period from July 1, 1995, until his reinstatement on September 15, 1996, with interest computed using the *Arkansas-Carbona/Clinchfield Coal Co.* method. In addition, Mr. Olmstead will be **CREDITED**, as agreed by the parties, with 87 hours accrued vacation time, with 35 hours accrued sick leave, with service time toward his pension benefits for the period of time he was discharged, and with a contribution of six percent of his back pay award to his 401(k) account and nine percent interest on the contribution.

3. The Respondent **REIMBURSE** Mr. Olmstead **$1,418.32** for reasonable and related economic losses or litigation expenses incurred as a result of his discharge, as detailed in this decision.

4. The Respondent **EXPUNGE** from Mr. Olmstead's personnel file and from company records the discharge and all references of the circumstances involved in it, if it has not already done so.

5. The abatement of the payment of the civil penalty is **LIFTED** and Respondent is **ORDERED TO PAY** a civil penalty in the amount of **$1,000.00** for its violation of section 105(c).

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[2] Mr. Olmstead testified that the union did not represent him at the company hearing.

The Respondent shall comply with these requirements within 30 days of the date of this final order. Upon timely compliance, this matter will be **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, 1600 Lincoln St., Suite 2710, Denver, CO 80264 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 4 1996

BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 94-700-R
	:	Citation No. 4260035; 9/1/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Buck Creek Mine
	:	Mine ID 12-02033
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 95-232
	:	A.C. No. 12-02033-03664
v.	:	
	:	Docket No. LAKE 95-252
BUCK CREEK COAL, INC., Respondent	:	A.C. No. 12-02033-03666
	:	Buck Creek Mine
BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 95-142-R
	:	Citation No. 4259853; 11/22/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 95-150-R
	:	Citation No. 4259491; 11/28/94
	:	Docket No. LAKE 95-152-R
	:	Citation No. 4259493; 11/28/94
	:	Buck Creek Mine
	:	Mine ID 12-02033
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket NO. LAKE 95-253
	:	A.C. No. 12-02033-03667
v.	:	
	:	Docket No. LAKE 95-280
BUCK CREEK COAL, INC., Respondant	:	A.C. No. 12-02033-03668
	:	Docket No. LAKE 95-281
	:	A.C. No. 12-02033-03669

:
: Docket No. LAKE 95-282
: A.C. No. 12-02033-03570
:
: Docket No. LAKE 95-295
: A.C. No. 12-02033-03671
:
: Docket No. LAKE 95-311
: A.C. No. 12-02033-03673
:
: Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 37 violations of the Secretary's mandatory health and safety standards and seek penalties of $25,014.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $25,014.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The

Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation No. 4260035 in Docket Nos. LAKE 94-700-R and LAKE 95-232; Citation Nos. 4262686, 4262688 and 4262689 in Docket No. LAKE 95-252; Order Nos. 4259491 and 4259493 and Citation No. 4259853 in Docket Nos. LAKE 95-142-R, LAKE 95-150-R, LAKE 95-152-R and LAKE 95-253; Citation Nos. 4259750, 4262528 and 4259573 in Docket No. LAKE 95-280; Citation Nos. 4259755, 4259756, 4385587, 4259578, 4259579, 4259580, 4259757, 4259758, 4259759, 4259760, 4262701, 4262881, 4262702, 4262703, 4262704 and 4262705 in Docket No. LAKE 95-281; Order No. 4262687 in Docket No. LAKE 95-282; Citation Nos. 4385589, 4385590, 4385592, 4385593, 4385594, 4262715, 4262716, 4262717 and 4262718 in Docket No. LAKE 95-295; and Order No. 4262706 in Docket No. LAKE 95-311 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$25,014.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 7 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 94-42
	:	A.C. No. 12-02033-03604
v.	:	
	:	Docket No. LAKE 94-50
BUCK CREEK COAL, INC., Respondent	:	A.C. No. 12-02033-03605
	:	
	:	Docket No. LAKE 94-73
	:	A.C. No. 12-02033-03607
	:	
	:	Docket No. LAKE 94-81
	:	A.C. No. 12-02033-03608
	:	
	:	Docket No. LAKE 94-89
	:	A.C. No. 12-02033-03610
	:	
	:	Docket No. LAKE 94-111
	:	A.C. No. 12-02033-03611
	:	
	:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 33 violations of the Secretary's mandatory health and safety standards and seek penalties of $20,588.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $20,588.00.

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

NOV 6 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 94-128
	:	A.C. No. 12-02033-03614
v.	:	
	:	Docket No. LAKE 94-142
BUCK CREEK COAL, INC., Respondent	:	A.C. No. 12-02033-03615
	:	
	:	Docket No. LAKE 94-143
	:	A.C. No. 12-02033-03616
	:	
	:	Docket No. LAKE 94-210
	:	A.C. No. 12-02033-03620
	:	
	:	Docket No. LAKE 94-211
	:	A.C. No. 12-02033-03621
	:	
	:	Docket No. LAKE 94-220
	:	A.C. No. 12-02033-03622
	:	
	:	Docket No. LAKE 94-433
	:	A.C. No. 12-02033-03623
	:	
	:	Docket No. LAKE 94-434
	:	A.C. No. 12-02033-03624
	:	
	:	Docket No. LAKE 94-435
	:	A.C. No. 12-02033-03625
	:	
	:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 50

violations of the Secretary's mandatory health and safety standards and seek penalties of $32,750.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $32,750.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary

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requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation No. 9941855 in Docket No. LAKE 94-128; Citation No. 4261601 in Docket No. LAKE 94-142; Order No. 3843797 and Citation No. 3843954 in Docket No. LAKE 94-143; Citation Nos. 4261870, 4261871, 4261826, 4261827, 4261829, 4261830, 4261831, 4261833, 4262233 and 4262234 in Docket No. LAKE 94-210; Citation Nos. 4262237, 4262238, 4262239 and 4262284 in Docket No. LAKE 94-211; Citation Nos. 4055900, 4262102, 4262105, 4262106 and 4262108 in Docket No. LAKE 94-220; Citation Nos. 4262200, 4262341, 4262342, 4262344, 4262112, 4262113, 4262114, 4262115, 4262116, 4262346, 4262347, 4262348, 4262349, 3537980 and 4386041 in Docket No. LAKE 94-433;

Order No. 3843796 in Docket No. LAKE 94-434; and Citation Nos. 4262350, 4262335, 4262353, 4262354, 4262332, 4262337, 4262356, 4262041, 4262338, 4262339 and 4262340 in Docket No. LAKE 94-435 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$32,750.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

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Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

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NOV 7 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 94-42
	:	A.C. No. 12-02033-03604
v.	:	
	:	Docket No. LAKE 94-50
BUCK CREEK COAL, INC., Respondent	:	A.C. No. 12-02033-03605
	:	Docket No. LAKE 94-73
	:	A.C. No. 12-02033-03607
	:	
	:	Docket No. LAKE 94-81
	:	A.C. No. 12-02033-03608
	:	
	:	Docket No. LAKE 94-89
	:	A.C. No. 12-02033-03610
	:	
	:	Docket No. LAKE 94-111
	:	A.C. No. 12-02033-03611
	:	
	:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 33 violations of the Secretary's mandatory health and safety standards and seek penalties of $20,588.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $20,588.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

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Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

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---

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Order No. 3843511 and Citation Nos. 3843584 and 3843587 in Docket No. LAKE 94-42; Citation Nos. 3843512, 3843532, 3843810, 3843536, 3843537, 3843538, 3843539, 3843540, 4055889, 4055890, 4055891, 4055892, 4055893 and 4055895 in Docket No. LAKE 94-50; Citation Nos. 3843945 and 3843946 in Docket No. LAKE 94-73; Citation Nos. 3843949 and 3843566 in Docket No. LAKE 94-81; Order No. 4055899 in Docket No. LAKE 94-89; and Citation Nos. 3843958, 3843921, 3843922, 3843923, 3843924, 3843926, 3843927, 3843928, 3843929, 3842536 and 3842537 in Docket No. LAKE 94-111 are **AFFIRMED**. Buck

Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$20,588.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 19 1996

AKZO NOBEL SALT, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 96-45-RM
	:	Citation No. 4100787; 11/28/95
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 96-65-RM
	:	Citation No. 4546275; 1/25/96
	:	Docket No. LAKE 96-66-RM
	:	Citation No. 4546276; 1/25/96
	:	Docket No. LAKE 96-80-RM
	:	Citation No. 4546323; 1/3 /96
	:	Cleveland Mine
	:	Mine I.D. No. 33-01994
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 96-125-M
	:	A. C. No. 33-01994-05659
v.	:	Cleveland Mine
AKZO NOBEL SALT INCORPORATED Respondent	:	

DECISIONS

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, for the Respondent/Petitioner; Mark N. Savit, Esq., Ruth L. Ramsey, Esq., Patton, Boggs & Blow, Washington, D.C., for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the Secretary of Labor (MSHA), against the respondent mine operator Akzo Nobel Salt Inc. (AKZO), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments of $1,000, for alleged violations of mandatory reporting regulations 30 C.F.R. 50.10 and 50.20(a). (Civil Penalty Docket No. LAKE 96-125-M, and Contest Docket Nos. LAKE 96-65-RM and LAKE 96-80-RM).

Contest Docket Nos. LAKE 96-45-RM and LAKE 96-66-RM concern contests filed by AKZO challenging the legality of two section 104(a) non-"S&S" citations alleging violations of regulatory sections 50.10 and 57.11050(a).

At the request of the parties, a prehearing conference was held on the record to allow the parties to explore and address the issues, proposed stipulations, and the filing of documentary evidence, depositions, and briefs, for submission of these matters for summary decisions. I have considered all of the oral and written arguments presented by the parties in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the MSHA inspectors constitute violations of the cited mandatory safety and reporting standards and (2) the appropriate civil penalties to be assessed for the alleged violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. 50.10, 50.20(a), and 57.11050(a).

4. Commission Rules, 29, C.F.R. § 2700.1 et seq.

Joint Stipulations

The parties stipulated to the following:

1. The Cleveland Mine was opened in 1961, has operated continuously since that time, and it is within the jurisdiction of the Mine Act.

2. The presiding judge has jurisdiction to hear and decide these matters.

3. The citations were properly issued by authorized representatives of MSHA and were properly served on AKZO.

4. The citations were timely contested by AKZO, and no part 100 post-inspection conferences were held.

5. The parties agree that AKZO has sought this litigation to challenge the positions of MSHA with respect to the implementation of 30 C.F.R. § 50.10 and 30 C.F.R. § 57.11050(a).

6. The mine produces approximately 2.5 million tons of salt per year, and the mined product (sodium chloride or rock salt) is used primarily for road salt, animal feed and chemical process additives. Salt is non-flammable and is recommended material for use in extinguishing fires.

7. Underground employment at the mine varies somewhat on a seasonal basis. However, at the time of incidents, total employment was approximately 174 on three production shifts and three maintenance shifts.

8. The mine is currently classified as a Category VI mine under the "gassy mine regulations." 30 C.F.R. § 57.22003(a)(6). That categorization "applies to mines in which the presence of methane has not been established and are not included in another category or subcategory." 30 C.F.R. § 57.22003(a)(6).

9. The production shaft is approximately 1853 feet deep from the shaft collar to the sump, and it is approximately 1763 feet from the shaft collar to the mine level.

10. The service shaft is approximately 1805 feet deep from the shaft collar to the sump, and is approximately 1765 feet from the shaft collar to the mine level.

11. The parties agreed to the technical descriptions of the production and service hoists (not included herein, but a part of the record).

12. Salt is extracted from the mine in a "room and pillar" formation, and a second, lower level is being developed. Three methods of salt extraction are currently being used in the mine.

13. The following type of combustible and flammable materials are used or stored for use in the mine: diesel fuel, hydraulic oil, greases, small quantities of paint, small amount of paper and wood, tires and fire resistant conveyer belting. The quantities of any of these materials underground vary significantly over time. However, the underground diesel fuel storage facility has a maximum capacity of 1,500 gallons. Furthermore, all of the flammable materials listed are stored in storage cabinets.

14. There are also various types of explosives, including ANFO along with boosters caps, detonators and primer cord that are used and stored, in magazines, for use in the mine. The mine has also experienced misfires on occasion. The mine has never been cited for any violation relating to the mishandling of misfires.

15. There have been two fires in the mine that were reported to MSHA pursuant to 30 C.F.R. § 50.10. The first was in 1983 and the second in 1996. The first involved a haulage truck while the second involved a lubrication truck. It appears that both fires apparently were caused by a diesel fuel line leak, and they were extinguished by mine personnel.

16. AKZO maintains that due to the construction of the wire ropes used in the hoisting equipment at the mine, it is necessary that the hoist ropes be "shortened" or adjusted periodically so that they are tight and of equal length. This must be done because, as the ropes are subjected to load, they stretch unequally. Once the variance in length among the ropes exceeds certain tolerances, they must be adjusted so that they are of equal length. Notwithstanding the variance among the lengths of individual ropes, the ropes must also be shortened if any of them exceed a certain maximum length.

17. AKZO maintains that the process of "shortening the ropes" must be undertaken more frequently with regard to the production hoist than with regard to the service hoist, because the ropes on the production hoist are subjected to greater loads and speeds than are the ropes on the service hoist.

18. AKZO maintains that the frequency with which this process must be undertaken decreases with the age of the

ropes, because they stabilize as the construction gaps between the wires are squeezed out with time.

19. MSHA maintains that the aforementioned maintenance work is required as a result of the wear and damage to the hoisting ropes which are caused by their use.

The Planned Hoist Outage of November 9, 1995
(Docket No. LAKE 96-45-RM)

20. A planned outage of the production hoist was conducted in order to "shorten" two of its four hoist ropes, in order, in part, to test AKZO's understanding of MSHA's interpretations of the applicability of the standards. Although AKZO's notification to MSHA and the citation state that the outage occurred at approximately 11:56 p.m. on November 9, 1995, the hoist log indicates that the outage occurred at approximately 12:56 p.m. on November 10, 1995. While no one can explain definitively the disparity, it has been suggested that the hoisting equipment clock had not been changed for daylight saving time. Counsel agree that this disparity is immaterial to the reporting issue because, in either case, the hoist was unavailable for use for more than 30 minutes. According to the hoist computer log, the hoist was put back into service at approximately 1:46 a.m., November 10, 1995.

21. This hoist incident was not immediately reported to MSHA, however a fax was received at the MSHA Newark Office at 8:34 a.m., on November 10, 1995.

22. On November 15, 1995, MSHA inspector Don Foster conducted interviews with both management and labor personnel with knowledge of the planned incident. AKZO management did not believe that the hoist could have been put back into service in less than 1 hour. MSHA also received statements from two miners who worked on the hoist which indicated that they believed that, in an emergency, the hoist could have been put back into service in approximately 40 minutes.

23. During the shift on which these events occurred, there were approximately 25 miners underground performing work unrelated to the maintenance activity at the production hoist. This work consisted entirely of maintenance activities on production equipment other than the hoist. No salt extraction occurred during the shift nor did any welding or cutting occur during the shift.

24. On November 28, 1995, MSHA inspector Okey Reitter issued section 104(a) Citation No. 4100787 in respect to the

event of November 9, 1995, citing a violation of 30 C.F.R. § 50.10.

25. On November 6, 1995, Mark Savit, AKZO Counsel, wrote MSHA seeking guidance regarding the enforcement of 30 C.F.R. § 57.11050 (the "Savit letter"). (Index of Documents, Tab N).

26. On December 8, 1995, MSHA Administrator Vernon Gomez respondent to Mr. Savit's letter of November 6, 1995 (the "Gomez Response"). (Index of Document, Tab S).

27. On December 15, 1995, prior to the Government budget shut down, counsel for AKZO informed counsel for the Secretary, that AKZO would plan a hoist outage over the holidays that would provide a test case for this litigation.

The Planned Hoist Outage of December 24, 1995
(Docket Nos. LAKE 96-65-Rm and LAKE 96-66-RM)

28. A planned outage of the production hoist occurred on December 24, 1995. The hoist computer log indicates that it was shut down at approximately 12:53 a.m., in order to "shorten" all four of its hoist ropes. According to the hoist log, the hoist was not put back into service until approximately 3:34 a.m., December 25, 1995.

29. At the time that the ropes were shortened, they had not yet stretched beyond the limit allowed by MSHA's retirement criteria, at 30 C.F.R. § 57.19024, or by the manufacturer for safe operation.

30. It is possible that the hoist could have been put back into operation in less than the time that it was out of service. However, during that time, there was a period during which it would not have been possible to put the hoist back into service in less than one hour and miners were not evacuated from the mine.

31. During the shift on which these events occurred, there were three miners underground performing work unrelated to the work on the production hoist: a mechanic, an electrician, and a foreman. This work consisted of checking pumps and fans and preventive maintenance on the service hoist. No salt extraction occurred during this shift nor did any cutting or welding occur during this shift.

32. This hoist incident was not immediately reported to MSHA, however a fax was received at the MSHA Newark Office on December 26, 1995.

33. Following AKZO's report of these incident, MSHA Inspector Donald Foster traveled to the mine on December 28, 1995, and started his investigation. He was accompanied by MSHA Inspector Jim Strickler during part of his inspection.

34. Inspector Foster conducted interviews of both hourly and management employees at the mine and by telephone on December 28 and 29, 1995, and January 4, 5, 9 and 11, 1996. Management employees were accompanied by AKZO counsel during their interviews. On January 25, 1996, Inspector Foster issued Citation No. 4546275 citing a violation or 30 C.F.R. 50.10, and Citation No. 4546276, citing a violation of 30 C.F.R. 57.11050(a).

Discussion

Docket No. LAKE 96-45-RM

Section 104(a) non-"S&S" Citation No. 4100787, issued at 2:45 p.m., on November 28, 1995, cites an alleged violation of section 103(j) of the Act, and mandatory reporting standard 30 C.F.R. 50.10, and states as follows:

> At about 11:56 p.m., on November 9, 1995, the production hoist was disabled for approximately 50 minutes while two of four hoist ropes were shortened. The rope shortening interfered with the use of the hoist equipment for more than thirty minutes while miners were underground. MSHA was not immediately notified of the interruption.

Docket Nos. LAKE 96-125-M, LAKE 96-65-RM and LAKE 96-80-RM

Section 104(a) non-"S&S" Citation No. 4546275, issued at 8:00 a.m., on January 25, 1996, cites an alleged violation of section 103(j) of the Act and mandatory reporting standard 30 C.F.R. 50.10, and states as follows:

> On December 24, 1995, at about 12:53 a.m., the production hoist was damaged in that it was unavailable for service due to maintenance to shorten the four stretched hoist ropes. This damage to the hoist interfered with its use for more than 30 minutes and MSHA was not contacted immediately. The requirement to report this type of hoisting accident had been communicated to the mine operator by MSHA inspectorate in the past and to the company's lawyer through an MSHA letter dated December 8, 1995 (LAKE 96-65-RM).

Section 104(a) non-"S&S" Citation No. 4546323, issued at 4:00 p.m., on January 31, 1996, cites an alleged violation of section 103(d) of the Act and mandatory reporting standard 30 C.F.R. 50.20(a), and states as follows:

> The mine operator failed to complete and mail to MSHA as required 7000-1 forms, for hoist damage which became immediately reportable when the production hoist was taken out of service for maintenance faults or damage, which exceeded 30 minutes. The outages were reported to MSHA by telephone for the following dates but no completed 7000-1 reports have been received. The operator had been informed in the past about the reporting requirements and has failed to submit the reports.
>
> The dates are as follows: July 21, 1995, August 8, 1995, September 26, 1995, October 16, 1995, October 30, 1995, November 9, 1995, December 17, 1995, December 23, 1995, December 24, 1995 and December 28, 1995 (LAKE 96-80-RM).

Docket No. LAKE 96-66-RM

Section 104(a) non-"S&S" Citation No. 4546276, January 25, 1996, 8:03 a.m., cites an alleged violation of 30 C.F.R. 57.11050(a), and the cited condition or practice states as follows:

> On December 24, 1995, at about 12:53 a.m., the production hoist was not available for use for approximately three hours and thirty-seven minutes. Miners continued to work underground performing tasks that were unrelated to the hoist rope shortening operation. The production hoist is part of one of the two escapeways at this mine. The mine operator therefore failed to comply with this standard because the miners who were underground were not provided with two properly maintained escapeways to the surface to use in the event of an emergency for a period in excess of one hour. During part of the time that the production hoist was out of service, the service hoist (the primary escapeway) was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. However, during that time both escapeways were not in service.
>
> This incident was staged to test MSHA's enforcement of this mandatory safety standard. MSHA interpretation of this standard had been

communicated to the mine operator by inspectorate previously and to their lawyer in an MSHA letter dated December 18, 1995.

Deposition Testimony

MSHA Inspector Donald J. Foster, Jr., has served in that capacity since May 1991, and he confirmed that Mr. C. Okey Reitter is his supervisor. Mr. Foster has inspected the Cleveland Mine and is familiar with the hoists that are in use. He has taken a class dealing with ropes and hoists at the mine academy, and has prior mining industry experience (Tr. 4-16).

Mr. Foster stated that he investigated the hoist incident that occurred on November 9, 1995 (Citation No. 4100787), made notes, and reviewed them with Mr. Reitter. He confirmed that Mr. Reitter issued the citation (Tr. 17-22). Although the citation states that the hoist was disabled for approximately 50 minutes, Mr. Foster confirmed that this is not mentioned in his notes and he did not know where this information came from (Tr. 23). Based on statements he received during his investigation, he would say that the hoist was disabled for 40 minutes (Tr. 24). He confirmed that he did not review the citation, but believes that it is consistent with what he found during his investigation, except for the difference between 40 and 50 minutes that the hoist was down (Tr. 26). He believed the citation was justified.

Mr. Foster explained his understanding of section 50.10, as follows at (Tr. 28):

> Q. The 30 minutes that's necessary to trigger the reporting requirement in section 50.10 is computed with regard to the amount of time it takes to put the hoist back in service . . . . In other words, I could leave the hoist down all day; but if I can get it back running in 15 minutes, I don't have to report it under section 50.10. Is that right?
>
> A. Yes. To my understanding of that, Yes.

Mr. Foster stated that it makes no difference why the hoist is disabled for more than 30 minutes, or whether it is planned or unplanned. As long as it is unavailable for over 30 minutes, it is reportable. If power was not available to the hoist due to a power substation problem and the hoist was down for over 30 minutes, it would be immediately reportable (Tr. 29-30). He did not believe that ice in the shaft, which he considered a natural

occurrence, and which may render the hoist inoperable for more than 30 minutes, would be reportable, but he was not sure (Tr. 30).

After reviewing a MSHA Program Circular, "Report on 30 C.F.R. Part 50," December 1986 (Exhibit C-10, Tab F), he stated that according to this circular, ice in the shaft that results in hoist outage for more than 30 minutes would not be reportable (Tr. 32). The circular reference in question was read into the record (Tr. 31-32), and it states as follows:

> Q. What constitutes "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes?"
>
> A. Damage may be considered to be caused by some accident that involved hoisting equipment, or resulting from hoisting equipment failure. A natural occurrence such as ice in a shaft may cause the shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not itself be reportable.

Mr. Foster confirmed his understanding that ice in the shaft that results in the unavailability of the hoist, regardless of its duration, does not have to be reported, as long as there is no hoist damage, accident, or endangerment to miners (Tr. 33-34).

Mr. Foster stated that the hoist was out on November 9, 1995, because "they had experienced a stretch in the ropes, to the ropes, and they were tightening them up." He did not know if the hoist was malfunctioning at that time (Tr. 34). In response to a question of how the hoist was damaged at that time, Mr. Foster stated as follows at (Tr. 35-37):

> * * * * So those ropes at that point were stretched where they needed to take the slack out of them. Those ropes were stretched. Those ropes were damaged.
>
> Q. Do you know for a fact -- and I think you said you did not know for a fact -- that the ropes were stretched to such a point that they had a skip that already exceeded the location they were supposed to go to?

A. No, I don't.

Q. Let's go back. Let's suppose that the rope-adjusting exercise was undertaken before the ropes had stretched to the point that they exceeded that limit. In other words, they were undertaken as a matter of preventive maintenance. It was done before there was any damage to the rope. Okay?

A. Okay.

Q. Then how is the hoist damaged?

A. If we're looking at a situation where they preventively -- or for preventive maintenance purposes were taking this slack out, in my opinion, if there was enough slack to take out of there, then it had to have exceeded the point where they wanted it to be. Okay? So there was already stretching of the rope in order to take the initiative and to go through this whole process to eliminate it.

Q. Are you willing to say that the work that was undertaken that you investigated in this regard was preventive maintenance? Do you know whether it was or not?

A. No.

* * * *

So in my opinion, preventive maintenance is the troubleshooting, the visual, the looking at it. Once you've started the mechanics on something, in my opinion the damage has started.

Mr. Foster confirmed that the purpose of changing his automobile oil is to prevent engine damage, and he would consider this to be preventive maintenance. He would presume that his engine is not damaged, and he does not check the engine to determine any damage (Tr. 37-40).

Mr. Foster confirmed that he issued Citation No. 4546276 on December 24, 1995, citing a violation of section 57.11050(a), which requires at least two separate functioning escapeways or methods of getting in and out of a mine (Tr. 41). In a mine with

two shafts and two hoists, a violation of section 57.11050(a) would occur "when either one of the hoists go down, and it cannot be put back into service within an hour" (Tr. 41). He conceded that the "one-hour" requirement is not stated in the regulation, and that it is derived from the one-hour oxygen supply of a W65 self rescuer (Tr. 42).

Mr. Foster explained his reasons for issuing the citation as follows at (Tr. 45-64).

> A. Through the statements of the people involved, it was determined that the production hoist had exceeded an hour from the furthest point that it could be put back into service. The four ropes had been, all four ropes had been involved; and if they had, at the very furthest point that they had this apart with the eight clamps off, the other ones loose, the chain falls on, to reverse that process exceeded an hour.
>
> Q. And at that point, in your interpretation of the standard, what was the violation?
>
> A. The violation was that, number one, that the occurrence exceeded an hour and was not immediately reported; and that it also exceeded an hour, it was longer than an hour that it could be brought up even in an emergency situation. Okay? And that violated having the two ways out of the mine that had your continuous escapeways to the surface.
>
> Q. In your judgment is there a requirement that everybody be evacuated from the mine except for those people working on the hoisting equipment at that time after an hour?
>
> A. In my understanding, once that hoist has become disabled and is realized it is going to be longer than an hour to get it back in, then those people should be given orders to evacuate at the time that that's determined to be, the damage, the extent, to exceed an hour.

Mr. Foster stated that section 57.11050(a) has no specific language that requires mine evacuation, and he was aware of no standard that requires automatic evacuation of the entire mine within any given time period (Tr. 53-54). However, he would rely

on section 57.11050(a) to accomplish a mine evacuation. He further confirmed that a section 104(a) citation does not require any withdrawal of miners from the area of a violation, or a mine evacuation. However, he then stated that the absence of two escapeways would require a mine evacuation, and in his opinion, the section 104(a) citation he issued "was a withdrawal order" because the standard requires two or more separate and properly maintained escapeways to the surface (Tr. 55). He further believed that a section 104(a) citation would require that the other escapeway be repaired and made available within one hour, even though this is not stated in the regulation (Tr. 56).

Mr. Foster stated that "a reasonable amount of time" to abate a section 104(a) citation for a violation of section 57.11050(a), would be one hour to repair the other escapeway regardless of what is wrong with the hoist, or what the other people underground are doing, and no matter what the likelihood of a fire underground might be (Tr. 57, 60-61).

Mr. Foster confirmed that although the second escapeway service shaft in the instant case was working and nothing would have prevented miners from escaping a fire using that escapeway, he still believed that a one-hour abatement time was reasonable (Tr. 59).

Mr. Foster stated that if he found a situation where the production hoist was down and was told that it would take two hours to repair it and miners have not been withdrawn, he would issue a section 104(a) citation citing a violation of section 57.11050(a), and would require an abatement time of one hour to evacuate the mine to eliminate the hazard (Tr. 63-64). He knew of no other situations where he has issued section 104(a) citations and required the withdrawal of miners to terminate the citation (Tr. 65).

Mr. Foster stated that he has seen a portion of the February 22, 1990, memorandum from District Manager Salois (Exhibit C-8, Tab G), but never received it through MSHA channels or told to use it to enforce section 57.11050(a). (Tr. 70, 73). He confirmed that he has always based his one-hour evacuation interpretation of section 57.11050(a), on the fact that the W65 self rescuer would enable a miner to get out of the mine within an hour using that device (Tr. 74). He confirmed that part of his understanding in this regard came from his experience and interpretation that he learned when he worked at a coal mine, and this was later confirmed from conversations with other MSHA inspectors, including his supervisors (Tr. 75-76).

In response to questions by MSHA's counsel, Mr. Foster stated that if a hoist used as an escapeway is broken, miners are exposed to the hazard of not having two well maintained

escapeways available for their use. Apart from repairing the hoist, evacuating the mine will eliminate the hazard (Tr. 80.).

C. Okey Reitter, Jr., MSHA Supervisory Inspector, Newark, Ohio office, testified that he has never been to AKZO's Cleveland mine (Tr. 16). He confirmed that he issued Citation No. 4100787 on November 28, 1995, because AKZO failed to immediately report a hoist outage which exceeded 30 minutes (Tr. 19). He identified a copy of his notes which reflect that the hoist outage was reported by fax by AKZO's counsel on November 10, 1995, (Tr. 23). He received the information which is stated as the "condition or practice" in the citation from inspector Foster who went to the mine to check out the situation (Tr. 24). Mr. Foster determined that the hoist was down for 50 minutes after speaking with the company and the miners. He believed the 40 to 50 minutes time frame "was probably what we came up with how long it would have taken to put the hoist back into service if an emergency occurred" (Tr. 28). He confirmed that Mr. Foster's notes reflected different down times for the hoist in question (Tr. 29).

Mr. Reitter expressed his understanding of section 50.10, as follows at (Tr. 32):

> If there is a hoist outage, accident or incident, that exceeds being able to put the hoist back into service, that exceeds 30 minutes, that incident becomes immediately reportable to MSHA.

He further explained at (Tr. 33-34):

> Q. Okay. That 30 minutes, is that in your interpretation of the standard, is that the actual time the hoist is out?
>
> A. That is the time that it would take to put it back into service.
>
> Q. Go ahead
>
> A. If the hoist were to be out one hour, let's say we had the hoist shut down for one hour, and we were able to, any time during that one
>
> hour we were able to put it back into service within 30 minutes, that would not have been immediately reportable.
>
> Q. So if the hoist were out for all day, if the hoist was shut down all day, but I could put

it back into service in less than 30 minutes, then that is not a reportable hoist outage?

A. Correct.

Mr. Reitter stated that his interpretation of section 50.10, is referred to in the December 8, 1995, letter from Vernon Gomez to AKZO's counsel where it addresses the 30 minutes loss of service (Tr. 34-35). This is the only written guidance that he was aware of with respect to the 30 minute immediately reporting requirement (Tr. 40).

Mr. Reitter stated that the cited hoist was disabled for use because two of the four tail ropes were being adjusted to equally distribute the rope lifting capacity and he explained the tightening procedure (Tr. 41). He confirmed that prior to this work the hoist was functioning fine and the work was performed to preclude any future problem (Tr. 42).

Mr. Reitter stated that nothing was broken on the hoist when it was taken out of service and put back together again (Tr. 45). In explaining why he believed the hoist was "damaged" within the meaning of the definition of "accident" found in section 50.2(h)(11), Mr. Reitter stated as follows at (Tr. 42-44):

Q. Now I want you to explain to me how the hoist was damaged.

A. Any time that I can't use something, it's damaged.

* * * *

Q. What I want to know is how the hoist was damaged in this case?

A. It interfered with the use of it.

Q. But what was the damage to it? What was wrong with it? You just explained to me your --

A. Once it was taken out service, it's damaged. I mean once it's -- To me, I would consider the hoist damaged because I could no longer use it. It was not a usable thing to me. So there was damage to it.

Q. So any time you can't use the hoist for more than 30 minutes, then it's damaged, right?

A. If I can't put it into service.

Q. So if the power were out to it, say, at the substation level more than 30 minutes and I couldn't get it on for more than 30 minutes, that would be damage, would it?

A. Yes, I believe so.

* * * *

Q. So what you're saying is that any condition that renders the hoist unusable for more than 30 minutes, any condition, is damage to the hoist in your understanding?

A. In my understanding, if I could not use the hoist as needed, if it's down and I can't use it because I can't travel -- It's like a timber beam being broken or ice in it, then if it exceeded 30 minutes, then I would assume it would be immediately reportable.

Mr. Reitter agreed that an automobile oil change is done to prevent engine damage, and even though the car is unavailable for use while the oil was changed he would not consider the car to be "damaged" (Tr. 49).

Mr. Reitter stated that in his experience an "accident" is an "unplanned event" (Tr. 51). He confirmed that he consulted with Mr. Salois before issuing the citation, and "at different times we ran it by different people," including Mr. Narramore in MSHA's Arlington office, Mr. Vernon Gomez, MSHA counsel Fitch, and his assistant district manager (Tr. 52-54).

Mr. Reitter confirmed that he supervised Mr. Foster in the issuance of Citation No. 4546276, on January 25, 1996, for a violation of section 57.11050(a), and that he and several individuals discussed it before it was issued, including Mr. Salois, Mr. Narramore, Mr. Gomez, and counsel Fitch (Tr. 55-57).

Mr. Reitter stated that section 57.11050(a), requires two operative escapeways at all times (Tr. 58). He then stated that one escapeway could be unavailable "for basically one hour," which is the normal time that self rescuers are good for in the event of a mine fire (Tr. 56-60). He confirmed that subsection (b) requires a refuge for miners who cannot reach the surface through at least two escapeways within an hour, and he conceded that its legal to leave people underground for more than an hour from evacuation (Tr. 62).

Mr. Reitter confirmed that the text of section 57.11050(a), does not state that the mine must be evacuated in one hour. Apart from the Gomez letter to AKZO's counsel, he knew of no other written MSHA directive requiring the evacuation of the mine within an hour (Tr. 64). He further stated that as an inspector, he was always told by other inspectors and by "word-of-mouth" that "they needed to be able to evacuate the mine within an hour" (Tr. 65).

Mr. Reitter stated that the one-hour time limit to evacuate a mine starts "from the time I realize that I can't get the hoist back into service within an hour" (Tr. 65). After discussing a number of "case-by-case" scenarios (Tr. 66-70), with respect to when the one-hour evacuation must be made, Mr. Reitter stated as follows at (Tr. 71):

> Q. Okay. But now I thought you -- I am very confused. I understand that answer. Once you realize that you cannot evacuate the mine -- Once you realize you can't put the hoist back in service in an hour, then you must begin evacuation procedures at that moment.
>
> A. Yes.
>
> Q. At that moment, okay. If it takes you more than an hour to evacuate the mine to start with, is it or is it not your statement that you must begin evacuation procedures immediately when one hoist -- when you are down to one escape route?
>
> A. I would have to ask for an interpretation of that.
>
> Q. Who would you ask?
>
> A. I would start with Jim Salois.

Mr. Reitter was not aware of any MSHA regulations that require the automatic evacuation of all miners (Tr. 72-730). He confirmed that the issuance of a section 104(a) or (d) citation does not require the withdrawal from the area where the violation has occurred or the evacuation of the mine (Tr. 74). The circumstances under which MSHA can require evacuation are very limited and are based on specific hazard exposure (Tr. 75). He agreed that the rope adjusting activities taking place when the citation was issued was part of hoist maintenance. He confirmed that none of the "hour language" is in the regulation and some of it is from the December 8, 1995, Gomez letter, and "from direction of what other people in the agency that review policies and procedures are interpreting it as" (Tr. 81-82).

Mr. Reitter stated that prior to the Gomez letter, he believed that if there were no escapeway for one hour there would be a violation and he would issue a section 104(a) citation which does not require an automatic evacuation. The citation would be abated by providing a second means of escape or putting the escapeway into service. He would establish an abatement time based on the hazards presented to employees working underground. In that scenario, he would provide a short abatement time to correct the condition, and if it is not corrected, the work area that was directly affected would have to be evacuated. He would use a section 104(b) order, on a case-by-case basis, to evacuate the work area and that order would require the people affected by the hazard to be removed. (Tr. 82-84).

Mr. Reitter stated that he first became aware of the February 22, 1990, Salois memorandum approximately a year and a half ago after he became a supervisor in 1992. He was unaware of the memo for a year while he was a supervisor and became aware of it when AKZO advised him that the memo was being recalled (Tr. 85, 90). He explained that he learned of the Salois policy sometime in 1994 and possibly as early as late 1993, and the inspectors in the office told him that they were following that policy, and had he known of the policy he would have followed it. However, he never had to use the policy because no hoist outages occurred that he was aware of (Tr. 94-95).

Mr. Reitter stated that the high negligence finding associated with the January 25, 1996, citation was based on the fact that the incident was staged to test MSHA's enforcement of the standard and MSHA's interpretation had previously been communicated to AKZO and its attorney by letter dated December 8, 1995. He concluded that AKZO knew that the cited condition would be a violation and intentionally violated the law (Tr. 102-103). He agreed with the non-"S&S" finding (Tr. 106). He also agreed that the service hoist was not unavailable for any period longer than 30 minutes (Tr. 110).

MSHA metal and non-metal Inspector James D. Strickler testified that he accompanied inspector Foster to the mine on January 4 and 5, 1996, to interview company officials with respect to hoist citation No. 4546276, issued on January 25, 1996. Mr. Foster told him that AKZO wanted a citation to issue so it could take it to court and he went with Mr. Foster to take notes of the interviews. He reviewed the citation and agreed with it, including the finding that an injury or illness was unlikely (Tr. 4-12).

Mr. Strickler stated that he has never seen the Salois memorandum but has heard about it from other inspectors in his office who told him that at one time miners were allowed to work underground until the end of the shift. This was not the case in

Illinois where the Sperry U.S. Gypsum Company evacuated miners immediately (Tr. 11, 15-16). He arrived at his field office in 1993, and the Salois memorandum had previously been rescinded and has never been used since he has been there. (Tr. 17-18).

Mr. Strickler stated that section 57.11050, requires two fully functional escapeways at all times. If he were to inspect a mine with two escapeway hoists and one is unavailable or unusable for any reason, the operator would have a 30 minute time period before deciding to bring people out. If the hoist is down for more than 30 minutes it must be reported to MSHA. The operator must then evacuate the mine "unless they are up and running within an hour." Once MSHA is notified after the expiration of the initial 30 minutes, if the operator determines that the hoist cannot be repaired within the next 30 minutes, it must then evacuate people at that time. This understanding on his part is not in writing or part of the standard, and he learned it from other inspectors and his experience. The evacuation must begin within the hour because the miners' breathing apparatus, the P65 and the MSAW65, is only good for an hour (Tr. 20-22).

Mr. Strickler stated that a "reasonable abatement time" for a violation is left to the inspector's discretion after asking the operator how long it will take to correct the condition, and he has used his experience to make this determination. He had no hoist experience, but would ask an operator about any hoist problem and how long it would take to repair it. He did not believe that section 104(a) required the withdrawal of miners while a violation is being abated (Tr. 23-25).

Mr. Strickler agreed that if an accident occurred as a result of the violation it could reasonably be expected to be fatal, and his opinion was based on his underground experience and the fact that a mine fire could cause a fatality. He confirmed that one of the escapeways was functioning and he would reasonably expect that everyone would be able to escape a fire. He agreed that the mine has no history of serious fires, but non-fatal fires have occurred. He confirmed that three people were working underground on the night of the incident in question and they were not exposed to any hazards other than those they are normally exposed to doing their normal job. He agreed they were exposed to less hazards because there was no active mining taking place (Tr. 26-28).

In response to MSHA's counsel's question, Mr. Strickland stated that if a hoist is out in an escapeway, it is unusable and broken, and miners who are underground must be evacuated. He would issue a citation for not evacuating the mine and because there was only one escapeway. A reasonable time to abate this violation would be one hour because "that's all their life

support is in my opinion," and he has found that an hour can be a reasonable time to evacuate at AKZO and other mines that he has been in (Tr. 28-30).

In response to further AKZO questions, Mr. Strickler stated that the word "evacuation" is not part of section 57.11050(a), and he is aware of no Part 57 regulations that require a mine evacuation for non-compliance. He confirmed that he has no authority to withdraw miners under section 104(a) of the Act, but believed that section 57.11050 gives him that authority (Tr. 31-32).

Mr. Strickler stated that a fire burning out of control must be reported to MSHA if it goes on for more than 30 minutes, but an evacuation is not required. However, in the event of such a fire or emergency, an operator is supposed to evacuate miners, but not from the entire mine. If the mine is not evacuated, a separate order would be required to evacuate the mine in the event a fire is out of control. However, based on his "experience," a separate order to evacuate would not be required for a violation of section 57.11050 (Tr. 33).

MSHA metal/non-metal mine Inspector Herbert D. Bilbrey, testified that he conducted a regular inspection of AKZO's mine on November 2, 1995, with Inspector Bill Backland and interviewed people regarding a hoist shutdown which required possible evacuation of the mine. He explained that section 57.11050, requires an operator to maintain two fully functional escapeways at all times, but that the regulation does not state that a mine has to be evacuated if one of the escapeways is not functioning (Tr. 8-9).

Mr. Bilbrey stated his understanding of when a citation pursuant to section 57.11050(a), would have to be issued as follows at (Tr. 11):

> A. The mine has a time limit to evacuate the mine. There could be several different cases. You would have to take each case by case. But if it was determined that the hoist could not be put back on line within the hour, then evacuation had to start.
>
> Q. If the hoist couldn't be put back on line within an hour, when does the evacuation begin?
>
> A. If the company had then determined it couldn't be.

Q. So how long does the company have to determine that the hoist can't be put back in service?

A. Well, there was a floating time period which would give them an hour to make that determination, and then an hour after that to evacuate the mine.

Q. So they have one hour to determine if they can get the equipment working again; and then once they make that determination, they have an hour from the time they decide that can't be put back in service to put it back in service.

A. Right.

Q. And where is that policy stated?

A. There's no written policy that I am aware of, that I know of.

Mr. Bilbrey stated that he was unaware of the Salois memorandum of February 22, 1990, and he learned about the unwritten policy to evacuate a mine when a hoist is out from a staff meeting and verbally from his lead supervisor Robert LeMaster, and discussions with Mr. Reitter (Tr. 12). He heard about this policy approximately a year ago, and prior to that the issue never came up in the first three years in his district (Tr. 13).

Mr. Bilbrey stated that it was his understanding that a hoist that is out for 30 minutes or more is considered to be an accident, but he could not explain how a hoist that is taken out of service for preventive maintenance is considered to be an accident. He then stated that he did not believe that a hoist that is taken out of service for preventive maintenance is an accident (Tr. 15).

Referring to the section 50.2(h) definitation of an accident, Mr. Bilbrey stated that preventive maintenance is "something that would prevent a breakdown" and something that would be done before the equipment is broken. He defined "damage" as "inoperative" and stated that this would not include equipment that is intentionally taken out of service for maintenance purposes (Tr. 15).

In response to further AKZO questions, Mr. Bilbrey stated that an unplanned outage of a hoist must be reported "if it's 30

minutes." If power is cut off to the hoist for more than 30 minutes, it would be a reportable accident. If ice were on the shaft and the hoist was inoperable for 30 minutes or more, he did not know if this would be reportable and he would have "to look in the books" and "I would run it by my supervisor" (Tr. 22-23).

MSHA Inspector Dale A. Backland, has served in that capacity for over 21 years and Mr. Reitter is his supervisor. He has inspected AKZO's mine on more than 30 occasions. He was at the mine for a regular inspection on November 2, 1995, and spoke to plant manager Higgins who informed him that he wanted him to issue a citation for a hoist outage on the previous evening. Mr. Backland stated that he contacted Mr. Reitter and Inspector Bilbrey explained the situation to him. Mr. Reitter told them that he would contact the district office to determine what further steps would be taken (Tr. 6-11). Mr. Backland agreed with Mr. Bilbrey's conclusion that no violation existed due to the fact that the hoist could be part back on line and the event was planned (Tr. 11).

Mr. Backland stated that section 57.11050(a) requires at least two or more fully functional hoists at all times. A hoist that is taken out of service for planned preventive maintenance is not necessarily a violation of that section, depending on how fast it can be put back into service in the event of an emergency. In a planned event, the hoist needs to be back in service in "a one-hour period" (Tr. 12). If the planned maintenance time is exceeded and it takes more than an hour, he would expect the mine to be evacuated (Tr. 13-14). He confirmed that section 57.11050(a) does not discuss mine evacuation, and his authority to require evacuation if it takes more than an hour to repair a hoist relates back to the self-rescuer which has a life period of one hour when activated. This policy is not in writing, but he believes it is district policy, but did not recall who told him about this policy (Tr. 15).

Mr. Backland reviewed the Salois memorandum and confirmed that he was aware of it in 1990, but did not believe it was the policy in his district. However, when he saw the memo in 1990, it was his understanding that regarding the time element, it should be followed. However, he never had to implement the policy because he never had a situation that required him to do so (Tr. 16).

Mr. Backland stated that a planned hoist outage probably would not be reportable under section 50.10, if the hoist can be activated within a reasonable amount of time, 10 to 15 minutes, for evacuation in the event of an emergency. An unplanned event that causes a hoist to go out in excess of the 30-minute required period would be reportable, and this includes a power outage at a site off mine property (Tr. 17-18). He stated that in fixing a

reasonable abatement time to restore the equipment to service, the circumstances must be evaluated (Tr. 18).

Mr. Backland was of the opinion that pursuant to the reporting requirements of section 50.10, and the definition of "accident" found in section 50.2(h), preventive maintenance that takes more than 30 minutes is not an accident. He believed that preventive maintenance could take place for a full shift. He stated that maintenance that takes a hoist out of service for more than 30 minutes need not be reported if the hoist can be put back in service within a reasonable amount of time to evacuate the mine. There is no set time during which the maintenance has to be completed or in which the hoist has to be put back in service (Tr. 20-21).

Mr. Backland stated that if a hoist is taken out of service in order to shorten or adjust the ropes, and it takes more than 30 minutes, it "is reportable due to the fact that you don't have a secondary escapeway available" (Tr. 22). He stated that the stretching of a hoist rope is normal and does not mean that the hoist is truly damaged or not functioning properly (Tr. 23). In response to a question as to whether the adjustment of an undamaged hoist rope that has been subjected to some stretching is a reportable accident, Mr. Backland responded as follows at (Tr. 24):

> A. Well, you're taking it out of service for more than 30 minutes to conduct this and -- It's a tough question to answer. We're talking about reportable, right? I don't know. I would probably have to converse with my supervisor on that.

Vernon R. Gomez, MSHA Administrator for Metal and Non-Metal, testified that he supervises all of the agency metal and non-metal enforcement operations, and part of his duties are to ensure consistent regulatory enforcement policies. He recently had occasion to consider the enforcement policy with regard to section 57.11050, because of his involvement with the instant litigation (Tr. 7-8).

Mr. Gomez confirmed that "he was in the loop" in the discussions of Citation Nos. 4546276 and 4546275, issued on January 25, 1996, citing violations of sections 57.11050(a) and 50.10, for a hoist incident on December 24, 1995, and Citation No. 4100787, issued on November 28, 1995, citing a violation of section 50.10, for a hoist incident on November 9, 1995. He stated that he reviewed the citation language that describe the conditions and probably saw more than one draft, but did not recall recommending any changes, or reviewing the gravity or negligence findings (Tr. 10).

Mr. Gomez stated that he has never been in AKZO's Cleveland Mine or in any salt mines in that area (Tr. 11). He confirmed that he became aware of the Salois memorandum of February 8, 1990, and the draft of that memorandum approximately a year ago (Tr. 11-13). He was concerned about the memorandum because it was contrary to what he considered the policy to be (Tr. 13). Mr. Gomez stated he was district manager of the Rocky Mountain District in February 1, 1990, and his enforcement policy concerning section 57.11050, was not like the policy stated in the Salois Memorandum (Tr. 14). His policy was to require two properly maintained escapeways to the surface at all times, and if this could not be done, miners had to be evacuated. If one escapeway was lost "and could not be restored where we could get the people out of the mine within an hour" a violation of section 57.11050, would occur (Tr. 15).

Mr. Gomez stated that if he found only one functioning escapeway in a mine, he would issue a citation. If he did not have two escapeways out of the mine within an hour, he would issue an imminent danger order and have the mine evacuated. The imminent danger and hazard are that "I have to be able to get the people out and they have to have two separate escapeways to the surface" (Tr. 16-17).

Mr. Gomez stated that MSHA policy concerning section 57.11050, requires the shutdown of mining operations in the event one of two escapeway hoists is down and miners cannot evacuate within an hour. This would be done through an imminent danger order regardless of the number of people who may be doing some work unrelated to the repairing of the disabled escapeway. He described the nature of the imminent danger as "the possibility of something occurring and not being in compliance with the two escapeways to the surface" (Tr. 19-21). He confirmed that the MSHA policy requiring evacuation if the hoist cannot be made available within an hour is based on section 57.11050, and not the time it might take to abate the violation (Tr. 23).

Mr. Gomez was not sure why Mr. Salois rescinded his memorandum, and he stated that he checked with everyone who may have been a district manager, and the current managers, to determine whether they had a policy such as the one discussed by Mr. Salois, and he found no such policy (Tr. 29).

Mr. Gomez stated that his December 8, 1995, letter to AKZO counsel Savit was drafted and reviewed with his safety division staff and states MSHA's current enforcement policy concerning section 57.11050. He stated that the letter was distributed to all MSHA districts except for the North Central District, and this was due to "a slipup" (Tr. 32). He did not know if the letter was distributed to any mine operators, but copies are available for hand out by the inspectors. The policy interpretation contained in the letter is not in writing anywhere

else, and the contents of the letter was put together by MSHA headquarters personnel, with no input from anyone outside the agency. Except for the Solicitor's office, the letter was not shown to others for comment before it was sent out (Tr. 34-35).

Mr. Gomez stated that he was familiar with Citation No. 4100787, issued on November 28, 1995, and Citation No. 4546275, issued on January 25, 1996, for violations of section 50.10, and he confirmed that MSHA's position is that a hoist that becomes unavailable for a period of more than 30 minutes, that is, for a period of 30 minutes during which it could not become available, must be reported to MSHA no matter the reason for its unavailability (Tr. 36).

With regard to his prior statements concerning the use of an imminent danger order to evacuate miners, Mr. Gomez further explained that an inspector could issue a citation with a short abatement time, and a (b) order, "in other words, repair the condition and get the people out. Then we would write you the order and remove the people" (Tr. 38). He would consider the lack of two properly maintained escapeways to the surface to be an imminent danger, "in and of itself" (Tr. 39).

Mr. Gomez stated that based on his December 8, letter, inspectors do not have the discretion to issue a section 104(a) citation with an abatement time exceeding one hour, and the actual abatement time would be less than an hour because "I have to be able to get people on the surface within an hour," regardless of the number of people underground or the activity they are engaged in (Tr. 39-41). He did not believe that the mining industry is confused about its responsibility if there are two escapeways and one is down for any particular reason (Tr. 45).

With regard to the Salois policy memorandum, Mr. Gomez stated that during the five years he was a district manager, and the six years he was a subdistrict manager, he never heard of the regulatory interpretation stated in that memorandum and he believed it is internally inconsistent. He saw no unique reason for allowing miners to work underground with one escapeway for the rest of a shift but not send the next shift underground with only one available escapeway. He believed that both shifts are entitled to escapeways, and that miners cannot be underground doing work other than fixing a problem if there is only one escapeway in a producing mine (Tr. 50-51).

Mr. Gomez did not believe that AKZO's position in the instant litigation is reasonable, and he confirmed that his December 8, letter articulates his understanding of the regulations as they relate to escapeway maintenance and reporting. Contrary to his earlier statements concerning the policy aspects of his letter, he explained as follows at (Tr. 52):

Q. Now that letter doesn't state any policy, does it?

A. No.

Q. There is a method for instituting agency policy, isn't there?

A. Yes.

Q. Do you always issue policy when you address a question that is raised by somebody?

A. No. There's different ways of handling it, such as that letter.

Mr. Gomez confirmed that the issuance of MSHA's Program Policy Manual in 1987, revoked any policy not included therein, and any prior existing policy would be inoperative by the issuance of the manual (Tr. 54). The Salois memorandum was not existing national policy, but it is possible that such policy may have existed in some form that he was not aware of (Tr. 56). Mr. Gomez further explained why he believed the existence of only one workable escapeway would be an imminent danger (Tr. 56-64).

Rodric M. Breland, Chief, Division of Safety, MSHA, Arlington, Virginia, since August 1994, stated that he serves as the principal advisor to the administrator on safety issues, regulatory policy development, petitions for modifications, and answering inquiries concerning regulatory enforcement and interpretations from interested mining parties (Tr. 8). He stated that he received an inquiry from MSHA's Dallas acting manager, Doyle Fink over a year ago concerning AKZO's mine in Louisiana concerning the unavailability of one of their escapeways. Mr. Fink asked whether there was any change in policy that would not require the evacuation of miners pursuant to section 57.11050 when maintenance was performed on the hoist, and Mr. Breland advised him that he was not aware of any change in policy (Tr. 11). After consulting with Mr. Gomez, Mr. Breland informed Mr. Fink that there was no policy change and that miners would have to be withdrawn "as soon as you don't have two escapeways" and that this would be a violation (Tr. 13).

Mr. Breland stated that in a two-hoist situation, if one goes down a "technical" violation occurs immediately because miners are entitled to two ways out of the mine at all times. However, as a practical matter, an operator needs time to evaluate the situation, and has 30 minutes from the time the hoist is interfered with to report the matter (Tr. 23). He explained the evacuation requirement as follows at (Tr. 24-25):

Q. Assuming a two hoist, two shafts, no refuge chamber. Let's assume that situation. Assuming that situation. You say they have an hour to escape?

A. They have an hour to evacuate from the time they've made that decision. You're talking about the evacuation portion of this requirement.

Q. When must they make that decision? What triggers the decision they must evacuate?

A. Once they decided they can't repair whatever is wrong within the hour they need to start evacuating.

Q. And however long that takes them, up to an hour, I guess?

A. Yeah. Essentially, you know, it's -- I think there's allowance for a reasonable amount of time to make the determination, what problem you're dealing with, how long is it going to take you to repair it. Once that decision is made, if it is going to take you longer than an hour you should start.

Mr. Breland stated that his interpretation of section 57.11050, with respect to the "evacuation within an hour" is found in subsection (b), and the self rescuer and fire evacuation standards, and he believed it is based on the limits of the self rescuer (Tr. 27).

Mr. Breland confirmed that he was aware of Citations Nos. 4100787 and 4546275, citing violations of section 50.10, and Citation No. 4546276 citing a violation of section 57.11050(a). He believed that the lack of a second escapeway would be an "S&S" violation if normal production activities were taking place, and further explained how he would evaluate "S&S" under several scenarios (Tr. 36-40).

Mr. Breland was of the opinion that "one hour for the abatement for this standard is reasonable because that is what we expect in the evacuation" without regard to the length of time if takes to fix the hoist or the number of people underground (Tr. 45-46, 49).

Mr. Breland stated that he first saw the February 22, 1990, Salois memorandum sometime in the fall of 1995, when a draft was brought to a meeting with AKZO representatives and MSHA officials

where the matter of doing maintenance work and having a hoist unavailable while people were still working was discussed (Tr. 52). He was never aware of any policy change such as that discussed in the Salois memorandum and he always followed the "instant violation and an hour to abate" policy as stated as follows at (Tr. 53).

> Q. You always thought of it, this kind of instant violation and an hour to abate?
>
> A. Yes, and that people would -- if your hoist became unavailable you would evacuate and your planned kind of maintenance activities were going to be done on off shifts, weekends, things like that. That's standard for most of the industry.
>
> Q. That's standard for most of the industry, in your experience?
>
> A. Yes.

Mr. Breland stated that he told Mr. Salois that he did not agree with his policy statement because it did not comply with his understanding of how section 57.11050(a), should be applied, but he did not know who may have directed Mr. Salois to rescind his memorandum. He confirmed that he may have had something to do with this because he informed Mr. Gomez of his opinion that Mr. Salois' policy was not correct (Tr. 56).

Mr. Breland stated that he and his staff initially drafted the December 8, 1995, Gomez letter to AKZO counsel Savit, and Mr. Breland believed the letter "is a well-written explanation of our policy and philosophy" regarding the enforcement of section 57.11050, and he does not disagree with anything in the letter. He was not aware that the policy stated in the letter was in any other written form other than the present program policy manual. He has never shown the letter to other mine operators and did not know whether any district managers have done this (Tr. 59-60).

Mr. Breland stated that the two citations citing violations of reporting section 50.10, were issued because a hoisting accident occurred and interfered with the use of a hoist for longer than 30 minutes and this was not reported. It was his understanding that the "accident" as defined by section 50.2 concerned "working on repairing damage to hoisting equipment" (Tr. 61). He was not aware of any other reason for shutting down the hoist other than to do the "maintenance" in question. He further explained as follows at (Tr. 62):

Q. Well, do you know -- do you know whether or not the ropes on the hoist were so out of balance in terms of length that the hoist was incapable of being run safely at the time these operations were undertaken?

A. At the time they were done it would be my assumption they were trying to prevent the damage from being such they would have been a danger to continue running.

Q. So what was the damage you're talking about?

A. Well, once you start using equipment it's going to be exposed to damage almost immediately once you start using it, but they were, I understand, cutting slack rope.

And, at (Tr. 64-65):

Q. So it's your experience as soon as something starts running it starts to be damaged?

A. Yeah. It starts to wear. Machinery wears from the time you start it.

Q. Is it damaged? The standard says damaged, right?

A. Correct.

Q. Is it damaged the moment you start it?

A. Yes, actually, instantly. It is damaged to some degree.

Q. It is an accident when that happens?

A. For our purpose, if the damage gets to the point it requires interference with the hoisting for more than 30 minutes.

Mr. Breland stated that any hoist that is interfered with for more than 30 minutes is always reportable even if it is one one of seven escapeways, and this would include power outages that occur off mine property. In short, any hoist that is interfered with for more than 30 minutes, regardless of the reason, is reportable under section 50.10 (Tr. 66). If a diesel generator that is used to run a hoist is shut off to lubricate it, and it takes more than a half-hour to do this work, he would

consider this to be "damage" because "you're treating the damage. You're trying to prevent progressive damage" (Tr. 69). He would consider ice in a shaft that prevented the use of the hoist to be a "natural occurrence" that would not be reportable. However, if there were people in the mine "and you can't get them out, you've lost your second way out," it would be reportable (Tr. 67).

James M. Salois, MSHA Metal/Non-metal North Central District Manager since September 1989, testified that he was familiar with citation Nos. 4100787 and 4546276, citing violations of section 50.10 and 57.11050(a), and he confirmed that he was involved in the decision to issue citation No. 4546276, and discussed it with Mr. Reitter, Mr. Foster, Mr. Gomez, and Mr. Narramore. He was somewhat familiar with the cited conditions as reported by the inspector and he reviewed the citation and findings before it was issued (Tr. 15-16).

Mr. Salois stated that his memorandum of February 22, 1990, dealt with planned and unplanned shutdowns of hoists that were designated as escapeways and it provided examples for the inspector to use when determining a mine evacuation when hoist repairs were made. Pursuant to that memorandum, when planned maintenance was being carried out, and one hoist was disabled as a result of this work, as long as the other hoist was available to transport persons, then it was permissible to work through the end of the shift (Tr. 18).

Mr. Salois explained that he issued the memorandum after Mr. Frank Delimba, Chief of Safety, advised him to do so because he (Salois) was enforcing the regulation different than the other districts. Mr. Delimba's instruction was the result of the issue raised by the Morton Salt Company who claimed that he (Salois) was enforcing the regulation differently from the other districts. Mr. Salois stated that he was a new district manager at that time and he did not speak with any other district managers about their policy. Mr. Salois stated that he was not sure that he agreed with his policy memorandum at that time but issued it because he was asked to do it. He felt that the policy provided less protection than the regulation. Prior to the issuance of the memorandum, miners were required to be out of the mine when hoist maintenance was performed, and it was always his understanding when he was an inspector "that you always had to have two ways out of the mine." Since Mr. Delimba informed him the other districts were doing otherwise, Mr. Salois stated "I didn't argue with him, but I didn't necessarily agree with it, either" (Tr. 22).

Mr. Salois stated that his understanding that miners had to be evacuated when hoist work was performed came from what he "learned on the job." He never issued a citation concerning this issue, and he did not recall any citations that came to his attention while serving as district manager (Tr. 23).

Mr. Salois confirmed that his 1990 memorandum was the policy in his district for five years, but that it was withdrawn in February, 1995, because he did not have the authority to establish enforcement policy for his district that was contrary or inconsistent with national policy. He stated that he was naive when he was asked to issue his original memorandum and he withdrew it after learning through discussions with other district managers that it was inconsistent with their policy (Tr. 25).

Mr. Salois stated that he is not aware of any written national policy interpretation concerning section 57.11050. His interpretation was stated as follows at (Tr. 27-30):

> A. Is, as I would interpret it, okay, is that you have to have two escapeways -- in talking about 1150(a) you have to have two escapeways out of the mine when you have people working underground, okay. And they have to be able to get out through those escapeways within one hour or they have to have a refuge chamber if they cannot.
>
> * * * *
>
> A. I would say the violation could start at the point the hoist went down, depending on what was wrong with the hoist and the time necessary to fix it.
>
> * * * *
>
> A. Let's say a guide breaks and the hoist -- the cage hangs in the shaft and nobody has any knowledge of how severe the damage is, okay, or how long it's going to take to fix it, okay.
>
> What I'm saying, at that point the clock starts ticking. They only have one way out of the mine, okay. And if they know they can't fix it right away then they should pull their people out of the mine, based on this standard.
>
> Q. Under Section 11050(a) they automatically have to begin evacuating at that moment.
>
> A. Well, I would say that under the standard, but in (b) where it says they have to be able to get out of the mine through two separate escapeways within one hour, and they only have one escapeway, they would have to pull their people

to the hoist equipment." However, "if the ice caused the damage then I would certainly consider it reportable" (Tr. 76). If a decision were made not to run the hoist because of concern that the ice would cause some damage, he did not believe it would be reportable "if you were going to wait for it to melt." However, taking the hoist out of service to shorten the ropes because of concern that damage may occur would be different because the ropes are a direct part of the hoist system (Tr. 78).

Mr. Salois believed that any event that impairs or interferes with the use of a hoist for more than thirty minutes would be considered damage (Tr. 80-81). He would consider a loss of power off mine property that interferes with the use of a hoist as damage, but would not consider ice in the shaft that interferes with the use of the hoist to be damage (Tr. 82-84).

In response to MSHA counsel's questions, Mr. Salois stated that in order to achieve evacuation of the mine for a violation of section 57.11050(a), he would issue a section 104(a) or 104(d) citation if the hazard was not imminent, and would fix the abatement time at one hour. If an underground rescue chamber is not provided, the regulation requires mine evacuation through both escapeways within an hour (Tr. 88). He believes that an hour is a reasonable time to evacuate the mine and once it is evacuated the escapeway would be available for use. He would not terminate the citation after the hour by the evacuation of personnel only, and would extend the abatement time to focus on other problems (Tr. 89).

Mr. Salois stated that the December 8, 1995, letter from Mr. Gomez to AKZO counsel Savit accurately reflects his understanding of the proper interpretation of sections 50.10 and 57.11050, as they relate to reporting hoist outages and evacuating the mine, and is consistent with what might have been a verbal understanding of the regulations prior to the issuance of the letter (Tr. 104).

Mr. Salois stated that a violation of section 57.11050, occurs when one of two escapeways is down, and that depending on the circumstances, it is reasonable and appropriate to allow the operator a few minutes to determine if the hoist is immediately fixable before evacuating the mine (Tr. 105). He further explained as follows at (Tr. 106, 108):

> A. If it's -- if it's damage that takes more than 30 minutes to correct they would have to report it to us. If they can repair it and evacuate the mine within an hour they would not have to evacuate the mine, in my opinion, they would just fix the problem in 35 minutes. They would not have to evacuate the mine.

* * * *

Q. If they thought they could fix it in 20 minutes you would not expect them to evacuate the mine, would you?

A. Yes. We would not expect them to evacuate.

Q. But if yo -- if they knew it was going to take them an hour and 10 minutes to fix it you would?

A. Yes.

Mr. Salois was of the opinion that in the event of preventive maintenance work on a perfectly working hoist that cannot be put back into use within an hour or half-hour, he would consider the hoist to be damaged by the maintenance work itself (Tr. 111). He explained as follows at (Tr. 112-114):

Q. So complying with the standard damages the equipment?

A. In effect, yes.

Q. And that creates an accident, doesn't it, because it's reportable as an accident. It's part of the definition of accident, isn't it?

A. Yes.

Q. And it also creates a violation of the standard, doesn't it?

A. Yes.

Q. Which requires the issuance of a citation or evacuation from the mine?

A. Yes.

Q. So complying with the terms of the standard requires that you violate it?

A. If there are people underground.

Q. Okay. So you're required to evacuate the mine in order to comply with the terms of the standard?

A. Yes.

Mr. Salois stated that if a hoist is down for more than an hour, and people cannot be evacuated in an hour or more, and repairs cannot be made within an hour, a section 104(a) citation will be issued, and the reasonable time for abatement would be one hour regardless of the circumstances. Based on the standard, he did not believe that an inspector has discretion to grant more than an hour to abate because two properly maintained escapeways would not be available (Tr. 119-121).

Peter M. Tiley, Chief, Tiley and Associates, has been in the mine hoisting consulting business since 1972, and his work includes the engineering and installation of hoisting systems. His first involvement with the AKZO hoist was in 1977 or 1978, and he is very familiar with the mine production hoists, having studied them for years, but not so familiar with the service hoist (Tr. 3-10). He explained the problems and solutions associated with the production hoists in the mine working environment (Tr. 10-16).

Mr. Tiley stated that the atmosphere in the AKZO mine shaft is a moist and salty corrosive atmosphere, and he would expect the hoist ropes to endure this corrosive impact during their life. Corrosion is a part of the deterioration process until the ropes are retired and he would consider this to be "possibly" damage. He would consider a wire that breaks due to corrosion to be damaged, and that "it's just degree, how fast is corrodes . . . . ongoing deterioration. I don't know if you call it damage or not" (Tr. 18).

Mr. Tiley explained what occurs during the hoisting cycles, including rope fatigue and stress (Tr. 22-26). He confirmed that he has monitored the retirement of the mine ropes over the last several cycles and had an idea as to how long the hoist ropes last. He stated that the ropes appear to be wearing out from corrosion rather than metal fatigue, and that lubrication is necessary to enhance the useful duration of the ropes (Tr. 28).

Mr. Tiley stated that he was aware of the citations, and the cited regulations, and has reviewed the December 8, 1995, Gomez letter to AKZO counsel Savit (Tr. 31). Based on his experience, Mr. Tiley stated his understanding as to how the term "damage" in connection with hoisting operations is generally understood and used in the industry as follows at (Tr. 31-34):

> A. Sure. Damage, in my experience, is something that happens to a hoisting system that is unusual and is cause for stopping the hoisting system and reviewing what has happened and then deciding whether the damage -- what has been termed damage will impinge upon safe -- further safe operation of the hoist.

Q. Well, is maintenance ever required to fix damage?

A. No. I say repair is for fixing damage. Maintenance is carried on to avoid this unusual occurrence, which -- which I consider to be what damage is.

Q. So you read the word "damage" in very narrow sense as to being something which actually stops it from working?

A. Not necessarily stops it from working, but you must pause when you have discovered something that's caused damage and decide whether or not it is severe enough that you should stop the hoist or not.

Typically, when I get phone calls, it's through damage and they want to know, do we have to change the oil in this bearing now, for example, and do we have to get somebody in to look at this thing that's happened. So it's an unusual occurrence that requires some stopping in the hoisting activity to decide whether this reported damage is serious or not.

Mr. Tiley was of the opinion that metal fatigue is not damage because "that's the physics of the material responding to stress." Broken wires in a lay of rope may or may not be considered damage, as opposed to metal fatigue, depending on how many wires are broken. He believed that damage begins when rope retirement is required, and that prior to this time "it's just useful life" (Tr. 33). He explained that ropes arriving from the manufacturer have broken wires "as part of the way they are made," and this does not mean that the rope is damaged. However, failure of the mechanical structure that falls because of metal fatigue would be damage (Tr. 34).

Mr. Tiley was of the opinion, based on his experience, that changing hoist ropes with miners underground where there is only one additional way out of the mine is a good mining practice and fairly normal process in the worldwide mining community (Tr. 35). He is aware that MSHA has required a mine evacuation by its application of the one hour rule, and stated "I understand they want to make sure that they can get men out of the mine in an hour period, at least through one way" when one of the two ways out is not available for use (Tr. 36-37). He further explained his understanding as follows at (Tr. 37):

Q. Now, is it your understanding that that is the practice in American mines, that you are aware of?

A. Yes.

Q. That they will evacuate the mine if the hoist is down, within an hour once it goes down?

A. Yes. My experience with them has been that if they -- they can foresee an outage of longer than an hour, then they evacuate the mine.

Mr. Tiley stated that if a hoist goes down halfway through a shift and it appears that it will take an hour and a half to repair it, the standard practice would be to initiate a mine evacuation, and if it were fixed in that time frame, the evacuation would be rescinded and those people who had already been evacuated would go back underground. If the hoist is still down at the beginning of another shift, it is not customary to lower men in the other hoist while one of the two hoists is out of commission. This is because if you know that one of the hoists will be down for a long time, you do not have two escapeways (Tr. 41).

Mr. Tiley stated that he considered "damage" to be some out of the ordinary occurrence that has resulted from a failure of a part or due to either external forces or a manufacturing defect that wasn't apparent (Tr. 4). As a general rule, hoist failures that tend to occur frequently and need to be dealt with fall into five major areas - namely, ropes, a skip stuck in the dump, problems with the dumping mechanism, failed electrical relays and limit switches, and defective electrical rotating equipment. He would consider some of these items to be damaged, including brake linkage pin breaks, a kink in a wire rope, or a broken or bent skip wheel that causes skip jamming (Tr. 44).

Mr. Tiley believed that on a good hoist installation, a hoist should be available 80% of the time, and the rest of the time spent on maintenance, but he has not tracked AKZO to determine the production/maintenance timing (Tr. 46). He did not believe that much meaningful hoist maintenance work can be done in less than an hour, and that changing all bearing lubricants, cleaning and testing electrical rotating equipment, including 20 safety devices, would each require three to five hours on scheduled maintenance days which are not necessarily on weekends. Further, each of these items cannot be completed efficiently if they are done piecemeal, and it takes time to prepare and finish the work (Tr. 47).

Mr. Tiley stated that his prior statements concerning the practice of allowing miners to remain in a two shaft mine where one of the hoists is down, and provided the second hoist is still available, did not apply to United States miners, but to Canadian miners where the mine is not shut down for hoist maintenance or changes. This practice complies with Canadian mining laws requiring two escapeways, but this varies from province to province (Tr. 51).

Mr. Tiley stated that based on his probability analysis, the chances of both hoists being inoperative at the same time for a period exceeding one hour is "once every hundred years" (Tr. 52). He confirmed that corrosion in the wire rope constitutes damage and that when a rope exceeds 10 percent strength loss it must be retired from service. The last production ropes were retired after approximately 18 months because tests indicated they were damaged and exceeded the 10 percent retirement criteria (Tr. 56).

Mr. Tiley stated that it was his understanding and experience in the United States that the law requires mine evacuation if the hoist is going to be down for more than an hour (Tr. 56-60). He agreed that major, unplanned accidents have occurred in metal/non-metal mines in the last 15 years, and that miners were possibly at greater risk if there was only one escapeway rather than two (Tr. 62). He believed that maintenance and repair of shaft equipment is a necessary and ongoing task and that its purpose is to obtain maximum life and productivity of the equipment and to maintain it in safe condition for use (Tr. 63).

Mr. Tiley stated that based on his review of the mine maintenance records at the Cleveland Mine and other mines he believed that AKZO's preventive maintenance program was above average, and he described what transpires on an average maintenance day (Tr. 68-69). He explained the reasons for shortening the hoist ropes as follows at (Tr. 73-74).

> A. There's two reasons why -- well, the ropes have to be shortened in order to make them equal length; and the reason they're not equal length is ropes stretch from the time they're put in the shaft. They stretch for two reasons.
>
> The original rope that goes in there has spaces between the various wires, because when you form the rope, you must have spaces between the wires. You can't put wires together with zero clearance. So as the tension is put on the rope, it contracts and, therefore, stretches. Now, this stretch occurs -- a large amount of the stretch occurs in the first month or so of operation of

the hoist rope, and then it settles down; and the rest of the stretch is a result of fatigue of the wires.

Q. So the initial stretch of the rope is expected to occur; is that correct?

A. Yes.

Q. Is it damage to the rope?

A. No. It's -- nothing's changed in the rope excepting it's shrunk to the point where the clearances in it have more or less disappeared.

Q. So as the rope stretches initially, it has to be shortened so that the ropes will be of equal lengths?

A. Of equal length, yes.

Mr. Tiley stated the rope will eventually stretch to the point where it is no longer suitable and when there is significant fatiguing of the wires it is time to change the rope. When asked about the rope shortening in question, he replied as follows at (Tr. 75):

Q. So to the best of your knowledge and in your expert opinion, were any of the rope shortening occurrences that you observed in your review of the records at the AKZO Cleveland Mine based on damage to the rope?

A. It depends whether you consider fatigue of the wire as damage or not. I don't consider it damage, but it could be interpreted as damage on a microscopic scale.

Q. Were the ropes that you know of stretched to a point where they were no longer fit for their intended purpose?

A. No. They weren't retired because of stretch.

H. John Head holds an MBA degree in management and an undergraduate degree in mining engineering. He is employed as the director of the technical services division of Archibald Mining and Minerals, a mining engineering consulting services company. He was previously employed with other consulting companies, and also worked for the Morton Salt Company from 1982 to 1990, as mining engineering manager (Tr. 5-11, 17).

Based on his knowledge of the industry, Mr. Head believed that the present evacuation procedure for mines with two shafts is that if one hoist is out of service for more than an hour the mine is evacuated, and this is standard practice among several MSHA districts. He stated that during his contacts with a number of mine operators concerning their current practices, all of them confirmed that their practice was to evacuate the mine. Further, they all appeared to recognize that there was a change in MSHA enforcement policy in the past two or three years. He identified the prior policy as the one followed by Mr. Salois and his inspectors in MSHA's North Central District. That policy recognized that if hoists were down, it did not pose an evacuation problem until the end of the shift, but if the outage extended beyond the end of the shift, the subsequent shift was not sent down and the shift that was in the mine should be brought out at the end of their shift (Tr. 24-25).

Mr. Head identified several other mines where this policy was followed, and his general understanding was that at mines with two shafts, "if one hoist went down, you could work in the mine until the end of the shift." This was his understanding while working at Morton Salt when he was in daily contact with several mine operators, and the "Cleveland issue made me aware that the situation had changed." He confirmed that he never spoke to MHSA about the practice of not withdrawing miners, but he was reasonably sure that MSHA inspectors were at mines with hoist outages, but made no comments (Tr. 30-32).

Mr. Head stated that in mines with numerous shafts, the present two shaft evacuation issue would not apply. He identified other mine operations that followed the prior practice followed at Morton Salt (Tr. 34-35).

Mr. Head defined "damage" as follows at (Tr. 37-39):

> A. Unexpected faulty condition.
>
> Q. How about fixing something that's broken? Would that be -- if you're fixing something that's broken, would that be fixing damage?
>
> A. I think damage implies a degree of uncertainty. Simply fixing something that's broken doesn't necessarily imply whether it was damaged or whether the damage occurred over a period of time. So I think damage has a time sense to it. Simply saying something was broken doesn't necessarily imply time.
>
> Q. So if the power is out, the hoist isn't damaged, it's just not usable?

A. That's correct.

Q. And before a wire rope gets retired because it's worn out, too damaged, it's just wearing out?

A. It's just wearing out. That, to my mind -- damage implies the reverse of preventive maintenance, damage implies an accidental situation, sudden occurrence. Clearly, a rope that is seriously corroded is also damaged, but it's not -- it's not broken because of damage, it's broken because of gradual corrosion.

* * * *

Q. If a guide in a shaft gets bent, is that damage to the guide?

A. If it happens suddenly. If there is -- you know, a problem with the guides, and a shoe on the skip catches a guide and pulls it out of line, that's clearly damage. If there's a gradual creeping, for example, of the salt and, therefore, the guides start to impinge on the skips, I don't consider that damage.

Q. But both might have to be replaced in order to make it function right, correct?

A. Correct.

Q. And you would be replacing a piece of metal that was damaged with one that was not, wouldn't you?

A. Correct.

Mr. Head stated that the probability of two hoists being down at the same time is low and he discussed these probabilities (Tr. 40-45). He agreed that unplanned accidents occur in mining, and in his experience hoist preventive maintenance is taken very seriously (Tr. 45, 48).

In response to AKZO questions, Mr. Head confirmed that when he managed the Morton Salt Weeks Island mine from 1984 through 1985, the standard practice he followed was to allow people to work to the end of the shift when a hoist was unavailable and not to lower the next shift into a situation where one hoist was shut down (Tr. 50). He believed that an acceptable hoist planned shut down period would be more than an hour and less than six hours,

based on different maintenance and production circumstances, including the number of miners underground at any given time, and their hazard exposure (Tr. 52-54). Based on his calculations, the probability of two hoists being out at the same time would be "once every 20-odd years" or "something like every 450 years" based on the two different ways that he calculated these failure probabilities (Tr. 55-56).

Thomas D. Barkand, MSHA Hoist Safety Specialist, testified that he has a B.S. degree in electrical engineering and an M.S. degree in industrial engineering from the University of Pittsburgh, and has worked for MSHA since 1980. He serves as a consultant on safety issues regarding mine hoists and elevator safety, and conducts testing of hoists and elevators. He has never supervised the day-to-day operations of a hoist (Tr. 6-8).

Mr. Barkand stated that he visited the Cleveland mine on November 28 and 29, 1995, and April 2, 1996, and made notes of his visit (Tr. 9). He disagreed with Mr. Head's calculations of the probability of failure of hoists, and he explained his reasons (Tr. 13-17). He explained his experience with frictional hoists and stated that the regulations do not explicitly require preventive maintenance on hoists. He defined preventive maintenance as "maintenance performed to keep a hoist functioning" and to prevent "failures of the operation of the hoist" (Tr. 19-21).

Mr. Barkand defined "damage" as follows at (Tr. 21-22):

> A. Yes, I can. My -- I think the confusion surrounding damage has been that some people consider damage to be a short-term effect, a sudden impact or collision. And in my broader view of damage it also includes effects from long-term exposure to corrosive elements causing corrosion, as well as short-term effects.
>
> Q. Is there a difference in your judgment between damage and what we would call normal wear and tear?
>
> A. No. Normal wear and tear does, in fact, cause damage to the device.

Mr. Barkand was of the opinion that damage to equipment on a car engine begins from the day one owns it and as soon as it is placed in operation. He confirmed that when he sold a used car he did advertise it as "use for parts" because it was damaged and not just used (Tr. 24). He confirmed that his belief that wear and tear and damage are the same is from a dictionary and not from any written MSHA definitions (Tr. 24).

Mr. Barkand agreed that preventive maintenance prevents failures and can lessen the onset of damage, but believed that a piece of equipment that has been disabled is damaged because it's unable to do its intended function (Tr. 25). He also considered a locked out piece of equipment to be damaged "in its broadest sense" (Tr. 26).

Mr. Barkand stated that rope "construction stretch" is a term that applies to the initial stretching of the rope in which the wires are brought into closer proximity to each other, and that this is expected (Tr. 32). Apart from wire wear and nicking, which are the primary causes of damage and wear, the fact that the rope gains length and loses diameter through the process of "construction stretching," is not, of self, damage.

Mr. Barkand did not know whether any of the rope shortenings at the mine were undertaken because of rope construction stretch. He did not believe that the rope shortening on December 24, 1995, was due to construction stretch because he recalled that the records reflected that the ropes were put in service five months or more prior to that time (Tr. 35). He confirmed that as a rule, a rope must be retired when it loses 10 percent of its baseline diameter as measured after the rope has stretched (Tr. 36).

Mr.Barkand stated that he has had experience with problems associated with new hoists placed in service for a period of a month and has spent several weeks on site addressing those problems. He identified the problems as safety devices that require calibration, deceleration cams that need to be physically ground on a brass, and needed adjustments to the current protection set points (Tr. 38-39). In response to a question as to whether he believed these items constituted damage, he responded as follows at (Tr. 39-40):

> Q. All right. So are those things damaged?
>
> A. The devices are not functioning as intended.
>
> Q. Yes or no. Is it damaged?
>
> A. In the instance -- in the examples I just cited they are calibration problems.
>
> Q. Do you understand the phrase yes or no?
>
> A. In that example, no, they were not damaged.
>
> Q. So if I were to miss one in my otherwise rigorous testing process, and find out after it had been placed in service that it was not

calibrated correctly, and I had to stop the hoist and recalibrate that control, that wouldn't be damage either, would it?

A. It's repair.

Q. But it's not damage, is it?

A. Something was calibrated wrong.

Q. I tried to do a rigorous analysis to find it. I missed it. I put in into service and it is still recalibrated wrong, the same way I got if from the factory, the same way I installed it. Then I discover it's calibrated wrong. Is it damaged or not?

A. In the broadest sense of damage it would be.

Mr. Barkand stated that he did not review any records concerning hoist outages at the mine and did not know the frequency of hoist unexpected unavailability (Tr. 41). He confirmed that he did not closely examine the hoist ropes, but observed that they appeared bare and moist with some fine salt particles (Tr. 43). He stated that the regulations require nondestructive rope testing at intervals not to exceed six months, and based on his review of the records these tests were being performed (Tr. 46).

Mr. Barkand stated that a rope could have a broken internal wire with no surface indication on the rope itself and that this occurs even during the manufacturing of the rope (Tr. 48). He did not believe that the maintenance of 100 percent availability of two independent hoisting systems is achievable. The mine production plan calls for people underground 24 hours a day, seven days a week, engaged in production activities unrelated to hoist maintenance. With this plan, it is difficult to comply with the minimum two escapeway requirement because system failures are bound to occur (Tr. 52).

Mr. Barkand stated that the regulation requires two properly maintained escapeways at all times, and if one is not operable, this would constitute non-compliance (Tr. 55). He confirmed that he has recommended the development of a comprehensive preventive maintenance program for implementation during the maintenance shift to increase the reliability and availability of escape routes (Tr. 61).

Mr. Barkand stated that a hoist switch that sometimes malfunctions would be considered damage and that his review of Part 50 accident and injury abstracts for a ten-year period from

1978-1988, reflects that mine operators have reported hoist outages exceeding 30 minutes due to power failures. He concluded from this that operators understand the "damage" reporting requirements when a hoist is unavailable (Tr. 63-64).

In reply to further AKZO questions, Mr. Barkand stated that approximately 600 Part 50 accident reports were submitted during the aforementioned 10-year period and that 40 or 50, or less than 10 percent, concern hoisting. The summarized incidents listed appear to be "normal wear" items (Tr. 67-68), with regard to the listed eleven "power outages," he presumed they were possibly nonscheduled (Tr. 71). He was not aware of any official MSHA guidance as to whether ice in a shaft has to be reported (Tr. 72-73).

Arguments Concerning the Interpretation and Application of 30 C.F.R. 50.10

The two alleged violations of reporting standard 30 C.F.R. 50.10, as noted in section 104(a) non-"S&S" citation numbers 4100787 and 4546275, concern a November 9, 1995, production hoist outage of approximately 50 minutes while two of the four hoist ropes were shortened, and a December 24, 1995, production hoist outage due to maintenance service to shorten four stretched ropes. Citation No. 4100787, states that the hoist was "disabled" while the rope shortening work was performed, and that this interfered with the use of the hoist for more than thirty minutes. Citation No. 4546275, states that the hoist was "damaged" in that it was unavailable due to the maintenance work being performed, and that the "damage" interfered with the use of the hoist for more than 30 minutes. AKZO allegedly violated section 50.10, by failing to immediately report these hoist outages. MSHA takes the position that the cited hoist outages were the result of reportable accidents under section 50.10, in that both hoists were "damaged" within the "accident" definition found in section 50.2(h)(11).

AKZO argues that MSHA has adopted a bizarre view that the maintenance work conducted on the cited hoists constitutes "accidents" within the meaning of section 50.2, and that MSHA's interpretation not only defies reason and common sense, but also impermissibly expands the reporting requirements of section 50.10. AKZO maintains that the hoists were not "damaged" within the meaning of § 50.2(h)(11), but were undergoing routine, preventive maintenance. AKZO asserts that in order to arrive at its current position, MSHA has given the operative words in the applicable regulations meanings which directly contradict their ordinary use and meaning.

Citing several supporting cases, AKZO asserts that canons of statutory construction require that statutes and regulations be applied so as to give effect to the plain meaning of words. AKZO

points out that the applicable definition of "accident" found in section 50.2(h)(11) involves damage to hoisting equipment. Since the regulations do not provide a definition for "damage," AKZO asserts that its common and ordinary meaning should apply. Citing Merriam Webster's Collegiate Dictionary 291 (5th Ed. 1993), AKZO states that in its ordinary usage, "damage" means "loss or harm resulting from injury to person, property . . . "

AKZO maintains that MSHA has taken a view which contorts the word "damage" beyond its ordinary meaning. AKZO cites the conflicting testimony interpretations of the word "damage" by MSHA officials, and characterizes it as "tortured and far-fetched." As examples, AKZO cites the following testimony by MSHA officials with respect to their understanding of the term "damage":

> Anytime that I can't use something, it's damaged; If I have brakes on my car that are worn out or need adjusted, there's damage that needs maintenance to it." (C. Okey Reitter).
>
> Statement of Rodric Breland that damage occurs instantly from the moment equipment is put into use.
>
> " . . . damage begins the day you put those ropes on, they begin to wear"
> " . . . used necessarily means damaged," and both wear and use constitute damage (James E. Salois).
>
> Statement by Herbert D. Bilbrey who defined damage as "inoperative," but did not believe equipment which is intentionally taken out of service was "damaged."

AKZO argues that these proffered definitions of "damage" reflect a confused understanding of that term and are clearly beyond the meaning found in Potash Company of America, 4 FMSHRC 56 (January 1982)(ALJ Stewart). In that case, a fire in the power plant control room caused a power failure that affected the use of two underground mine hoists for more than 30 minutes. The power outage lasted for approximately two hours. The man hoist normally used to hoist men was not energized until two or three hours after power was restored because of circuit modifications that were necessary to utilize outside power.

Potash was charged with a violation of section 50.10, for not immediately reporting the "accident" to MSHA. The inspector who issued the citation believed that an "accident" under 30 C.F.R. 50.2(h)(11) occurs any time a hoist is "down" for more

than 30 minutes for any reason, without regard to damages, and that a hoist is "damaged" within the meaning of 30 C.F.R. 50.2(h)(11), whenever there is an unplanned hoist outage for any reason.

Potash took the position that when a hoist is not damaged, but simply disabled by a loss of electrical power that affects the mine in general, no "accident' within the meaning of section 50.2(h)(11) occurs, and there is no obligation to immediately report the loss of power pursuant to section 50.10. MSHA's belief that the issue presented was whether an unexpected fire causing disruption of power to a hoist for more than 30 minutes is an "accident" requiring immediate notification pursuant to section 50.10, was rejected as too broad by Judge Stewart, and he limited his decision to the specific facts of the case.

MSHA argued that in a lay sense the fire and loss of power to the hoists were "accidental," and that the hoisting equipment was "damaged" because its usefulness was impaired. As support for this argument, MSHA relied on The American Heritage Dictionary of the English Language (1976), which defines "accident" as: "1. An unexpected and undesirable event; a mishap. 2. Anything that occurs unexpectedly or unintentionally." The dictionary defines "damage" as "Impairment of the usefulness or value of person or property; loss; harm."

Aside from the "lay definition" of "accident," MSHA asserted that the triggering alternative element for the definition of "accident" as defined in section 50.2(h)(11) "or which interferes with use of the equipment for more than thirty minutes" existed because there was no power to the hoists from 9:40 p.m. to 11:35 p.m., and the hoists were not energized until 2:00 p.m. Although MSHA conceded that the hoists were not physically damaged as a result of the powerhouse fire and loss of power, it contended that the loss of electrical power to the hoists, without more, was a reportable accident within the meaning of sections 50.10 and 50.2(h)(11), because of the loss of power interfered with the use of the hoists for more than 30 minutes.

Judge Stewart found that it was clear that section 50.10, was not intended to require the reporting of every unexpected and undesirable event or mishap, and that when read in context with the regulatory definition of "accident," the kinds of accidents required to be reported are limited to the 12 types listed in section 50.2(h). Judge Stewart concluded that the pivotal question was whether the hoist interference was due to physical damage to the hoisting equipment.

Judge Stewart found no basis to support the inspector's belief that a power outage for any reason constitutes damage to the hoisting equipment when no physical damage to the equipment

occurs as a result of the outage. Under the circumstances, he concluded that the power outage was clearly not reportable under the requirements of section 50.10, and vacated the citation.

AKZO contends that the Potash case limits the reporting requirements of section 50.10 to the specific events listed in section 50.2(h), and it points out that the judge relied on an MSHA publication (Information Report on 30 C.F.R. Part 50) which provided the following "Question and Answer" guidance as to what constituted damage to hoisting equipment under section 50.2(h)(11):

> 41. Q. What constitutes "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes"?
>
> A. Damage may be considered to be caused by some accident that involved hoisting equipment, or resulting from hoisting
>
> equipment failure. A natural occurrence such as ice in a shaft may cause the shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not itself be reportable.

AKZO further argues that even if the plain meaning rule or applicable precedent were not controlling, "damage," within the meaning of § 50.2(h)(11), should be considered " . . . 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." Savage Zinc, Inc. v. MSHA, 17 FMSHRC 279, 283 (February 1995), quoting Diamond Roofing v. OSHRC, 528 F2d 643 (5th Cir. 1976). Since it believes that the regulations give no indication that the work "damage," as used therein, has any meaning other than that in ordinary usage, AKZO concludes that a reasonably prudent miner would operate on the belief that damage means "loss or harm resulting from injury" rather than "used" or "worn." In support of this conclusion, AKZO cites the testimony of Peter Tiley, who defined damage as " . . . an unusual occurrence that requires some stopping in the hoisting activity to decide whether this reported damage is serious or not."

Applying the common or ordinary meaning of the word "damage," AKZO further concludes that it is evident that there

was no damage to hoisting equipment in this case as there was no loss or harm to the property. AKZO points out that it did not experience any problems with the use of the hoisting equipment, nor had it received any complaints about the operation of the hoists. It takes the position that the equipment was simply taken out of service as a preventive care measure, and that such routine maintenance does not constitute damage within the ordinary meaning of that word. Further, based upon the Potash analysis, AKZO maintains that the closure of the production shaft hoist for routine maintenance purposes does not constitute an accident under § 50.2(h)(11), and, therefore, is not reportable under § 50.10. As in Potash, AKZO points out that there was no hoist malfunction or physical damage to the hoisting equipment as a result of the closure for maintenance.

AKZO maintains that MSHA's guidelines indicate that if no accident occurred and no equipment is damaged, the incident is not reportable. AKZO asserts that both closures of the production shaft hoist fully meet MSHA's own criteria in this regard, and that not only did the outages last no longer than three and one-half hours, the outages did not involve any of the circumstances, incidents or occurrences enumerated in § 50.2(h). Although the production shaft was not available for more than 30 minutes, there was no physical damage as contemplated by Potash and the MSHA guidelines. Under all of these circumstances, AKZO believes that no violation of section 50.10 occurred.

AKZO concludes that MSHA's interpretation fails to give operators fair notice of which conditions would trigger the reporting requirements under section 50.10. AKZO points out that while MSHA contends that the regulation applies whenever there is interference with hoisting equipment for thirty minutes, it also appears from the Gomez letter of December 8, 1995, to AKZO's counsel, that MSHA has taken the broader view that section 50.10 is violated anytime hoisting equipment is interfered with. AKZO maintains that this interpretation would render practically any and all maintenance activities at a mine "damage," which potentially could require notification to MSHA each and every time maintenance activities are undertaken.

AKZO concludes that it did not violate regulation § 50.10 because the production shaft hoist was not damaged within the meaning of § 50.2(h)(11), and thus there was not an accident within the meaning of § 50.2(h). The regulations very specifically detail, in § 50.2(h), the circumstances, incidents, and occurrences to which the term "accident" applies. The subsection under which MSHA cited the Cleveland mine states explicitly that there must be damage to the hoisting equipment which interferes with its operation for 30 minutes or longer. Further, since the regulations do not define "damage," the ordinary meaning of that word should be applied in determining

whether preventive maintenance activities which take more than 30 minutes to accomplish constitute a violation of § 50.2(h). As there was no loss or injury which resulted from the maintenance activities, there was no damage at the mine, and therefore no violation of § 50.2(h).

MSHA argues that a hoist outage that prohibits its use for more than thirty minutes is a damaged hoist that is required to be immediately reported pursuant to section 50.10. Relying on the Gomez letter, MSHA takes the position that the relevant issue in a hoist outage is its availability for use, and if the hoist can be activated quickly in the event that it is needed, it is not damaged and does not have to be reported. However, if because of maintenance, the hoist is unavailable to be used and cannot by placed back in use within 30 minutes, MSHA concludes that it is clearly damaged, and while it may be intentionally disabled, it is damaged and unavailable nonetheless.

MSHA asserts that there is no requirement that the damage, loss, harm, or injury occur unexpectedly, and concludes that it would be entirely inconsistent with the purpose of the regulation to allow an operator to intentionally disable a hoist that is being used as an escapeway but to prohibit such actions when the disabling of the hoist was unintentional. MSHA contends that any intentional and planned actions which render the hoist unavailable for use are the equivalent damage, loss, harm, or injury to the hoist which have the effect of damaging it for some period of time. MSHA further concludes that when a hoist is shut down for repairs and it is removed from a usable status for a period of over thirty minutes, it has clearly suffered harm or loss of use during that time period. MSHA believes that it is the period of time that it is unavailable for use, not whether the repair was planned or unplanned, that is the relevant issue with respect to the reportability of the damaged hoist.

MSHA submits that AKZO's interpretation would allow a hoist to be unavailable for extensive periods of time without being reportable to MSHA, so long as AKZO could say the repair activity was not caused by an immediate, unintentional, or unexpected "injury" to the hoist. MSHA submits that AKZO's reading of the regulation would allow the repairs and maintenance to go on for days or weeks, and that its position is not reasonable because it places far too much emphasis on the immediacy of the need for repair, and on the surprise nature of the cause of the hoist outage, and not on the fundamental focus of the unavailability of the hoist for use in an emergency.

MSHA concludes that there is no basis in logic that only unintentional, unexpected harm constitutes "damage" as that word is used in 30 C.F.R. 50.2(h)(11), and points out that AKZO's position does not acknowledge the obvious damage that occurs when

a hoist is taken apart in order to repair a damaged aspect of the system, during which time the system cannot function when needed. MSHA further concludes that if the hoist cannot be used because of unintentional preplanned dismantling of part of its system, the hoist is damaged under either scenario and that such damage or unavailability for use must be reported if it lasts for 30 minutes or longer.

MSHA maintains that the regulatory reporting requirement in section 50.10 in this case is clear, and that a reasonably prudent person familiar with the mining industry understands the requirement to be consistent with MSHA's position. Even if the regulation were to be construed as unclear, MSHA asserts that its reasonable interpretation is entitled to deference by the Commission.

Citing a number of precedent cases, MSHA argues that when a statute is ambiguous, an adjudicatory body should give deference to the interpretation of the statute adopted by the agency entrusted with its enforcement, and that the agency's interpretation must be accepted as long as it is not unreasonable or inconsistent with the language or the purpose of the statute. MSHA asserts that a statute or regulation that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal, and that the issue on review is not whether the agency's interpretation represents the most desirable choice in the view of the adjudicatory body, but whether the agency's interpretation represents a permissible choice in view of the language and the purpose of the statute or regulation.

MSHA maintains that requiring the reporting of any incident that makes the hoist unavailable for more than 30 minutes is the only interpretation that enhances safety, and that AKZO's position to the contrary would thwart the objectives of the Mine Act and the regulation. Citing the American College Dictionary definition of "damage" as injury or harm that impairs value or usefulness, MSHA concludes that whenever a hoist (being used as an escapeway) is unavailable for use for more than 30 minutes, with miners underground, it is damaged, because it is useless as a means of escape and therefore it is required to be immediately reported.

Arguments Concerning the Interpretation and Application of 30 C.F.R. 57.11050(a)

The alleged violation of mandatory safety standard 30 C.F.R. 57.11050(a), as noted in section 104(a) non-"S&S" Citation No. 4546276, concerns the unavailability of the mine production hoist for approximately three-hours and thirty-seven minutes on December 24, 1995, while the hoist ropes were being shortened.

The incident was staged to test MSHA's enforcement interpretation of the regulation, and it would appear that MSHA was on notice and cooperated and participated in the staging.

AKZO asserts that section 57.11050 requires only that each mine be equipped with "two escapeways to the surface," and that its purpose is to ensure that, in the event one of the ways out of the mine cannot be used, there is an alternative means of escape available. AKZO maintains that the standard contemplates that there will be occasions when that purpose is not fulfilled; that is, that one means of egress from the mine will be unavailable, but the second means, as required by the regulation, will be fully functional. AKZO believes that the fact that only one of two escapeways is functional for some period of time does not mean that the operator has failed to comply with section 57.11050, but rather, that it has complied with it. AKZO concludes that to hold otherwise would mean that the moment that the standard accomplished its intended purpose, it would be out of compliance. AKZO believes that such a result would be absurd, and it concludes that the regulation cannot be read to mean that two escapeways must already be functioning. If this were the intended meaning, AKZO believes the regulation would have required that there be at least three escapeways so that, in the event one was unavailable, there would be at least two operating.

AKZO maintains that the mine had two separate, properly maintained escapeways to the surface in full compliance with section 57.11050. AKZO asserts that MSHA's contention that a violation of section 57.11050 occurs the moment hoisting equipment has been shut down for maintenance purposes for a period of over one hour, requiring immediate evacuation of the entire mine, is not supported by the statute, the regulation, or the relevant decisions.

AKZO cites several court decisions in support of its assertion that the regulation in question should be interpreted as a whole to avoid conflicting inconsistent, and meaningless interpretations. It points out that under section 57.11050, AKZO must not only provide two escapeways from the mine, but it must also ensure that the escapeways are "properly maintained." Considered in this light, AKZO concludes that issuing a citation for taking an escapeway out of service for maintenance clearly violates the spirit and intent of the regulation.

AKZO asserts that at the time of the violations, the production hoist was out of service for routine upkeep and maintenance rather than repair to broken or damaged equipment. AKZO points out that this maintenance work generally takes the hoist out of service for periods no longer than a few hours, is done relatively infrequently, and that during this time the service shaft remains an available, operable escapeway in the

event of an accident or emergency. Simply put, AKZO points out that it was conducting work which was necessary in order to comply with the regulatory mandate that escapeways be properly maintained. AKZO concludes that it would defy logic to hold that maintenance activities which are necessary in order to comply with the regulation are, when undertaken, a violation of the very rule which requires their undertaking in the first place.

AKZO argues that while section 57.11050, requires that at least two escapeways exist, it does not require that both be functional at all times, but only requires that they are positioned so that damage to one shall not lessen the effectiveness of the other. Accordingly, AKZO concludes that this clearly indicates that the drafters of this regulation anticipated there may be occasions when not all escapeways are in use. In support of this conclusion, AKZO cites the MSHA policy regarding former standard section 57.11-50, as noted in the Potash Company of America case, 4 FMSHRC 56.70 N.8 (January 1982). That policy allowed miners to remain underground the remainder of the shift provided all personnel were notified and were in agreement, but not to allow the next shift to go underground until the hoist was repaired. Recognizing the regulatory language "damage to one," AKZO does not believe that this exception would not apply when an escapeway is temporarily closed so that maintenance work can be performed. In this case, the second escapeway was out of use for only three and one-half hours while undergoing preventive maintenance.

AKZO maintains that the issue is not whether it failed to have two escapeways from the mine to the surface, but whether it is required to evacuate the entire mine while performing routine required preventive maintenance which renders one of the two hoists unavailable for more than one hour. Since the regulation contains no such requirement and, in order to adopt such a new, substantive requirement, AKZO maintains that MSHA is required to comply with the notice and comment requirements of both the Mine Act and the Administrative Procedure Act ("APA").

AKZO states that prior to MSHA's newly articulated compliance policy, it engaged in the practice widely accepted in the mining industry, and sanctioned in Potash, 4 FMSHRC 56, allowing a mine to continue operation until the end of the shift when only one escapeway was available, provided the miners underground were aware of the situation. If, however, at the beginning of the next shift only one escapeway remained available for use, the next shift was not allowed to be lowered underground.

AKZO asserts that there is virtually no guidance as to how to interpret section 57.1105(a) during the course of required, routine maintenance, and that in a situation where one of the

hoists is not operable for a period of time, analysis of the standard must utilize the "reasonably prudent person" test applied for general or vague regulations. In this regard, AKZO points out that over the years, the standard has been subject to several changes in interpretation and implementation, including the uncertainty as to the existence of a national policy, the "end of shift" rule noted in Potash, the absence of any national policy as expressed in the Gomez, Bilbrey, Salois, and Breland depositions, the February 1990 Salois Memorandum adopting the "end of shift" rule in MSHA's North Central District, and the February 1995 recision of the Salois 1990 memo which replaced the "end of shift" rule with the one hour policy in the North Central District.

AKZO cites the testimony of its expert witness John Head, who has worked in the mining industry for 20 years, who stated that the "end of shift" rule appeared to be standard practice in two shaft mines until two or three years ago. AKZO further cites a Morton Salt Company March 1980 Memorandum (Exhibit Tab D) indicating that the "end of shift" rule has in practice been recognized in MSHA's North and South Central Districts.

AKZO states that following the recision of the 1990 Salois memorandum in February 1995, after the instant dispute had begun, no written material was issued by MSHA to replace it. However, AKZO asserts that notwithstanding MSHA's conflicting evidence as to how section 57.11050 should be implemented, it has attempted to comply by following the policy most widely published as proper policy -- the "end of shift" rule. AKZO contends that the fact that MSHA itself has interpreted the regulation to allow significant time periods to elapse while work is being done on the shift makes clear the fact that AKZO acted as a reasonable prudent person in complying with § 57.11050.

AKZO argues that the automatic evacuation requirement engrafted by MSHA onto section 57.11050(a), is a substantive, not interpretative rule that is subject to the notice and comment requirement of both the Mine Act and the APA. In support of its argument, AKZO points out that MHSA's new automatice evacuation requirement whenever a hoist may be inoperative is simply not expressed in section 57.11050(a). Had MSHA intended that the standard contain such a requirement, AKZO believes MSHA could have (and should have) included it as part of the regulation. Since MSHA has for almost 20 years consistently interpreted the standard not to require any such action, AKZO maintains that to now engraft such a new substantive requirement onto the regulation is tantamount to the promulgation of an additional rule, subject to the "notice and comment" requirements of section 101 of the Act, 30 U.S.C. § 811, and section 553 of the APA, 5 U.S.C. § 553.

AKZO states that the automatic evacuation requirement has never been subjected to notice and comment rulemaking proceedings, and has never been published for general circulation in the mining industry. AKZO maintains that such a significant new requirement should have been subject to review and comment by the mining industry, and since it was not, the requirement must be struck down and the citations vacated.

AKZO takes note of the following rulemaking exceptions applicable to substantive rules found in section 553(d) of the APA:

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

AKZO argues that the APA interpretative rule exception should be construed narrowly, and that any deference accorded MSHA's interpretation of section 57.11050, should take into account the consistency and reasonableness of its interpretation. On the facts of this case, AKZO concludes that MSHA's interpretation should not be given deference because the new compliance requirements are unreasonable and inconsistent with past interpretations over the years.

AKZO takes the position that MSHA's newly formed interpretation of section 57.11050, is a substantive rule rather than an interpretative one because it "set[s] forth a course of conduct or behavior to which employers will be held under penalty of law and has sufficient impact to justify the notice and comment procedure." Matter of Chicago Aluminum Castings Co., Inc., 535 F.Supp. 392,397 (N.D.Ill. 1981); Carter v. Cleland, 643 F.2d 1, 8(D.C. Cir. 1980)(substantive or legislative rule is one that has the force of law and narrowly limits administrative discretion.) Additional cases are cited holding that a substantive rule is one that imposes obligations, creates additional conditions, or has a substantial impact on a regulated industry or an important class of members.

AKZO argues that while the existing regulation merely requires that a mine have two properly maintained escapeways to the surface, MSHA personnel seek to interpret the regulation to require the evacuation of the entire mine whenever one of the two hoists is "down" for more than one hour (Reitter, Breland, Salois, and Strickler depositions). AKZO asserts that this interpretation stands in stark contrast to the previously

accepted and endorsed "end of shift" rule that interrupted mine operations only if the hoist was not back in service at the start of the next shift, in which case the next shift could not be lowered into the mine. AKZO concludes that such a vastly different implementation of a regulation is clearly more than an interpretative rule, and as such is subject to the notice requirements of the APA. AKZO further points out that MSHA's top officials indicated that MSHA's interpretation allows its inspectors no discretion in allowing a mine operator a reasonable time for abatement, and they agreed that regardless of the circumstances, an operator was allowed only one hour to evacuate the mine if one of the two escapeways was not available for use. (Gomez, Reitter, Breland, and Salois depositions).

AKZO maintains that beyond requiring an operator to evacuate the mine when one of two escapeways is not available, MSHA's interpretation of § 57.11050(a) has a tremendous economic and operational impact on underground mine operators because of increased costs of operating an underground mine by unnecessarily interrupting workflow and productivity. Conceding that financial costs are clearly not an operator's sole consideration, AKZO nonetheless believes that MSHA's evacuation requirement is too broad-sweeping in that it establishes a definitive rule or course of action in the event of a hoist outage without granting any consideration to the actual hazard or risk posed by the situation. AKZO asserts that this goes against the Mine Act's policy of giving consideration to several factors, including, the risk or danger presented by the alleged violation, in determining a reasonable period of time to abate a violation.

AKZO maintains that MSHA's one hour automatic evacuation requirement represents a significant departure from its past position and therefore requires APA notice, comment, and publication. Notwithstanding the status of the end of shift rule, AKZO asserts that MSHA cannot deny that it was followed in a large portion of the country for a substantial number of years and that the new automatic evacuation requirement substantially departs from it.

Reviewing the limited circumstances under which the Mine Act authorizes the withdrawal of miners, AKZO points out that the violations issued in this case were issued as section 104(a) non-"S&S" citations which do not grant MSHA authority to effect an evacuation of the mine. AKZO contends that MSHA's action amounts to a de facto order of withdrawal, issued without statutory or regulatory authority, citing Aluminum Company of America v. MSHA, 14 FMSHRC 1721 (October 1992).

AKZO points out that section 104(a) of the Act requires that MSHA fix a reasonable time for the abatement of a violation, and it cites the relevant Commission precedent cases establishing the

factors to be considered by an inspector in fixing a reasonable abatement time. In the instant case, AKZO maintains that none of the factors were followed by MSHA in requiring a one hour abatement time.

On the facts of this case, AKZO maintains that there is no dispute that there was no imminent danger at the mine while the production hoist was out of service, and it points out that the violation was issued as a non-"S&S" citation with "unlikely" injury or illness findings, and that MSHA inspector Foster and supervisory inspector Reitter testified that the danger was minimal and that the normal hazards to which miners were exposed were not affected by the hoist outages. Further, AKZO states that the equipment was only out of service for a period of three hours, another escapeway to the mine surface was available in case of an accident or emergency, there were only three miners underground, and no mineral extraction was taking place. Under the circumstances, AKZO maintains that the inspector should not have required an immediate abatement of the alleged violation, but rather should have given it a reasonable period of time to return the hoist to service.

AKZO concludes that it did not violate section 57.11050 because it provided two escapeways to the mine surface and was, at the time of the alleged violation, in fact, ensuring compliance with a provision contained in that standard by performing preventive maintenance to ensure that the hoist was properly maintained. While the production hoist was unavailable, miners still had access to the service hoist in the event of an accident or emergency. AKZO disputes MSHA's view that the requirement of at least two escapeways means that both of them must be functional at all times, and notes that section 57.11050(a) does not state such a requirement, and if this had been the drafters' intent, the standard would read otherwise.

AKZO believes that MSHA's insistence on automatic evacuation of the entire mine within one hour if only one of two hoists is available is contrary to prior agency acceptable policy and not supported by the language of the standard. AKZO concludes that failure to subject this substantive requirement to notice, comment, and publication unfairly allows MSHA to promulgate a new rule with no benefit of participation from those in the affected industry, and fails to provide industry fair and adequate notice of the substantive requirements of § 57.11050(a). AKZO further concludes that MSHA's automatic evacuation policy also constitutes a de facto order of withdrawal, although under § 104(a) of the Act, MSHA does not have such authority, and that the new requirement is an improper interpretation of § 57.11050(a) which clearly exceeds MSHA's authority. Finally, AKZO concludes that MSHA's one hour abatement period in the event

of a hoist outage, regardless of the circumstances, is unreasonable and ignores consideration of several factors, including the risk of danger presented, in determining a reasonable abatement period.

MSHA's position is that AKZO violated the provisions of 30 C.F.R. 57.11050(a) by intentionally taking one of the mine's two escapeways out of service for a period of more than one hour while allowing normal mining operations to continue. MSHA asserts that any event, whether planned or unplanned, that makes the escapeway unavailable for more than one hour constitutes a failure to properly maintain at least two escapeways and that miners must be evacuated until both escapeways are available for use. MSHA asserts that the regulation requires "at least two" separate "properly maintained" escapeways in order for miners to be allowed underground unless they are developing the second escapeway or are working to make the unavailable escapeway "properly maintained" and available for use.

MSHA maintains that the requirement for two separate escapeways is a fundamental cornerstone of a miner's safety net in the event of an emergency and that AKZO's operation of its mine with only one "properly maintained" available escapeway while it fixes its unavailable escapeway is not allowed by the regulation. MSHA asserts that an escapeway that is not available for any reason is not "properly maintained," and that the regulations require the evacuation of the mine when only one escapeway is available until both have been "properly maintained" and are again available. In support of its evacuation argument, MSHA asserts that section 104(c) of the Mine Act allows only the miners needed to correct the deficiency in escapeways to be present in the affected areas of the mine.

MSHA asserts that the regulation does not allow AKZO to maintain normal mining operations until the end of the shift with only one properly maintained and available escapeway for the miners to use in the event of an emergency. MSHA believes that in order to stay in compliance, AKZO must schedule its maintenance for time periods when miners are not scheduled to work, or in the alternative, construct a third escapeway.

In response to AKZO's assertion that the obligation to evacuate miners facially violates the requirement in section 104(a) of the Act that each operator be given a "reasonable time to abate" a violation, MSHA takes the position that when a violation can be avoided and is intentionally created, no time for abatement is reasonable, because an operator does not have a right to operate in knowing noncompliance with a mandatory safety standard. However, to the extent that an operator is unaware of the existence of a violation, MSHA concludes that the operator is obligated under the Mine Act to abate the violation as soon as

reasonably possible. If only one escapeway is available for use, and the second one cannot be made available for use within one hour, MSHA insists that miners must be evacuated since only one escapeway does not achieve the level of safety mandated by the regulation. MSHA further concludes that the one hour requirement is a reasonable length of time for achieving compliance, based on the language of 30 C.F.R. 57.11050(b), which provides that escapeways shall be positioned so that miners may exit the mine within one hour.

MSHA rejects AKZO's contention that its current escapeway enforcement position and application of section 57.11050(a) is inconsistent with its past enforcement practices as evidenced by an MSHA memorandum mentioned in footnote 8, pg. 69, of former commission Judge Stewart's decision in Secretary v. Potash Corporation of America, 4 FMSHRC 56, 69 (January 1982), and the 1990 memorandum from MSHA District Manager James Salois. AKZO concludes from those documents that it "was widely understood in the industry" that a violation of section 57.11050(a) would be cited pursuant to the "policy" set forth in Potash, allowing operators to continue to work until the end of the shift whenever an escapeway is damaged or unavailable for use.

MSHA takes the position that pursuant to Commission Rule 72, 29 C.F.R. 2700.72, an unreviewed Judge's decision (Potash), is not a precedent binding on the Commission. MSHA asserts that it is evident from both of AKZO's expert witnesses that there is currently a clear understanding in the industry that whenever a mine only has two escapeways, it is now industry practice to evacuate the mine immediately whenever one of the escapeways is unavailable for any reason. MSHA concludes that this establishes that at some point after the Potash decision was issued fourteen years ago, it became clear to the industry that the guidelines noted in Potash had not been adopted and were in fact not applicable. MSHA concludes that AKZO must concede that MHSA's interpretation, as asserted in this case, is the very position understood and relied upon throughout most of the mining industry.

MSHA maintains that equitable estoppel does not apply in Mine Act proceedings and that all of AKZO's assertions of conflicting prior enforcement practices that were arguably inconsistent with the requirements of the regulation and the footnote in the Potash decision do not provide a defense to the fact of violation of 30 C.F.R. 57.11050(a). MSHA concludes that it is clear that AKZO and other mine operators have been aware of MSHA's interpretation that the unavailability of an escapeway requires evacuation of the mine until the escapeway is returned to normal use. In this regard, MSHA cites the Gomez letter of December 1995, as evidence that any prior misunderstandings or conflicts were resolved and that the letter clearly sets forth reasonable applications of the requirements of section

57.11050(a), as it relates to maintenance activities that make the hoist, and thereby one of the escapeways in a two-shaft mine, unavailable for use for various periods of time. MSHA points out that AKZO was aware of the position incorporated in the Gomez letter when it took the actions it took to challenge the interpretations of the regulation in this case.

Finally, as argued in support of the asserted violations of section 50.10, MSHA maintains that section 57.11050, is clear and that a reasonably prudent person familiar with the mining industry understands that what is required is consistent with MSHA's position. Assuming the regulation may be construed to be unclear or ambiguous, MSHA nonetheless concludes that its reasonable interpretation is entitled to deference and must be broadly interpreted to achieve the statutory goal of protecting the health and safety of miners.

Findings And Conclusions
Fact of Violation, Citation Nos. 4100787 and 4546275

The respondent is charged with two alleged violations of 30 C.F.R. 50.10, for failing to immediately notify MSHA of two production hoist interferences that occurred on November 9, and December 24, 1995. MSHA's position is that the two incidents were reportable as "accidents" because the unavailability of the hoists was the result of maintenance work to shorten several stretched hoist ropes, and that these interferences with the use of the hoists constituted hoist "damage" and a reportable "accident" pursuant to definition of those terms found in 30 C.F.R. 50.2(h)(11). MSHA has the burden of proving the alleged violations by a preponderance of the evidence.

30 C.F.R. 50.10, provides as follows:

> § 50.10 Immediate notification.
>
> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.
>
> The applicable definition of "accident" found in 30 C.F.R. 50.2(h)(11), is as follows:
>
> Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes.

Webster's New Collegiate Dictionary, defines "accident" in part as: "1a: an event occurring by chance or arising from unknown causes, b: lack of intention or necessity; an unexpected happening * * * ."

Black's Law Dictionary, Revised Fouth Edition, 1968, defines "accident" as follows:

- an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence;
- some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops;
- an uncommon occurrence;
- an unusual or unexpected result attending the operation or performance of a usual or necessary act or event;

Webster's New Collegiate Dictionary defines "damage" as "loss or harm resulting from injury to person, property, or reputation."

The Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, 1968, does not define "damage." However, the definition of "damaging stress" found at page 300, is stated as follows:

> The least unit stress, of a given kind and for a given material and condition of service, that will render a member unfit for service before the end of its normal life. It may do this by producing excessive set, or by causing creeping fatigue cracking, excessive strain hardening, or rupture. (Emphasis Added)

Inspector Foster's understanding of section 50.10, as applied to hoists, is that the thirty minute time period referred to in the section 50.2(h)(11), definition of accident, does not apply if the idled hoist can be put back in service within fifteen minutes. He confirmed that a hoist can be idled for an entire shift, as long as it can be re-activated within fifteen minutes (Tr. 28).

Inspector Foster believed that a hoist that is unavailable for use because of ice in the shaft, a condition that he characterized as "a natural occurrence," need not be reported,

regardless of the downtime duration as long as there is no hoist damage, accident, or miner hazard exposure (Tr. 34). This comports with MSHA's Part 50 Program Circular interpretation (Exhibit C-10, Tab F), but is contrary to MSHA's interpretation that does not exempt "natural occurrences," and requires all hoist outages longer than thirty minutes to be immediately reported.

Inspector Foster's supervisor, C. Okey Reitter, confirmed that he issued the citation, and it was his understanding that the thirty-minute regulatory reference in question refers to the time that it would take to put an idled hoist back into service. As an example, he stated that if a hoist was out of service for an hour, as long as it could be put back in service within thirty minutes, there is no reportable hoist outage. Mr. Reitter identified the source of his interpretation as the Gomez letter of December 8, 1995, and confirmed that this was the only written guidance that he was aware of (Tr. 33-34).

Inspector Strickler believed that a hoist that is down for more than 30 minutes must be reported to MSHA, and he believed that an idled hoist "is unusable and broken" (Tr. 28-30).

Inspector Bilbrey's understanding is that a hoist that is out of service for more than thirty minutes would be considered a reportable accident. He believed that an idled hoist that can be restored to service in fifteen minutes and was not unavailable for more than an hour would not be a reportable accident (Tr. 20). However, Mr. Bilbrey did not believe that a hoist that is taken out of service for preventive maintenance constituted an "accident" (Tr. 15). In his opinion, preventive maintenance is "something that would prevent a breakdown and something that would be done before the equipment is broken." He defined "damage" as "inoperative" but stated that this would not include equipment that is intentionally taken out of service for maintenance purposes (Tr. 15). Mr. Bilbrey did not know if an inoperable hoist that is idled for more than thirty minutes by ice in the shaft would be considered a reportable accident, and stated that he would have to consult with his supervisor in this regard (Tr. 23).

Inspector Backland testified that a planned hoist outage is "probably" not reportable if the hoist can be activated within ten to fifteen minutes, but if the outage is in excess of thirty minutes, it is reportable. He further testified that preventive maintenance in excess of thirty minutes is not an "accident" pursuant to section 50.2(h), and that such maintenance could be on-going for a full shift. He then stated that preventive maintenance that takes a hoist out of service for more than thirty minutes need not be reported as long as the hoist can be

put back in service within a reasonable amount of time, but there is no fixed time for completing maintenance or reactivating the hoist (Tr. 20-21).

In response to a question as to whether or not a hoist that is taken out of service to adjust an undamaged rope needs to be reported, Mr. Backland responded that "It's a tough question to answer . . . I don't know. I would probably have to converse with my supervisor on that" (Tr. 24).

Inspector Breland believed that any hoist that is interfered with for more than 30 minutes is reportable regardles of the number of hoists in operation and regardless of the reason for the outage (Tr. 66). However, he would consider a "natural occurrence," such as ice in the shaft, not to be reportable unless there is no other way out of the mine (Tr. 67).

MSHA's District Manager Salois testified that any event specifically related to a hoist that takes it out of service for more than thirty minutes is reportable damage. He would not consider ice in the shaft that idles a hoist to be reportable, unless the ice actually damaged the hoist (Tr. 75-76).

In Jim Walter Resources, Inc., 17 FMSHRC 209 (February 1995), Commission Judge Barbour affirmed a violation of section 50.10, for a failure by the operator to immediately notify MSHA of a hoist accident that resulted in the hoist being out of service for over 30 minutes. The facts reflected that a skip hoist stopped after losing its source of power. Upon investigation by management at the hoist house containing the hoist motor and drum, it was discovered that there was damage to the hoist drum neoprene wearing strips which help to maintain proper tension on the hoist ropes which are seated into grooves on the drum as the ropes wind and unwind. The ropes were slipping on the wearing strips and the resulting friction heated the strips to the point where they had begun to melt and smoke. The condition of the hoist was not reported until many hours after the damage occurred.

The principal issue in Jim Walter was the application of sections 50.2(h)(11) and 50.10 to a hoist that transported coal and/or materials rather than miners. Judge Barbour found that the accident reporting requirement in section 50.10, applied equally to a hoist used to transport coal and materials and a hoist used to transport miners. However, I take note of the decision, at 17 FMSHRC 215, summarizing the testimony of the MSHA inspector who had 13 years of service. Judge Barbour noted as follows:

> Tuggle stated that the regulations require the reporting of all hoisting accidents which result in a hoist being out of service for over

> thirty minutes, unless the hoist it out of service for routine maintenance (Tr. 70-71). He stated, "[if] it's mechanical failure, which damages the hoisting system for more than 30 minutes . . . it needs to be investigated . . . [I]f the mechanical damage it due to an accidental breakdown of the components . . . it needs to be investigated. But if it's due to normal wear then, no, I don't think it needs to be investigated" (Tr. 93). (Emphasis Added)

It would appear to me that the experienced inspector in Jim Walter did not believe that hoist outages for over thirty minutes caused by routine maintenance or normal wear were required to be immediately reported to MSHA pursuant to section 50.10. It would further appear that the inspector would only require the reporting and investigating of hoist incidents involving mechanical failure resulting in damage to the hoisting system or mechanical damage due to a breakdown of the hoist components.

In the instant proceedings, the common thread binding the opinions of the inspectors with respect to the interpretation and application of section 50.10, and the meaning of the terms "damage" and "accident" is their inconsistent and contradictory testimony offered in support of the violations. Under the circumstances, I cannot conclude that a reasonably prudent person familiar with the mining industry would understand that any interruption to the use of a hoist renders it damaged and reportable pursuant to section 50.10. If the experienced inspectors charged with the enforcement of this regulation are uncertain as to its meaning and application, I would not expect a reasonably prudent mining person to be clear as to what is required to be reported. Indeed, district manager Salois conceded as much when he said he was unsure as to whether everyone understood the reporting requirements as he did.

With respect to the use of the word "damage," the testimony of record reflects a variety of opinions. Mr. Foster testified that the hoist was idled on November 9, 1995, because the ropes that experienced some stretching were being tightened. Although he was of the opinion that the stretching of the ropes constituted damage, he conceded that he had no knowledge of any hoist malfunctions, and he admitted that he had no factual basis to support any conclusion that the ropes had stretched to a point that would cause them to skip (Tr. 35-37).

Mr. Reitter confirmed that prior to the idling of the hoist, it was not broken and was functioning fine. The work that was performed was done to preclude future rope problems (Tr. 42-44). He believed the hoist was "damaged" because it was out of service and unavailable for use for more than thirty minutes and could

not be used. In his opinion, a hoist that cannot be used for more than thirty minutes is "damaged" per se. (Tr. 44).

I find Mr. Reitter's explanations with respect to the meaning of the term "damage" to be contradictory and confusing. On the one hand, he believed that a hoist that is idled for more than thirty minutes is damaged, but a hoist that is idled for one hour is not damaged, as long as it can be put back into service within thirty minutes. Further, Mr. Reitter's explanations contradict Mr. Foster's opinion based on a 15 minute window of opportunity for putting an idled hoist back into service.

Unlike Inspector Foster, Inspector Backland believed that the stretching of a hoist rope is normal and does not indicate that the hoist is damaged or not functioning properly (Tr. 23). I find Mr. Backland's testimony to be the more credible.

Inspector Breland assumed that the maintenance performed on the cited hoists was done to prevent damage. He also testified that damage occurs when a hoist is placed in service, but then stated that it becomes an "accident" when the "damage" interferes with hoisting for more than thirty minutes (Tr. 62). I find his testimony to be contradictory and incredible, and he obviously had no evidence that the hoists were physically damaged other than his speculative assumptions that the maintenance was somehow connected with some unexplained damage.

District Manager Salois did not know whether the cited hoist ropes had stretched to a point beyond the allowable tolerances (Tr. 61-64). He also had no factual knowledge that the ropes were changed out because they were damaged and could no longer be used (Tr. 69-70). Further, I find his testimony that a hoist rope is damaged when it is placed in service and subjected to stretching to be incredible and lacking any evidentiary support. His testimony contradicts Inspector Backland's belief that rope stretching is normal. Further, when asked if his opinion regarding rope damage is understood by the average miner, Mr. Salois responded "I'm not sure everybody would look at it that way" (Tr. 68-69).

Hoisting consultant Tiley distinguished rope deterioration, fatigue, and damage. He believed that damage begins when rope retirement is required, and that prior to this time "it's just useful life" (Tr. 33). Contrary to the opinion of Mr. Salois, Mr. Tiley did not believe that a newly manufactured hoist rope with broken wires was damaged, and he agreed with Inspector Backland's belief that rope streching is expected and does not constitute damage (Tr. 74). He also confirmed that the hoist ropes in questions were not retired because of stretching or were no longer fit for use (Tr. 75). I find Mr. Tiley's testimony in this regard to be credible. Although he alluded to a "corrosive"

mine atmosphere, I find no credible evidence that the cited ropes were damaged by corrosion when they were cited, and the citations do not state that they were.

Mining engineering consultant Head defined "damage" as an "unexpected faulty condition" that implies "an accidental sudden occurrence" that is the opposite of preventive maintenance performed to prevent such unexpected events (Tr. 37-39). He further indicated that damage is akin to the physical breakdown of a hoist part, and I find his testimony to be credible.

MSHA's hoist specialist Barkand was of the opinion that damage and normal wear and tear are no different and that normal wear and tear causes damage. However, he offered no credible testimony that the cited hoists were damaged due to normal wear and tear, and he conceded that he did not examine the ropes closely (Tr. 22, 41). He cited rope wire wear and nicking as the primary causes of damage, but offered no evidence that these hoist conditions were present in the instant cases. Indeed, he confirmed that the "constructive stretching," of a hoist rope, which results in the loss of rope diameter and increased lengthening is not damage (Tr. 32-33).

The parties stipulated that when the cited ropes were shortened they had not stretched beyond the limits allowed by MSHA's retirement criteria. MSHA has presented no credible evidence that the cited hoists were physically damaged or inoperable, or that the hoist ropes exceeded their normal life expectancy or were not installed or maintained within the applicable hoist rope specifications or tolerances. Further, the citations were issued as non-"S&S" violations, and I find no credible evidence to support any reasonable conclusion that any miners were exposed to a hazard.

It would appear to me that the purpose and intent of the Part 50 reporting requirements, as stated in section 50.1, is to provide MSHA with information in connection with mine accidents, injuries, and illnesses in order to enable MSHA to respond to those events by investigating and developing facts to ascertain the causes of such incidents, and to enable MSHA, in cooperation with the mine operator, to find the ways and means for preventing recurrences. A secondary purpose appears to be the establishment of a system of reporting that will enable MSHA to compile accident, injury, and illness statistics as a means of "tracking" such events for publication and dissemination to the mining community as a means of identifying problems associated with these events.

Insofar as the definition of "accident" associated with hoisting equipment as stated in section 50.2(h)(11) is concerned, I have difficulty in understanding how a planned routine

preventive maintenance procedure that is performed to prevent damage and insure continued compliance with sections 57.11050(a), in the absence of any actual hoist damage or hazard exposure to miners, can reasonably be construed to constitute a reportable accident pursuant to section 50.10. I cannot conclude that requiring the reporting of such incidents is reasonably related to the intent and purpose of sections 50.10 and 50.20.

MSHA's position that any interference with the use of a hoist for more than thirty minutes, regardless of the reason, and notwithstanding the absence of any physical damage, nonetheless constitutes damage that is immediately reportable as an accident pursuant to section 50.10, IS REJECTED as an unreasonable and rather strained interpretation of the common use of the word "damage."

As noted earlier in the Potash Company of America case, 4 FMSHRC 56 (January 1982), former Commission Judge Stewart concluded that in the absence of any evidence of physical damage to a hoist which interferes with its use, it is not "damaged" within the common understanding of that word or the meaning of section 50.2(h)(11), and the interference does not constitute an "accident" under the immediate notification requirement found in section 50.10.

I conclude and find that the common and ordinary meaning of "damage" in connection with the cited hoists connotes some readily recognizable physical damage that renders the hoist inoperable and requiring some repair to place it back in service. In this regard, I agree with Judge Stewart's decision in the Potash case, and I conclude and find that absent any evidence of some physical damage to the cited hoists, taking them out of service for reasons unrelated to any such damage, such as routine preventive maintenance where no damage repairs are made, does not amount to a reportable accident within the scope and intent of section 50.10.

In my view, if MSHA desires the definition of a reportable "accident" to include hoisting equipment that is idled for more than thirty minutes for any reason, it should take the appropriate procedural steps to re-draft and amend the regulatory definition found in section 50.2(h)(11).

In view of the foregoing, I conclude and find that MSHA has failed to establish any violations of section 50.10, by a preponderance of the credible evidence adduced in these proceedings. ACCORDINGLY, the contested citations ARE VACATED.

The parties agreed to hold the disposition of Citation No. 4546323 (Docket No. LAKE 96-80-RM) in abeyance pending my decisions concerning section 50.10. The citation concerns an

alleged violation of section 50.20(a), because of AKZO's failure to submit MSHA Mine Accident, Injury, and Illness Report Form 7000-1, for hoist maintenance outages of more than thirty minutes. In view of my findings that such hoist outages are not reportable accidents, I conclude and find that AKZO was not obliged to submit the form in question. ACCORDINGLY, the contested citation IS VACATED.

Fact of violation. Citation No. 4546276

The respondent is charged with a violation of 30 C.F.R. 57.11050(a), for allegedly failing to provide underground miners with two properly maintained escapeways on December 24, 1995. The cited production hoist, which was one of the escapeways, was not available for use for approximately three hours and thirty-seven minutes while the hoist rope was being shortened. Section 57.11050(a), provides as follows:

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

The parties stipulated that a planned shut down of the cited hoist escapeway occurred on December 24, 1995, in order to shorten all of the hoist ropes and to afford AKZO an opportunity to challenge the application of section 57.11050(a). The duration of the shut down was over three hours, no miners were evacuated, and three miners (a mechanic, an electrician, and a foreman) remained underground checking fans and pumps, and performing maintenance on the service hoist. No salt extraction occurred during the shut down and no cutting or welding was taking place.

The Evolution of MHSA's Asserted "One-hour" Evacuation "Policy"

Past "Policy"

I find no credible evidence of the existence of any written MSHA National policy statements prior to the institution of the instant litigation, concerning mandatory evacuation of the entire mine for a violation of section 57.11050(a), if compliance is not achieved within one hour, the fixing of an "automatic" one-hour abatement time to achieve compliance, or the uniform enforcement methods to be followed by MSHA inspectors when citing a mine operator for a violation of section 57.11050(a).

The evidence establishes that on February 22, 1990, MSHA's Metal/Non-metal North Central District Manager Salois issued a memorandum concerning the interpretation and application of section 57.11050(a), to be followed by his district inspectors when citing mine operators in that district, including AKZO's Cleveland Mine (Index of Exhibits, Tab G).

The Salois memorandum guidelines did not require the immediate evacuation of miners if a hoist was unavailable for use for more than one hour. In a planned hoist maintenance/repair situation, if one of the hoists was disabled as a result of this work, it was permissible to continue the work through the end of the shift, with miners underground, as long as the second hoist was available. The same rule essentially applied to unplanned hoist repair shutdowns.

I take note of the fact that the Salois memorandum, at page 3, specifically noted the absence if any MSHA national policy for "Mine Evacuation Related to Hoist Repairs/Maintenance Affecting Two Escapeways," the subject of the memorandum. The memorandum further noted, on the first page, that when compared to five other MSHA district practices, the practices in Mr. Salois' district were "substantially different." Since Mr. Salois states that his district should follow the other district practices and since his memorandum was apparently issued to accomplish this, I believe it is reasonable to assume that the other districts followed a similar practice of allowing hoist repairs to be made during a production shift, and through the end of the shift, without requiring the immediate evacuation of the mine within an hour of discovering that a hoist was in need of repair.

Mr. Salois testified that he withdraw his memorandum in February, 1995, because he lacked the authority to establish enforcement policy for his district and his policy was inconsistent with MHSHA's national policy. Although Mr. Salois indicated that prior to the issuance of his memorandum, miners were required to be out of the mine when hoist maintenance was performed, no evidence was produced to establish the existence of any written MSHA policy requiring the evacuation of miners. Indeed, Mr. Salois stated that his understanding that mine evacuation was required when hoist work was performed came from what he "learned on the job." Further, although Mr. Salois stated that other district managers informed him that his memorandum was inconsistent with the policy they were following, no credible evidence was produced to establish the factual existence of any written policy in these other districts.

Supervisory Inspector Reitter, who never visited the AKZO mine, testified that he first became aware of the Salois memorandum after he became a supervisor in MSHA's Newark, Ohio district, and he was unaware of the memorandum for the following

year until it was called to his intention by AKZO at the time it was rescinded. He confirmed that his inspectors were following the policy, and that if he were aware of it, he too would have followed it.

Inspector Strickler, who inspected AKZO's mine, never saw the Salois memorandum but heard about it from other inspectors in his office who informed him that at one time miners were allowed to work underground until the end of the shift. He stated that this was contrary to the policy in Illinois where a mine operator evacuated miners immediately. However, I find no evidence of the actual existence of any such written policy.

Inspector Bilbrey testified that he never saw the Salois memorandum, and learned about the unwritten policy for mine evacuation when a hoist was out at a staff meeting and verbally from his supervisors, including Mr. Reitter.

Inspector Backland, who also inspected AKZO's mine, testified that he was aware of the Salois memorandum in 1990, but did not believe it was the policy in his district. He did, however, believe the stated "time element" should be followed.

Mr. Gomez testified that he became aware of the Salois memorandum a year ago. He was concerned because it was contrary to what he considered to be MSHA's policy. He explained that when he served as manager of MSHA's Rocky Mountain District in February 1990, his policy was to require mine evacuation if there were no properly maintained escapeways. If one escapeway was down and could not be restored in one hour, a violation of section 57.11050(a), would occur. Mr. Gomez stated that he contacted every past and present district managers to determine if they had a policy such as the one stated in the Salois memorandum, and he found no such policy. He further stated that during the eleven years he served as a district and subdistrict manager, he was not aware of the regulatory interpretation stated in that memorandum and he believed it was "internally inconsistent."

Mr. Breland stated that he first saw the Salois memorandum in the fall of 1995, during a meeting with AKZO representatives and MSHA officials. He was never aware of any policy change as stated in the Salois memorandum, and he always followed the "instant violation and hour to abate" policy.

Mr. Breland alluded to an inquiry from MSHA's Dallas acting manager over a year ago regarding any change in policy that would not require the evacuation of miners under section 57.11050(a) at one of AKZO's mines in Lousiana when maintenance was performed on a hoist. After consulting with Mr. Gomez, Mr. Breland advised the manager that there was no policy change and miners would have

to be evacuated. If would appear to me that Mr. Breland's advice to the manager was based on the Gomez letter of December 8, 1995.

The record includes a copy of a Morton Salt Company memorandum dated March 10, 1980, stating an interpretation by MSHA's Dallas District office with respect to the intent of section 57.11-50. That interpretation is the same as the Salois policy memorandum of February 22, 1990, allowing production to continue until the end of the shift while the unavailable hoist is again made available. (Index of Exhibits, Exhibit D).

Mine Consultant Tiley initially testified that changing hoist ropes with miners underground when there is only one additional way out of the mine is a good mining practice and a normal process in the worldwide mining community. He later corrected himself and indicated that the practice of allowing miners to remain in a two shaft mine when one of the hoists is down applied to Canadian miners and not to U.S. miners. He was aware of MSHA's "one-hour" rule requiring mine evacuation if a hoist is down for more than an hour and he believed that this was the practice in American mines.

Mine consultant Head testified that the evacuation of miners from a two-hoist mine if one of the hoists is out of service for more than an hour is standard practice among several MSHA districts. He confirmed that many mine operators recognized that this was a policy change that occurred in the past two or three years, and that the prior policy followed in Mr. Salois' North Central District, did not pose an evacuation problem until the end of the shift. Mr. Head further confirmed that the prior practice in a two-hoist mine allowed work to continue until the end of the shift if one hoist was unavailable, and immediate evacuation was not required.

Present "Policy"

MSHA's position is that the Gomez letter of December 8, 1995, to AKZO's counsel constitutes the prevailing definitive interpretations of section 57.11050. Notwithstanding the absence of any regulatory language requiring the evacuation of miners within one hour for non-compliance, MSHA relies on the Gomez interpretation to support the cited violation of section 57.11050(a). The relevant portion of the letter states as follows:

> With respect to the escapeway issue, 30 C.F.R. 57.11050 requires that producing mines have two or more escapeways from the lowest level of the mine to the surface. The standard also requires that a method of refuge be provided for

all underground miners who can not reach the surface within 1 hours using both of the escapeways.

During the March meeting we discussed the need for evacuating miners from the Cleveland Mine, or any other mine, during hoist outages when the minimum requirements for escapeways could not be met because the hoist was unavailable for use in one of the two escapeways.

We believe that the standard does not authorize maintenance to interefere with a mine operator's ability to use the hoist in the event of an emergency if it is part of, or one of, the two required escapeways.

We also informed AKZO officials at the March meeting that, as a practical application of this standard, if a hoist could be returned to service within 1 hour of the need to be used then evacuation of the mine would not be required. This action would comply with the 1-hour time provided for in 30 C.F.R. 57.11050(b) and the requirement to have two escapeways available.

* * * *

* * * * Put another way, we believe that the language and clear intent of the standard indicates that routine maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within 1 hour. Your second conclusion that the mine need not be evacuated, regardless of the length of a hoist outage so long as it could be placed back into service and miners withdrawn from the mine within 1 hour, is correct.

The Gomez letter is a private communication to AKZO's counsel Savit in response to his request of November 6, for an explanation of MSHA's interpretation of section 57.110509 (Index of Exhibits, Tab N). The record reflects that the Gomez response was prepared unilaterally and was not shared with other members of the mining community, and its contents have apparently never been reduced to other written form or included as part of MSHA's enforcement guidelines or policy manuals. Indeed, MSHA's policy with respect to section 57.11050, as stated in the manual, has apparently not been revised or updated since 1988.

The record further reflects that prior to the November/December 1995, exchange of the aforementioned correspondence, a legal assistant in Mr. Savit's firm, in a letter dated September 11, 1995, to the Secretary's solicitor's office in Arlington, Virginia, requested a copy of the proposed section 57.11050, program directive referred to in the Potash decision of January 19, 1982, as well as other explanatory memorandums dealing with that regulation (Index of Exhibits, Exhibit L). The letter was referred to Mr. Gomez's office, and it was answered on October 20, 1995, by letter from Mr. C. Narramore, who signed it for Mr. Gomez. The response included a page from MSHA's July 1, 1988, Program Policy Manual regarding section 57.11050, and statements that copies of the requested memorandum could not be located, and that they were superceded by the program policy.

Apart from the Gomez letter, there is no evidence that the interpretation stated by Mr. Gomez is in fact reduced to any other written form as a means of notifying mine operators about MSHA's mine evacuation and abatement requirements, or providing guidelines or procedures for MSHA's inspectors to follow when inspecting and citing mine operators for violations of section 57.11050(a).

Inspectors Foster, Reitter, Strickler, Bilbrey, and Backland all confirmed that section 57.11050(a), contains no language requiring mine evacuation in the event a disabled hoist escapeway could not be put back in service within one hour, and they were unaware of any regulation that required automatic mine evacuation within any particular time frame. With regard to their understanding of what is required pursuant to section 57.11050(a), there appears to be inconsistent, uncertain, and confusing enforcement practices among MSHA's inspectors as to the interpretation and application of this regulation, examples of which follow below.

Inspector Reitter, who has never been in the mine, but who nonetheless "supervised" Mr. Foster in issuing the citation, was unaware of any written MSHA directive (except the Gomez letter) requiring mine evacuation. His belief that one of two hoist escapeways could be unavailable for one hour was based on the one-hour normal life of a self rescue device, and "word of mouth" discussions with other inspectors.

Inspector Bilbrey believed that when section 57.11050(a), is cited because a hoist is unavailable and cannot be returned to service within one hour, evacuation must begin. However, he further believed that a mine operator had a "floating time" frame to determine that the hoist cannot be restored to service. He explained that one hour would be allowed to make the initial unavailability determination, and that evacuation could begin

during the next hour. He confirmed that there is no written policy supporting his interpretation.

Inspector Backland believed that in the event of a "planned maintenance situation," if it takes more than one hour to repair a hoist evacuation must begin. His belief in this regard "relates" to the one-hour life of a self rescue device, and he confirmed that there is no MSHA written policy in this regard. However, he believed it is district policy, but could not recall who advised him of this.

MSHA's Safety Division Chief Breland's interpretation that section 57.11050(a), requires the evacuation of the mine within one hour after non-compliance is based on his understanding of subsection (b), the one-hour life of a self rescuer, and MSHA's fire evacuation standards. However, Inspector Strickler testified that a fire that is out of control for more than 30 minutes must be reported, but no evacuation of the entire mine is required, and a separate order would be required to achieve a mine evacuation.

Inspector Foster's "one-hour" evacuation interpretation is based on the one-hour oxygen supply of a self rescue device, his "experience" in coal mines, and conversations with fellow inspectors and supervisors.

Inspector Strickland believed that if a hoist were down for 30 minutes, and could not be restored within the next 30 minutes, evacuation must begin. He was not aware of any MSHA "one-hour evacuation" policy, and he based his belief in this regard on the one-hour self rescue device, and his "experience" and conversations with other inspectors.

Mr. Salois testified that he was not aware of any written MSHA National policy determination concerning section 57.11050, but that based on what he "learned on the job, miners have to be evacuated when hoist work is performed." He believed that the regulation required two separate escapeways at all times, and if only one was available, this would constitute non-compliance.

Although Mr. Salois claimed ignorance of any section 57.11050(a) national policy, Mr. Gomez stated that his December 8, 1995, letter states the current enforcement mine evacuation policy for non-compliance. However, contrary to his earlier testimony concerning the policy aspects of his letter, Mr. Gomez later testified that his letter does not state any policy and that he does not always issue policy when answering letters of inquiry. In explaining further, Mr. Gomez stated there are different methods and ways of handling and instituting agency policy, and he cited his letter as one of these methods. I find his explanation to be confusing and contradictory.

The record further reflects a variety of methods that inspectors would follow in citing violations of section 57.11050(a), and requiring abatement. Inspector Strickland did not believe that section 104(a) required the withdrawal of miners while abatement is ongoing, and he confirmed he had no authority under section 104(a) to order mine evacuation. However, based on his "experience," he believed that section 57.11050(a), authorized him to evacuate a mine and that a separate order was not required. He also believed that a one-hour abatement time is reasonable based on the one-hour useful life of a self rescuer.

Inspector Bilbrey questioned his authority to require mine evacuation. Inspector Reitter believed that a section 104(a) or (d) citation does not require withdrawal from a cited area. However, if a hoist were unavailable for one hour, he would issue a section 104(a) citation, with a short abatement time, and would require mine evacuation by issuing a section 104(b) order if the hoist could not be restored to use within the hour.

Mr. Salois would achieve compliance with section 57.11050(a), by issuing a section 104(a) or (d) citation if there were no imminent danger, and he would fix the abatement time at one hour.

Inspector Foster confirmed that a section 104(a) citation does not require the withdrawal of miners, and he conceded that there is no language in section 57.11050(a), requiring mine evacuation in the event of non-compliance. However, in the instant case, he considered the section 104(a) citation that he issued to be a withdrawal order with a one-hour abatement time regardless of the condition of the hoist, and without regard to the other work being performed underground, or the likelihood of a fire. I note from the pleadings however, that the citation be issued was issued at 8:03 a.m., on January 25, 1996, and he fixed the abatement at 5:00 p.m., the next day, January 26, 1996.

Inspector Strickler initially indicated that the fixing of a reasonable abatement time is left to the inspector's discretion after consultation with the mine operator as to the time it would take to correct the condition. He later indicated that a reasonable time for abatement would be one hour based on the useful life of a self rescuer.

Mr. Salois indicated that he would fix the abatement time at one hour, and would extend the time to focus on other problems, but only after the mine was evacuated. He further stated that a one-hour abatement time is reasonable regardless of the circumstances, and that based on section 57.11050(a), an inspector has no discretion to grant more than an hour for

abatement because two properly maintained escapeways would not be available.

Mr. Breland believed that one-hour is a reasonable abatement time because "that is what we expect in the evacuation," without regard to how long it might take to reapir a hoist or the number of people underground.

Mr. Backland believed that all of the circumstances presented must be evaluated in fixing a reasonable time to abate a violation.

Mr. Gomez suggested that an inspector could issue a citation with a "short" abatement time of less than one hour, followed by a section 104(b) withdrawal order. He was of the opinion that the absence of two functional escapeways constituted a per se imminent danger, and he would achieve compliance by initially issuing a section 104(a) citation, followed by an imminent danger order if a cited unavailable hoist was not restored to use within one hour.

The Gomez letter, at page 4, quotes a passage from Judge Hodgdon's decision in Savage Zinc, Inc., 17 FMSHRC 279,290 (March 1995), addressing the "S&S" hazard in failing to have two escapeways. In that case, Judge Hodgdon affirmed a violation of section 57.11050(a), after concluding that the mine had only one escapeway. I take note of the fact that contrary to MSHA's asserted policy of requiring mine evacuation within one hour in the absence of at least two escapeways, and the automatic one-hour abatement rule, the inspector in the Savage Zinc case issued a citation, did not require the immediate evacuation of miners, and fixed the abatement time at one month, not one hour. I further note that the citation was issued on October 14, 1994, prior to the January 8, 1995, Gomez letter. In any event, the failure to immediately evacuate the mine, and allowing 30 days to abate appears to be contrary to Mr. Gomez' avowed "long-standing" policy of immediate mine evacuation and short, one-hour abatement in the absence of two available escapeways.

MSHA's reliance on subsection (b) of section 57.11050, as its authority for requiring evacuation of the entire mine if one of the two escapeway hoists is unavailable for more than one hour is rejected. Subsection (b), on its face, does not provide for any mine evacuation. Indeed, the plain language of subsection (b) provides for refuges, not evacuation, if miners cannot reach the surface within an hour by using the escapeways provided by subsection (a). AKZO is not charged with a violation of subsection (b). In any event, it is my view that if the rule makers had intended to require the evacuation of the entire mine, they would have clearly included this as part of the regulation.

MSHA's assertion that section 104(c) of the Act supports its belief that all miners are required to be evacuated from the mine when one of the two escapeways is unavailable for use because that section allows only the miners needed to correct the escapeway deficiency to be present in the affected mine areas is not well taken, and is rejected. In my view, section 104(c) of the Mine Act provides no independent evacuation or withdrawal authority or requirement. That section must be read in conjunction with the citation/order scheme found in section 104, and comes into play when a citation or withdrawal order requiring abatement is issued. In the instant case, the violation was issued as a section 104(a) non-"S&S" citation.

MSHA's suggestion, at page 8 of its initial responsive brief, that no time for abatement is reasonable because AKZO "intentionally" created the violation in order to test the application of section 57.11050(a), and "knowingly" violated the law is not well taken and is rejected. AKZO specifically informed MSHA of its intentions, and MSHA willingly accommodated AKZO. In short, I conclude and find that MSHA was a cooperative and knowing participant, and cannot now complain and seek additional punishment against AKZO. I find nothing to suggest that MSHA ever initiated any section 110(c) proceedings against AKZO officials for any "knowing" violations. Further, the alleged violation was issued as a section 104(a) non-"S&S" citation, and AKZO was never charged with any aggravated or unjustifiable or inexcusable conduct for any unwarrantable failure noncompliance.

I disagree with MSHA's assertions that its requirements pursuant to section 57.11050(a) are clear and unambiguous, and that a reasonably prudent person familiar with the mining industry understands them. Apart from the Gomez letter of December 8, 1995, which admittedly was not shared with other mine operators, there is no evidence that MSHA has ever published its contents as part of its policy manual, inspector guidelines, or in any communications to the mining community at large. It seems obvious to me from the testimony in this case that the inspectors themselves do not have a clearly defined and consistent understanding with respect to the interpretation, application, and enforcement of section 57.11050(a). Except for ad hoc interpretations, "word-of-mouth" advice, and possibly a copy of the Gomez letter, it does not appear that MSHA's districts and inspectors have at their disposal a clearly defined written official agency enforcement policy to follow, particularly with respect to the issuance of citations and orders, and the fixing of abatement times.

I find nothing in section 57.11050(a), that supports MSHA's position that mine evacuation must begin immediately if one of

the two designated hoist escapeways is unavailable for more than one hour, nor do I find support for MSHA's position that the cited hoist was not properly maintained because it was unavailable for more than one hour.

I conclude and find that the regulatory language requiring the positioning of escapeways so that damage to one shall not lessen the effectiveness of the others recognizes the fact that one escapeway in a two escapeway mine may not always be available at all times because of damage. I believe that this would also apply to a situation where a hoist is taken out of service for maintenance to insure that it is kept in a properly maintained condition.

In the instant case, the cited condition or practice includes a finding that during part of the time the cited production hoist was out of the service, the primary service hoist was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. Since there is no evidence that the service hoist was damaged, or that its use was interfered with for more than thirty minutes pursuant to section 50.2(h)(11), I cannot conclude that the fact the production hoist was out of service lessened the effectiveness of the service hoist within the meaning of section 57.11050(a).

I conclude and find from the record in this case, that prior to the December 8, 1995, Gomez letter, MSHA's inspectors in the North-Central District, and probably other districts, followed an apparent long standing practice of not requiring the evacuation of miners working underground when only a single escapeway was available during a shift. This practice allowed production to continue until the end of the shift, provided miners were notified that only one escapeway was available and they agreed to continue working until the end of the shift, and provided the next shift was not permitted to go underground until the second escapeway was repaired.

In the instant case, the cited production hoist was out of service for maintenance, and I find credible AKZO's assertion that the rope shortening work was being done to insure continued compliance with the regulatory requirement that the hoist be properly maintained. I find it reasonable to conclude that if MSHA were following its pre-Gomez letter policy, a citation would not have been issued and work would have been allowed to continue until the end of the shift until the unavailable hoist was restored to service.

After further careful review and consideration of the arguments presented by the parties, I agree with AKZO's position

that MSHA's automatic one-hour mine evacuation requirement, a requirement clearly not contained in cited section 57.11050(a), is a significant departure from MSHA's apparent prior practice that has a substantial adverse impact on AKZO's mining rights and compliance obligations. The same can be said for MSHA's automatic one-hour abatement practices that appear to be contrary to Commission precedents. MSHA's requirement pursuant to section 57.11050(a), creates and imposes new compliance obligations on AKZO, under pain and penalty of immediate mine closure, with little or no discretion left to the inspector not to require mine evacuation in the event a hoist that is undergoing routine preventive maintenance in order insure its "properly maintained" condition is not returned to service within an hour. Under these circumstances, I conclude and find that the Gomez letter is more than a general explanatory or interpretative statement regarding the application of section 57.11050(a). I conclude and find that the letter constitutes a substantive rule subject to APA notice, comment, and publication requirements. See: Drummond Company, Inc., 17 FMSHRC 661 (May 1992).

Based on the entire record before me in this case, I conclude that MSHA's interpretation and application of section 57. 11050(a), goes well beyond the regulatory languages found in that section, and constitutes an unreasonable and impermissive enforcement reach that is not entitled to deference.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 57.11050(a), by a preponderance of the credible and probative evidence adduced in this proceedings. Accordingly, the contested citation IS VACATED.

ORDER

In view of the foregoing, IT IS ORDERED as follows:

1). Section 104(a) non-"S&S" Citation Nos. 4100787, November 28, 1995, and 4546275, January 25, 1996, citing alleged violations of 30 C.F.R. 50.10, ARE VACATED.

2). Section 104(a) non-"S&S" Citation No. 4546323, January 25, 1996, citing an alleged violation of 30 C.F.R. 50.20(a), IS VACATED.

3). Section 104(a) non-"S&S" Citation No. 4546276, January 25, 1996, citing an alleged violation of 30 C.F.R. 57.11050(a), IS VACATED.

4). MSHA's proposed civil penalty assessments of $600, for citation No. 4546275, and $400 for Citation No. 4546323 in Docket No. LAKE 96-125-M, ARE DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
5203 LEESBURG PIKE SUITE 1000
FALLS CHURCH VA 22041

NOV 2 0 1996

BOBBY JOE HENSLEY, Individually, and DAY BRANCH COAL COMPANY, Contestants	:	CONTEST PROCEEDINGS
v.	:	Docket No. Cit/Order No.
	:	KENT 94-1005-R; 4489701; 6/13/94
	:	KENT 94-1006-R; 4489702; 6/13/94
	:	KENT 94-1007-R; 4489703; 6/13/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	KENT 94-1008-R; 4489704; 6/13/94
	:	KENT 94-1009-R; 4489705; 6/13/94
	:	KENT 94-1010-R; 4489706; 6/13/94
	:	KENT 94-1011-R; 4489707; 6/13/94
	:	KENT 94-1012-R; 4489708; 6/13/94
	:	KENT 94-1013-R; 4489709; 6/13/94
	:	KENT 95-492-R; 4246556; 3/13/95
	:	
	:	Mine No. 9
	:	Mine I.D. No. 15-16418
DAY BRANCH COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	
	:	Docket No. Cit/Order No.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	KENT 95-147-R; 4246694; 11/7/94
	:	KENT 95-148-R; 4246695; 11/7/94
	:	KENT 95-149-R; 4246696; 11/7/94
	:	KENT 95-150-R; 4246697; 11/7/94
	:	KENT 95-151-R; 4246698; 11/7/94
	:	KENT 95-152-R; 4246699; 11/7/94
	:	KENT 95-153-R; 4246700; 11/7/94
	:	KENT 95-154-R; 4246861; 11/7/94
	:	KENT 95-155-R; 4246862; 11/7/94
	:	KENT 95-156-R; 4246863; 11/7/94
	:	KENT 95-157-R; 4246864; 11/7/94
	:	KENT 95-158-R; 4246865; 11/7/94
	:	KENT 95-159-R; 4246866; 11/7/94
	:	KENT 95-160-R; 4246867; 11/7/94
	:	KENT 95-161-R; 4246868; 11/7/94
	:	KENT 95-162-R; 4246869; 11/7/94
	:	KENT 95-163-R; 4246870; 11/7/94
	:	KENT 95-164-R; 4246871; 11/7/94
	:	KENT 95-165-R; 4246872; 11/7/94
	:	KENT 95-166-R; 4247425; 11/7/94
	:	KENT 95-167-R; 4247426; 11/7/94
	:	KENT 95-168-R; 4247427; 11/7/94
	:	KENT 95-169-R; 4247428; 11/7/94
	:	KENT 95-170-R; 4247429; 11/7/94

	:	KENT 95-171-R; 4247430; 11/7/94
	:	KENT 95-172-R; 4247433; 11/7/94
	:	KENT 95-173-R; 4247434; 11/7/94
	:	KENT 95-174-R; 4247435; 11/7/94
	:	KENT 95-175-R; 4247436; 11/7/94
	:	KENT 95-176-R; 4247437; 11/7/94
	:	KENT 95-177-R; 4247438; 11/7/94
	:	KENT 95-178-R; 4247439; 11/7/94
	:	KENT 95-179-R; 4247440; 11/7/94
	:	
	:	Mine No. 8
	:	Mine I.D. No. 15-16439
	:	
	:	Docket No. Cit/Order No.
	:	KENT 95-180-R; 4246821; 11/10/94
	:	KENT 95-181-R; 4246822; 11/10/94
	:	KENT 95-182-R; 4246823; 11/10/94
	:	KENT 95-183-R; 4246824; 11/10/94
	:	KENT 95-184-R; 4246825; 11/10/94
	:	
	:	Mine No. 9
	:	Mine I.D. No. 15-16418
	:	
BOBBY JOE HENSLEY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. Cit/Order No.
	:	KENT 95-185-R; 4246821; 11/10/94
SECRETARY OF LABOR,	:	KENT 95-186-R; 4246822; 11/10/94
MINE SAFETY AND HEALTH	:	KENT 95-187-R; 4246823; 11/10/94
ADMINISTRATION (MSHA),	:	KENT 95-188-R; 4246824; 11/10/94
Respondent	:	KENT 95-189-R; 4246825; 11/10/94
	:	
	:	Mine No. 9
	:	Mine I.D. No. 15-16418

ORDER OF DISMISSAL

Before: Judge Fauver

These are Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. The Secretary of Labor has moved for dismissal on the ground that Contestants failed to request a hearing upon receipt of the penalty proposals.

It appears from the record that proposals for assessment of civil penalties regarding the above citations/orders were made to

both Contestants in 1995.[1] No responses were made to the proposals and by operation of the Commission's Procedural Rule 2700.27 (29 C.F.R. § 2700.27), the proposals became final orders of the Commission.

Contestants move for relief from application of Rule 2700.27 on the ground that the operator's counsel did not receive a copy of the proposals. It appears from the pleadings that Contestants were served at their designated address: P.O. Box 204, Cawood, KY 408915, and that the postal receipts for the proposals were received by Contestants and signed for by Betty Cassim.

The Secretary opposes the motion and states that MSHA does not serve operators' counsel with proposals for assessment of civil penalties and the applicable regulation requires service of a proposed penalty on the operator at its designated address.

I find that Contestants have not set forth a sufficient reason for relief from the application of Rule 2700.27.

Accordingly, it is ORDERED that the Motion to Dismiss is GRANTED, and these proceedings are DISMISSED.

William Fauver
Administrative Law Judge

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[1]The Secretary states in his Reply to Contestants' Response to the Motion to Dismiss that he did not propose assessment of a civil penalty against Joe Hensley individually with regard to Citation No. 4246556 and that Day Branch Coal Company received a proposed penalty of $50 (A.C. 15-16418-03569). The Secretary further states that he waives his right to proceed against Joe Hensley concerning such citation, "in the interest of facilitating disposal of these cases."

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/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 21, 1996

JAMES M. RAY, employed by LEO JOURNAGAN CONSTRUCTION, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 96-4
v.	:	Formerly CENT 96-53-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Journagan Portable #12 MO

DECISION

Before: Judge Fauver

James M. Ray filed an application for attorney fees and litigation expenses against the Secretary of Labor (MSHA) under the Equal Access to Justice Act (EAJA), 25 U.S.C. § 504, based upon the outcome of the Secretary's civil penalty case against him under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Docket No. CENT 96-53-M).

The EAJA provides for the award of attorney fees and other expenses to a "prevailing party" against the United States or an agency unless the position of the government "was substantially justified or ... special circumstances make an award unjust."

I.

Judge's Findings in CENT 96-53-M

Citation No. 4329462

The judge found that on March 28, 1995, Federal Mine Inspector Michael Marler inspected the Journagan Portable #12 portable crusher in southwestern Missouri. While he was

on the site, rocks became stuck in the crusher. He observed a miner, Steve Catron, straddling the opening to the crusher and trying to dislodge rocks with a metal bar about five to six feet long. The opening of the crusher was about six feet deep. The jammed rocks extended about two feet from the jaws of the crusher. The superintendent of the operation, James M. Ray, was with the inspector.

The crusher was not turned on, but the electric power to the crusher was not shut off and locked out. Catron was straddling the crusher while standing on metal plates about two feet above the jaws of the crusher. He was wearing a safety belt with a lifeline attached to a catwalk railing above him. The judge found that if Catron fell, his fall would be limited to 1-1/2 to 2 feet. His feet "could possibly have brushed the movable jaw but it was unlikely that he would be injured" by the jaw.

Another employee, Keith Garoutee, was standing at the doorway of a power shed that controlled the power to the crusher. After Catron tried to dislodge the rocks, he would disconnect his lifeline and step up on a metal plate about 1-1/2 feet above his original position. He would then connect the lifeline to a point above and behind him and signal Garoutte to start the crusher to see if it would operate. If it was still jammed, he would signal Garoutee to turn off the crusher and he would disconnect his lifeline and step down to his original position, reattach the lifeline to the catwalk railing and again try to dislodge the rocks.

Ray was familiar with the above procedure. The company had been following this practice before Ray was employed there, and Ray had seen the employees dislodge rocks this way before the inspection on March 28.

Inspector Marler issued Citation/Order No. 4329462, charging the company with a violation of 30 C.F.R. § 56.12016, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power witches shall be locked out or other measures

> taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it ....

After the inspection on March 28, the Secretary conducted a special investigation under § 110(c) of the Mine Act to determine whether Ray should be charged with liability as an agent of the corporation. The Secretary decided to bring charges against Ray individually.

The Secretary proposed a $4,000 civil penalty against the company and a $1,500 penalty against Mike Ray.

Citation No. 4329463

When the withdrawal order was issued on March 28, Ray shut off the power to the crusher, and he and the inspector went to the crusher. They observed Catron and Garoutte inside the crusher shute removing rocks. Above the miners, the hopper was 3/4 full with about 25-30 tons of rocks piled at an angle of about 35 degrees. The judge found that the rocks, which extended to within a foot of the miners, ranged in size from dust particles to stones two inches in diameter. There was no barrier between the rocks and the crusher. Inspector Marler considered this to be an imminent danger of rocks sliding into the crusher shute and on top of the miners. Accordingly, he issued Citation/Order No. 4329463, which charged the company with a violation of 30 C.F.R. § 56.16002(a), which provides:

> Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be-
>
> > (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials ....

After a special investigation under § 110(c), the Secretary charged Ray individually for this violation.

The Secretary proposed a civil penalty of $4,500 against the company and a penalty of $1,500 against Ray.

II.

Judge's Decision in CENT 96-53-M

The judge held that the company violated § 56.12016. He reasoned that the plain language of the standard applied to the crusher operation and the "fact that miner Catron was tied off at almost all times when he was above the energized crusher is not relevant to the issue of whether the standard was violated." The judge found that the violation was not significant and substantial because "there was no reasonable likelihood that the hazard contributed to by Journagan's violation would result in injury." He assessed a penalty of $500 against the company for this violation.

The judge ruled that Ray was not subject to a civil penalty for the violation of § 56.12016. He reasoned that, although Ray "clearly had reason to know that his employees would be working on the crusher without it being deenergized ...., his conduct was not aggravated." The judge found that the procedure followed by the employees was not a practice initiated by Ray, but was a company policy in place before Ray was hired. The judge also stated: "More importantly, I find that Ray had a reasonable good faith belief that miners were adequately protected by wearing a safety belt that was tied off above them. Mr. Catron was tied off for all but a very brief period, during which it was very unlikely he would fall and that the jaw of the crusher would move." The judge vacated the penalty proposed against Ray as to Citation No. 4329462.

The judge held that the Secretary failed to prove a violation of § 56.16002(a). He found that the Secretary had not proved that the 25-30 tons of rock above the miners "had not reached an angle of repose" and that the company's "evidence tends to prove that the rocks would not slide." Accordingly, he vacated Citation No. 4329463.

III.

Disposition of Issues Under
Equal Access to Justice Act

The Secretary has moved to dismiss the application on the ground that it was not filed within 30 days of the final disposition in the adversary adjudication.[1] The judge's decision in the Mine Act case was on June 7, 1996. The application was filed on July 8, 1996. Under the Commission's Rules of Procedure, the date of the judge's decision is excluded in computing the time. 29 C.F.R. § 2700.8. Accordingly, day 1 is June 8 and day 30 is July 7. Since July 7 was a Sunday, the rule requires the period to run to the end of the next business day, July 8. Therefore, the application was timely filed.

The Equal Access to Justice Act, 5 U.S.C. § 504 (administrative agency actions) and 28 U.S.C. § 2412 (civil actions), was passed in 1980. The legislative history of the act reflects the intent of Congress to help individuals and small businesses defend against unreasonable government actions. The House Report of the Judiciary Committee on the 1980 bill provides:

> [The EAJA] rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and the government. The purpose of the bill is to reduce the

[1] 5 U.S.C. § 504(a)(2) states: "A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application...."

> deterrents and disparity by entitling certain prevailing parties to recover an award of attorneys fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified.

H.R. Rep. 96-1418, 96th Cong., 2nd Sess. (1980). Congress was concerned that parties with limited resources were allowing unjust agency actions to go uncontested because "[w]hen the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." Id. The report further notes that the rapid growth in government regulations, combined with the increasing inability of ordinary citizens to defend against unreasonable charges, results in a situation where "at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position." Id.

The EAJA as originally written was to expire in October 1984, but Congress made the law permanent in 1985 through Pub. L. No. 99-80, 99 stat. 183. Referring to agency actions, the Act states:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. [5 U.S.C. § 504(a)(1).]

Under the case law, "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In Pierce, the Supreme Court rejected a higher standard and held that "as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase ['substantially justified'] is not 'justified to a high degree,' but rather 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." Ibid. The Supreme Court also held that a loss on the merits is not equated with a lack of substantial justification, recognizing that the government "could take a position that is substantially justified, yet lose." Pierce, 487 U.S. at 569. The government is not required to show that its decision to litigate was based on a substantial probability of prevailing. Different triers of fact may view conflicting evidence differently. However the government has the burden of showing that its position was reasonable in law and fact.

The basic issue is whether, based on the information available to the government, the charges had a reasonable basis in law and fact.

The government's § 110(c) investigation, before charges were brought against Ray, indicated that when Inspector Marler observed miner Catron straddling the crusher, his safety line was not taut but was looped down with slack several feet long. Exhibit A (Sec's Response in Opposition to Application) and hearing Tr. pp. 33 and 249. On these facts, if the miner fell his feet could become entangled in the crusher. Also, the safety line would offer no protection against an injury caused by the bar striking the miner or by rocks sliding down on the miner if the crusher were suddenly reactivated. The investigation also disclosed that Superintendent Ray had been cited earlier for failing to lock out a power circuit when doing mechanical work on a conveyor belt, and that Ray was the superintendent of the mine, the sole supervisor on the property, and a professional with a B.S. in mining engineering.

Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act ..., any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b).

The Commission has held that the term "knowingly" as used in § 110(c) of the Mine Act "does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. *** If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), aff'd, 689 F.2D 632 (6th Cir. 1982), cert. Denied, 461 U.S. 928 (1983).

The Commission has also held that a "knowing" violation under § 110(c) requires proof of "aggravated conduct," which means greater than ordinary negligence. Bethenergy Mines, 14 FMSHRC 1232 (1992).

The Secretary's investigation of the alleged violation of § 56.12016 provided a reasonable basis in law and fact for charging Mike Ray with liability under § 110(c) of the Mine Act. There was evidence that Mike Ray's practice was to ignore § 56.12016 if he decided that the procedure followed by the miners was not hazardous. Ray had been cited earlier for a similar violation. Section 56.12016 is plain and unambiguous. It requires deenergizing the power circuit on equipment when doing mechanical work. It does not provide or imply that a substitute method may be used,

such as relying on an employee to stand guard over the controls. A trier of fact could reasonably hold that Ray, as superintendent of the rock-crushing operation, served both as a role model for the work force and the leader accountable for complying with mandatory safety standards. In light of Ray's prior citation for a similar violation of § 56.12016, a trier of fact could also reasonably find that Ray acted deliberately in ignoring the safety requirement to deenergize the crusher and his act constituted "aggravated conduct." The fact that the judge in the mine case held it was not aggravated conduct does not mean that another judge may not have viewed the evidence differently.

The government's investigation of the alleged violation of § 56.16002(a) also provided a reasonable basis in law and fact for charging Ray with liability under § 110(c). The investigation disclosed that the investigator had observed two miners working in the crusher opening with rocks up to their chests. The rocks were small to very large and were held on the slope by other rocks. It was the opinion of Inspector Marler that a jolt by another rock or any small movement could send the pile of rocks down upon the two miners. He found an imminent danger. Mike Ray was aware of the practice and had observed miners removing rocks in this manner at other times. Ray disagreed with the inspector's opinion. Nonetheless, a trier of facts may have given weight to the inspector's observations and opinion and found that Ray's conduct was aggravated by subjecting miners to an imminent danger. The fact that the trial judge gave greater weight to Ray's safety opinion does not mean that the Secretary's case was not substantially justified by the inspector's observations and safety opinion.

I find that the government's position in charging Mike Ray under § 110(c) of the Mine Act as to both charges was "substantially justified" within the meaning of the Equal

Access to Justice Act.[2]

ORDER

The application for an attorney fee and other costs under the Equal Access to Justice Act is DENIED.

William Fauver
Administrative Law Judge

[2]The Secretary also contends that there are "special circumstances which make an award unjust," contending that his action against Ray involves a "credible extension of law." Secretary's Response to Application, p.13-14. The Secretary does not articulate what extension he was trying to advance. However, it appears that the Secretary's position is that a supervisor may be subject to a penalty under § 110(c) even if he or she believed the miners were safe. This is not an extension of the current law. It is the current law. The contention of "special circumstances" is rejected.

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/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 2 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 95-186-M
	:	A.C. No. 24-01986-05505
v.	:	Docket No. WEST 95-433-M
	:	A.C. No. 24-01986-05507
	:	Docket No. WEST 95-448-M
	:	A.C. No. 24-01986-05506
HOLLOW CONTRACTING, INC., Respondent	:	Docket No. WEST 95-549-M
	:	A.C. No. 24-01986-05508
	:	Portable Crusher

DECISION

Appearances: Barbara J. Renowden and Gary L. Grimes, Conference and Litigation Representatives, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
William J. Hollow, President, Hollow Contracting, Inc., Butte, Montana, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hollow Contracting, Inc. ("Hollow Contracting"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petitions allege 33 violations of the Secretary's safety standards. For the reasons set forth below, I affirm 30 citations, vacate 3 citations, and assess penalties in the amount of $2,065.

A hearing was held in these cases in Butte, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Portable Crusher involved in these cases was a very small facility that produced fines and crushed rock. (Tr. 284). At the time the citations were issued, the crusher was about ten miles south of the town of Big Timber in Sweet Grass County, Montana. The operation consisted of a crusher and related equipment. Hollow Contracting recorded about 2,375 hours of production in 1994 and it employed about 16 people. (Ex. S-1; Tr. 284). About five people were employed at the Big Timber crusher at the time the citations were issued. (Tr. 283). Hollow Contracting has a history of 25 citations between September 1992 and September 1994. (Ex. S-2). On September 15, 1994, MSHA Inspector Seibert Smith inspected the crusher and issued most of the citations at issue in these proceedings. Two citations were issued by MSHA Inspector Ronald Goldade at a different time.

General Background

Hollow Contracting first became involved in the crushing business when it operated a crusher that was owned by another company near Libby, Montana. (Tr. 280). After that job was completed, Hollow Contracting bought equipment, leased other equipment, and operated a crusher near Roundup, Montana. (Tr. 281). At about the same time, Hollow Contracting started the Big Timber operation. *Id.* It started setting up the Big Timber crusher about a week before MSHA's inspection. (Tr. 282). It ran the plant for one day to get product samples to be analyzed in Billings. *Id.* At the time of the inspection, the plant was not operating because the crusher was broken. Mr. Hollow went to Billings to get a part. (Tr. 286). The crusher started production the next day after it was fixed. *Id.* Hollow Contracting was not paid for much of its work and the company sold its crushing equipment to Montana Materials, L.L.C., sometime after the subject citations were issued. (Tr. 317-18). Hollow Contracting is still in business but does not own the crushing equipment. *Id.* Mr. Hollow is the sole owner of Hollow Contracting and Hollow Contracting is a part owner of Montana Materials. *Id.* Based on the evidence of record, I find that Hollow Contracting remains liable for any penalties assessed for the citations at issue in these proceedings.

Hollow Contracting contends that it attempted on several occasions to get a copy of MSHA's safety regulations from MSHA inspectors. Hollow Contracting states that it did not know what the safety standards required because it did not have a copy of the standards. The Secretary's safety standards are publicly available in the Code of Federal Regulations. While I appreciate that the standards may be difficult for a small mine operator to obtain, they are available to the public. The fact that

Mr. Hollow had not yet received a copy cannot be a defense to the citations or a mitigating factor in assessing civil penalties. *See Materials Delivery*, 15 FMSHRC 2467, 2471 (December 1993) (ALJ).

Hollow Contracting also maintains that many of the conditions described in the citations did not create a hazard to its employees. The Commission and the courts have uniformly held that the Mine Act is a strict liability statute. See, e.g. Asarco v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." Id. at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. 30 U.S.C. § 814(a). If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The degree of the hazard is taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

In addition, Hollow Contracting contends that its crusher was not operating at the time of the inspection. There is no dispute that the crusher was out of service for repairs at the time the citations were issued. Nevertheless, Mr. Hollow testified that once the repairs were completed, the plant was scheduled to start commercial production within one day. (Tr. 286). Thus, the conditions observed by MSHA would have continued to exist when the plant was started. Except where noted below, Hollow Contracting did not argue that it would have repaired the cited conditions prior to starting production. In addition, there is no dispute that the crusher was operating the day before the inspection when product samples were obtained.

Finally, Hollow Contracting contends that its crushing equipment was inspected by MSHA in the past and that MSHA's inspectors saw the same conditions that were cited at Big Timber. It argues that it is unreasonable for MSHA to issue citations and assess penalties for conditions that were not cited in these past inspections. The Commission has held that the Secretary is not prevented from issuing a citation for a condition that violates a safety standard simply because the same condition existed during a previous MSHA inspection and was not cited. The fact that a condition was observed by an MSHA inspector and not cited may

reduce the level of negligence attributed to the mine operator and result in a reduced penalty.

In assessing civil penalties, I have taken into consideration the fact that Hollow Contracting is a very small business and that it promptly abated the citations. I reduced the penalties from that proposed by the Secretary, in part, because the Secretary did not give sufficient consideration to Hollow Contracting's small size. Except as noted below, I find that Hollow Contracting's negligence was low with respect to the citations. Mr. Hollow was attempting to run a safe operation and reasonably believed that he was in compliance with the Secretary's safety standards.

Specific Citations

In order to discuss the allegations in a systematic way, I have grouped the citations by subject area rather than by docket number.

A. NOTIFICATION AND REPORTING CITATIONS

1. Citation No. **4409918** alleges that Hollow Contracting failed to notify MSHA in writing that it was starting operations at the Big Timber site. The regulation, **30 C.F.R. § 56.1000**, provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office before starting operations. Inspector Smith testified that the crusher was not on MSHA's list for the Big Timber location. (Tr. 219-20). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $136.

Mr. Hollow testified that his office notified the local MSHA office of the Big Timber operation by telephone. (Tr. 316). Apparently, Hollow Contracting had notified MSHA of its other crushing operations. (Tr. 224). I find that the Secretary established a violation. The regulation does not specifically require that the notification be in writing, but when the regulation is read in conjunction with 30 C.F.R. § 41.11(a) and section 109(d) of the Mine Act it is clear that a telephone call may not be sufficient. In any event, I credit the testimony of Inspector Smith that the local MSHA office did not have any record of the call.

I find that Hollow Contracting's negligence was very low because it believed that it notified MSHA and the crusher facility had only been at Big Timber for about a week. Based on the penalty criteria, I assess a civil penalty of $5 for this violation.

2. Citation No. **4363435** alleges that Hollow Contracting failed to notify the local MSHA office when it closed its operations at Big Timber. The regulation, **30 C.F.R. § 56.1000**, provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office when a mine is temporarily or permanently closed. Inspector Goldade testified that when he traveled to the site on March 23, 1995, the crusher was no longer there. (Tr. 258). He stated that the violation was not serious but that Hollow Contracting's negligence was high because Hollow Contracting had been cited for violations of this safety standard on two previous occasions. The Secretary proposed a penalty of $189.

Mr. Hollow testified that Hollow Contracting had not completed its work at the Big Timber site at the time of Inspector Goldade's inspection so the mine was not temporarily or permanently closed. (Tr. 312-15). Apparently, Hollow Contracting was crushing material at the site that was used in an asphalt paving project. The citation was issued in March and Mr. Hollow stated that Hollow Contracting was required to return to the cite in the spring and "clean up the chips." (Tr. 315). Chips are "three-eighths rock with no fines in it." (Tr. 314). The cleaned chips would then be put on top of the asphalt. The asphalt was not chipped in the fall because of cold weather.

I find that the Secretary did not establish a violation. I credit Mr. Hollow's testimony that he had to return to the site to finish work on the project. Hollow Contracting had to bring in some screening equipment to clean the chips. (Tr. 259, 313-14). The screen removed any debris and fines. This activity is considered to be "sizing," which is subject to Mine Act jurisdiction. The Secretary did not produce evidence to establish the length of time between the date the crushing operation was completed and the date that the chips were to be screened. The inspector issued the citation because the crushing equipment was not at the Big Timber site on March 23. Although the regulation requires mine operators to notify the nearest MSHA office when a mine is temporarily closed, a rule of reason is required. A short period of inactivity may not amount to a temporary closure. Hollow Contracting removed the crushing equipment because they were no longer needed at Big Timber, not because the mine was closed. Accordingly, this citation is vacated.

3. Citation No. **4410149** alleges that Hollow Contracting failed to provide Inspector Smith with a copy of the quarterly employment report for the second quarter of 1994. The regulation, **30 C.F.R. § 50.40**, provides, in part, that mine operators shall keep a copy of each quarterly employment report submitted to MSHA at the mine office for a period of five years. Inspector Smith testified that he was told that the report was not available at the mine. (Tr. 171). He stated that the violation was not serious but that Hollow Contracting's negligence was high

because no employment reports were available at the mine. The Secretary proposed a penalty of $136.

Mr. Hollow testified that the plant was not in operation and he did not know that these reports were required to be filed when Hollow Contracting was not in production. (Tr. 315). He stated that at that time he kept his records on top of his refrigerator. I find that the Secretary established a violation, but I do not agree that the operator's negligence was high. The fact that several reports were not available does not establish high negligence. Based on the penalty criteria, I assess a civil penalty of $5 for this violation.

B. MACHINERY AND EQUIPMENT CITATIONS

1. Citation No. **4410144** alleges that records were not provided at the mine site of the defects in the equipment that "were cited on this inspection" for review by the inspector. The regulation, **30 C.F.R. § 56.14100(d)**, provides, in part, that defects on self-propelled mobile equipment affecting safety, which are not immediately corrected, shall be recorded. Inspector Smith testified that there were no records kept of safety defects at the mine. (Tr. 209-10). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $157.

Mr. Hollow testified that there was a calendar in the generator van where workers would mark down what needed to be fixed that day. (Tr. 210, 310-11). It appears, however, that this record concerned routine matters, such as oil changes. The calendar did not contain a list of the safety defects found by employees. Accordingly, I find that the Secretary established a violation. I find that the violation was not serious. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

2. Citation No. **4409970** alleges that the backup alarm on a John Deere loader was not maintained in a functioning condition. The safety standard, **30 C.F.R. § 56.14132(b)(2)**, provides, in part, that backup alarms shall be audible above the surrounding noise level. Inspector Goldade testified that he observed an employee backing up the loader and that a backup alarm could not be heard. (Tr. 250). He stated that the violation was significant and substantial ("S&S"), and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that the backup alarm was working, but that Inspector Goldade did not think it was loud enough. (Tr. 305, 312). He stated that Inspector Smith was in the area on the previous day and did not issue a citation.

I find that the Secretary established a violation. I also find that the violation was S&S. The four elements of the *Mathies* test were met. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, presents the closest question. Inspector Goldade testified that if an employee were to walk in the area of the loader while it was backing up, he may not be aware that he was in danger because he could not hear the backup alarm. (Tr. 252). He testified that the operator of the loader might not see him because of a blind spot on the loader. (Tr. 253). He further testified that there was a reasonable likelihood that the hazard contributed to would result in a serious accident or a fatality. (Tr. 254). He noted that fatal accidents in such situations are not uncommon. (Tr. 252).

I credit the inspector's testimony and find that the violation was very serious. I also find that Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $300 for this violation.

3. Citation No. **4409920** alleges that the guard installed on the tail end of the pan discharge feeder was not secured on the right side. The safety standard, **30 C.F.R. § 56.14112(b)**, provides, in part, that guards shall be securely in place while machinery is being operated. Inspector Smith testified that a guard was present but that it was not secured on one side. (Tr. 39-44; Ex. G-448-2). He determined that the violation was not serious and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $189.

Mr. Hollow testified that the guard had been bolted on, but that the guard must have been snagged by a loader. (Tr. 287). He stated that it was highly unlikely that the condition would cause anyone to be injured. I find that the Secretary established a violation. I agree that the violation was not serious and that it was highly unlikely that it would have caused an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

4. Citation No. **4409922** alleges that a guard was not installed on the overhead v-belt drive unit for the main white screen plant to prevent a whipping action of the belt if it were to break. The safety standard, **30 C.F.R. § 56.14108**, provides that overhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons. Inspector Smith testified that he observed that the v-belt drive was not provided with a guard. (Tr. 54-58; Ex. G-448-4). He stated that if the belt were to break, a whipping action could cause the belt to strike an employee. Inspector Smith stated that he saw an employee in the area on the previous day. (Tr. 60-61). He determined that the violation was not

serious and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $147.

Mr. Hollow testified that because of the direction of the rotation of the belt and the location of the motor, he did not believe that a broken belt would hit anyone. (Tr. 59, 289). I find that the Secretary established a violation. I agree that the violation was not serious and that it was highly unlikely that it would have caused an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

5. Citation No. **4409921** alleges that a guard was not installed on the sides of the fin-type tail pulley for the orange stacker discharge conveyor. The safety standard, **30 C.F.R. § 56.14107(a)**, provides, in part, that moving machine parts shall be guarded to protect persons from contacting drive, head, tail, and takeup pulleys and similar moving parts that can cause injury. Inspector Smith testified that he observed that the cited tail pulley was not provided with guards and that several employees were required to work or walk by the area. (Tr. 44-46; Ex. G-448-3). He stated that neither side of the tail pulley was guarded and that employees cleaning up in the area could be injured as a result. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that it would be very difficult for a person to fall and trip into the pinch point of the tail pulley. (Tr. 288). He stated that the only time that anyone was in the area was at the end of the work day after the operation was shut down. *Id.* On the other hand, he testified that employees sometimes clean up while the conveyors are running. (Tr. 289).

The Commission held that the most logical construction of a guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Co.*, Inc., 6 FMSHRC 2094, 2097 (September 1984). The Commission stressed that the construction of safety standards involving miners' behavior "cannot ignore the vagaries of human conduct." *Id.* (citations omitted). Thus, I must consider all relevant exposure and injury variables including "accessibility of the machine parts, work areas, ingress and egress, work duties, and ... the vagaries of human conduct" on a case-by-case basis. *Id.*

Taking these factors into consideration, I find that the Secretary established a violation. The more difficult question is whether the Secretary established that the violation was S&S. It is clear that a discrete safety hazard was created by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result

in a serious injury if not corrected. Inspector Smith testified that an employee working in the area or walking through the area could slip and fall and come in contact with the moving parts of the tail pulley. (Tr. 48). He determined that such an event was reasonably likely. (Tr. 47-48). The tail pulley was about one foot above the ground.[1] I find that the Secretary established that the violation was S&S. The ground was uneven in the area. A significant tripping hazard was presented by the terrain. (Ex. G-448-3). I find that it was reasonably likely that someone would be seriously injured as a result of the cited condition. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

6. Citation No. **4409923** alleges that a guard was not installed on the tail pulley for the discharge conveyor under the white shaker screen, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 62-72; Ex. G-448-5). He stated that employees were required to clean up in the area and that an employee could slip, come in contact with the moving parts, and sustain serious injuries. The pulley was about one and a half feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that it would be difficult for someone to come in contact with the tail pulley because of its location. (Tr. 290). He stated that the tail pulley is behind iron supports for the white shaker screen. (Tr. 290-92; Ex. G-488-4). He stated that an employee could not get any closer than about three to four feet from the pulley. He testified that it was unlikely that someone would trip and come in contact with the tail pulley. Finally, Mr. Hollow stated that the fines are cleaned off the belt at a different location. *Id.*

I find that the Secretary established a violation but did not establish that the violation was S&S. There was no showing that it was reasonably likely than anyone would be injured by the violation because the pulley was not in an easily accessible area

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[1] For reasons that are not entirely clear, Inspector Smith was instructed by MSHA headquarters to take all of his measurements in centimeters. The safety standard at subsection (b) uses feet as the standard measurement. It is pointless to require measurements in the metric system when the safety standards use feet and inches. This requirement confused Mr. Hollow and I can understand his confusion. I encourage the Secretary to drop his requirement that MSHA inspectors take measurements in centimeters. In this decision, I converted Inspector Smith's measurements to feet and inches.

and regular cleanup was not required. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

7. Citation No. **4409924** alleges that a guard was not installed on the head pulley and v-belt drive system for the main discharge conveyor for the shaker screen, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited head pulley and v-belt drive were not provided with guards. (Tr. 73-85; Ex. G-448-6). He stated that employees were required to be in the area where they could make contact with the moving parts. He stated that he observed footprints in the area. At its lowest point, the pulley unit was about three feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the area had been guarded, but that the guard had been removed. (Tr. 293-95). I find that the Secretary established a violation. The moving parts were within seven feet of a walking or working surface. (Tr. 83-84). Whether the violation was S&S is a close question. Inspector Smith stated that employees "could make contact with the moving parts." (Tr. 76). Spilled material was in the area and footprints were observed on the spilled material. He stated that anyone cleaning up the spilled material or walking in the area could slip and make contact. (Tr. 78-79). Inspector Smith did not observe anyone working close to the head pulley or v-belt drive. (Tr. 81). Given the nature of the hazard, the location of the unguarded moving parts, the terrain around the area, and the necessity to clean up the accumulated material from time-to-time, I find that it was reasonably likely that someone would be seriously injured as a result of the cited condition, assuming continued normal mining operations. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

8. Citation No. **4409925** alleges that a guard was not installed on the v-belt drive unit for the pan feeder for the orange crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited v-belt drive was not provided with a guard. (Tr. 85-94; Ex. G-448-7). He stated that employees were required to be in the area where they could make contact with the moving parts. He stated that the v-belt drive was readily accessible to employees walking in the area. The lower pulley was about two feet from the ground and the upper pulley was about eight feet off the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the area may have been guarded in the past and that it is a slow-moving v-belt drive. (Tr. 295). I find that the Secretary established a violation but did not establish that the violation was S&S. Although the v-belt drive

was not near an established walkway, it was in an area that was easily accessible to miners. They could walk within seven feet of the pulleys in their daily routine. It was not shown, however, that it was reasonably likely that anyone would be injured as a result of this condition, assuming continued normal mining operations. Inspector Smith stated that employees would not be in the area very often. (Tr. 89). Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

9. Citation No. **4409926** alleges that a guard was not installed on the side of the fin-type tail pulley for the stacker conveyor at the El-Jay crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 97-103; Ex. G-448-8). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about 15 inches above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the pulley was in an area where employees were not normally required to be. (Tr. 295-96). He stated that there was a cluster of belts in the area and it was a difficult area to enter. I find that the Secretary established a violation but did not establish that the violation was S&S. Although the tail pulley was not near an established walkway, it was in an area that was accessible and employees might be required to cleanup accumulations in the area. It was not shown, however, that it was reasonably likely that anyone would be injured as a result of this condition, assuming continued normal mining operations. I credit Mr. Hollow's testimony and find that employees would generally not be in the area while the belts were operating. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

10. Citation No. **4409927** alleges that a guard was not installed on the tail pulley for the light yellow stacker conveyor, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 103-08; Ex. G-448-9). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about 15 inches above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that a guard was supposed to be on the tail pulley. (Tr. 296). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. In addition, the exhibit shows a shovel within a few

feet of the conveyor. It would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

11. Citation No. **4409928** alleges that a guard was not installed on the head pulley and the v-belt drive for the main discharge conveyor for the El-Jay crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited head pulley and v-belt drive assembly were not provided with a guard. (Tr. 109-17; Ex. G-448-10). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about five feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he did not own the cited equipment, but rented it. (Tr. 297). He said that the crusher did not have guards when it was delivered. I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that Hollow Contracting did not own the equipment is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

12. Citation No. **4409929** alleges that a guard was not installed on the fin-type tail pulley for the sand stacker conveyor, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 117-22; Ex. G-448-11). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was between one and two feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he had recently purchased the cited equipment and that it did not come equipped with guards. (Tr. 297). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that guards were not installed on the equipment when Hollow Contracting purchased it is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Accumulations were visible and the inspector observed footprints in the accumulations. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

13. Citation No. **4409930** alleges that a guard was not installed on back end of the tail pulley for the conveyor under the Telsmith crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 123-27; Ex. G-448-12). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about one foot above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he had recently acquired the equipment and it did not come with guards. (Tr. 298). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that guards were not installed on the equipment when Hollow Contracting purchased it is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Accumulations were visible around the pulley and there were indications that the an employee had cleaned around the area. (Tr. 124). Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

14. Citation No. **4409932** alleges that a guard was not installed on the bottom half of the main v-belt drive unit for the Telsmith crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited v-belt drive unit was not provided with a guard. (Tr. 131-40; Ex. G-448-14). He stated that he believed that a guard had been provided at one time. He also said that he observed footprints under the Telsmith crusher. The v-belt drive was about five feet above the ground and a little over two feet from the frame of the crusher. He determined that the violation was S&S and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $235.

Mr. Hollow testified that it would be impossible for anyone to come in contact with the v-belt drive assembly unless one climbed up onto the crusher and reached into the area or crawled under the crusher. (Tr. 298-300). He stated that the sides of the v-belt drive were guarded. I find that the Secretary did not establish a violation. There was no showing that the cited drive was within seven feet of walking or working surfaces. 30 C.F.R. § 14107(b). The v-belt drive was protected by its location and an employee could come in contact with the moving parts only if he stooped over and walked under the crusher or climbed onto the crusher. (Tr. 135-36). Although Inspector Smith observed footprints under the crusher, it is not clear how they got there. The crusher had been recently set up and the prints could predate

the operation of the crusher. Accordingly, this citation is vacated.

C. FIRE CONTROL AND MEDICAL ASSISTANCE CITATIONS

1. Citation No. **4409940** alleges that a small quantity of gasoline was stored in a five-gallon plastic container. The safety standard, **30 C.F.R. § 56.4402**, provides that small quantities of flammable liquids shall be kept in safety cans labeled to indicate the contents. Inspector Smith testified that he was concerned that pressure could build in the container if it got hot and cause an explosion. (Tr. 185-93; Ex. G-443-2). He could not recall if the can was labeled. He stated that a safety can is "a metal can that has a spring loaded lid on top that ... will pop and relieve the pressure." (Tr. 189). He stated that the violation was not serious and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $147.

Mr. Hollow testified that the can was OSHA-approved and it probably contained diesel fuel. (Tr. 306-07). I find that the Secretary established a violation. Safety can is defined as "an approved container ... having a spring-closing lid and spout cover." 30 C.F.R. § 56.2. There is no question that the can used by Hollow Contracting was not a safety can. I find that the violation was not serious in that it did not pose a hazard to employees, and that Hollow Contracting's negligence was low. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

2. Citation No. **4410141** alleges that a set of oxygen and acetylene cylinders were observed being stored in the back of a pickup truck. A small container of gasoline was stored in the same area. The safety standard, **30 C.F.R. § 56.4601**, provides that oxygen cylinders shall not be stored in areas used for storage of flammable liquids. Inspector Smith testified that he observed grease, an acetylene cylinder, and gasoline stored in the same area as the oxygen cylinder. (Tr. 193-98; Ex. G-443-3). He was concerned about an explosion hazard. He stated that the violation was S&S and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $238.

Mr. Hollow testified that he was not present at the time the citation was issued and the can may have contained antifreeze. (Tr. 307). I find that the Secretary established a violation and that the violation was S&S. Two employees were cutting metal with the torch at the end of the truck. (Tr. 196). This created a significant risk of a fire or explosion. It was reasonably likely that an employee would be seriously injured by this practice. This violation posed a serious safety hazard to employees. I credit Inspector Smith's testimony that he considered the negligence to be low because Mr. Hollow was not at the

mine at the time of the violation. Based on the penalty criteria, I assess a civil penalty of $175 for this violation.

3. Citation No. **4410142** alleges that an employee was observed using oxygen and acetylene cylinders with a cutting torch at the end of a pickup truck and that a fire extinguisher was not available. The safety standard, **30 C.F.R. § 56.4600 (a)(2)**, provides, in part, that a fire extinguisher shall be at a worksite where cutting is being performed with an open flame. Inspector Smith testified that he observed employees cutting with an open flame on the tailgate of the pickup truck in the vicinity of flammable material and that a fire extinguisher was not readily available. (Tr. 198-206; Ex. G-443-3). The conditions that prompted Inspector Smith to issue this citation are the same as described in Citation No. 4410141, above. He stated that the violation was S&S and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that fire extinguishers were available at the mine. (Tr. 308-10, 200-06). He stated that if a fire were to start, employees would want to get away from the fire and get an extinguisher. Mr. Hollow contends that under MSHA's interpretation of the standard, the extinguisher would have to be within a few feet of the cutting activity, which would be too close to be of use during a fire. He testified that a fire extinguisher was available in a truck that was parked within ten feet of the cutting activity. (Tr. 310).

Inspector Smith testified that he issued the citation because he could not find a fire extinguisher in the "immediate area." The regulation does not contain such a requirement. It states that an extinguisher must be "at the worksite." This term is not defined in the regulations. Mr. Hollow testified that an extinguisher was available within about ten feet of the cutting activity. No evidence contradicts this testimony and I credit the testimony. I also agree that there is no advantage in having an extinguisher so close that an employee would hesitate to get it for fear of getting burned. Accordingly, this citation is vacated.

4. Citation No. **4410147** alleges that Hollow Contracting had not established emergency fire fighting, evacuation, and rescue procedures for the mine. The safety standard, **30 C.F.R. § 56.4330(a)**, provides that such procedures be established and coordinated with available fire-fighting organizations. Inspector Smith testified that Mr. Hollow had not contacted any fire-fighting organization or established any procedures. (Tr. 216-18). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

Mr. Hollow testified that he had not established any procedures but that everybody knew that the crusher was there, including the police department. (Tr. 311). I find that the Secretary established a violation. The violation was not serious and was highly unlikely to result in an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

5. Citation No. **4410146** alleges that Hollow Contracting had not made arrangements for obtaining emergency medical assistance and transportation of injured persons. The safety standard, **30 C.F.R. § 56.18014**, provides that such arrangements be established in advance. Inspector Smith testified that Mr. Hollow had not made arrangements for emergency medical assistance and for the transportation of injured persons in the event of an accident at the mine. (Tr. 213-16). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

Mr. Hollow testified that he had not made any arrangements but that everybody knew that the crusher was there, including the police department. (Tr. 311). He stated that he did not believe that rescue services were available in the area. I find that the Secretary established a violation. The violation was not serious and was highly unlikely to result in an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

6. Citation Nos. **4409933** and **4409934** allege that a record of the inspection of the fire extinguishers at the fuel truck and generator trailer was not provided at the mine for review by the MSHA inspector. The safety standard, **30 C.F.R. § 56.4201(b)**, provides that a certification shall be made that fire extinguishers have been tested in the manner set forth in subsection (a), and requires that this certification be kept at the mine. Inspector Smith testified that he searched for the required records but that none were available. (Tr. 140-42). He stated that other extinguishers at the site were provided with such certifications. He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed penalties of $147 and $136, respectively.

Mr. Hollow said that the employees regularly check the extinguishers, but he did not know why these did not have a record of the inspections. (Tr. 300-01). I find that the Secretary established the violations. The violations were not serious because there was no showing that the extinguishers were not functioning properly. Based on the penalty criteria, I assess a civil penalty of $10 for each violation.

D. ELECTRICAL CITATIONS

1. Citation No. **4410143** alleges that Hollow Contracting did not perform a continuity and resistance test of the grounding system at the mine. The safety standard, **30 C.F.R. § 56.12028**, provides, in part, that continuity and resistance of grounding systems shall be tested immediately after installation and annually thereafter. Inspector Smith testified that there was no indication that such a test had been preformed. (Tr. 206-08). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

I find that the Secretary established a violation. If such tests are not conducted, the operator cannot be sure that its grounding system is working. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

2. Citation No. **4409931** alleges that a cover plate was not provided on the motor make-up box for the drive unit for the feed return conveyor on the Telsmith crusher. The citation states that the cover plate fell off and was on the ground. The safety standard, **30 C.F.R. § 56.12032**, provides, in part, that cover plates on junction boxes shall be kept in place at all times except during testing or repair. Inspector Smith testified that he observed the condition during his inspection. (Tr. 127-31; Ex. G-488-13). He stated that the crusher was not energized at the time of his inspection. He further stated that the violation was not serious because it was not in an accessible area and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $235.

I conclude that the Secretary established a violation. I agree with the inspector that the violation was not serious because the junction box was in an inaccessible area and it was unlikely that anyone would come in contact with it. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

3. Citation No. **4409935** alleges that the door on the 480-volt electrical panel in the generator trailer was left open. The citation states that the circuits were energized and could be accidentally contacted by employees. The safety standard, **30 C.F.R. § 56.12030**, provides that when a potentially dangerous condition is found, it shall be corrected before the circuit is energized. Inspector Smith testified that he observed an employee in the generator trailer and that the door on the electrical panel had been left open. (Tr. 143-57; Ex. G-488-17). He stated that he believed that the circuit was energized at the time of his inspection. He further stated that the violation was S&S because it would be easy for an employee in the trailer to accidentally contact the energized connections. He stated that

he observed tools and other things stored in the trailer. He determined that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that the generator was shut down shortly after the inspector arrived because the crusher was not operating. He also testified that the main circuit breaker, which was at a different location, was off so the electrical contacts at the electrical panel were not energized. (Tr. 301-02). He stated that employees are not in the generator trailer and that he believed that the employee spotted by the inspector had been in the trailer to test the circuit to make sure it was not energized so that employees could start their repairs on the crusher. He stated that this panel is not used to de-energize the circuit.

I find that the Secretary established a violation. The panel could be closed but it could not be latched. Normally I would find that such a violation was S&S. In this case, however, I credit the testimony of Mr. Hollow that the circuit had been de-energized at the main breaker and that employees do not generally go into the trailer when the power is on. Because of Hollow Contracting's operating procedures, it was not reasonably likely that anyone would be in a position to contact the electrical connections when the circuit was energized. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

4. Citation No. **4409936** alleges that no ground was provided for the extension cord that provided power to the overhead lights at the crusher motor. The citation states that the grounding prong on the plug was missing. The safety standard, **30 C.F.R. § 56.12025**, provides that all metal parts enclosing or encasing electrical circuits shall be grounded. Inspector Smith testified that he observed that the grounding prong was missing from the electrical cord. (Tr. 157-63; Ex. G-488-18). He testified that the cord was plugged in but was not energized at the time of his inspection. He further stated that the violation was S&S and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $298.

Mr. Hollow testified that he believes that the cited plug is on a 110-volt cord and not on the 220 volt cord that supplied power to the lights. (Tr. 302-03). I find that the Secretary established a violation. The circuit connected to the cited extension cord was not protected by the grounding circuit. I find that the Secretary did not establish that the violation was S&S. When the inspector was asked why he determined that an injury was reasonably likely he stated that "the operator was aware that all circuits shall have a ground." (Tr. 159-60). When the inspector was asked why he determined that the violation was S&S, he replied that he observed an employee "in the area"

the day before when it was raining. (Tr. 161). This testimony does not establish that it was reasonably likely that an employee will be seriously injured as a result of the cited condition, assuming continued normal operations. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

5. Citation No. **4409937** alleges that the inner wires on the power cord for the overhead lights at the crusher operator's station were exposed where they pass into the fixture. The citation states that if a person contacted the metal parts of the light fixture, he could receive a serious injury. The safety standard, **30 C.F.R. § 56.12008**, provides, in part, that power wires shall be insulated adequately where they pass into electrical compartments and substantially bushed with insulated bushings. Inspector Smith testified that the power cord was torn so that the inner wires were exposed to the metal frame of the lighting fixture. (Tr. 163-70; Ex. G-488-19). He was concerned that an employee working around the operator's station could be killed or seriously injured if he made contact with the metal parts of the fixture. The inspector stated that the violation was S&S and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that he believes that the cord had not been torn for a long time because the cord was pulled tight. I find that the Secretary established an S&S violation. It is not disputed that the inner wires of the cord were exposed. Although there is no evidence that the insulation on the individual wires had been cut, this insulation is designed to provide electrical protection, not mechanical protection. The insulation could easily be damaged and the metal components could become energized as a result. The photograph, Ex. G-448-19, shows the hazard involved. The wires were pulled tight against the frame and it was only a matter of time before bare wire would be exposed. People were required to work in the area and the lighting fixture was in an easily accessible area. Accordingly, I find that it was reasonably likely that someone would be seriously injured as a result of the condition. I also find that Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $300 for this violation.

E. OTHER CITATIONS

1. Citation Nos. **4409938** and **4409939** allege that a toeboard and handrails were not provided on the elevated work deck on the main orange crusher below the operator's station. The safety standard, **30 C.F.R. § 56.11002**, provides, in part, that elevated walkways, ramps, and stairways shall be provided with handrails and, where necessary, with toeboards. Inspector Smith testified that the work deck was about nine feet above the ground. (Tr.

175-84; Ex. G-433-1). Toeboards were not provided. He stated that he was concerned that an employee on the deck could accidentally kick rocks or other objects off the deck onto employees working below. Inspector Smith testified that handrails were present but were not complete. He stated that a midrail should have been installed in one area and a top rail in another area. He was concerned that an employee could slip and fall from the deck. Finally, he testified that the violations were not serious and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $147 for each citation.

Mr. Hollow testified that these conditions existed on the crushing equipment for quite some time at other sites and were never cited by MSHA. (Tr. 304-06). I find that the Secretary established a violation. The cited work deck is a walkway and I believe that a toeboard was required in that location. I find that a reasonably prudent person would have known that a toeboard was necessary. I also agree with the inspector that complete handrails were not provided at some locations on the deck. The violations did not present a serious safety hazard. Based on the penalty criteria, I assess a civil penalty of $20 for each violation.

2. Citation No. **4409919** alleges that a berm was not provided on the outer edge of the elevated roadway at the main hopper for the crusher. The safety standard, **30 C.F.R. § 56.9300**, provides that berms or guardrails shall be provided on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Inspector Smith testified that the area cited is where employees drive the front-end loader to dump rock into the hopper of the crusher. (Tr. 26-31; Ex. G-488-1). He stated that the drop-off was about ten feet and that it was possible for a loader to fall off. (Tr. 38-39). Because the mine was shut down at the time the citation was issued, there was no activity in the area, but the inspector observed the front-end loader operating in the area on the previous day. He further stated that the violation was S&S and was caused by Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $595.

Mr. Hollow testified that there was about a three-to-one slope off the outer edge. (Tr. 285-86). He did not believe that this slope created a serious hazard of a rollover. In any event, Mr. Hollow stated that once operations commenced, the loader operator would have put a berm in that area. I find that the Secretary established a violation. A drop-off existed along the bank of the elevated dumping area of a sufficient depth and grade to create a risk that a loader would overturn or the loader operator would be injured if he accidentally went over the edge. I cannot assume that the loader operator would have created a berm when the mine began full production.

I also find that the violation was S&S based on the testimony of Inspector Smith. He stated that he observed a loader operating in the area the previous day and that he saw tire tracks in the area. He also relied on the fact that fatal and serious accidents have been reported to MSHA involving overtravel on elevated roadways. Accordingly, I find that it was reasonably likely that someone would be seriously injured as a result of the condition, assuming normal operations. Based on the penalty criteria, I assess a civil penalty of $100 for the violation.

3. Citation No. 4410145 alleges that a record of the examination of working places was not provided for review by the MSHA inspector. The safety standard, 30 C.F.R. § 56.18002(b), provides that a record certifying that an examination was made once each shift of each working place shall be kept at the mine and shall be made available for review by MSHA inspectors. Inspector Smith testified that he asked to review the records of the examinations of working places and the operator could not provide such records. (Tr. 211-13). He testified that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $136.

Mr. Hollow testified that records of equipment inspections are usually kept at the generator van. (Tr. 310). I find that the Secretary established a violation. Equipment operators are required to check equipment before they start using them. In addition, the cited safety standard requires that a competent person examine all working places for adverse conditions. This requirement is in addition to the equipment checks. A record of these examinations must be kept at the mine. The violation was not serious and Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

II. CIVIL PENALTY ASSESSMENTS

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

Citation Nos.	30 C.F.R. §	Assessed Penalty
WEST 95-186-M		
4409918	56.1000	$ 5.00

Citation Nos.	30 C.F.R. §	Assessed Penalty
WEST 95-433-M		
4409938	56.11002	$ 20.00
4409939	56.11002	20.00
4409940	56.4402	20.00
4410141	56.4601	175.00
4410142	56.4600(a)(2)	vacated
4410143	56.12028	50.00
4410144	56.14100(d)	20.00
4410145	56.18002(b)	50.00
4410146	56.18014	20.00
4410147	56.4330(a)	20.00
4409970	56.14132(b)(2)	300.00
4363435	56.1000	vacated
WEST 95-448-M		
4409919	56.9300	100.00
4409920	56.14112(b)	20.00
4409921	56.14107(a)	100.00
4409922	56.14108	20.00
4409923	56.14107(a)	50.00
4409924	56.14107(a)	100.00
4409925	56.14107(a)	50.00
4409926	56.14107(a)	50.00
4409927	56.14107(a)	100.00
4409928	56.14107(a)	100.00
4409929	56.14107(a)	100.00
4409930	56.14107(a)	100.00
4409931	56.12032	50.00
4409932	56.14107(a)	vacated
4409933	56.4201(b)	10.00
4409934	56.4201(b)	10.00
4409935	56.12030	50.00
4409936	56.12025	50.00
4409937	56.12008	300.00
WEST 95-549-M		
4410149	50.40	5.00
	Total Penalty	$2,065.00

III. ORDER

Accordingly, the citations listed above are **VACATED** or **AFFIRMED** as indicated, and Hollow Contracting, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $2,065.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 25 1996

DAY BRANCH COAL COMPANY, INC. and BOBBY JOE HENSLEY, Contestants	:	CONTEST PROCEEDINGS
v.	:	Docket Nos. KENT 94-1077-R Order No. 3822201; 7/8/94
	:	Thru
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket Nos. KENT 94-1190-R Order No. 4489780; 7/8/94 (See the attached list)
	:	Mine No. 9 Mine ID 15-16418

ORDER OF DISMISSAL

Before: Judge Maurer

Respondent's renewed motion to dismiss the above-captioned Notices of Contest is granted based on the assertions set forth in the motion.

More specifically, the contestants have failed to contest the penalty proposals in these matters. Proposals for assessment of civil penalties regarding the citations/orders contained in these cases were made to both contestants via two groups of assessments on January 17, 1995, and September 17, 1995. To date, no contests of the proposed assessments have ever been filed.

Accordingly, pursuant to 29 C.F.R. § 2700.27, the Secretary's proposed penalty assessments are deemed to be a final order of the Commission. That being so, it appears that the contest herein of the same citations/orders has been rendered moot. These cases are therefore **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 25 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. LAKE 95-310
BUCK CREEK COAL, INC., Respondent	:	A. C. No. 12-02033-03672
	:	Docket No. LAKE 95-321
	:	A. C. No. 12-02033-03674
	:	Docket No. LAKE 95-326
	:	A. C. No. 12-02033-03675
	:	Docket NO. LAKE 95-335
	:	A. C. No. 12-02033-03677
	:	Docket No. LAKE 95-340
	:	A. C. No. 12-02033-03679
	:	Docket No. LAKE 95-358
	:	A. C. No. 12-02033-03680
	:	Docket No. LAKE 96-9
	:	A. C. No. 12-02033-03689
	:	Docket No. LAKE 96-18
	:	A. C. No. 12-02033-03692
	:	Docket No. LAKE 96-27
	:	A. C. No. 12-02033-03694
	:	Docket No. LAKE 96-32
	:	A. C. No. 12-02033-03695
	:	Docket No. LAKE 96-43
	:	A. C. No. 12-02033-03696
	:	Docket No. LAKE 96-44
	:	A. C. No. 12-02033-03697
	:	Docket No. LAKE 96-51
	:	A. C. No. 12-02033-03699
	:	Docket No. LAKE 96-62
	:	A. C. No. 12-02033-03700
	:	

:	Docket No. LAKE 96-73
:	A. C. No. 12-02033-03702
:	
:	Docket No. LAKE 96-74
:	A. C. No. 12-02033-03703
:	
:	Docket No. LAKE 96-76
:	A. C. No. 12-02033-03701
:	
:	Docket No. LAKE 96-99
:	A. C. No. 12-02033-03704
:	
:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Maurer

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor;, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal, Inc. pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 188 violations of the Secretary's mandatory health and safety standards and seek penalties of $44,367. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $44,367.

On May 10, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the respondent. On June 28, 1996, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 13, 1996, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on September 19, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 15 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the

company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either September 23 or 24, 1996.

On October 18, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price* v. *Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirement of Rule 66(a) were complied with.

ORDER

Based on the above, I find the respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, all citations/ orders contained in the captioned dockets are **AFFIRMED**.

Buck Creek Coal, Inc., or its successor, is **ORDERED TO PAY** civil penalties of $44,367 within 30 days of the date of this decision. Upon receipt of payment, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 14 1996

SAMUEL J. MCLAUGHLIN, Employed by CONSOLIDATION COAL COMPANY Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDINGS
	:	Docket No. EAJ 96-5
v.	:	
	:	Formerly WEVA 94-366
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

ORDER REQUIRING FURTHER SUBMISSIONS

This proceeding arises under the Equal Access to Justice Act (28 U.S.C. § 2412, et seq.) (EAJA). The Applicant, Samuel J. McLaughlin, seeks an award of legal fees and expenses resulting from his defense of the Secretary of Labor's allegation that McLaughlin "knowingly, authorized, ordered, or carried out" a violation of 30 C.F.R. § 75.1101-23, a mandatory safety standard for underground coal mines. The allegation was the subject of a civil penalty proceeding filed by the Secretary pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 820(c); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Samuel J. McLaughlin, employed by Consolidation Coal Company, Docket No. WEVA 94-366). The proceeding was consolidated with other civil penalty proceedings (Consolidation Coal Company, Docket No. WEVA 94-57, J.T. Straface employed by Consolidation Coal Company, Docket No. WEVA 94-368, and Robert Welch, employed by Consolidation Coal Company, Docket No. WEVA 94-384), and the cases were tried together at a duly noticed hearing.

After the hearing, the Secretary moved to dismiss the section 110(c) allegation against McLaughlin. I granted the motion in a decision on the merits of the consolidated cases. I stated, "[T]he Secretary [has] moved to dismiss the section 110(c) allegation against McLaughlin . . . . The case is the Secretary's to bring and the Secretary's to prosecute. I do not question the Secretary's judgement in this regard" (Consolidation Coal Company, 16 FMSHRC 1189, 1238-39, (July 1996)).

The decision was appealed to the Commission, which granted review on August 28, 1996. Because review does not encompass that portion of the decision dismissing the section 110(c) allegation against McLaughlin, I regard the dismissal as final for the purpose of this proceeding (See 29 C.F.R. § 2704.204(c)).

NEED FOR FURTHER SUBMISSIONS

The Commission's rules require determination of an EAJA award to be based on the record of the proceeding for which fees and expenses are sought, except that the judge may order such further proceedings or submissions as are necessary for full and fair resolution of issues arising from the application (29 C.F.R. § 2704.306(b)).

The first prerequisite for EAJA entitlement is that the award be made to a "prevailing party." McLaughlin meets this requirement. He was a "party" to the underlying civil penalty proceeding, and the Secretary's case against him was dismissed on the Secretary's motion.

Second, if a prevailing party is an individual, he or she must have a net worth of no more than $2 million; or, if a business, must have a net worth of no more than $7 million with no more than 500 employees (28 U.S.C. § 2412(d)(2)(B)). McLaughlin is an individual and his net worth is less than $2 million. (The Secretary does not dispute McLaughlin's sworn statement that his net worth (assets less liabilities) is $115,302.51 (Application for Award of Fees, Exh. A; see Sec.'s Response to Application).

Thus, McLaughlin meets two of the prerequisites for entitlement, and, under the Commission's rules, the burden shifts to the Secretary to establish that the position taken against McLaughlin was "substantially justified" (29 C.F.R. § 2704.105(a)). However, before the issue of justification can be considered, there is a question that requires further submissions from McLaughlin.

McLaughlin seeks attorneys fees of $19,695 and costs and expenses of $13,044.97. He claims this represents "his attorney's fees and expenses in defending the . . . section 110(c) proceeding brought against him by the Secretary" (Id. 4, emphasis added). Appendix B, which is attached to McLaughlin's application, details his claims, but as the Secretary's counsel notes, McLaughlin has not submitted any evidence that "he actually incurred the costs and expenses listed" (Sec.'s Response to Application 15).

The principal purpose of the EAJA is to "to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government" (U.S. v. Paisley, 957 F.2d 1161,1164 (4th Cir. 1992)). Obviously, if another party pays the claimed fees and expenses; or, if the claimant knows, through a formal agreement or otherwise, that another party will pay them, the claimant may not be hindered in the ability to litigate. Obviously, as well, the claimant may subvert the "net worth" prerequisite of § 2412(d)(2)(B), by "standing in" for a business worth more than $7 million and with more than 500 employees. The claimant may not have "incurred" the costs within the meaning of § 2412(d)(1)(A) (S.E.C. v. Comserv Corp, 908 F2d 1407, 1413-1416 (8th Cir. 1990)).

In such instances, the party seeking reimbursement may have to establish that he or she actually paid or was otherwise responsible for the claimed amounts and was not reimbursed, or was not entitled to reimbursement.

ACCORDINGLY, it is **ORDERED** that within **15 days** of the date of this order McLaughlin submit the following:

1. A copy of the bill for each fee and expense claimed;

2. A copy of the check or receipt showing the identity of the payee, the amount of the payment and the date of payment for each fee and expense claimed;

3. A copy of any written contract or other written agreement entitling McLaughlin to reimbursement for payment of any fee and expense claimed, or a sworn written description of any such oral agreement;

4. If McLaughlin has paid any of fees or expense claimed, and has been reimbursed, a sworn statement specifying the fee or expense paid, the date of payment, the amount and date of reimbursement and the identity of the reimbursing entity;

5. If another entity or person has paid any claimed fee or expense, a sworn statement specifying the fee or expense paid, the identity of the payer and when such payments were made;

6. If another entity or person has promised or otherwise entered into an obligation to pay any of the claimed amounts but has not yet paid them, a sworn statement explaining the details of said promise or obligation, include the identity of the entity or person obligated to pay and any contingencies attending the promise or obligation.

David Barbour
Administrative Law Judge

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November 15, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER DENYING MOTION FOR AMICUS CURIAE STATUS

Santa Fe Pacific Gold Corporation ("Santa Fe") filed a motion under 29 C.F.R. § 2700.4(c) to participate as amicus curiae in these proceedings. As grounds for the motion, Santa Fe states that it recently received citations alleging violations of 30 C.F.R. §§ 56.20011 and 56.20014 that raise similar allegations concerning mercury as the citations in these cases. The motion also states that Santa Fe has been "closely monitoring" the mercury issues raised in these proceedings. Finally, Santa Fe states that the outcome of these cases will have a significant effect on the mining community and on Santa Fe in particular. Santa Fe maintains that its participation will not delay the proceeding or prejudice the adjudication of the issues.

The Secretary opposes the motion. He states that the fact that Santa Fe is, or will be, involved in similar proceedings under the Mine Act does not justify its admission in this case as amicus curiae. The Secretary also contends that Santa Fe has not demonstrated that counsel for Newmont Gold Company ("Newmont") is unable to represent Newmont's interests in these cases or that counsel requires assistance. In addition, the Secretary maintains that because Santa Fe's interests are identical to Newmont's, Santa Fe's participation would not offer additional insight to the court.

The Commission's procedural rule provides that participation as amicus curiae is not a matter of right but is committed to the sound discretion of the judge. While granting Santa Fe's motion may not delay these proceedings, its participation will not advance the adjudication of the issues raised. Newmont's

interests are fully represented by its counsel. Santa Fe has contested the citations issued at its mine. Santa Fe will be given the opportunity to fully contest the citations issued at its mine and my decision in the present cases will not be binding on the judge in Santa Fe's case.

I do not believe that Santa Fe will be able to assist the court in reaching a just result in these cases. It will not be in a position to present additional facts. Newmont is thoroughly litigating all issues raised by these cases. It is highly unlikely that Santa Fe will present an analysis of the legal issues that is different from that presented by Newmont's counsel. Indeed, Newmont and Santa Fe are represented by the same attorney.

I find that participation by Santa Fe as amicus curiae will not assist me in resolving the issues raised in these proceedings. Accordingly, Santa Fe's motion to participate as amicus curiae is **DENIED.**

Richard W. Manning
Administrative Law Judge

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November 29, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-05543
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER DENYING RESPONDENT'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE CONCERNING EVENTS PRIOR TO 1995

Newmont Gold Company ("Newmont") filed a motion *in limine* to prohibit the Secretary from introducing any evidence at the hearing "relating to events or circumstances occurring before January 1, 1995." Newmont argues that the citations and orders at issue in these proceedings were issued on March 14, 1995, and that evidence concerning conditions at the mine prior to January 1, 1995, "would not be relevant to or probative of any material fact in this case and would waste the Court's and the parties' time." The Secretary opposes Newmont's motion.

Based on my review of Newmont's motion and memorandum in support of the motion, and the arguments presented in our conference call of November 27, 1996, I find that Newmont's motion lacks merit. One of the citations and both orders allege that the violations were the result of Newmont's unwarrantable failure to comply with the standards and allege that Newmont's negligence was high with respect to the violations. As part of his proof of these allegations, the Secretary may wish to attempt to establish that the alleged violative conditions had existed with Newmont's knowledge for a considerable length of time. Such evidence is frequently used to establish an unwarrantable failure finding.

Newmont argues that under the circumstances of these cases such proof will not establish an unwarrantable failure because it had no notice that the cited conditions violated any of MSHA's standards. Indeed, it argues that MSHA's own inspectors did not consider the cited conditions to be a violation until they were told to issue the citations at issue in these proceedings. Newmont's motion would prohibit the Secretary from offering proof of

Newmont's unwarrantable failure. Newmont is free to make its argument but it cannot prevent the Secretary from submitting evidence to establish high negligence or an unwarrantable failure. The fact that Newmont does not agree with the Secretary's position is, of course, irrelevant.

In part, Newmont is concerned that the evidence the Secretary may present on this issue will be unnecessarily repetitious, cumulative, and a "waste" of time. I expect both parties to organize and present their evidence in a manner that effectively uses the time set for hearing. The parties shall not present evidence that is unduly repetitious or that goes into more detail than is necessary to establish their point. The underlying facts in these cases do not appear to be particularly complicated and I expect the parties to present their cases with that in mind.

Accordingly, Newmont's motion *in limine* to exclude evidence concerning events prior to 1995 is **DENIED.**

Richard W. Manning
Administrative Law Judge

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