NOVEMBER 1999

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER 1999

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

Secretary of Labor, MSHA v. Target Industries, Inc., and Phillip Peterson and Gregory Golden, Docket Nos. PENN 97-170, etc. (Judge Barbour, September 23, 1999)

Local Union 2232, District 20, United Mine Workers of America v. Island Creek Coal Company, Docket No. VA 99-79-C. (Judge Weisberger, October 6, 1999)

Cyprus Cumberland Resources Corporation v. Secretary of Labor, MSHA, Docket No. PENN 98-15-R. (Judge Feldman, October 8, 1999)

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

James C. Keys, Sr. v. Reintjes of the South, Inc., Docket No. CENT 99-267-DM. (Judge Zielinski, October 13, 1999)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 2, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. CENT 2000-1-M
	:	A.C. No. 23-01787-05542
THE DOE RUN COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 1, 1999, the Commission received a request from the Doe Run Company ("Doe Run") to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Doe Run.

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

Doe Run asserts that it intended to contest the proposed penalty associated with Citation No. 7860390 but that it did not submit a green card because it inadvertently paid the assessment along with sixteen other assessments it intended to pay, which were issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") at the same time. Mot. at 2. Doe Run asserts that it received Citation No. 7860390 on March 11, 1999, and that it filed a Notice of Contest of that citation on April 6, 1999. *Id.* at 1-2. Such contest was assigned Docket No. CENT 99-198-RM to Administrative Law Judge Gary Melick, who subsequently stayed the

contest proceeding pending the issuance of the proposed penalty assessment. *Id.* at 2. On April 22, 1999, MSHA issued the proposed assessments for seventeen citations, including $55 for Citation No. 7860390. *Id.* Doe Run asserts that it did not submit a green card with respect to the proposed penalty for Citation No. 7860390 because the employee normally responsible for the initial review of any proposed assessment, the safety administrator, was out of the country on assignment. *Id.* at 2-3. Doe Run contends that, as a result of the apparent lack of coordination between its employees in the safety administrator's absence, it inadvertently paid the assessment for Citation No. 7860390. *Id.* Accordingly, Doe Run requests relief under Fed. R. Civ. P. 60(b). Attached to Doe Run's motion are various documents, including the proposed assessments issued by MSHA, a request for check and a copy of Doe Run's check for payment of the seventeen assessments. Exs. 1 & 2.

We have held that, in appropriate cases and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

It appears from the record that Doe Run intended to contest the penalty related to Citation No. 7860390 and that, but for an apparent lack of coordination between the operator's personnel, Doe Run would likely have returned the green card and contested the proposed penalty assessment. While Doe Run does not deny receiving the proposed assessment, its failure to submit the green card and payment of the proposed penalty assessment can be reasonably found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Cyprus Emerald Resources Corp.*, 21 FMSHRC 592, 592-93 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997) (granting operator's motion to reopen where operator inadvertently paid assessment because Secretary failed to send assessment to its counsel on record); *Westmoreland Coal Co.*, 11 FMSHRC 275, 276-77 (Mar. 1989) (granting operator's motion to vacate dismissal and remanding for further proceedings where operator asserted it mistakenly paid assessment); *Tug Valley Coal Processing*, 16 FMSHRC 216, 216-17 (Feb. 1994) (same).

Accordingly, in the interest of justice, we grant Doe Run's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7860390. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Doe Run's position and would remand the matter for assignment to a judge to determine whether Doe Run has met the criteria for relief under Rule 60(b). *See Tug Valley Coal Processing*, 16 FMSHRC 216 (Feb. 1994) (remanding to judge to determine whether payment of proposed penalty amounted to "genuine mistake" sufficient to reopen civil penalty proceeding); *Westmoreland Coal Co.*, 11 FMSHRC 275 (Mar. 1989) (same). I note that Doe Run has failed to provide any affidavits to support its assertion that it mistakenly paid the assessment for a citation (No. 7860390) that it intended to contest. *Compare Cyprus Emerald Resources Corp*, 21 FMSHRC 592 (June 1999).

Robert H. Beatty, Commissioner

Distribution

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 3, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 98-1
BLACK DIAMOND CONSTRUCTION, INC.	:	

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

DECISION

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

This is a proceeding involving the recovery of attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"). Black Diamond Construction, Inc. ("Black Diamond") prevailed over the Department of Labor's Mine Safety and Health Administration ("MSHA") in the underlying penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), when the Secretary vacated two citations prior to trial. Thereafter, Black Diamond filed an application for fees on the ground that the Secretary's position was not substantially justified. Administrative Law Judge David Barbour ordered the Secretary of Labor to pay to Black Diamond fees and expenses of $14,390.25. 20 FMSHRC 1169 (Oct. 1998) (ALJ).[1] For the reasons that follow, we affirm the judge's award.

[1] Judge Jerold Feldman presided over the Mine Act proceeding and issued the order dismissing the proceeding; however, the EAJA application was assigned to Judge Barbour.

I.

Factual and Procedural Background

A. The Mine Act Proceeding[2]

On May 15, 1997, during a routine mine inspection at the Robin Hood Preparation Plant, MSHA Inspector Ernest Thompson observed Brian Casto on mine property and asked about his work duties. 20 FMSHRC at 1170, 1173; B.D. Reply to S. Answer to EAJA Appl., Ex. B at 6 ("Thompson Dep."). Casto responded that he had driven a fuel truck on three occasions. 20 FMSHRC at 1170. Thompson knew that Casto worked for a contractor, Black Diamond, which was at the mine to eliminate an impoundment. Thompson Dep. at 11. The impoundment, which had been in existence for several decades, was a dam, constructed out of rock and coal refuse, that was located between two hillsides with about 40 acres of water and slurry behind it. 20 FMSHRC at 1172; Thompson Dep. at 10-11, 87. Thompson was also aware that Black Diamond was going to pump the water out of the impoundment and push the coal fines from the face of the dam back into the impoundment area. Thompson Dep. at 11-12. Elimination of the dam would allow longwall mining of coal underneath the impoundment without fear of water seepage. 20 FMSHRC at 1172. At the completion of the work, there would be a refuse pile in place of the impoundment. S. Answer to EAJA Appl. at 2-3.

Thompson also observed Black Diamond employee Matthew Adkins operating sediment pumps in the impoundment. *Id.* at 3. Thompson concluded that both workers were performing general mine labor and therefore were "miners" for purposes of the MSHA training regulations. 20 FMSHRC at 1170.

Thompson issued two citations against Black Diamond. Citation No. 4404455 charged Black Diamond with violating 30 C.F.R. § 48.25(a) when Casto performed general labor duties at the work site without having received mandatory safety training.[3] *Id.* at 1169; Thompson Dep., Ex. 1. Citation No. 4404941 charged Black Diamond with violating 30 C.F.R. § 48.29(c) when it failed to certify that Adkins had received the required training and to keep his certification form at the mine.[4] 20 FMSHRC at 1169-70; Thompson Dep., Ex. 4.

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[2] The facts in this case were developed largely as a result of discovery during the Mine Act proceeding. However, because there was no hearing in that matter, those facts only became a part of the record during the EAJA proceeding. *See* 29 C.F.R. § 2704.306(c).

[3] Section 48.25(a) provides in pertinent part: "Each new miner shall receive no less than 24 hours of training as prescribed in this section."

[4] Section 48.29(c) provides: "Copies of training certificates for currently employed miners shall be kept at the mine site for 2 years, or for 60 days after termination of employment."

Later that day, Thompson met with William Casto, vice-president of Black Diamond, concerning the citations. Thompson Dep. at 79-80. Casto stated that Black Diamond was performing demolition work and was exempt from the training regulations. 20 FMSHRC at 1170-71; B.D. EAJA Appl., Ex. 1 at 11 ("Casto Dep."). At a later meeting with MSHA officials on June 25, 1997, Casto again asserted that Black Diamond employees were construction workers who were exempt from the training regulations, and he supported his position with pages from MSHA's *Program Policy Manual*.

The *Program Policy Manual*, Part 48 Training and Retraining of Miners, provides:

> **Independent Contractor Training**
> A. **Coverage and Training Requirements**
> Independent contractors working at a mine are miners for Part 48 training purposes, except as explained below.
>
> ****
>
> This policy does not cover independent contractors who are shaft and slope workers, surface construction workers . . . .
>
> ****
>
> **Persons Performing Construction Work**
> Construction work includes the building or demolition of any facility, the building of a major addition to an existing facility, and the assembling of a major piece of new equipment . . . .
>
> ****
>
> B. **Surface Mines or Surface Areas of Underground Mines**
>
> ****
>
> 2. If workers are performing shaft and slope construction work - no Part 48 training is required.
>
> **Persons Performing Maintenance or Repair Work**
> Maintenance or repair work includes the upkeep or alteration of equipment or facilities. . . .
>
> A person performing maintenance or repair work, whether or not the mine is operational, must receive the appropriate comprehensive or hazard training under Subpart A or B [of the Part 48 regulations].

III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 14-15 (1991) ("*PPM*"). Casto further stated that he had talked with MSHA officials at its Mt. Hope, West Virginia office who agreed with him. 20 FMSHRC at 1171; Casto Dep. at 34-35. MSHA supervisor Don Ellis responded that it was MSHA policy to apply its training regulations to the work that Black Diamond was performing. 20 FMSHRC at 1171.

On October 17, 1997, the Secretary filed a petition for assessment of civil penalties against Black Diamond. *Id.* at 1169. The Secretary proposed penalties of $108 for the violation involving Brian Casto and $50 for the violation involving Adkins. *Id.* at 1170. Black Diamond denied that it violated the regulations, and the case was assigned to an administrative law judge. *Id.*

After the failure of settlement discussions, the judge ordered prehearing statements. *Id.* Black Diamond contended that Part 48 exempted the individuals performing construction work of the type that it was hired to perform. *Id.* In her statement, the Secretary contended that Black Diamond was hired to drain an impoundment at the preparation plant in order to allow longwall mining to commence under the impoundment. S. Preh. Statement at 2. Therefore, the Secretary concluded, the miners were hired to make alterations to the impoundment and were repair and maintenance workers subject to Part 48. *Id.*; 20 FMSHRC at 1170. The Secretary included in her list of proposed exhibits copies of the relevant pages of the *PPM* and Black Diamond's Impoundment Elimination Plan ("Plan"), which had been submitted to MSHA for approval. S Preh. Statement at 6.

On February 23, one day prior to the scheduled hearing, the Secretary vacated the underlying citations. 20 FMSHRC at 1170; S. Mot. to Dismiss at 3. The Secretary filed a motion to dismiss the penalty proceeding because it was moot. 20 FMSHRC at 1170; S. Mot. to Dismiss at 1. Attached to the motion were copies of the vacations, which stated: "After consultation with the Office of the Solicitor, [the citation] is hereby vacated." 20 FMSHRC at 1170. On February 25, the judge issued an order dismissing the proceeding. *Id.*; Unpublished Order dated February 25, 1998.

B. The EAJA Proceeding

Black Diamond filed an application for legal fees and expenses under the EAJA. 20 FMSHRC at 1170-71; EAJA Appl. at 1. Black Diamond asserted that, from the time the citations issued, it told MSHA Inspector Thompson that it was an independent contractor performing demolition work and that its employees were exempt from the training requirements. 20 FMSHRC at 1170-71. At the June 25, 1997 post-inspection conference, Black Diamond reiterated this position and supported its claim with the *PPM* and represented that MSHA officials at its Mt. Hope, West Virginia office confirmed that surface construction workers were exempt from the training regulations. *Id.* at 1171. Black Diamond further asserted that MSHA was aware that its employees were engaged in demolishing the impoundment but did not vacate the citations until the company was forced to go to the expense of defending itself. *Id.* at 1172.

The Secretary opposed the application, stating that her position that Brian Casto and Matthew Adkins were subject to the training requirements was substantially justified.[5] 20 FMSHRC at 1172. According to MSHA Inspector Thompson, Casto and Adkins were retained to make alterations to the impoundment and, therefore, were subject to the Part 48 training requirements. *Id.* at 1174. The Secretary explained that the decision to vacate the citations was due to "an internal dispute within the agency with respect to whether the overall nature of the work being done . . . was 'construction work' or 'maintenance or repair work.'" S. Answer to EAJA Appl. at 17. The Secretary further explained that the conflict within the agency became apparent during the deposition of Stuart Shelton, MSHA's impoundment specialist, who stated, on February 18, 1998, that a refuse site could not legally be both an impoundment and a refuse pile. *Id.*; Shelton Dep. at 1, 26. Until that time, it was the Secretary's position that Black Diamond was modifying a coal refuse facility from an impoundment to a refuse pile by eliminating the impounding capability of the facility.[6] S. Answer to EAJA Appl. at 17.

The judge viewed the primary issue in the underlying Mine Act proceeding as whether the work being performed at the impoundment was "construction work." 20 FMSHRC at 1176. Based on the *PPM*, the Plan, the deposition testimony of several witnesses, the regulatory scheme governing impoundments and coal refuse facilities, and dictionary definitions, the judge concluded that the Secretary had failed to establish that her position was substantially justified and that, therefore, Black Diamond was entitled to an award. *Id.* at 1177-79. The judge ordered the Secretary to pay fees and expenses totaling $14,390.25. *Id.* at 1180. Thereafter, the Commission granted the Secretary's petition for discretionary review.

II.

Disposition

A. Motions to Strike

Because the Mine Act proceeding ended prior to trial and a decision by the judge, there was limited evidentiary material in that proceeding. Commission EAJA Rule 306(c) specifically

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[5] The Secretary also opposed the application on the grounds that Black Diamond was ineligible for an award because its parent company exceeded the net worth requirements in EAJA and challenged the amount of fees sought because the hourly rate exceeded the statutory cap of $125 per hour in EAJA. 20 FMSHRC at 1172. The judge found in Black Diamond's favor on the net worth determination (*id.* at 1174-75), and the Secretary has not appealed. With regard to the statutory cap, the judge determined that Black Diamond could not recover fees at a rate higher than $125 per hour. *Id.* at 1179-80.

[6] The Secretary attached affidavits to its Answer to the EAJA Application that indicated that two additional MSHA officials had differing opinions on the nature of Black Diamond's work. S. Answer to EAJA Appl., Attach. F, G.

addresses this situation by allowing the applicant and the Secretary to supplement the record in the EAJA proceeding with affidavits and other documentary evidence. 29 C.F.R. § 2704.306(c).[7] However, each party's brief cites to deposition testimony not placed in the record in accordance with the Commission's rule.

Black Diamond filed a motion to strike citations in the Secretary's brief to pages in the deposition testimony of Don Ellis and Brian Casto that were not included in the record before the judge. B.D. Mot. to Strike at 3-4. In response, the Secretary cross-moved to strike references in Black Diamond's brief to pages of the depositions of Brian Casto, Matthew Adkins, Raymond Brown, and Don Ellis that were not before the judge. S. Resp. to B.D. Mot. to Strike at 5-6.

Black Diamond also objects to the Secretary's reference in her brief to an MSHA handbook entitled "Coal Mine Impoundment Inspection Procedures" and to the regulatory history and findings of fact by the Mining Enforcement and Safety Administration ("MESA"), because these materials were not considered by the judge and were submitted for the first time to the Commission on appeal. B.D. Mot. to Strike at 1, 3-4. In response, the Secretary argues that the Commission can take judicial notice of the MSHA handbook and the MESA regulatory history contained in the Federal Register. S. Resp. to B.D. Mot. to Strike at 1-3.

Consideration of the non-record deposition testimony is unnecessary to disposition of the case. Further, we do not rely on the secondary authorities cited in the Secretary's brief that were objected to by Black Diamond. Therefore, the motions to strike the disputed testimony and authorities are denied as moot. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535 n.7 (Sept. 1997).

B. EAJA Application

The Secretary argues that the judge erred in failing to independently evaluate the reasonableness of the Secretary's position and impermissibly commingled a substantial evidence standard, appropriate for an evaluation of the merits of the case, with the substantial justification standard — whether there is a reasonable basis in fact and law for the government's position. S. Br. at 10. The Secretary contends that, in the absence of a definition of "alteration" in the regulations or the *PPM*, her position that elimination of the water-impounding capability was an alteration of the impoundment was reasonable. *Id.* at 15-20. The Secretary also argues that the employees of Black Diamond were exposed to the same hazards as miners and that coverage

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[7] Commission EAJA Rule 306(c) provides:

> If the proceeding for which fees and expenses are sought was conceded by the Secretary on the merits, withdrawn by the Secretary, or otherwise settled before any of the merits were heard, the applicant and the Secretary may supplement the administrative record with affidavits or other documentary evidence.

under the Mine Act was reasonable. *Id.* at 26-29. Finally, the Secretary argues that her position, on which the underlying litigation was based, was consistent and reasonable. *Id.* at 29-33.

Black Diamond responds that the Secretary's position was not reasonable and that such an analysis cannot be divorced from a consideration of the merits of her position. B.D. Resp. Br. at 7-9. Black Diamond contends that Inspector Thompson, who issued the citations, was unfamiliar with the Plan, and that his deposition testimony indicates that he failed to adequately analyze Black Diamond's work. *Id.* at 10-12. Black Diamond argues that the Secretary acted contrary to her own regulations and *PPM* in taking the position that construction workers were "miners" and that, therefore, her position was not justified. *Id* at 16-18. Further, Black Diamond contends that the MSHA inspector erroneously overlooked the nature of the work at the impoundment site and instead looked exclusively at the hazards to which the workers were exposed. *Id.* at 19-20. Finally, Black Diamond concludes that the Secretary pursued the citations until hearing was imminent, without regard to her own policies, and that the judge's award of fees should be affirmed. *Id.* at 24-25.

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998), *appeal docketed,* No. 98-1480 (D.C. Cir. Oct. 20, 1998). The Supreme Court has defined substantially justified as "justified in substance or in the main," or a position that has "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In *Pierce*, the Court set forth the test for substantial justification as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. The Court also noted that certain "'objective indicia' such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits" can be relevant to the inquiry of whether the government's position was substantially justified. *Id.* at 568. In EAJA proceedings, the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). When reviewing an administrative law judge's EAJA decision, the Commission applies the substantial evidence test for factual issues and de novo review for legal issues. *Contractors*, 20 FMSHRC at 966-67.

"Position of the agency" is defined as "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504 (b)(1)(E). Here, the focus is on the Secretary's prelitigation conduct — the action or inaction that gave rise to the litigation that was aborted. The Secretary states in her brief that she chose to withdraw the citations against Black Diamond when she became aware of "disagreement among MSHA's personnel" concerning whether the work in question was construction work. S. Br. at 32-33. The Secretary further argues that her

position throughout the prelitigation period, until the time of depositions, was consistent.[8] *Id.* at 30-32. The facts surrounding the issuance of the citations are, for the most part, undisputed. S. Br. at 27. Substantial justification turns largely on the language of the *PPM* and Black Diamond's Impoundment Elimination Plan. Therefore, whether there is a reasonable basis in law and fact for the Secretary's position involves primarily a legal analysis of these operative documents and the undisputed facts.

Part 48 of the Secretary's regulations, which covers the training and retraining of miners, excludes "construction workers" from the definition of "miner" at surface areas of underground mines. 30 C.F.R. § 48.22(a)(1)(i). The regulations do not further define construction workers or describe their work functions. MSHA's *PPM* also excludes the employees of independent contractors who are involved in surface construction work. III MSHA, *PPM*, Part 48, at 14. The *PPM* further provides that "[c]onstruction work includes the building or demolition of any facility." *Id.* at 14b. The *PPM* also specifies that a person performing maintenance or repair work must be trained in accordance with the regulations, and that "[m]aintenance or repair work includes the upkeep or alteration of equipment or facilities." *Id.* at 15. The relevant terms in the *PPM* are not further defined or given a technical usage. Accordingly, the Commission looks to the ordinary meaning of these terms. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (applying this rationale to the language of a regulation).

The record shows that Inspector Thompson was aware that Black Diamond was an independent contractor performing construction work at the mine site. 20 FMSHRC at 1177. Further, the Plan, which was submitted to MSHA, described the essential nature of the work that Black Diamond was performing. Thus, the Plan stated that the impounding capability of the Spruce Lick Fork coal refuse facility[9] was being eliminated to facilitate longwall mining in an underground mine. Plan at 2. In order to eliminate the impoundment, it had to be drained, filled with over 1.4 million cubic yards of coarse coal refuse over coal fines, and graded. *Id.*; 20 FMSHRC at 1177. As the impoundment was pumped dry, coal refuse was to be pushed down

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[8] Significantly, the Secretary continues to argue in support of the position that was the basis for the citations and that she abandoned when the citations were vacated because of disagreement among her experts (*supra* at 5 & n.6). Thus, the Commission has not been asked to determine if the Secretary's position at the time of the issuance of the citations was reasonable and became unreasonable at some later time. *Cf. Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148 (D.C. Cir. 1988) (resolving conflict in evidence available to the NLRB General Counsel at different stages in the litigation process for purposes of determining whether the General Counsel's position was substantially justified). Rather, the Secretary's prelitigation position that the Commission must examine is the same as her litigation position would have been had she gone to trial — application of the Part 48 training regulations and the *PPM* to the work being performed under the Plan.

[9] According to the Plan, the Spruce Lick Fork coal refuse facility had been idle during the 5 years preceding the submission of the Plan. Plan at 2.

from the slope of the impoundment. 20 FMSHRC at 1177. In addition, coal refuse that made up the dam would be used as fill. *Id.* Black Diamond would build diversion ditches, dikes, and ponds to ensure that the storm water did not go back into the impoundment area. Plan at 3.

The *PPM* specifically provides that construction work includes "demolition." *PPM* at 3. As the judge noted, the dictionary definition of "demolition" is "the act or process of demolishing," and "demolish" means to "do away with" something. 20 FMSHRC at 1178, *quoting Webster's Third New Int'l Dictionary* 600 (1986). The judge found that Black Diamond's work was directed at eliminating the impoundment. *Id.* The essential elements of the impoundment, the dam and the water behind it, were being eliminated. *Id.* The basic structural design of the impoundment was changing. *Id.* As the judge concluded: "In effect, the dam would cease to be a dam." *Id.* at 1177. Thus, based on the undisputed facts and the Plan, the judge concluded that Black Diamond was engaged in the demolition of the impoundment. *Id.* at 1178.

In addition to the demolition work, the record further indicates that Black Diamond was engaged in construction work at the site as well. Thus, once the water behind the dam was drained, Black Diamond's work included filling and grading in the impoundment area, and building sludge cells, drainage ditches, and ponds. 20 FMSHRC at 1178; *see* Plan at 2-4; Shelton Dep. at 12. In short, the work being performed by Black Diamond involved both demolition and building and, therefore, fell well within the parameters of the *PPM*'s description of construction work.

The Secretary's primary argument in support of her position that the impoundment elimination work constituted "alteration" work is that the impoundment was a coal refuse facility before its elimination and remained one after. S. Br. at 16-19. However, as the judge noted, the fact that impoundments and coal refuse facilities are governed by separate regulations (*see* 30 C.F.R. §§ 77.214 through 77.215-4 and 30 C.F.R. §§ 77.216 through 77.216-5), and treated as "totally different facilities" undercuts the Secretary's position that Black Diamond was only maintaining or repairing the impoundment when it eliminated its impounding capabilities. 20 FMSHRC at 1178.[10]

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[10] The judge noted two decisions by other administrative law judges that the Commission did not review. In *Dakco Corp.*, 10 FMSHRC 1259, 1259, 1289-90, 1293 (Sept. 1988) (ALJ), the judge vacated citations, which charged violations of the training regulations, against a contractor who was renovating a coal preparation plant. The work involved "extensive demolition, rebuilding, renovation, and installation" of new equipment. *Id.* at 1289. In *Frank Irey, Jr., Inc.*, 11 FMSHRC 990, 991-94, 996 (June 1989) (ALJ), the judge upheld citations against a contractor who failed to comply with the training regulations when his employees were performing renovation work on a coal preparation plant, "the basic structural design" of which did not change. *Id.* at 993. The instant case appears similar to *Dakco* and, in contrast to *Frank Irey*, the basic structure of the impoundment was being materially changed. As the Supreme Court noted in *Pierce v. Underwood*, the views of other courts can be relevant to the inquiry of whether

Finally, the Secretary makes two related arguments in contending that the judge erred when he rejected her interpretation of the *PPM*. The Secretary asserts that she broadly construed the *PPM* in order to maximize coverage of workers under the Mine Act. S. Br. at 20-22. The Secretary further argues that she sought to cover Black Diamond's workers in order to protect them from hazards similar to those miners are exposed to.[11] *Id.* at 25-29. However, both arguments ignore the plain meaning of the term "construction work" as it is used in the *PPM*. Moreover, as the judge noted, giving undue emphasis to the hazards contractor employees are exposed to would render meaningless the exceptions to Mine Act coverage. 20 FMSHRC at 1178.

The dissent's assertion (slip op. at 16) that "up until the time of the Shelton Deposition, the Secretary's action in pursuing this action had a reasonable basis in law and fact," is inconsistent with the record.[12] MSHA did not first learn of the "internal dispute" within the

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the government's position was substantially justified. 487 U.S. at 567. While unreviewed judges' decisions are not binding legal precedent (*see* 29 C.F.R. § 2700.72), nonetheless the reasoning in the decisions discussed above is helpful in this proceeding.

[11] Commissioner Marks states that "[u]ntrained persons on mine property present a grave safety risk to themselves and others." Slip op. at 16. We certainly agree with this fundamental principle. The Secretary never argued that the training exclusions in these regulations were based on a determination that construction workers on a mine site are exposed to less hazardous conditions than workers covered under the training regulations, nor is that a premise of our opinion. The problem is that, for reasons unknown to us, a void exists in MSHA's training regulations regarding construction workers. *See* 43 Fed. Reg. 30990 (1978) ("[T]hese two categories of workers [construction workers and shaft and slope sinkers] were to be covered under subpart C, which is still in the drafting stages. . . ."); *cf.* 64 Fed. Reg. 53080, 53130 (1999) (to be codified at 30 C.F.R. pt. 46) (requiring training and retraining at sand and gravel mines for "[a]ny construction worker who is exposed to hazards of mining operations"). We are certainly cognizant of this problem, but are not prepared to ignore the explicit language of 30 C.F.R. § 48.22(a)(1)(i) or sanction actions by the Secretary that unilaterally permit her to expand the existing standard to fill the vacuum.

[12] Contrary to our dissenting colleague's suggestion (slip op. at 16), no evidence emerged at the deposition of MSHA's impoundment expert, Shelton, that changed the factual basis for the citations in this case. Rather, as the Secretary readily admits (S. Answer to EAJA Appl. at 17-18; S. Br. at 32-33), the deposition simply resulted in a realization that there was an "internal dispute" at MSHA regarding the legal interpretation of impoundment sites and refuse facilities. This disclosure is readily distinguishable from the cases cited by the dissent in which there was disclosure of factual evidence at trial by non-governmental witnesses. *See Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1235-36 (9th Cir. 1997) (NLRB's General Counsel had reasonable basis for pursuing complaint through trial where employer's rebuttal case was dependent on judge crediting employer witnesses); *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992)

agency (concerning whether Black Diamond's employees were covered by the training regulations) at the February 18, 1998 deposition or the meeting of its experts on February 20. Rather, MSHA learned of it no later than June 25, 1997, at the post-inspection conference with Black Diamond, when president William Casto explained why Black Diamond was not in violation and brought to MSHA's attention the disagreement among its own personnel. It is hardly reasonable for a litigant to be forced to bear the considerable cost of defending itself over many months, including preparing for trial, while an enforcement agency ignores essential information brought to its attention at the outset.[13] The conflicting interpretations of the regulation by MSHA's own officials that led MSHA to drop this case could have been discovered much sooner, with a minimum of effort by agency personnel.

In agreement with the administrative law judge, we conclude that the Secretary has failed to establish that her position was substantially justified during the pre-litigation stage of the case. As the judge noted, the essence of substantial justification "is whether 'reasonable people could genuinely differ.'" *Id.* at 1175. On the basis of the clear language of the *PPM*, the Impoundment Elimination Plan, and the uncontested facts, we agree with the judge's determination that the Secretary's position was not reasonable in law and fact.

(General Counsel was substantially justified in issuing complaint but evidence adduced at trial made further pursuit unreasonable); *Leeward Auto Wreckers*, 841 F.2d at 1148 (General Counsel should have withdrawn complaint once employer presented undisputed evidence at trial).

[13] Commissioner Riley observes that such matters should be resolved at the earliest possible opportunity during the pendency of a case, preferably when, or soon after, the litigant first raises them at the post-inspection conference. He notes there is little point to a post-inspection conference, if this last informal opportunity to resolve misunderstandings and provide clarification before formal charges are brought is squandered because MSHA does not exercise due diligence in ascertaining its own position on its regulation or give any consideration to the operator's position.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision to grant the award, and we remand this case to the judge to provide Black Diamond the opportunity to amend its EAJA application to include the reasonable fees and expenses incurred in defending its award before the Commission.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

Because I conclude that the Secretary was "substantially justified" in bringing this action and in litigating it as far as she did, I dissent and would reverse the judge's EAJA award.

Under EAJA, a prevailing party may receive an award unless the position of the agency was "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). The position of the agency can be justified within the meaning of EAJA even though it is not correct or prevailing. *Pierce (HUD) v. Underwood*, 487 U.S. 552, 566 n.2, 569 (1988). Moreover, the government's position cannot be viewed as unjustified simply on the ground that proceedings were voluntarily terminated on terms unfavorable to it. *Id.* at 568-69; *Kuhns v. Board of Governors of Fed. Reserve Sys.*, 930 F.2d 39, 44 (D.C. Cir. 1991).

In interpreting "substantially justified," the Supreme Court rejected any connotation of the phrase that required "justifi[cation] to a high degree" and instead held that substantial justification was met when a position was "'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person." *Pierce,* 487 U.S. at 565. A position is substantially justified if it has a reasonable basis both in law and fact." *Id.* The Court of Appeals for the D.C. Circuit has held that "[t]o show substantial justification for its position, the [government] did not have to demonstrate that a large amount of evidence supported it." *Kuhns*, 930 F.2d at 43. In addition, the Secretary's position can be substantially justified even if the position is unsupported by substantial evidence on the record as a whole. *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991).

At issue in this case is not whether the Secretary would have succeeded on the merits, but instead whether the Secretary's position, which required the two workers to have training pursuant to 30 C.F.R. § 48.25(a), was substantially justified. The judge however incorrectly evaluated the merits when making his EAJA determination. 20 FMSHRC at 1179 ("I conclude a reasonable person would have found the Secretary was both *wrong* and unreasonable . . . ."). Not only did the judge fail to employ the proper and lesser standard for EAJA cases, but the judge failed to adequately consider the Secretary's justification for her position as well as the circumstances that led up to the Secretary's dismissal of her case.[1]

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[1] I disagree with the majority's characterization of the Secretary's argument to the Commission and the judge. Slip op. at 8 n.8. The Secretary asked the judge to make a determination on the reasonableness of its action in dismissing its case once a conflict of opinion was discovered within the agency. S. Answer to EAJA Appl. at 18-19. The Secretary now seeks review of that determination, asking the Commission to review the reasonableness of her decision to dismiss the case (S. Br. 33) as well as the reasonableness of her litigating position from the time Black Diamond was cited to the time the case was dismissed.

After a complete review of the Secretary's position and her responsible action of dismissing this case, I conclude that the record can support only one conclusion — that the Secretary was eminently justified in bringing this action and in dismissing it when she did.

Prior to the February 18, 1998 deposition of MSHA Impoundment expert, Stuart Shelton, the agency's position was that the work being performed was "maintenance or repair work" not construction work. S. Answer to EAJA Appl. at 17. The Secretary asserted that "Black Diamond was modifying a refuse facility from an impoundment to a refuse pile by eliminating the impounding capability of the facility" and that "Brian Casto and Matthew Adkins were not demolishing an existing facility and constructing a new one." *Id.* The Secretary's position that Black Diamond was performing alteration work to the refuse site was a reasonable view of the evidence and the law and, as such, it was a reasonable position in law and fact. *Welter*, 941 F.2d at 676 (stating that, because "'at least one permissible view of the evidence' shows a reasonable basis in law and fact for the Secretary's position," claimants were not entitled to fees).

MSHA Inspector Thompson who issued the citation determined that Black Diamond was only modifying the refuse site from an impoundment to a refuse pile. Thompson Dep. at 11, 40. He stated that "they were going to pump the impoundment dry and backfill it with refuse." Thompson Dep. at 29. As they were performing alteration work, the workers did not qualify as construction workers that were exempt from training under Part 48.[2] Additionally, Thompson observed that the two workers were performing general labor duties on mine property and were exposed to the hazards of mining. Thompson Dep. at 79-80, 101. Without proper training, these workers were a hazard to themselves and others on the mine property. Thompson Dep., Ex. 1. Thompson's view was supported by MSHA Supervisor Ellis, who similarly considered the work being done by Black Diamond as an "alteration" of a refuse site. Ellis Dep. at 15. Ellis informed William Casto at the Health and Safety Conference that MSHA never considered the elimination of an impoundment to be major construction. W. Casto Dep. at 35; S. Answer to EAJA Appl. at 7.

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[2] In order to conclude that Black Diamond's work was characterized as "construction," the majority and the judge incorrectly refer to Inspector Thompson's isolated comment that, prior to inspecting the mine, he heard that construction was going on at the site. Slip op. at 8; 20 FMSHRC at 1177 (citing Thompson Dep. at 29). However, Inspector Thompson's comment does not indicate that he or MSHA had evaluated the mine and determined that construction, as the term "construction" is used in the Secretary's regulations, was underway. Instead, Thompson was consistent in his testimony that Black Diamond was performing maintenance/alteration work and not construction work under the Secretary's regulations. Thompson Dep. at 11, 40. In the case of *Frank Irey Jr., Inc.*, 11 FMSHRC 990, 995 (June 1989) (ALJ), Judge Melick likewise recognized that maintenance workers that are subject to the existing MSHA training regulations could perform work that might be colloquially considered construction work. Thus, Thompson's reference that he heard that construction work was underway is certainly not dispositive of whether the work was construction or maintenance work under the Secretary's regulations.

MSHA's view was based on the premise that both impoundments and refuse piles are refuse sites and that altering one to the other did not qualify as major construction. Such a view was not unreasonable given that both impoundments and refuse piles are for refuse disposal. *See* MSHA Handbook 89-V-4, *Coal Mine Impoundment Inspection Procedures* (Sept. 1989) (refuse facilities are classified as impounding and non-impounding).[3] Similarly, the dictionary definition of "alter" is "to make different: modify." *Webster's II New Riverside University Dictionary* 96 (1994). "Modify" is in turn defined as "to change in form or character." *Id.* at 762. The dictionary definitions support MSHA's view that modification of the refuse site was an alteration as set forth in the *PPM*. Moreover, both the judge and the majority incorrectly view that MSHA was unreasonable because refuse piles and impoundments are subject to different regulations. However, there was nothing in the Act, in the regulations, or in binding Commission law that conclusively stated that they were distinct structures, such that the Secretary's view was an unreasonable construction of her own regulations and policies. Indeed, the judge erred in failing to account for the deference owed to the Secretary's interpretations of her own regulations. 30 C.F.R. § 48.22 excludes construction workers from the definition of miner. The standards however are silent as to the meaning of a construction worker. Where a regulatory provision is unclear or silent, deference is accorded to an agency's reasonable interpretation of its own regulations. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *Secretary of Labor ex rel. Bushnell v. Cannelton Industries*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) ("The Secretary is emphatically due this respect when she interprets her own regulations."). The majority also fails to consider the deference owed to the Secretary's construction of section 48.22.

Further, the Secretary's construction of the *PPM* was reasonable because there has been no governing precedent by this Commission that alteration of an impoundment to a refuse site qualified as a construction project.[4] It must be remembered that MSHA's *PPM*s are not binding

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[3] The Commission may take judicial notice of MSHA public documents. *Secretary of Labor on behalf of Acton v. Jim Walter Resources, Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985).

[4] In concluding that the Secretary's position was not correct, the judge relied on two judge's decisions which involved this issue. 20 FMSHRC at 1178 & n.4. Of course, these decisions do not represent "what the law is" because administrative law judge decisions are not legal precedent. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 972 (Sept. 1998); Commission Rule 72, 29 C.F.R. § 2700.72. In any event, neither case dealt with modification of refuse sites and the *Irey* case, 11 FMSHRC 990, can be reasonably viewed to support the Secretary's position. In that case, the judge held that in maintenance work "the basic structural design was not changed" and that maintenance work could involve work that was considered construction work. *Id.* at 993, 995. Under the Secretary's view, the refuse facility would be altered by work that could be considered construction work, but its basic purpose as a refuse site

on the Secretary and do not have the same force and effect of law as the Mine Act itself or the Secretary's standards and regulations. *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (reversing Commission which improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required strictly to observe). Thus, the judge erred when he stated that "the pronouncements and policies set forth in the *PPM* are equivalent to the Act and regulations for EAJA purposes, and the Secretary cannot take an enforcement position that unreasonably varies from the *PPM* without subjecting herself to EAJA liability." 20 FMSHRC at 1176.

In addition, the Secretary's position was reasonable because she is charged with enforcing the Mine Act in a manner that furthers its remedial purposes. *Cannelton*, 867 F.2d at 1437; *Menlo Service Corp.*, 765 F.2d 805, 809 (9th Cir. 1985). Accordingly, the Secretary was justified in narrowly construing any exemption to mine safety training. These individuals posed a grave risk of harm to themselves and others. According to the deposition of Inspector Thompson, Brian Casto had trouble getting the truck into gear. Thompson Dep. at 33-34. He did not know how to make a pre-shift examination of a truck. Thompson Dep. at 34. The UMWA representative observed Brian Casto not only driving the truck on mine property but out on a boat on the impoundment, which posed a high danger of drowning. Thompson Dep. at 67-69, 78-80. In addition, the dozer operator William Adkins had gotten too close to the edge of the impoundment in one instance. Thompson Dep. at 77, 98-99. The slurry that is located on the edge of impoundment is like quicksand and very hazardous. Thompson Dep. at 98. Untrained persons on mine property present a grave safety risk to themselves and others. Thompson Dep. at 101. Therefore, I can only view Inspector Thompson's decision to issue the citation and order to withdraw these two individuals from the mine property until adequate training and training certification were obtained as completely reasonable and in furtherance of his duties as a safety inspector.

I conclude that, up until the time of the Shelton Deposition, the Secretary's action in pursuing this action had a reasonable basis in law and fact. On the afternoon of Wednesday, February 18, 1998, Shelton, an impoundment expert, testified that a site cannot be both legally an impoundment and a refuse pile. Shelton Dep. at 29. On Friday, February 20, Secretary's counsel met with agency experts who gave conflicting opinions as to whether the work was construction or alteration and maintenance work. S. Answer to EAJA Appl. at 18, Attach. F, G. Although in *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 552 (D.C. Cir. 1990), the court held that conflicting expert opinions on a particular issue indicated that the government's litigating position was substantially justified, the Secretary chose to dismiss the case. One business day after the experts were consulted, on Monday, February 23, MSHA dismissed the suit. The judge never addressed the Secretary's argument that "the decision to vacate the order and citation" was

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would remain. Thus, the *Irey* case supports the Secretary's interpretation that Black Diamond was engaged in maintenance work at the mine.

grounded in a conflict of opinions within the agency. S. Answer to EAJA Appl. at 16. Nor did he discuss the reasonableness of the Secretary's action in dismissing the claim three business days after the deposition of Shelton and one business day after consultation with the MSHA experts.

When other agencies have similarly acted, no award has been granted. In *Blaylock Elec. v. NLRB*, 121 F.3d 1230 (9th Cir. 1997), the General Counsel withdrew its complaint one month after hearing and the day before post-hearing briefs were due. In denying fees under EAJA, the court opined that, although the General Counsel was unlikely to prevail on the merits, the ultimate determination would depend upon whether the judge credited certain testimony. *Id.* at 1235-36. Because of this, the General Counsel was substantially justified in pursuing the case through trial, notwithstanding the relative weakness of its case. *Id.* So too, examining the evidence prior to the Shelton deposition, if the judge had credited the testimony of the Inspectors Thompson and Ellis, although it might have been a close case, the Secretary may well have prevailed on the merits. See *Welter*, 941 F.2d at 676 (holding that the Secretary's reliance on experts and on some contradictory and inconsistent evidence was sufficient to support the Secretary's position, although the court recognized that the case was a close one, because "[c]loseness itself is evidence of substantial justification"). Thus, an EAJA award was not warranted for the time preceding the Shelton deposition.[5]

Moreover, the Secretary's prompt dismissal, only three business days after the deposition and prior to hearing, was a reasonable action, certainly undeserving of a fee award. In *Blaylock*, the Court of Appeals for the Ninth Circuit determined that the agency's action of dismissing its case a month after the hearing and one day before post-hearing briefs were due was objectively reasonable and did not warrant an EAJA award. 121 F.3d at 1236. In *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541 (7th Cir. 1992), and *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148 (D.C. Cir. 1988), the courts held that the government was substantially justified in initially raising and arguing its cases, but that when the hearings revealed conclusively that the cases lacked merit, the protective mantle of substantial justification was lost at the hearings' end. Fee awards began at the conclusion of, and not before or during, the trial. *Leeward Auto*, 841 F.2d at 1149 (judge decided that EAJA fees accured during the hearing, but appellate court clarified that EAJA fees should accrue at the conclusion of the hearing). Applying the same reasoning to the instant case, even if the Secretary's theory arguably lost its substantial justification once the

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[5] Contrary to the majority's misapprehension of my view and the record, the deposition testimony of MSHA's expert Shelton never changed the factual basis of this case. Slip op. at 10-11 & n.12. The facts were largely undisputed right from the start of this case and never changed. What changed is that MSHA realized that there was an internal conflict in its interpretation on the afternoon of February 18, 1998. Prior to that time (and probably even following, *see Public Citizen*, 909 F.2d at 552), MSHA was completely justified in pursuing its complaint against Black Diamond because its case was dependent on whether a judge, charged with weighing the merits, was going to credit the testimony of MSHA Inspectors Thompson and Ellis. *See Blaylock*, 121 F.3d at 1235-36.

conflict of opinions became apparent, no EAJA award would accrue because she acted so quickly in dismissing the case and before any hearing began.[6]

MSHA's decision to prosecute this case as long as she did and then to dismiss it promptly, before any expenses of trial were incurred, was reasonable in law and fact. The Secretary's conduct was laudable and responsible, certainly not the type of action where an EAJA award is justified. Therefore, I would reverse the judge and vacate the EAJA award.

Marc Lincoln Marks, Commissioner

[6] The majority relies on a slim morsel to harshly criticize the timing of the Secretary's dismissal. Relying on the uncorroborated deposition testimony of William Casto (W. Casto Dep. at 35-36), who alleges that, at the June Health and Safety Conference, he stated that the MSHA Mt. Hope Office informed him that construction workers are not subject to training, the majority speculates that MSHA could have discovered the agency conflict much sooner. Slip op. at 11 & n.13. The problem with the majority's speculation is that Mr. Casto did not testify that the Mt. Hope Office gave him an opinion that the specific work Black Diamond was performing qualified as construction work as opposed to maintenance work, as those terms are construed in the Secretary's regulations.

Distribution

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of WALTER JACKSON	:	
v.	:	Docket No. KENT 95-613-D
MOUNTAIN TOP TRUCKING COMPANY, INC., ELMO MAYES, WILLIAM DAVID RILEY, ANTHONY CURTIS MAYES, and MAYES TRUCKING COMPANY, INC.	:	

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

DECISION

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

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman issued a Decision on Remand awarding relief to, among others,[1] truck driver Walter Jackson. 21 FMSHRC 913 (Aug. 1999) (ALJ). On August 30, 1999, Mountain Top Trucking Company ("Mountain Top"), Mayes Trucking Company, Elmo Mayes, Anthony Curtis Mayes, and William David Riley (collectively the "operators"), filed a motion for relief from the judge's Decision on Remand. After considering filings in opposition from both the Secretary of Labor and Jackson, the Commission treated the operators' motion as a petition for discretionary review, directed review, and stayed briefing. For the reasons that follow, we vacate the judge's damages award and remand the case for further proceedings consistent with this opinion.

[1] The Commission has since ordered severance of the discrimination dockets of two other truck drivers that had been consolidated with this proceeding. *See Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 967 (Sept. 1999).

I.

Factual and Procedural Background

Following an evidentiary hearing, the judge determined that the operators' discharge of Jackson on February 17, 1995, violated Mine Act section 105(c)(1).[2] 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). The judge subsequently ordered the parties to confer, in the hope that they could stipulate to the amount of backpay the operators owed Jackson as part of his relief. *Id.* at 204.

When the parties could not agree on the amount of backpay Jackson was owed, Jackson, pursuant to the judge's order (*id.* at 205) and through private counsel, filed a Statement of Backpay.[3] Thereafter, he provided copies of his tax returns for 1995 and 1996. As the result of a further oral request by the operators and a conference call with the judge, Jackson's private counsel, by letter dated March 21, 1997, addressed the source of interest income reflected on Jackson's 1996 tax return. This item was described as interest on certificates of deposit Jackson had purchased in 1996 with the proceeds from a judgment he received that year in a product liability suit he had filed against General Motors Corporation. The suit stemmed from an eye injury Jackson suffered in February 1991 when a wrench broke while he was changing a flat tire on his pickup truck. In the letter Jackson's counsel further stated that "Jackson did not file a disability claim regarding his eye injury, nor did it affect his ability to work during the backpay

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

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

30 U.S.C. § 815(c)(1).

[3] Pursuant to the judge's request (19 FMSHRC at 205), the Statement addressed why Jackson had withdrawn his application for temporary reinstatement to his position with the operators prior to the August 1995 hearing on the application. According to the Statement, Jackson had obtained "full-time employment with Cumberland Mine Service" ("Cumberland"), and worked from August 1, 1995, until October 10, 1995, when he was laid off by Cumberland. Statement of Backpay for Walter Jackson (March 3, 1997), at 2. His compensation for those 10 weeks was $3,343. *Id.*

period in this proceeding. Therefore, the matter is irrelevant to my client's claim for backpay herein."

The judge subsequently ordered Jackson to supply certain additional information and the parties to address certain legal issues. *See* 19 FMSHRC 661 (Mar. 1997) (ALJ). Most of the order addressed Jackson's obligation to mitigate his damages, and questioned the extent to which that obligation was satisfied in light of Jackson's withdrawal of his temporary reinstatement application and later layoff from Cumberland. *See id.* at 663-64. However, in the fifth of the seven enumerated requests for information, the judge stated:

> (5) The respondents have alleged that Jackson may have been party in a pertinent disability proceeding. Has Jackson been a party in any legal action or claim involving allegations of physical or mental impairment? If yes, identify or describe the legal action or claim, provide the date of such actions or claims, and provide the status or outcome.

Id. at 664.

The Secretary responded by letter dated April 18, 1997, to the judge's order, but deferred to Jackson's counsel on this request. Through counsel, Jackson filed a pleading in response to the order. He stated that "[t]he answer to this question is 'No[,]'" but also went on to reference his March 21, 1997, letter to Judge Feldman, in which the genesis of Jackson's suit against General Motors was described. Resp. of Walter Jackson to Court's Order of March 24, 1997, at 2-3.

The operators replied to the submissions of the Secretary and Jackson. They did not address the section of the judge's order regarding legal claims involving allegations of impairment. Instead, they took the position that Jackson forfeited the right to further backpay upon the withdrawal of his temporary reinstatement application. Reply to Complainants' Resp. to Order of March 24, 1997, at 2-3.

In his decision on relief, the judge did not address this part of his earlier order. *See* 19 FMSHRC 875 (May 1997) (ALJ). He determined that the maximum amount of time for which Jackson could be awarded backpay was February 18, 1995, the day after his discharge from Mountain Top, until June 21, 1996, the termination date of the operators' haulage contract which necessitated the employment of drivers such as Jackson. *Id.* at 878-79 & n.2. Focusing solely on Jackson's failure to attempt to reopen his temporary reinstatement application, the judge held that Jackson had failed to mitigate his damages, and consequently awarded him backpay only through December 9, 1995, which was 60 days subsequent to Jackson's layoff from Cumberland. *Id.* at 882-83.

The Commission granted petitions for review of the judge's decision filed by the Secretary and Jackson. The Commission subsequently reversed the judge's failure-to-mitigate

determination on the ground that the Mine Act does not require a discriminatee to seek temporary reinstatement. 21 FMSHRC 265, 284 (Mar. 1999). Reviewing the evidence that had been submitted to the judge, we further concluded that the only record evidence upon which a finding of a failure to mitigate by Jackson could rest was his failure to seek reopening of his reinstatement application. *Id.* Consequently we held that the only conclusion that the record before us could support was that the operators did not meet their burden of establishing a failure to mitigate on the part of Jackson, and we limited remand to a recalculation of backpay and interest owed Jackson, consistent with our conclusion that it was not shown that Jackson failed to mitigate his damages. *Id.* at 284-85.

After the case was returned to him, the judge held a telephone conference with the parties. Unpublished Order dated April 23, 1999, at 2. Operators' counsel stated he had information he wished to submit regarding Jackson's availability to work during the backpay period. *Id.* The judge established a procedure for submission of the information and comment by the parties on it. *Id.* at 2-3.

The operators submitted to the judge copies of the following documents: (1) the April 1995 Unemployment Compensation Report that resulted from Jackson's claim for unemployment benefits following the end of his employment relationship with Mountain Top; (2) October 1992 answers to interrogatories Jackson provided in his product liability lawsuit; (3) excerpts from a June 1994 deposition Jackson gave in that lawsuit; (4) an October 1995 vocational assessment report of Jackson conducted in connection with the suit which discusses, among other things, Jackson's college attendance between August and December 1995 and his ability to drive a truck; and (5) the January 1996 jury verdict form from the suit, which contains both handwritten amounts detailing the award to Jackson as well as the printed figure of $12,043.00, identified as "[l]oss of wages and income sustained to date directly by reason of the injuries[.]" *See* Resp. to Order Requesting Information Concerning Jackson's Availability for Work for the Period February 18, 1995 through June 21, 1996 (hereinafter "Operator's Resp. to Judge's Order"), Exs. I-V.[4] In response, both the Secretary and Jackson argued to the judge that the Commission's statement that "the only conclusion that the record can support is that the operator did not show a

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[4] Copies of documents 1, 4, and 5 were attached to the briefs the operators had earlier submitted to the Commission. (The operators filed two briefs. We cite herein to the brief they filed in response to the Secretary's brief.) The operators stated that the documents supported their arguments that Jackson was not discriminated against for engaging in a protected work refusal, and, that by withdrawing his temporary reinstatement application, he forfeited any right to backpay beyond that point. Op. Br. at 13-16 & Addendums 1-2. We held that, because the three documents were not part of the record before the judge, they could not properly be considered by the Commission on review. 21 FMSHRC at 284-85 n.25 (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1544-45 (Sept. 1996)). Consequently, we granted the Secretary's motion to strike the documents and all references thereto in the operators' briefs (*see* Unpublished Order dated July 27, 1998, at 1-2), and did not consider them in reaching our decision on mitigation of damages.

failure to mitigate on the part of Jackson" was res judicata on that issue. S. Resp. to Judge's Order at 2-3; Jackson Resp. to Operator's Resp. to Judge's Order at 3. Jackson also submitted a proposed order for relief predicated on his assertion that he was available for work at all times during the backpay period. Proposed Order for Relief for Walter Jackson (June 4, 1999).

The judge then ordered the Secretary to provide information regarding the period in 1995 that Jackson was a college student and an employee of Cumberland. 21 FMSHRC 693, 698 (June 1999) (ALJ). The judge also ordered the Secretary to further explain her contention that Jackson was available to work each weekday of the backpay period for 12 hours each day. *Id.* While both the Secretary and Jackson moved the judge to reconsider his decision, the Secretary provided the requested information and explanation, and Jackson submitted a 1-page affidavit stating that he sought employment while in college and would have stopped attending college if he had found a job which required him to do so. S. Mot. for Recons. at 2-3; Jackson Resp. at 2-6 & Aff. of Walter Jackson.

In his decision on remand on the backpay owed Jackson, the judge found that in the record originally before him and the Commission, Jackson had not been forthcoming regarding his college attendance, despite the judge's request that Jackson "disclose any 'periods when [he] was not available for employment.'" 21 FMSHRC at 917 (quoting 19 FMSHRC at 204). The judge also found that information provided by Jackson in the vocational assessment contradicted the statement of Jackson's private counsel in his letter of March 21, 1997, that the product liability lawsuit was irrelevant to the issue of backpay before the judge at that time. *Id.* According to the judge, the misleading information in that letter prevented the operators from pursuing relevant evidence regarding the suit and contributed to the Commission's striking such evidence when the operators attached it to their briefs. *Id.* The judge concluded by stating:

> I am concerned about the apparent inconsistencies in Jackson's position, *i.e.*, asserting in his civil suit that his decision to attend college was related to an eye impairment that interfered with employment as a truck driver[,] while asserting in this proceeding that he was looking for work as a truck driver, and that he would have left college to obtain full[-]time employment. Although I have concluded that Jackson's full[-]time student status is relevant evidence that should be considered, I am constrained by the Commission's remand decision that "limited [me] to a recalculation of backpay and interest owed Jackson consistent with [the Commission's] conclusion that it was not shown that Jackson failed to mitigate his damages." Absent further direction from the Commission, I construe the Commission's decision as a finding that Jackson was available for work. Accordingly, I shall award the net backpay of $32,642.00, plus interest, sought by Jackson in this matter.

Id. at 918.

II.

Disposition

In their motion for relief from the judge's decision, the operators contend that the information provided by counsel for Jackson in March 1997 was not truthful or forthcoming, contributed to a delay by the operators in obtaining evidence from Jackson's civil suit, and influenced the Commission to strike evidence concerning that civil suit in the belief that the issues concerning Jackson's representations in that suit had not been raised before the judge. Op. Mot. at 3. The operators submit that their "newly discovered" evidence is probative on a number of matters relevant to whether Jackson was available for full-time employment during the backpay period, and request remand to the judge for further consideration of the issue. *Id.* at 3-4.

The Secretary opposes the relief requested by the operators, contending that the evidence establishes that Jackson was available for work while he was in college. S. Opp'n at 1-3. According to the Secretary, the judge should not have ordered the development of further evidence he considered relevant to the mitigation issue, and his analysis of the evidence contains errors. *Id.* at 3-5 & n.4. Jackson joins in the Secretary's opposition, and specifically denies that he and his counsel submitted false information to the judge at any time. Jackson Resp. at 4-6. Jackson contends that the operators had adequate opportunity prior to the judge's original decision on damages to obtain all of the evidence they claim is "newly discovered." *Id.* at 4-5. According to Jackson, nothing in the record supports the operator's argument that Jackson was not available for full-time employment as a truck driver during the backpay period. *Id.* at 5.

As we discussed in our earlier decision, the Commission recognizes that a backpay award "may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings.'" 21 FMSHRC at 284 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982)) (other citations omitted). Under the duty to mitigate damages from discrimination, "a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted) (emphasis in original).[5]

The Commission's earlier statement that the only conclusion that could be drawn from the record is that the operators did not establish that Jackson failed to mitigate his damages was based

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[5] "Because the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, [the Commission] ha[s] sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay." *Metric Constructors, Inc.*, 6 FMSHRC 226, 231 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

on the record as it was developed before the judge. *See* 21 FMSHRC at 285. We note that the record at that time was then devoid of evidence on the issue of mitigation. Instead it contained representations of the various counsel on Jackson's efforts at obtaining employment during the backpay period, and what those efforts meant with respect to his entitlement to backpay. Consequently, once we determined that the evidence the judge found dispositive on the issue of mitigation — Jackson's failure to seek reopening of his temporary reinstatement application — did not resolve the issue, we were left with no evidence to consider. As the burden of proving a failure to mitigate is on the operator (21 FMSHRC at 285 (citing *Metric Constructors*, 6 FMSHRC at 233)), and there was nothing in the record to support the conclusion that Jackson failed to mitigate his damages, we so held, and limited remand to a calculation of the backpay and interest owed Jackson. *Id.*

According to the judge, however, the operators, in a teleconference that was held while the judge was originally determining damages, raised the issue of whether Jackson had always remained in the labor market during the backpay period. Moreover, according to the judge, the representations of Jackson's counsel regarding the nature of Jackson's civil suit prevented the operators from obtaining evidence from that suit relevant to the issue of whether Jackson could have returned to work as a full-time truck driver. Both the Secretary and Jackson oppose consideration of the documents, relying on our earlier refusal to consider some of the civil suit documents when the operators attached them to their briefs. S. Opp'n at 2-3; Jackson Resp. at 3-4. They read too much into our decision, however, as we refused to consider the documents only because they had not been before the judge when he made his original decision. *See* 21 FMSHRC at 284-85 n.25. The Secretary is therefore mistaken in suggesting that the operators should have requested the Commission to reconsider its decision to strike the documents before submitting them to the judge. *See* S. Opp'n at 5. Because the documents had yet to be admitted into the record by the judge, the Commission could not have considered them, regardless of their relevance.

While the proceedings on remand in which the judge requested, received, and reviewed the documents may have exceeded the literal terms of our remand order, we cannot deny the relevancy of the information contained in the documents to the questions of whether and to what extent Jackson was available to work during the backpay period. There is also evidence that supports the judge's conclusion that the information provided by Jackson's counsel was not as accurate as he had a right to expect. The judge specifically asked whether Jackson has "been a party in any legal action or claim involving *allegations of physical* or mental *impairment*." 19 FMSHRC at 664 (emphasis added). The documents from Jackson's civil suit show that in that case he sought compensation for lost wages and impairment of his earning capacity,[6] and

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[6] In his October 1992 answer to an interrogatory regarding the claim in paragraph 10 of his product liability complaint that he had suffered impairment of his power to earn money due to the accident, Jackson stated that he had suffered permanent loss of vision in his right eye, was unable to pass any type of pre-employment physical examination due to the damage to his vision, and thus was prohibited from any type of work as a truck driver or other work requiring visual

eventually was compensated for, among other things, "[l]oss of wages and income sustained to date directly by reason of the injuries[.]" Resp. to Judge's Order, Ex. V. Jackson's response through counsel that "[t]he answer to . . . question [No. 5] is 'No'" was thus not accurate. *See* Resp. of Walter Jackson to Court's Order of March 24, 1997, at 2-3. In light of this discrepancy, as well as the earlier statement of Jackson's counsel that the civil suit was irrelevant to Jackson's claim for backpay, we will not find, as the Secretary and Jackson request (S. Opp'n at 6-7; Jackson Resp. at 4-6), that the operators' failure to obtain the probative documents from Jackson's civil suit while the proceeding was originally before the judge was due to the operators' lack of diligence.

The Secretary and Jackson are correct that some of the information contained in the civil suit documents is contradicted by evidence elsewhere in the record. *See* S. Opp'n at 4-5 n.4; Jackson Resp. at 5. However, it is up to the judge to reconcile the conflicting evidence. Consequently, we direct him to do so on remand and resolve the question of whether and to what extent Jackson was available for employment during the backpay period.

In addition, Jackson's status as a college student does not necessarily mean that he must be found to have failed to mitigate his damages during the time he was enrolled in college. The question is whether Jackson sought full-time employment during that time, and would have accepted employment and quit college had a job become available. The burden of proof is on the operators to show that he either did not seek such employment or would not have quit college if it had become available. *See Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1274 (4th Cir. 1985). On remand, the judge will have the opportunity to hear Jackson's testimony on this and other issues relevant to the mitigation question.[7]

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acuity. Resp. to Judge's Order, Ex. IV at 1, 3. In his June 1994 deposition he again stated that he believed he would be unable to pass a pre-employment physical (*id.*, Ex. II at 48), and, according to the October 1995 vocational assessment report, Jackson claimed to have failed a physical with Manalapan Mining Company for a driving position. *Id.*, Ex. I at 2-3.

[7] The judge never evaluated the credibility of the 1-page affidavit Jackson submitted regarding his college attendance and his search for employment. Given the conflicting evidence, we believe a hearing on the record is necessary for the judge to best decide the mitigation question.

III.

Conclusion

For the foregoing reasons, we vacate the judge's damages award and remand this case for further proceedings consistent with this opinion.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

Because I conclude that the judge's damages award in favor of truck driver Walter Jackson should be affirmed, I dissent.

The operators bear the burden of proving a failure to mitigate damages in a discrimination case under the Mine Act. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985). In January 1997, the judge determined that the operators' discharge of Jackson on February 17, 1995, violated Mine Act section 105(c)(1) and ordered the parties to confer on the issue of appropriate relief. 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). In May 1997, the judge issued his supplemental decision and final order awarding back pay relief to Jackson. 19 FMSHRC 875, 883 (May 1997) (ALJ). Prior to this damages decision, Jackson, through counsel's letter of March 21, 1997, informed the operator and the judge of the lawsuit that Jackson filed in 1991 against General Motors. The operators with any measure of due diligence could have sought, prior to the May 1997 damages decision, all the information that it now claims is pertinent to the mitigation issue.[1] I refuse to let this case drag on and penalize Jackson, the discriminatee, when the operators failed in their mitigation burden more than two years ago.

This case has been pending before the Commission and its judges for nearly five years. The operators' recent maneuvering has succeeded in prolonging its responsibility to remedy its unlawful discrimination against Jackson. In the interest of justice and judicial economy, I would affirm the judge's damages award in favor of Jackson.

Marc Lincoln Marks, Commissioner

[1] For example, at the time that counsel for Mountain Top was first made aware of Jackson's eye injury in March 1997, he could have easily discovered the October 27, 1995, letter from the vocational rehabilitation consultant that was prepared in the course of the tort litigation, which stated: "Mr. Jackson is currently a full-time student at Union College . . . ." Resp. to Judge's Order, Ex. I at 2.

Distribution

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

Stephen A. Sanders, Esq.
Appalachian Research & Defense Fund
Of Kentucky, Inc.
28 North Front Street
Prestonsburg, KY 41653

Edward M. Dooley, Esq.
512 Richmond Circle
Fairhope, AL 36532

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1999

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	SE 99-101-RM
ADMINISTRATION (MSHA)	:		SE 99-102-RM
	:		SE 99-103-RM
v.	:		SE 99-104-RM
	:		SE 99-105-RM
	:		SE 99-106-RM
NOLICHUCKEY SAND CO., INC.	:		

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

ORDER

BY: Riley, Verheggen, and Beatty, Commissioners

Before us is a "Motion to Stay Abatement" filed by Nolichuckey Sand Company, Inc., ("Nolichuckey") on September 22, 1999 in the above-captioned proceedings. Mot. at 1. The motion recites that on January 28, 1999, MSHA issued Nolichuckey six citations alleging violations of 30 C.F.R. § 56.14109(a). *Id.*; *see* 21 FMSHRC 681, 682 (June 1999) (ALJ). The Department of Labor's Mine Safety and Health Administration ("MSHA") agreed to extend the time period for abatement of the citations at issue until the judge rendered his decision. Mot. at 1. Administrative Law Judge Avram Weisberger upheld the citations on June 30. *Id.* MSHA further extended until October 1 the date by which the operator was to abate the cited conditions. *Id.* at 1-2. In support of its motion, Nolichuckey states that review of the judge's determination in this matter is pending before the Commission, that briefing in this matter will not be complete by the date by which it must abate the cited conditions, that the alleged violation is non-significant and substantial, that MSHA's enforcement position prior to these citations' issuance was that the operator was in compliance with the safety standard, and that continuation of the status quo would not place miners at risk of bodily injury. Mot. at 2.

The Secretary of Labor opposes Nolichuckey's motion. The Secretary submits that section 105(b)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(b)(2) (1994) ("Mine Act" or "Act"), "prohibits the Commission from granting temporary relief . . . in the case of a citation issued under subsection (a) or (f) of Section 104 [of the Act]." S. Opp'n at 2 (citing 30 U.S.C. § 815(b)(2)). The Secretary's opposition also cites *Energy Fuels Corp.*, 1 FMSHRC 299, 306 (May 1979), which states that the Mine Act "does not permit the Commission to stay abatement requirements of a citation during litigation." *Id.*

The citations at issue in the instant matter were issued under section 104(a) of the Mine Act. *See* 21 FMSHRC at 682. In effect, Nolichuckey's motion requests temporary relief from abatement. The text of section 105(b)(2)(C) provides in part that "[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104." 30 U.S.C. § 815(b)(2)(C); *see also* 29 C.F.R. § 2700.46(a) (providing that the Commission may not grant temporary relief with respect to citations issued under section 104(a) of the Mine Act).

In *Pennsylvania Electric Co.*, 11 FMSHRC 793 (May 1989), the operator requested that the Commission enjoin MSHA enforcing citations pending a Commission decision. *Id.* We noted that section 105(b)(2) "specifically states that '[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) . . . of section [104]' of the Act." *Id.* We denied the operator's request, and held that "the two citations in question were issued under section 104(a) of the Act. Thus, by the express terms of the Act, temporary relief may not be granted in this case." *Id.* at 793-94. Similarly, in *Utah Power & Light Co., Mining Div.*, 11 FMSHRC 953 (June 1989), we held that "the citation from which temporary relief is sought by [the operator] is a section 104(a) citation . . . and as such is not within the purview of section 105(b)(2) relief. Accordingly, [the operator's] Application for Temporary Relief is denied." *Id.* at 958; *see also Energy Fuels, Corp.*, 1 FMSHRC 299, 306 (May 1979) ("Furthermore, the Commission cannot, unless a final order favorable to Energy Fuels is issued, relieve Energy Fuels of its responsibilities to continue to maintain the cited condition in compliance. The 1977 Act does not permit the Commission to stay abatement requirements of a citation during litigation.") (citing sections 104(b) and (h), 105(b)(1)(A) and (b)(2) of the Act).

Contrary to Nolichuckey's assertion, section 105(d) does not require a different result. Section 105(d) provides that an operator may *contest* certain issues before a Commission judge, including the issuance or modification of an order issued under section 104 or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104. *See* 30 U.S.C. § 815(d). However, Nolichuckey currently requests what amounts to *temporary relief* from the abatement requirement, not a review of the reasonableness of the time set for abatement. Mot. to Stay Abatement at 1. We previously have applied section 105(b)(2) to operator requests to stay abatement requirements related to section 104(a) citations. *See Pennsylvania Electric Co.*, 11 FMSHRC at 793; *Utah Power & Light*, 11 FMSHRC at 953. Moreover, Nolichuckey failed to contest the reasonableness of abatement time, either in its contest or in its Petition for Discretionary Review.

The plain language of section 105(b)(2) mandates that we deny the requested relief. However, we find several circumstances presented by this case troubling. It appears that the Secretary agreed to extend the abatement period for the citations at issue here during the pendency of this litigation. This made sense given that MSHA's position before the citations were issued was that the operator was in compliance with the relevant safety standards. 21 FMSHRC at 682 n.2. Indeed, MHSA extended the abatement period until October 1, 1999 — for a condition cited in January 1999.

MSHA has apparently declined, however, to extend the abatement period any further, notwithstanding the fact that the agency apparently decided to re-evaluate its position regarding the application of 30 C.F.R. § 56.14109(a) to the guards used by Nolichuckey. Since MSHA is advancing a new position regarding a specific condition that was previously deemed in compliance, we believe, in this case, it would be appropriate and reasonable for MSHA to opt not to press for abatement.

The Commission is bound, however, by the terms of the Mine Act, and the Act does not allow us to intervene here and order the Secretary to continue her forbearance. Instead, if Nolichuckey wants further vindication, it must risk defying MSHA's abatement period so that it might obtain a closure order and institute further proceedings before the Commission. The Secretary's insistence at this particular time to require abatement makes little sense — her brief certainly sheds no light on why abatement is suddenly needed now. Absent any explanation, we find her position unfortunate and merely a potential cause of additional litigation.[1]

In sum, and in accordance with Commission case law, we hold that the provision of temporary reinstatement procedures in section 105(b)(2) of the Mine Act does not include temporary relief from section 104(a) citations.

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[1] While our concurring colleagues characterize our concerns as "gratuitous" and "dabbl[ing] in the affairs" of MSHA (slip op. at 5), we note that this Commission has not been reluctant in the past to scrutinize the Secretary's enforcement activities. *See, e.g., Minerals Exploration Co.*, 8 FMSHRC 477, 478 (Apr. 1986) ("we express our strong disapproval of and, as appropriate, serve warning with respect to some of the activities of certain MSHA officials and the Secretary's trial counsel"). In fact, this scrutiny was recently reemphasized by the Commission in *Black Diamond Constr., Inc.*, 21 FMSHRC __, No. EAJ 98-1 (Nov. 3, 1999). In *Black Diamond*, a Commission majority expressed disapproval of the Secretary's position in an EAJA case by stating that "it is hardly reasonable for a litigant to be forced to bear the considerable cost of defending itself over many months . . . while an enforcement agency ignores essential information brought to its attention at the outset." Slip op. at 11.

In light of the Commission's previous willingness to scrutinize the Secretary's enforcement activities, it is unfair to characterize our position here as "gratuitous" and "dabbl[ing] in the affairs"of MSHA. It is important that all members of the Commission recognize that Congress established this impartial adjudicative body to, among other things, "review[] the enforcement activities of the Secretary" and "provide guidance to [her] in enforcing the [Mine Act]." Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Comm. on Human Resources, 95th Cong., 1 (1978). We are not prepared to join our concurring colleagues in their willingness to turn a blind eye to this important statutory responsibility imposed by the Mine Act.

Accordingly, upon consideration of Nolichuckey's motion, and in accordance with the plain language of section 105(b)(2) of the Act and Commission Procedural Rule 46(a), we deny the operator's motion.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, concurring:

We agree with our colleagues that the plain language of the Mine Act clearly states that an operator may not be granted temporary relief in a case arising from a citation issued under section 104(a) of the Act. We are therefore in accord with the majority's denial of Nolichuckey's motion to stay abatement, as the operator is requesting a remedy explicitly precluded by the statute.

We write separately, however, because we wish to disassociate ourselves from the majority's gratuitous criticism of the Secretary's decision to require abatement as of October 1. The judge in this case found six violations of the regulation mandating stop cords or railings on conveyor belts. The Secretary, who is charged with enforcing the Mine Act, has determined that any additional delay in abating these violations is not warranted. We are most reluctant to second-guess that decision and announce that this regulation — designed to ensure the safety of miners working near the belt — should not now be enforced.

When the majority interpreted — correctly — the clear language of the Mine Act to mandate the denial of temporary relief to Nolichuckey, its task was complete. To then opine on the propriety of the Secretary's enforcement action at this stage of the proceedings appears to be little more than the attempt of an adjudicatory agency to dabble in the affairs of its prosecutorial counterpart. We do not know why the Secretary agreed to the previous extension of the abatement period, nor have we been provided with any information as to what prompted her decision to impose abatement as of October 1. On the basis of the pleadings filed in this proceeding, we are unwilling to draw conclusions about the implications for miner safety if the abatement period were extended beyond that date.[1]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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[1] Commissioner Marks also notes:

In light of the fact that Nolichuckey is represented by competent and experienced counsel, I find that my colleagues' suggestion to Nolichuckey on how to proceed in order to obtain "further vindication" against the Secretary is not only superfluous to the holding in this case but it is inappropriate, as the Commission is not in the business of providing legal advice on how to proceed against the Secretary.

Distribution

Adele L. Abrams, Esq.
Mark N. Savit, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
November 3, 1999

ANTHONY WILLIAMS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 99-71-D
v.	:	MSHA Case No. HOPE-CD-99-03
	:	
OASIS CONTRACTING, INC.,	:	
Respondent	:	

DECISION

Appearances: Andrew J. Katz, Esq., The Katz Working Families' Law Firm, L.C., Charleston, West Virginia, for Complainant;
Ricklin Brown, Esq., Bowles Rice McDavid Graff & Love, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination filed by Anthony E. Williams against Oasis Contracting, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Charleston, West Virginia. For the reasons set forth below, I find that the Complainant was not discharged by Oasis because he engaged in activities protected under the Act.

Williams filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on December 8, 1998.[1] On March 4, 1999, MSHA informed him that, on the basis of its investigation, it had determined that "a violation of Section 105(c) of the Act has not occurred." Williams then instituted this proceeding with the Commission on April 2, 1999, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

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

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

Background

Oasis Contracting, Inc., provides temporary contract labor for various coal companies in the southern coal fields of West Virginia. Anthony Williams began working for Oasis on September 12, 1997. Since he had never worked as a miner, Oasis provided him with new miner training. He was then assigned to work as a general laborer at the Upper Big Branch underground coal mine operated by Performance Coal Company.

Williams worked both above ground and underground for Performance, operating scoops and "supply motors," taking care of belt lines and working as a supply man, "inloader" operator and welder. All of this work was considered "outby work," that is, it was not directly involved with the production of coal at the face. On August 26, 1998, Williams received his miner's certification.

Williams was laid-off by Performance on September 16, 1998. He called Philip Farley, owner of Oasis, to find out why he had been laid-off. Farley checked into the matter and informed Williams that Performance considered his work to be unsatisfactory. Farley also advised Williams that if he had an opening at another coal company, for which Williams was qualified, he would give him a second chance.

On December 7, 1998, the Complainant went to Oasis' office to find out if there was any work available for him. After being advised that there was none, he left the office only to return a few minutes later to request his "bonus." The "bonus" was really a yearly clothing allowance provided for Oasis employees working as miners. On being informed that he was not entitled to the allowance since he was not working, he began talking in a loud voice and using profanities to the woman in the office concerning the lack of work and allowance. He had to be asked to leave by a male employee. As a result of this incident, Oasis terminated his employment.

Williams filed a discrimination complaint with MSHA the next day. In his complaint, Williams alleged:

> I believe I was laid off after Oasis management was pressured by Performance Coal Company. The coal company was afraid that I had knowledge that would get them in trouble. I had received a telephone call from the Johnson family lawyer informing me that I would be subpoenaed to testify in court about a fatal accident that occurred at the Upper Big Branch mine.

(Comp. Ex. 3.) At the hearing, Williams also implied that he was laid-off from Performance because he complained about having to work alone as an inexperienced miner.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800.

I find that the Complainant has demonstrated that he engaged in protected activity, but that he has not established that he was discriminated against as a result of that activity. I also find that the Respondent has shown that the Complainant was terminated for reasons other than his having engaged in protected activity.

Protected Activity

Williams alleges that the protected activity that he engaged in was being a potential witness in a wrongful death action being brought by the family of Danny Johnson.[3] This claim is supported only by the Complainant's uncorroborated testimony. However, giving him the benefit of the doubt, I find that he did engage in protected activity.

The Respondent questions whether being a potential witness in a civil case can be protected activity. I find that in this case it was.

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), states that a miner has engaged in protected activity when he has acted as follows: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted *any proceeding* under or *related to this Act* or has testified or *is about to testify in any such proceeding*;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." (Emphasis added.)

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[3] It was never stated at the hearing against whom the wrongful death action was being brought; I am assuming it was Performance Coal Company.

While there does not appear to be any law on this point, I find that a wrongful death case based on an alleged safety violation at a mine is a proceeding related to the Act. Thus, it follows that a person about to testify in such a proceeding is engaging in protected activity.

Motivation for Discharge

The Complainant has failed to establish that he was discharged because he was a potential witness in the wrongful death case. To prevail in this matter, Williams must show not only that he was laid-off by Performance because of his protected activity, but also that he was terminated by Oasis for the same reasons.[4] While he has presented evidence that he engaged in protected activity and that he was laid-off and terminated, respectively, he has presented no evidence to connect the protected activity with the adverse action.

As the Commission has frequently acknowledged, it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). That is because "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Chacon*, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965). The Commission has "listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action." *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510).

As alleged in his complaint, Williams testified that he was called sometime in June or July by an investigator working for the Johnson family and told that he could be *subpoenaed* to testify at a trial. He claimed, however, that the only mine people he told about the call were "[j]ust co-workers." (Tr. 179.) Despite this claim, it is apparent that Performance was aware that its employees, including Williams, were being questioned by someone representing the Johnson's.[5]

The fact that Performance knew that Williams had been contacted, however, does not mean that they knew that Williams "had knowledge that would get them in trouble." He did not show that the company knew that he was going to be a witness at the trial. In fact, there is no

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[4] Since Williams was laid off on September 16, 1998, and did not file his complaint until December 8, 1998, had he filed his complaint against Performance it would not have been timely. 30 U.S.C. § 815(c)(2).

[5] Gary Frampton, the Performance superintendent, testified that Williams came to him and told him that "somebody from Mrs Johnson's law firm had tried to contact" him and Williams wanted to know if he should talk to the person. (Tr. 218.)

way the company could have known this since Williams himself did not know it. At the time of this hearing, there had been no trial in the Johnson case and Williams had not even been deposed, much less *subpoenaed* as a witness for the trial. Indeed, there was no evidence offered at the hearing that the civil case had even been filed.

Further, the Complainant did not show that Performance believed that he would testify adversely to its interests. Williams gave a statement to the MSHA and state investigators when the Johnson accident was being investigated. At that time, he told the investigators that the overcast structure which later collapsed "looked sound to me when I left that night." (Resp. Ex. 4 at 2.) In addition, Williams testified that he refused to talk to the investigator, so even the Johnson family did not know what his testimony would be. Consequently, if anyone at Performance considered it at all, the assumption would have been that he would support their case, not "get them in trouble."

The Complainant testified that he observed Danny Jarrell weld a "rusty screwdriver" into the overcast which later collapsed causing the death of Johnson. (Tr. 91-92.) The implication in this testimony was that this was the adverse information that Performance did not want Williams to reveal at a trial. However, as noted, he did not mention this to the state and federal investigators, instead telling them that everything on the overcast looked sound.[6]

Assuming that he gave a false statement during the investigation because, as he said, he did not want to lose his job, this does not explain why he did not mention the screwdriver in his discrimination complaint. By this time he had lost his job. Yet he made no mention of what he allegedly knew either in his formal complaint, (Comp. Ex. 1), or the detailed statement he made to MSHA the next day in support of his complaint, (Resp. Ex. 1).

Thus, it is apparent that not only did Performance not know that Williams was going to be a witness adverse to their interests, but that no one but Williams knew it until the time of this hearing. Accordingly, I conclude that the Complainant has failed to establish that Performance had knowledge of his protected activity.

Williams has also failed to establish that Performance had evidenced hostility toward his alleged protected activity or that there was any coincidence in time between the alleged protected activity and his being laid-off. The telephone call from the Johnson family investigator took place in June or July. Williams was not laid-off until September 16, 1998. Yet he has presented

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[6] Both the West Virginia Office of Miners' Health, Safety and Training investigation report and the MSHA investigation report concluded that out of the 18 "H" beams making up the ceiling of the overcast, only one had been welded and that this weld was insufficient to support the weight placed on the ceiling of the overcast. (Resp. Exs. 5 and 6.) The reports also concluded that "[i]nferior and insufficient bracing was used to support the sidewalls and ceiling." (Resp. Ex. 6 at 6.) Neither report mentions a "rusty screwdriver" and neither the state nor the federal agency issued any citations or orders to Performance as a result of the accident.

nothing to indicate that the telephone call was ever mentioned by anyone from Performance, much less that they displayed animus toward anyone being a witness in the case or him in particular. Nor has he explained why they let him continue to work for at least two and one-half more months before laying him off, if laying him off was motivated by his being a witness against them.[7]

Finally, not only has Williams not demonstrated that he was laid-off by Performance because of the protected activity he engaged in, but even more importantly to a decision in this case, he has failed to show that Oasis was aware of the protected activity at the time he was terminated. Both Philip Farley, the owner of Oasis, and Stephanie Buchanan, the Oasis employee who received the telephone call from Performance asking that Williams be laid-off, denied knowing anything about the protected activity in which Williams claimed he engaged. Frampton denied telling Oasis that the Complainant had engaged in protected activity. Indeed, if Performance were having the Complainant laid-off as a means of discriminating against him for his protected activity, what better way to accomplish it and cover-up the fact than not tell Oasis the truth.

The Complainant has presented no evidence, other than his own assertions, to establish that Oasis terminated him for the protected activity he allegedly engaged in at Performance. There is nothing in the record from which corroboration of his assertions can be inferred. The circumstantial indicia of intent set out in *Chacon*, which were not present against Performance, are even farther removed concerning Oasis. Accordingly, I conclude that Williams was not terminated by Oasis because of any protected activity he may have engaged in while working for Performance.

Adverse Action Not Motivated by Protected Activity

Although the Complainant has not shown that he was discriminated against by Performance or Oasis because of protected activity that he engaged in, I find that even if he had, the companies have demonstrated that the adverse action taken against Williams was for reasons other than his engaging in protected activity. Frampton testified that Williams was laid-off because his work was not satisfactory. He stated that he had talked with the Complainant several months before about the layoff after receiving complaints from several of Williams' supervisors. Williams denied that he had ever been told his work was satisfactory. However, Farley confirmed that Frampton had called him about Williams' work performance. Farley and Buchanan both testified that when Williams was laid off they were told by Frampton that it was because of unsatisfactory work.

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[7] While not exactly necessary to his case, Williams did not show how laying him off would have benefitted the company. If they suspected that he was a hostile witness, certainly laying him off would make him more hostile and more likely to testify against them. Therefore, it seems unlikely that this would have motivated Performance to lay him off.

Moreover, even if Performance's reason for laying Williams off was a pretext for laying him off because of his protected activity, as discussed above, there is nothing to indicate that Oasis was aware of the pretext. Indeed, Oasis told Williams that if work was available with another company, which he could perform, they would give it to him. It was not until he became abusive at the Oasis office that he was terminated.

The Complaint of Working Alone

For the first time, at the hearing, the Complainant alleged that he was laid off by Performance and terminated by Oasis because he complained about working alone as a "red hat."[8] He testified that he complained about this as follows: "I started on that job on a Monday and then Thursday night I finally, you know, met Danny [Jarrell] outside, and I told him that I shouldn't be working by myself as a red hat and besides I need help to get this caught up, I can't keep up." (Tr. 73.)

Williams was apparently under the impression that working alone as a "red hat" violated the Secretary's safety regulations. However, he has not cited, and I have not been able to find, any prohibition in the regulations against new miners being assigned to work alone. There are prohibitions against any miner, not just a "red hat," working alone where hazardous conditions exist at surface metal and non-metal mines, the surfaces of underground metal and non-metal mines and surface coal mines, 30 C.F.R. § § 56.18020, 57.18020 and 77.1700, and in underground metal and non-metal mines, 30 C.F.R. § 57.18025.[9] Curiously, there does not appear to be a similar requirement for underground coal mines.

It is apparent that the mere fact of working alone and being a "red hat" is not a safety violation. And Williams has failed to allege that he was working in hazardous conditions that could have endangered his safety or that he could not be heard or seen by others, which could have made it a violation. In addition, it is not clear from his testimony whether Williams was complaining about working alone because it was a safety violation or because he could not do the job alone.

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[8] Until a new miner has been certified, he is distinguished in the mine as a new miner by wearing a red hard hat. *See* 30 C.F.R. § 75.1720-1.

[9] 30 C.F.R. § § 56.18020, 57.18020 and 77.1700 prohibit a miner being "assigned, or allowed, or . . . required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen." 30 C.F.R. § 57.18025 prohibits any miner being "assigned, or allowed, or . . . required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen."

Accordingly, I conclude that if Williams made such a complaint, and in this regard I find it significant that he did not raise it in his discrimination complaint with MSHA, he was not engaging in protected activity when he did so.[10] Furthermore, even if this was engaging in protected activity, it fails for all of the reasons discussed above with regard to his witness claim.

Order

Accordingly, since the Complainant has failed to show that he was laid-off and then terminated for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Anthony Williams against Oasis Contracting, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Andrew J. Katz, Esq., The Katz Working Families' Law Firm, L.C., 1324 Virginia Street East, Charleston, WV 25301 (Certified Mail)

Ricklin Brown, Esq., Bowles Rice McDavid Graff & Love, PLLC, 600 Quarrier Street, P.O. Box 1386, Charleston, WV 25325-1386 (Certified Mail)

/nj

[10] By not raising this issue until the hearing, the Respondent was not given an opportunity to find or prepare evidence rebutting the claim.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

November 3, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-128
Petitioner	:	A. C. No. 44-06872-03509 A
	:	
v.	:	Kennedy #2
DONALD J. RIFFE, EMPLOYED	:	
BY KNOX CREEK COAL	:	
CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(a).

The Solicitor has filed a motion for leave to file her petition out of time and the operator has filed a response in opposition.

On July 21, 1999, the Secretary issued a notice of proposed civil penalty assessment. The respondent timely contested this assessment by filing a request for hearing within 30 days. The request was received on August 10, 1999. 29 C.F.R. § 2700.26. The Secretary had 45 days after receipt of the contest to file the penalty petition. 29 C.F.R. § 2700.28. Therefore, the petition was due on September 24, 1999, but the Solicitor did not file until October 20, 1999. 29 C.F.R. § 2700.5(d). It was, therefore, 26 days late.

The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). A determination of adequate cause is based upon the reasons offered and the extent of the delay.

In this case the sole basis for the Solicitor's request to permit late filing is her own misunderstanding of procedures followed in her office. She states that she was unaware that she was required to draft a new petition in a 110 (c) case, because in 110(a) cases a petition is automatically generated upon assignment. This Solicitor has handled many mine safety cases. I find that her professed lack of understanding of such basic and simple procedures does not constitute adequate cause. This type of excuse could be made in virtually any case where the Solicitor is late.

In light of the foregoing, it is **ORDERED** that this case is **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203

David J. Hardy, Esq., Maris E. McCambley, Esq., Jackson & Kelly, PLLC, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
November 16, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A.C. No. 46-07711-03660
v.	:	
	:	Mine No. 1
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;[1]
David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) against the respondent, Eagle Energy Incorporated (Eagle Energy), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a).[2] The petition seeks to impose a total civil penalty of $3,300.00 for three alleged violations of the Secretary's mandatory safety regulations.

This matter was heard on April 13 through April 16, 1999, and June 22 through June 23, 1999, in Charleston, West Virginia. Eagle Energy is a large mine operator that is subject to the jurisdiction of the Act.

After approximately two days of testimony, the parties agreed to settle Citation No. 7158529 that concerned an alleged non-significant and substantial (non-S&S) violation of the mandatory safety standard in section 50.10, 30 C.F.R. § 50.10, that requires an operator to immediately notify the Mine Safety and Health Administration (MSHA) in the event of an accidental ignition. Although the accidental ignition occurred at 10:00 a.m. on August 23, 1997,

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[1] Yoora Kim is no longer employed with the U.S. Department of Labor's Office of the Solicitor.

[2] Docket Nos. WEVA 98-45-R, WEVA 98-69 and WEVA 98-81 were severed from Docket No. WEVA 98-39 and stayed by Order dated July 8, 1999.

Eagle Energy did not notify MSHA until later that afternoon at approximately 4:45 p.m. The accidental ignition occurred while a cutting torch was being used to repair a section of track rail. Although a very brief flame emanating from a crack in the mine floor was observed by only one of several miners working on the track repair, several miners saw smoke coming from the vicinity of the crack after the flame presumably had extinguished. Eagle Energy did not report the incident immediately because it believed the ignition was caused by excess acetylene from the cutting torch rather than methane bleeding from the crack.

After hearing a substantial amount of testimony on Citation No. 7158529, the parties had a settlement conference. As a result of the conference, the parties agreed to settle Citation No. 7158529. The parties' agreement, that was approved on the record, resulted in reducing the initial $300.00 civil penalty proposed by the Secretary to a $50.00 civil penalty. The reduction in penalty was based on reducing the degree of negligence attributable to Eagle Energy from high to low.

At the hearing, the parties also agreed to settle Citation No. 7163240 that concerned an alleged non-S&S safeguard violation of section 75.1403, 30 C.F.R. § 75.1403, on September 2, 1997, because of water that had accumulated in depths of approximately two to five inches above the ball of the track between crosscuts 69 and 70 on the 10 Left track entry. The parties agreed to reduce the civil penalty from $500.00 to $300.00. The reduction in civil penalty was based on reducing the degree of Eagle Energy's negligence from high to moderate.

The remaining matter for disposition is 104(d)(1) Citation No. 7163242 that cited an alleged September 2, 1997, S&S violation of the mandatory safety standard in section 75.380(d)(1), 30 C.F.R. 75.380(d)(1), for several areas of extensive water accumulations in the 10 Left intake escapeway. Section 75.380(d)(1) requires each escapeway to be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons." The citation noted, "this condition was reported [in the escapeway book] on August 15, August 22 and August 29, 1997."

I. Statement of the Case

For the reasons discussed herein, the fact of the violation in 104(d)(1) Citation No. 7163242 is supported by the cited extensive water accumulations. The S&S designation is likewise affirmed because it is reasonably likely that such conditions would seriously interfere with both the passage of miners during emergencies, and the removal of disabled persons.

However, with respect to the issue of unwarrantable failure, Eagle Energy's No. 1 Mine is an extremely wet mine with recurring water problems. Eagle Energy has positioned over 100 pumps at locations throughout the mine where water chronically accumulates. The water pumping cycle is that water accumulates to levels significant enough to pump at which time the water pump is turned on. The pump remains on until the water is drained and the pump is turned

off. Significantly, pumps cannot operate continuously because "dry pumping" would burn out the pump motors. Thus, the normal process of pumping water requires waiting for accumulations to occur that are deep enough to pump. Tr. III 119, 146-48.[3]

Since the pumping of water in the Mine No. 1 is an ongoing process, for the reasons discussed herein, the evidence does not support the conclusion that the reference in Citation No. 7163242 to Eagle Energy's previous notations of water accumulations in its weekly escapeway book during the three weeks preceding September 2, 1997, refers to the same water observed on September 2, 1997. Although Eagle Energy obviously was on a heightened state of awareness with regard to its mine's water problems, a heightened state of awareness, alone, does not, as the Secretary suggests, render subsequent violative water accumulations unwarrantable *per se*. Rather, the question of whether a violation is attributable to an operator's aggravated or unjustified conduct must be resolved based on the particular facts surrounding the violation, including examining such factual issues as the duration of water accumulations and the reasons for their existence.

The primary means of pumping water to the surface from Eagle Energy's 10 Left intake escapeway is pumping water onto the moving beltline. Using this method, the water is absorbed by coal on the beltline and carried to the surface. However, the beltline in the 10 Left section was dismantled on July 9, 1997, when Eagle Energy ceased continuous mining operations to prepare for longwall operations. The secondary means of pumping water after the beltline had been dismantled on July 9, 1997, was converting the incoming fresh water line, normally used for dust and fire suppression during mining operations, to a discharge line.

However, on Labor Day weekend, Saturday, August 30, 1997, through Monday, September 1, 1997, the final stages of the longwall move were performed. Thus, at approximately 4:00 p.m. on Sunday, August 31, the discharge line was re-converted to a fresh waterline to facilitate longwall preparations in anticipation of longwall mining and normal beltline operations commencing at 7:30 a.m. on Monday, September 1, 1997. However, as a consequence of several unanticipated beltline breakdowns, operations did not begin until the afternoon of Tuesday, September 2, 1997, at which time the pumping of water on the beltline could resume. Thus, at the time the cited water conditions were observed during the early morning hours of September 2, 1997, it is undisputed that Eagle Energy had neither the primary, nor the secondary, means of pumping water available. Given these undisputed, significant mitigating circumstances, as well as additional mitigating factors, 104(d)(1) Citation No. 7163242 shall be modified to a 104(a) citation to reflect that the cited condition was not a consequence of Eagle Energy's unwarrantable failure.

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[3] The transcription service has prepared the transcript of this six day proceeding by volume rather than consecutive pages. Consequently, transcript references will note days one through six of the trial by Roman numeral followed by the page number.

II. Preliminary Findings of Fact

On August 31, 1996, Eagle Energy, a subsidiary of A.T. Massey Coal Company, acquired the Mine No. 1 from Eagle Nest, Inc., a subsidiary of Bethlehem Steel Corporation. Eagle Energy employs approximately 140 people at its Mine No. 1. There are about 84 miners who work underground in addition to 30 to 40 supervisors.

Eagle Energy's Mine No. 1 is a wet or damp mine. Water seeps out from the mine top and/or bottom, and accumulates in various locations throughout the mine. Water also accumulates during a heavy rainfall, flowing down to the underground mine from the surface. In addition water seeps into the mine from an adjacent abandoned mine that is inundated with water.

The 10 Left section was developed as a three entry system with the continuous mining machine. While the continuous miner was advancing in the section, the return air entry was the No. 1 entry, the No. 2 entry served as the conveyor belt and track entry, and the No. 3 entry was the primary escapeway intake air entry. The three entries were separated by stoppings. An incoming six-inch diameter fresh water line was installed in the No. 2 belt/track entry to bring fresh water to the working face and to provide fire protection along the belt. While the 10 Left section was being mined by the continuous miner, water was being removed from the section by pumping water onto the beltline through discharge hoses connected to pumps. The water was absorbed by the coal on the beltline and carried to the surface. Longwall mining was occurring in the 9 Left section while continuous mining progressed in the 10 Left section.

On July 9, 1997, continuous mining in the 10 Left section was completed and the section became "non-producing." The continuous miner was then moved to the 2 North section of the mine. In anticipation of bringing the longwall from the 9 Left section to the 10 Left section, on July 9, 1997, Eagle Energy began dismantling the 10 Left belt conveyor to move it from the No. 2 entry to the No. 1 entry. In dismantling the belt conveyor, Eagle Energy lost its ability to pump water out of the section.

On July 10, 1997, Mine Safety and Health Administration (MSHA) inspector Albert "Benny" Clark was at the Mine No. 1 conducting a regular "triple A" inspection. As part of his inspection that day, Clark traveled the 10 Left intake escapeway (the No. 3 entry) to determine if Citation No. 7160006 issued by MSHA inspector Andrew Nunnery on June 24, 1997, should be terminated. Citation No. 7160006 cited a non-S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left No. 3 escapeway entry ranging "in depth from 1" to 14" with slick and muddy bottom at crosscut 49 to 48 for a distance of approx. 100 feet." Gov. Ex. 29. Nunnery characterized Eagle Energy's degree of negligence as "moderate" even though normal continuous mining operations were in progress, and, unlike this case, the beltline was operational and available for removing water from the entry.

Clark found there was water at the location cited in Citation No. 7160006. Believing it was the same water cited by Nunnery, Clark issued 104(b) Order No. 7163178 on July 10, 1997, for Eagle Energy's alleged failure to abate Citation No. 7160006. However, 104(b) Order No. 7163178 was subsequently vacated during a Health and Safety Conference on procedural grounds.

Inspector Clark also issued Citation No. 7163177 on July 10, 1997, citing an S&S violation of section for 75.380(d)(1) for water accumulations between 1 and 24 inches in depth between the 69 and 71 crosscuts for a distance of 200 feet. Clark testified that he believed the violation was due to Eagle Energy's unwarrantable failure because there were notations in the weekly examination book of similar water accumulations for the preceding five weeks. However, Clark testified he was persuaded by Safety Director Jeffrey Bennett and then Superintendent Stan Edwards to issue Citation No. 7163177 as a 104(a) citation rather than an unwarrantable 104(d) citation because of their assurances that future escapeway water problems would be prevented.

Although safety director Bennett Energy provided assurances that Eagle Energy's water problems would be addressed, it was apparent that Eagle Energy could not abate Citation No. 7163177 issued by Clark, as the normal method of pumping water from the section was no longer available because the beltline had been dismantled. Clark initially suggested that Bennett could run a discharge line approximately 1,000 feet to the Mudlick Mains discharge line. However, upon further reflection, Clark conceded that 1,000 feet was too long a distance to run a water line. Specifically Clark testified, "[Bennett and I] throwed (sic) it around. We was (sic) talking about ways of getting rid of [the water]. We discussed if we could run it over to Mudlick, and there was no way. It was too far." Tr. III 90.

As an alternative, Inspector Clark suggested that Bennett should convert the section's fresh water line to a discharge line. Bennett agreed to reverse the fresh water line. Citation No. 7163177 was terminated by Clark on July 11, 1997, after the cited water accumulations had been discharged through the fresh water line. Eagle Energy did not contest Citation No. 7163177, and it paid a civil penalty of $362.00. Clark testified that Eagle Energy continued to follow his suggestion after July 11, 1997, by continuing to use the fresh water line as a discharge line. Tr. III 124.

The primary escapeway route from the 10 Left section was the 10 Left intake escapeway into the Cook Mountain Mains. However, roof falls occurred in the Cook Mountain Mains on August 4, 1997, and August 22, 1997. The second roof fall was removed on August 29, 1997, the Friday before Labor Day. While the Cook Mountain Mains was impassable, the primary escapeway route was re-designated as the 10 Left intake escapeway into the Mudlick Mains. During this period when the Cook Mountain Mains could not be used as an escapeway, the cited areas of water accumulations in the 10 Left intake escapeway that led to the Cook Mountain Mains were not designated as an escapeway route. Thus, the cited areas of water accumulations were not in an escapeway route from August 22 until August 29, 1997, when these areas were reestablished as the primary escapeway in preparation for the anticipated start of 10 Left

Longwall operations beginning at 7:30 a.m. on Monday, September 1, 1997.

On August 13, 1997, while continuing his Triple A inspection, Clark issued Citation No. 7163218 citing another S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left intake escapeway measuring 1 to 15 inches in depth with slick and muddy bottom at crosscuts 97, 98 and 99.[4] Significantly, Clark did not characterize this violation as attributable to Eagle Energy's unwarrantable failure, despite the fact that, also unlike this case, the fresh water line was available for use as a discharge line. The citation was terminated on August 14, 1997, after the water was pumped and discharged through the fresh water line. Eagle Energy did not contest Citation No. 7163218, and it paid the $362.00 civil penalty proposed by the Secretary.

Hourly miners did not work at Eagle Energy's Mine No. 1 on Labor Day weekend from Saturday, August 30 through Monday, September 1, 1997. On that weekend, the mine was staffed with 20 to 30 management personnel who had decided to complete the longwall move on their own. On Sunday, August 31, 1997, at approximately 4:00 p.m., the discharge line was converted back to a fresh water line to facilitate impending longwall operation. The fresh water line was needed to power up the shields for dust suppression, thus it could not be turned back to a discharge line without interfering with longwall start-up. When the water line was converted to fresh water, the pump lines in the 10 Left intake escapeway were re-directed to the belt conveyor that was now located in the No. 1 entry.

On Monday morning on September 1, 1997, Eagle Energy started the beltline. However, it pulled apart at several locations and had to be repaired. Thus, longwall operations were delayed until the following day. On Tuesday, September 2, 1997, at approximately 7:00 a.m., Eagle Energy once again attempted to start the belt conveyor, but it again pulled apart in several locations.

Shortly after the belt pulled apart for the second time, Clark, and Madison Field Office Supervisor Terry Price, arrived at the Eagle Energy mine at approximately 8:30 a.m. on Tuesday, September 2, 1997, to continue the Triple A inspection. After reviewing the preshift and on shift books, Clark and Price traveled by mantrip to the 10 Left section. Clark and Price were accompanied by Safety Director Bennett. Upon arriving in the 10 Left section Clark and Price noted general damp and wet conditions. The No. 1 belt entry had several water accumulations and was generally damp; the No. 2 track entry also contained several areas of water accumulations, soft ribs, and a hooved bottom in several places; and the No. 3 intake escapeway was damp to wet, had several water accumulations, loose ribs at different locations, and a hooved bottom in some locations.

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[4] Citation No. 7163218 states the violative water accumulations were in the 9 left section. Clark testified the reference to the 9 left section is erroneous, and that the site of the violation was in the 10 Left section. Tr. III 21-22.

After Clark terminated citations that previously had been issued at the longwall face, Clark, Price and Bennett started walking down the track entry. At crosscut 70, the inspection party came across a large water accumulation, which extended into the crosscut right up to the stopping between the track and intake entries. Based on the amount of water he observed in the vicinity of the 70 crosscut in the track entry, Clark knew there would be water at the 70 crosscut in the intake escapeway.

In order to get into the intake escapeway, the inspection party traveled along the edge of the rib to get past the accumulation in the track entry to the nearest mandoor between the track and intake entries. When they arrived at the 70 crosscut at the intake escapway, as expected, Clark observed water accumulations at this location as well. In fact, the water at the 70 crosscut in the intake escapeway and at the 70 crosscut in the track entry was one continuous water accumulation. The distance between the track entry and the intake escapeway is about 100 feet.

At crosscut 70 in the intake escapeway, Clark waded out into the water accumulation until the water was about ½ to 1 inch from the top of his boots. At that time Clark was wearing metatarsal boots that are approximately 13 inches in height. Clark reached out as far as he could with a straight arm and took several measurements of the water's depth with his retractable metal tape line. Clark held the tape line straight up and down and measured 15 inches of water. He did not try to go any further out into the water because the water was murky and the depth of the water was over his boots. Clark also observed that the water accumulation in the intake escapeway in the vicinity of the 70 crosscut extended from rib to rib (about 20 feet) and was about 110 feet from shallow end to shallow end. Clark testified that throughout his inspection of the intake escapeway, Bennett did not object to the method of measurement or in any way demonstrate that he disagreed with the measurements taken by Clark. Tr. II 214, 225, 237.

The inspection party started walking the intake escapeway in an outby direction. When they got to crosscut 60, Clark observed another sizeable water accumulation. Clark once again waded into the water as far as he could go without letting the water go over the top of his boots and measured 15 inches of water. Clark also observed water extending from rib to rib, 90 feet in length. Because he could not see the mine floor, Clark determined the accumulation was too hazardous to walk through. Instead the inspection party avoided the accumulation by backtracking to the nearest mandoor, traveling outby in the track entry to the next mandoor, and crossing back over into the intake escapeway.

Once back in the intake escapeway, the inspection party continued traveling in an outby direction. Between crosscuts 51 and 52, Clark observed another water accumulation measuring 12 inches deep. He observed the water extended from rib to rib, 40 feet in length. Clark determined the water accumulation was too hazardous to walk through, so the inspection party backtracked to the nearest mandoor, traveled outby in the track entry, and re-entered the intake escapeway through the next mandoor.

The inspection party continued walking the intake escapeway in an outby direction. About 20 feet inby crosscut 49, Clark observed a water accumulation which extended for about 120 feet in length to crosscut 48. Clark measured the water depth and determined the water was at least 15 inches deep. The inspection party did not walk through the accumulation. Instead, they backtracked to the nearest mandoor and traveled outby to the surface via the track entry.

In addition to the depths and extent of the water accumulations, Clark observed that loose coal from the ribs had rolled off into the water. Clark also noted the mine floor was slippery when he waded into the water accumulations and that it was uneven with slopes, potholes and hooves in some locations. The irregularities in the mine floor made it difficult for Clark to determine whether the water got deeper or more shallow and contributed to the potential hazard. There were also pieces of wood floating in the water, and coal deposits and discharge lines sticking out of the water. While they were still underground, Clark informed Bennett that he was going to issue a citation for the water in the escapeways.

Once the inspection party got back to the surface, Clark checked the weekly examination books for the 10 Left escapeway. The weekly escapeway book contains entries of firebosses that examine the escapeways on a weekly, rather than daily basis. Price stated that, with the exception of the area in the working section, examiners normally were not in the intake escapeway more than once per week. Clark found that water accumulations in the general vicinity of the water he had just observed in the 10 Left intake escapeway on September 2, 1997, had been noted by entries in the weekly examination book on August 15, August 22 and August 29, 1997. However, Clark did not see any indication on the weekly examination reports that any action (*i.e.*, pumping) had been taken to correct the hazardous condition. As a result, Clark concluded that no corrective action had been taken. Tr. V 344.

Clark's conclusion was, in part, based on his comparison of the entries for the 10 Left intake escapeway with the Mudlick intake escapeway. In this regard, Clark saw that entries of fireboss Reams reflected "water over the boots" in the Mudlick Intake on August 14, and action taken entries of water "being pumped" or "pumped down." In contrast, when Reams observed "water over boots" in the 10 Left intake, he reported his observation, but there is no report, either by Reams, or another fireboss, that any corrective action had been taken. Similarly, fireboss Fisher reported a hazardous water accumulation in the Mudlick Intake on August 21 and noted that the water was being pumped. In contrast, while Fisher noted water accumulations in the 10 Left intake on August 22, neither he, nor another fireboss, noted that any action was being taken to correct the hazardous condition.

After examining the weekly escapeway examination book, Clark looked at the daily preshift and onshift reports. Beginning with the third onshift report on August 29, 1997, water at crosscut 70 in the 10 Left No. 2 track entry was reported under the column marked "Violations and other Hazardous Conditions Observed and Reported" on nearly all of the preshift and onshift reports from August 29 to September 2, 1997. Although the condition was noted as "reported," there are no entries reflecting that action was taken to discharge the noted water before the

discharge line was converted back to a fresh water line on August 31, 1997.

Although Bennett, who was with Clark while he was examining the reports, did not tell Clark that corrective action which was not listed in the books had been taken to pump the water out of the intake escapeway, Production Director John Adkins and Assistant Superintendent Harry Walker testified materials were stored in the intake escapeway and scoops traveled the escapeway during the longwall setup. Tr. III 76-77; Tr. IV 167-70; Tr. V 100-01. Walker and Adkins testified pumps were continually being turned on and off to discharge water accumulations. Tr. V 100-01; Tr. IV 141.

As a result of his observations underground and his examination of the books in the mine office, Clark concluded that the intake escapeway was not being maintained in a safe condition. Clark told Bennett that the citation was going to be issued as an unwarrantable failure violation because the hazardous condition had been repeatedly reported in the weekly examination books without any action being taken to correct the problem. Tr. III 120-121, 216. Consequently, Clark issued 104(d)(1) Citation No. 7163242, alleging a significant and substantial violation of 30 C.F.R. § 75.380(d)(1). Tr. III 34, 36, 39-40, 41-45.

Clark concluded that the violation was significant and substantial because the water in the accumulations was muddy, the mine floor could not be seen, even at the shallow end, and the bottom was slick. These conditions created a slipping or stumbling hazard to miners, especially to miners who may be hurrying to get out of the mine because of an accident or disaster. Tr. III 34, 39-40, 211. In addition, there was material floating in the water (*i.e.*, wood) and things sticking out of the water (*i.e.*, lumps of coal and discharge lines). Tr. III 211. The wood pieces observed floating or sticking out of the water looked like "half-headers" used for blocking or capping timber. Tr. III 217.

Clark concluded the violation was the result of the Eagle Energy's unwarrantable failure to comply with the standard because: management was aware of the hazardous water accumulations since the hazardous accumulations had been reported in the weekly examinations reports for at least three weeks prior to the inspection and there were no notations that corrective action had been taken; Eagle Energy had been warned on prior occasions about water in its escapeways; and Eagle Energy had a history of previous violations for the same violative condition. Tr. III 41, 233, 261, 266.

The belt was repaired by the afternoon of September 2, 1997, between 12:00 p.m. and 3:00 p.m. at which time the cited water accumulations could be pumped onto the moving beltline and transported to the surface. 104(d)(1) Citation No. 7163242 was terminated at 10:30 a.m. on September 4, 1997.

III. **Further Findings and Conclusions**

At the outset, it is a fundamental principal that the Mine Act imposes on the Secretary the burden of proving each element of 104(d)(1) Citation No. 7163242, *i.e.*, that the violation occurred, that it was significant and substantial, and that it was attributable to Eagle Energy's unwarrantable failure. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152-53. The testimony of Inspector Clark and Supervisory Inspector Price was sincere and credible. Their testimony establishes that the fact of the violation, as well as its S&S nature, are self evident. While I am cognizant of MSHA's apparent frustration regarding Eagle Energy's repeated failure to control its water problems despite its assurances, the facts in this case, given the Secretary's burden of proof in the face of significant mitigating circumstances, do not support a finding of unwarrantable failure.

A. Fact of the Violation

104(d)(1) Citation No. 7163242 cites a violation of the mandatory standard in section 75.380(d)(1) that requires each escapeway to be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons." A mandatory safety standard must be enforced consistent with its intended purpose. Although Eagle Energy provided testimony that an injured miner on a stretcher ordinarily would be removed from the mine by the No. 2 track entry rather than the No. 3 intake escapeway, it is the No. 3 intake escapeway, rather than the track entry, that is the primary means of escape in the event of exigent circumstances such as a fire or explosion. Thus, the propriety of the intake escapeway's conditions with respect to the cited water accumulations must be viewed in the context of miners having to use the escapeway in emergency conditions when they are in a hurry to evacuate the mine.

The Commission has determined that the language in section 75.380(d)(1) is "plain and unambiguous" in that it imposes on an operator an obligation to maintain escapeways that pass the general functional test of "passability." *Utah Power and Light*, 11 FMSHRC 1926, 1930 (October 1989). Eagle Energy's assertion that the nature and extent of the cited water accumulations were not hazardous, or in violation of section 75.380(d)(1), is belied by its repeated entries of similar water conditions requiring corrective action in its weekly examination book. Moreover, Eagle Energy has not refuted the testimony of Clark and Price that reflects that they, as well as Bennett, repeatedly went through mandoors to circumvent areas of the intake escapeway that were impassable.

Finally, in denying the violation, Eagle Energy seeks to have it both ways. Eagle Energy admits it had no means of pumping water accumulations in the No. 3 escapeway from 4:00 p.m. on Sunday, August 31, 1997, when the discharge hose was converted to a fresh water line, until the morning of Tuesday, September 2, 1997, when the cited conditions were observed by Clark and Price in the presence of Bennett. In defending against the unwarrantable failure charge,

Safety Director Adkins testified that, absent pumping, water rapidly accumulated at locations of chronic accumulations at depths of approximately eight inches in a 24 hour period. Tr. IV 175-76. If water quickly re-accumulated, as Eagle Energy contends, then it is unreasonable to argue an absence of significant water accumulations on Tuesday morning given Eagle Energy's inability to discharge water since Sunday afternoon.

In short, the evidence amply supports the conclusion that the cited water accumulations were significant and extensive ranging up to 15 or more inches in depth and extending over areas over 100 feet in length. It is obvious that such water accumulations would impede the progress of miners during an emergency evacuation, particularly miners who are "disabled" by virtue of injury. Accordingly, the Secretary has demonstrated the fact of a section 75.380(d)(1) violation.

B. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

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

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

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

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

With regard to the first element of *Mathies*, the Secretary has demonstrated a violation of the cited mandatory standard. Turning to the second and fourth elements of the *Mathies* test, there is little doubt that the cited extensive water accumulations in areas of murky, slick and uneven bottom, created the discrete safety hazard of slipping and falling, particulary during an emergency evacuation, that was reasonably likely to result in injury of a reasonably serious nature.

The remaining element of Mathies requires an analysis whether there was a reasonable likelihood that the hazard of slipping and falling would result in injury. The Commission visited the issue of the significant and substantial nature of water accumulations in escapeways in *Eagle Nest, Incorporated*, 14 FMSHRC 1119 (July 1992). The *Eagle Nest* case involved the same Mine No. 1 that is the subject of this proceeding when the mine was operated by a predecessor of Eagle Energy. The Commission concluded, that while the exercise of caution by miners using an escapeway with violative water accumulations may lessen the chances of a slip and fall injury, the exercise of caution does not mitigate the hazard. 14 FMSHRC at 1123. Rather, it is the significance of the hazard and the contribution of that hazard to potential injury that is determinative of the S&S issue. *Id.*

The cited conditions created a significant likelihood of slipping on the slick escapeway floor as well as the reasonable likelihood of falling over a submerged obstacle, or stumbling in a pothole. Consequently, the Secretary has demonstrated that the cited violation was properly designated as significant and substantial.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Without question, if the Secretary can demonstrate the cited water accumulations in the No. 10 Left intake escapeway are the same accumulations that had been repeatedly ignored without any remedial pumping after they had been repeatedly noted in the weekly examination book on August 15, August 19, and August 29, 1997, the cited violation is attributable to Eagle Energy's unwarrantable failure. Since Clark and Price do not have any personal knowledge concerning the condition of the No. 3 escapeway from August 15 until their September 2, 1997, inspection, the Secretary seeks to establish an unwarrantable failure based on circumstantial evidence.

The Commission has recognized that the Secretary may establish the elements of a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). However, the inference must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. Id. at 1138. Here, the Secretary relies on the repeated entries in the preshift examination book since August 15, 1997, without entries of corrective action, to support the inference that the cited water accumulations existed since August 15, 1997, without any efforts to remove these slip and fall hazards. Ordinarily, such circumstantial evidence would be compelling. However, this is no ordinary case.

As a preliminary matter, although the Secretary throughout this proceeding asserts that Clark and Price reached the firm conclusion that the water accumulations they observed in the No. 3 entry on September 2, 1997, was the same water, without any remedial pumping, as the accumulations noted in the weekly examination book during the preceding three weeks, an examination of their testimony supports no such conclusion. Clark's testimony that he concluded no pumping had been performed in the No. 3 intake escapeway from August 15, 1997, through the time of his observations during the morning of September 2, 1997, is inconsistent with his other testimony, inconsistent with his assessment of Eagle Energy's degree of negligence, and, inconsistent with Price's testimony.

Clark conceded he had no personal knowledge of the conditions in the No. 3 entry from August 15, 1997, until his September 2, 1997, inspection. Tr. III 104. Clark also conceded that the water accumulations he observed in the No. 3 entry were at locations where there were chronic water problems, and that water would re-accumulate in these areas after a pump had been turned off. Tr. III 147. Thus, in effect, Clark agreed that his September 2, 1997, observations of water accumulations at the same locations that were previously noted in the weekly examination book did not mean that those areas had not been recently pumped.

Finally, Clark testified that, if any pumping had been done despite the fact that it was not reported, the pumping was inadequate since the water kept accumulating. Tr. III 78; Tr. V 344. However, repeated accumulations of water was a fact of life at the Mine No. 1. As previously noted, accumulations of water could not be pumped until the degree of accumulations was adequate to warrant turning on a pump. The fact that water accumulations had returned, is not, as Clark concluded, evidence of an unwarrantable failure. In fact, Clark testified water accumulations at various locations were chronic and that he "had run into this before. Crosscuts

48 to 49 had been cited before with accumulation, and 70 had been cited before." Tr. III 146. Rather, it is the duration of the cited water conditions that is important in determining whether Eagle Energy committed an unwarrantable failure.

Significantly, Clark attributed the subject violation to Eagle Energy's high degree of negligence rather than a reckless disregard. It is difficult to understand why Clark would not characterize Eagle Energy's behavior as a "reckless disregard" if Clark had concluded Eagle Energy had, in fact, ignored repeated entries in its examination books over a period of approximately four weeks.

Moreover, Price conceded there must have been some efforts to discharge water accumulations at the cited locations in the No. 3 entry. Price testified that, "there may have been some pumping because they were hooked up," although he also believed "some of the water was the same water." Tr. IV 31. With respect to the question of reckless disregard, Price testified a reckless disregard requires evidence of an intentional failure to comply, and "that's not the case here." *Id.*

Finally, on August 13, 1997, Clark issued Citation No 7163218, not in issue here, for water accumulations in the No. 3 escapeway. The cited water accumulations on August 13, 1997, were not attributed to Eagle Energy's widespread failure to address pumping in that the violation was not attributed to Eagle Energy's unwarrantable failure. The Secretary has not provided any evidence to demonstrate that two days later, on August 15, 1997, Eagle Energy began a course of conduct wherein it repeatedly ignored water accumulations in its escapeway. To the contrary, Clark admitted Eagle Energy had continued to follow his July 10, 1997, recommendation that it discharge water through the fresh water line stating that "they felt it was a good way to do it." Tr. III 124.

Given the evidentiary facts at the time of Clark's September 2, 1997, inspection, consisting of recurring water accumulations, installed pumps, and a temporary inability to discharge water, the Secretary has failed to satisfy the *Mid-Continent* test that requires the evidence to support the ultimate inference that the No. 3 escapeway had not been pumped since August 15, 1997.

Having determined that the Secretary has not demonstrated Eagle Energy's longstanding failure, over a period of weeks, to discharge the cited water accumulations, we turn to the traditional inquiries for determining whether an operator's conduct evidences an unwarrantable failure. The Commission has identified the following relevant factors that may be indicative of unwarrantable conduct: (a) the extent of the violative condition; (b) the length of time that it has existed; (c) whether an operator has been placed on notice that greater efforts are necessary for compliance; and (d) the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (August 1992).

a. Extent

It is true that the water accumulations were extensive. However, the evidence reflects that, from approximately 4:00 p.m. on Sunday August 31, 1997, until the cited accumulations were observed by Clark and Price on Tuesday morning, September 2, 1997, Eagle Energy lacked both the primary means of discharging water on its beltline and the secondary means of discharging water by using its fresh water line as a discharge line.

On several prior occasions MSHA elected not to cite Eagle Energy for an unwarrantable failure for Eagle Energy's failure to keep its escapeway clear. For example, Eagle Energy lacked any discharge method for pumping water before Clark suggested using the fresh water line for discharge when Clark issued Citation No. 7163177 on July 10, 1997, for escapeway water accumulations. Similarly, Eagle Energy's discharge line was operational when Clark issued Citation No. 7163218 on August 13, 1997, for escapeway water accumulations. In effect, MSHA now seeks to undo its previous restraint with respect to alleging an unwarrantable failure under circumstances where Eagle Energy temporarily had no means of pumping the cited water accumulations.[5]

b. Duration

The Secretary could still prevail on the issue of unwarrantable failure if she could establish, by a preponderance of the evidence, that the cited water conditions existed for a significant period of time prior to the August 31, 1997, conversion of the discharge line to fresh water. However, Clark and Price, as well as Eagle Energy witnesses Adkins and Walker, all testified that water accumulations chronically reoccur over a short period of time. Thus, the presence of accumulations alone, is inadequate to demonstrate an inexcusable delay in clearing the cited water conditions given Eagle Energy's short term inability to discharge water.

c. Notice

The Secretary's heavy reliance on similar previous citations, in addition to notations of water accumulations in examination books, as a basis for demonstrating that Eagle Energy was on notice only serves to establish the obvious. Adkins testified without contradiction that the Mine No. 1 was engineered to permit it to be located under an inactive mine. Therefore, entries and crosscuts run in directions that impede water drainage. Tr. IV 140-41. The fact that Eagle Energy knows that its Mine No. 1 is a wet mine does not make all violations for water accumulations unwarrantable *per se*. The issue of unwarrantable failure must be determined on a case-by-case basis. Here, the Secretary has not carried her burden of demonstrating that this is a case of unwarrantable failure.

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[5] I am not suggesting that Eagle Energy did not have an obligation to keep the escapeway clear of hazardous water conditions on September 2, 1997. I am simply stating that its failure to do so was not a manifestation of aggravated or unjustifiable conduct given the compelling mitigating circumstances in this case.

d. Compliance Efforts

Finally, we turn to the question of Eagle Energy's compliance efforts. Significantly, Eagle Energy has over 100 pumps placed in areas of chronic water accumulation throughout the mine. There is no evidence that Eagle Energy failed to use its fresh water line for discharge in the No. 10 Left section since the line was converted on July 10, 1997, after the beltline had been dismantled. In fact, Price testified the pump lines had been connected to discharge water. As previously noted, the fact that Eagle Energy had no means of pumping water during the final interim stages of the longwall setup when the subject citation was issued on September 2, 1997, does not relieve it of its obligation to keep the escapeway clear. However, it does not follow that its failure to do so must be attributable to its unwarrantable failure.

Although the Secretary has failed to demonstrate the most common elements of unwarrantable behavior, it should be noted that there are additional mitigating circumstances in this case. The subject citation was issued on the morning after Labor Day weekend when Eagle Energy had not been staffed by regular hourly employees. In addition, there were two relevant roof fall events. The last roof fall that occurred on August 22, 1997, was not cleared until the late evening of Friday, August 29, 1997, when the Labor Day weekend began. Tr. IV 205-06. That roof fall diverted the attention of Eagle Energy management personnel who were already short-staffed on Labor Day weekend. Moreover, the roof falls resulted in temporarily altering the escape route to exclude areas containing the cited accumulations until the roof fall debris was removed.[6] Therefore, giving priority to clearing the roof fall is understandable.
The roof fall problem is an additional mitigating factor.

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[6] Without personal knowledge, the Secretary relies on conflicting deposition testimony, not introduced at trial, reflecting that the respondent's discharge line may have been converted to fresh water several days earlier than 4:00 p.m on Sunday, August 31, 1997. *Sec. Reply Br.* at 2-3. As a threshold matter, this evidence was not entered at trial and may not be considered. However, I note parenthetically, that the Secretary has not rebutted the fact that the escapeway was rerouted from August 22, 1997, when the second roof fall occurred, until the late evening of Friday, August 29, 1997, when the roof fall was cleared.

Thus, on balance, the evidence fails to establish that Eagle Energy's actions were so egregious that they constituted a reckless disregard, or, that its behavior otherwise evidenced aggravated or unjustifiable conduct.[7] Accordingly, 104(d)(1) Citation No. 7163242 shall be modified to a 104(a) citation thus removing the unwarrantable failure charge.

However, I am retaining the high degree of negligence attributed to Eagle Energy to reflect that, in the final analysis, despite mitigating circumstances, Eagle Energy was still responsible for maintaining escapeways in this wet mine in a passable condition, and, for ensuring that pertinent entries were made in the examination books to reflect actions taken to address hazardous conditions noted. Therefore, I am imposing the $2,500.00 civil penalty initially proposed by the Secretary for Citation No. 7163242 to reflect the serious gravity of the violation, Eagle Energy's history of failing to control water accumulations in escapeways, and Eagle Energy's admitted repeated failure to note corrective actions in its examination books.[8]

ORDER

ACCORDINGLY, IT IS ORDERED that 104(d)(1) Citation No. 7163242 **IS MODIFIED** to a 104(a) citation to reflect that the cited violation of section 75.380(d)(1) is not attributable to Eagle Energy's unwarrantable failure.

IT IS FURTHER ORDERED that Eagle Energy shall pay a $2,500.00 civil penalty in satisfaction of Citation No. 7163242.

IT IS FURTHER ORDERED, consistent with the parties' settlement agreements reached at trial, that Eagle Energy shall pay civil penalties of $50.00 in satisfaction of Citation No. 7158529, and $300.00 for Citation No. 7163240.

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[7] I am also not suggesting that high negligence can never provide a basis for an unwarrantable failure finding.

[8] I credit Clark's testimony that he had previously warned Bennett "about not showing any corrective action in the [examination] book[s]." Tr. III 77. Moreover, the essence of Eagle Energy's defense in this case is that it had pumped water where water hazards had been noted on examinations despite failing to note corrective action in the weekly escapeway and on-shift examination books.

IT IS ORDERED that Eagle Energy's total civil penalty of $2,850.00 shall be made within 40 days of the date of this decision. Upon timely payment of the $2,850.00 civil penalty, this matter **IS DISMISSED**.[9]

Jerold Feldman
Administrative Law Judge

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[9] I have also considered several post-hearing motions filed by the respondent, as well as the Secretary's responses thereto. The respondent's motions to strike evidence of Citation No. 7187806 issued on August 22, 1999, concerning a methane explosion, proffered as an attachment to the Secretary's proposed findings, and, the portions of the deposition testimony of Superintendent Stanley C. Edwards, proffered as an attachment to the Secretary's reply brief, **ARE GRANTED,** as these documents were not presented, or otherwise referred to, in the Secretary's case. The admission of these documents at this late, post-hearing stage would deprive the respondent of its right to cross examination.

The respondent also filed a motion to strike the Secretary's reply brief because the filing of reply briefs was not authorized when the post-hearing briefing schedule was discussed on the record at the culmination of the hearing. In view of the fact that the respondent was provided with the opportunity to respond, and, has responded, to the Secretary's reply brief, the respondent's motion to strike **IS DENIED**.

In addition, the respondent filed a motion seeking a show cause order requiring the Secretary to demonstrate why this matter should not be dismissed because of the Secretary's October 12, 1999, correspondence requesting that I consider the Commission's recent decision in *Windsor Coal Company*, 21 FMSHRC 997 (September 1999). I do not view the respondent's request for a show cause order as a serious proposal as the Secretary's October 12, 1999, correspondence only requested that I do what I am already obligated to do - - consider all relevant case law. Accordingly, the respondent's request for an Order to Show Cause **IS DENIED**.

Finally, the respondent has also requested attorney's fees for legal expenses associated with its post-hearing motions. Notwithstanding the fact that the respondent has not shown that it is a small entity eligible for reimbursement under the Equal Access to Justice Act, the respondent has failed to demonstrate that legal expenses associated with motions filed during a proceeding that clearly was justifiably brought by the Secretary are reimbursable. Moreover, it is noteworthy that several of the subject motions have been denied on the merits. Accordingly, the respondent's request for attorney's fees **IS DENIED**.

Distribution:

Douglas N. White, Associate Regional Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 18, 1999

WILLIAM KACZMARCZYK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 99-154-D
	:	WILK CD 99-03
READING ANTHRACITE COMPANY,	:	
Respondent	:	Ellangowan Refuse Bank #45
	:	Mine ID No. 36-02234

DECISION

Appearances: William Kaczmarczyk, Barnesville, Pennsylvania, *pro se*;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, PC,
Pottsville, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Complaint of William Kaczmarczyk pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." Mr. Kaczmarczyk, an applicant for employment with Reading Anthracite Company (RAC), alleges as adverse action under Section 105(c)(1) of the Act, that RAC violated the 1998 Collective Bargaining Agreement (1998 Contract) when it transferred employee Ronald Yarnell into a vacant electrician's position rather than recalling him off the layoff list[1]. More specifically, Kaczmarczyk alleges in his January 7, 1999, complaint as follows:

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

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

Reading Anthracite's management discriminated against me by not awarding me a position as an electrician. At this time, I have been laid off from my previous work site (a union mine). Accordingly, Reading Anthracite's management inserted another employee (younger in seniority) ahead of me in the vacant electrical position at another mine site (also a union mine). My qualifications are equal to this employee with less seniority. I should have been awarded this position. Reading Anthracite's management refused to recall me because of my prior involvement in protected activities.

Background

RAC production employees are represented by the United Mine Workers of America (UMWA). The employees belong to local unions with each job site having its own local. RAC also has certain other panel lists of employees with specialized assignments, one of which is the electrical transient crew. Employees on that list enjoy rights on that panel as well as on their "mother" local. The "mother" local is the local at the job site where the employee was first hired by RAC. Seniority at RAC is established by job site, and therefore, also by the corresponding union local. A company-wide multiunit panel list of employees is maintained for those on layoff status. (Complainant's Exhibit No. 2, Article 17(d)).

The Complainant had been an employee of RAC since 1975 but was laid off on November 18, 1998. He had at earlier times held the classification of electrician, but at the time of his layoff was working as a truck driver at the Maple Hill job site under UMWA Local Union 807. Over a period of about six months, mostly the latter half of 1998, RAC had a reduction in work force, losing approximately 100 union workers as well as a number of non-union office personnel. Kaczmarczyk was among those laid off.

On December 31, 1998, John Yurdock resigned his position as an electrician at the New St. Nicholas Breaker (Breaker), which is the job site for Local Union 7891. RAC's General Manager, Frank Derrick filled that job position shortly thereafter (around January 4, 1999) by transferring Ronald Yarnell from his position on the transient crew to the electrician's position at the Breaker. It is undisputed that Yarnell's "mother" local was the Breaker Local, Local Union 7891 (Respondent's Exhibit No. 2). Yarnell was accordingly returning to his "mother" local. According to General Manager Derrick, this action was taken in lieu of laying off Yarnell. There is no dispute that Kaczmarczyk was a member of Local Union 807 at all times relevant hereto and has never been a member of either Local Union 7891 (the Breaker Local) or the transient crew.

Evaluation of the Evidence

Section 11 of the 1964 Supplementary Agreement (Complainant's Exhibit No. 1) provides that seniority at RAC is governed by local union (panel) membership. These provisions were continued and carried forward by virtue of Article 17(a) of the 1998 Contract. Accordingly

company-wide seniority is not observed.[2] Specifically, Section 11 provides that "[s]eniority shall be applied to all mines, surface plant and stripping employees separately, and there shall be no invasion or interference by the employees of one panel by the employees of another." The arbitration decision, *John Ruschak, Jr., v. Reading Anthracite Company*, Board of Conciliation Grievance No. 8049 (1982), confirms that these provisions in the collective bargaining agreements had also been a long-standing practice (Complainant's Exhibit No. 3). It was stated therein as follows:

> "Traditionally, seniority in the industry has been limited to a single mine or facility and cannot be carried from one local union to another. There may be exceptions by special agreement or practice, but they are not common. The Union has, itself, jealously guarded the separateness of seniority rights, preserving job rights with the facility for employees on the local seniority roster."

Neither party in this case has cited any exceptions by special agreement or practice. Accordingly, within the framework of the controlling collective bargaining agreements and a binding arbitration decision, it is clear that unless the Complainant was a member of Local 7891, he had no seniority rights within that local to the electrician's job at issue. Since it is undisputed that the Complainant was not a member of Local Union 7891, he had no seniority rights within that local.

Kaczmarczyk also argued at hearing that the failure by RAC to have posted the electrician's job was a violation of the 1998 Contract. The 1998 Contract clearly provides however that posting is required only when the company otherwise hires a new employee "from the street," rather than by filling a position with a present employee. (Article 17 (c)(1), Complainant's Exhibit No. 2). Even assuming, *arguendo*, that the failure to post the job was a violation, Kaczmarczyk would not in any event have had rights superior to those of Ronald Yarnell. In this regard, Jay Berger, District Board member of the UMWA and testifying on behalf of the Complainant, acknowledged at hearing that, if Yarnell was a member of Local 7891, it was proper to have awarded him the position. Since the evidence in fact establishes that Yarnell remained as a member of Local 7891, the Complainant's allegations in this regard must also be rejected.

The Complainant in a discrimination case under the Act has the burden of proving his allegations of adverse action. *See Secretary of Labor on behalf of Donald Zecco v. Consolidation Coal Company,* 21 FMSHRC 985, 990 n.5. (September 1999). Here the Complainant has alleged that he suffered adverse action when RAC violated the terms of its collective bargaining agreement in transferring employee Ronald Yarnell into the vacant

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[2] An exception not here applicable applies to the multiunit panel. This provision becomes relevant only in the event of a need to recall people from layoff status. It is applicable only when a vacancy is posted to be filled and no one within the local bids on the position. The position is then made available to those on layoff who are on the multiunit list.

electrician's position rather than recalling him off the layoff list. As I have concluded herein, RAC did not violate the collective bargaining agreement in this regard. Under the circumstances the Complainant has failed to sustain his burden of proving the adverse action as alleged and accordingly this case must be dismissed.

ORDER

Docket No. PENN 99-154-D is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

William Kaczmarczyk, RR 2, Box 131 DD, Barnesville, PA 18214 (Certified Mail)

Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, PC, 450 West Market St., P.O. Box 450, Pottsville, PA 17901 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 24, 1999

SECRETARY OF LABOR, MSHA on behalf of LEWIS FRANK BATES, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
CHICOPEE COAL COMPANY, INC., Respondent	:	Lilly Branch Surface Mine Mine ID 46-08723
SECRETARY OF LABOR, MSHA on behalf of EARL CHARLES ALBU, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
CHICOPEE COAL COMPANY, INC., Respondent	:	Lilly Branch Surface Mine Mine ID 46-08723

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Forest H. Roles, Esq., Mark E. Heath, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

The hearing in the temporary reinstatement cases in these matters was conducted on June 2, 1999. At the temporary reinstatement proceeding, the parties advised that they had reached a settlement agreement with respect to the temporary reinstatement of Lewis Frank Bates. Specifically, the respondent, Chicopee Coal Company, Inc., (Chicopee), agreed to economically reinstate Bates by reinstating Bates' medical benefits, and paying Bates the weekly salary he was earning immediately prior to his alleged January 25, 1999, discriminatory discharge. A hearing on the merits was conducted with respect to the temporary reinstatement application of Earl Charles Albu, a/k/a Chuck Albu.

The scope of a temporary reinstatement proceeding was governed by the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(2), and Commission Rule 44(c), 29 C.F.R. § 2700.44(c), that limited the issue to whether

the subject discrimination complaints were "frivolously brought." The rationale for the frivolously brought standard in temporary reinstatement was addressed by the Court of Appeals, in *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Court stated:

> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. 920 F.2d at 748, n.11. (emphasis in original).

Applying this lesser burden of proof, the initial decision ordered Chicopee to temporarily reinstate Albu to the position that he held immediately prior to his January 26, 1999, discharge, or to a similar position, at the same rate of pay and benefits and with the same, or equivalent, duties assigned to him. 21 FMSHRC 673, 680 (June 1999). The Commission, intimating no view on the ultimate merits of Albu's underlying discrimination complaint, affirmed the initial decision to reinstate Albu. 21 FMSHRC 717 (July 1999).

The hearing in these discrimination complaints that gave rise to the temporary reinstatement proceedings was convened on November 2, 1999, in Charleston, West Virginia. The scrutiny applicable to a trial on the merits of the underlying discrimination complaint is entirely different from the minimal "frivolously brought" statutory standard of proof in temporary reinstatement matters. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). In order to prevail, a complainant has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a complainant must demonstrate that he participated in safety related activity protected by the Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

A mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. An operator may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

The gravamen of the Bates and Albu discrimination complaints is that they were terminated immediately after they expressed safety related concerns at a January 25, 1999, safety meeting. The complaints concerned the qualifications of Vecellio and Grogan personnel who had recently been designated by Chicopee to supervise certain mining operations. Vecellio and Grogan is a company specializing in road building and mining in the State of West Virginia. In addition to being Chicopee's subcontractor, Vecellio and Grogan also has provided substantial financial resources to support Chicopee's continuing operations.

The evidence appears to support a *prima facie* case of discriminatory conduct given the brief period of time that elapsed between the protected safety complaints and the Bates and Albu terminations. 21 FMSHRC at 718. However, Bates' and Albu's apparent disinclination to work with Vecellio and Grogan may have provided Chicopee with an independent business justification for their terminations that could constitute a defense to these discrimination complaints.

For example, there was testimony at the temporary reinstatement proceeding concerning threats that Albu had made against Vecellio and Grogan's superintendent, Dale McGrady. 21 FMSHRC at 676. McGrady had recently been designated by Chicopee to oversee road construction activities, responsibilities that were previously assigned to Bates. This change in Bates' assigned duties caused Bates to convene the January 25, 1999, safety meeting to "warn" his fellow employees that he was no longer responsible for ensuring the safety of the roadways. *Id.* at 677. At the safety meeting Albu complained about Vecellio's equipment, characterizing the equipment as "junk." *Id.* In short, the evidence reflects that the conduct of Bates and Albu may have been detrimental to Chicopee's ongoing relationship with Vecellio and Grogan, a company that Chicopee relied on for financial support.

At the hearing, the parties advised that they had agreed to settle these discrimination cases. The terms of the parties' settlement were presented and approved on the record. The settlement terms were committed to writing in the Secretary's Motions to Approve Settlement filed on November 15, 1999.

With respect to Bates, in lieu of temporary reinstatement, Chicopee previously has agreed to economically reinstate Bates effective May 26, 1999, pending the outcome of his discrimination complaint. Chicopee now has agreed to pay Bates a lump sum payment as consideration for Bates' withdrawal of his complaint. Chicopee also has agreed to provide Bates with a letter for prospective employers specifying Bates' dates of employment and reflecting that Bates was terminated due to a reduction in work force. Chicopee will provide employment references that are consistent with the terms of this settlement and all references to this discrimination matter shall be expunged from Bates' personnel records. Finally, Chicopee has agreed to allow Bates to retain medical coverage for his wife at Bates' expense until Bates finds new employment, or until Chicopee is no longer permitted by law to cover Ms. Bates on their company medical insurance policy.

Albu was reinstated effective June 30, 1999, pursuant to the initial decision granting the Secretary's application for Albu's temporary reinstatement. 21 FMSHRC at 680. Chicopee now has agreed to pay Albu a lump sum payment as consideration for Albu's withdrawal of his complaint. Chicopee also has agreed to provide Albu with a letter for prospective employers specifying Albu's dates of employment and reflecting that Albu was terminated due to a reduction in work force. Chicopee will provide employment references that are consistent with the terms of this settlement and all references to this discrimination matter shall be expunged from Albu's personnel records.[1]

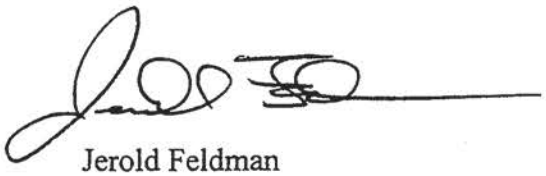
ORDER

This decision formalizes the approval of the parties' settlement agreements that were previously approved on the record. Consistent with their agreement Ms. Bates medical insurance coverage shall continue without interruption.

IT IS ORDERED that Chicopee Coal Company immediately provide Bates and Albu with written references for employment and that Chicopee Coal Company immediately expunge all references to these temporary reinstatement and discrimination matters from the personnel records of Bates and Albu.

IT IS FURTHER ORDERED that Chicopee Coal Company tender to Bates and Albu the agreed upon lump sum payments no later than thirty (30) days from the date of this decision.

Upon timely compliance with the terms of the settlement agreements, the discrimination proceedings in Docket Nos. WEVA 99-121-D and WEVA 99-122-D **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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[1] As part of their settlement, Chicopee has agreed to pay a civil penalty of $300.00 in satisfaction of Albu's alleged discriminatory discharge. Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to impose this $300.00 penalty, the Secretary must file with this Commission, within 45 days, a pertinent petition for assessment of civil penalty.

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

Forrest H. Roles, Esq., Mark E. Heath, Esq., Heenan, Althen & Roles, P.O. Box 2549, Charleston, WV 25329-2549 (Certified Mail)

/mh

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

November 26, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-290
Petitioner	:	A.C. No. 42-02095-03517
	:	
v.	:	
	:	Bear Canyon #2
C.W. MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges C.W. Mining Company (C.W.) with the violation of the mandatory safety standard 30 C.F.R. § 75.220(a)(1) which requires each operator to develop and follow a roof control plan approved by the MSHA District Manager. The Respondent asserts that there was no violation of their approved roof control plan and presented evidence that it developed a roof control plan that was approved by the MSHA district manager, that it followed that plan at all relevant times and furthermore, the alleged violation was not related to the fatal accident of August 24, 1997. That accident gave rise to an MSHA investigation. Twenty-one days thereafter Inspector Jerry O.D. Lemon issued the citation charging C.W. with a violation of its roof-control plan.

THE ACCIDENT

The fatal accident of August 24, 1997, at the Bear Canyon No. 2 mine was the direct result of a slip and fall under or in front of the path of a moving Joy shuttle car. The victim was a 45-year old continuous mining machine helper who was attempting to move quickly past the

moving shuttle car. As a result of the slip and fall in the path of the moving shuttle car he was run over, sustaining fatal crushing injuries.

STIPULATIONS

1. Bear Canyon No. 2 is an underground coal mine located nine miles northwest of Huntington, Emery County, Utah, and its mining operations affect interstate commerce.

2. The mine is owned and operated by C.W. (Co-op Mine), MSHA I.D. No. 42-2095.

3. Bear Canyon No. 2 mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject 104(d)(1) Order No. 4890930 was properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The operator demonstrated good faith in abating the violation.

8. C.W. Mining Co. is a coal mine operator with 570,060 production tons or hours worked in 1997.

ISSUES

The primary issues are whether or not C.W. violated its roof-control plan as alleged in Citation/Order Number 4890930 and, if it did, should the S&S and unwarrantable failure designations be upheld and the appropriate penalty to be assessed considering the criteria in § 110(i) of the Mine Act.

FINDINGS AND CONCLUSIONS

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the Findings of Facts, Conclusions and Further Findings in the Discussion below:

1. Bear Canyon #2 is an underground coal mine, located in Emery County, Utah, and is owned and operated by C.W. (Co-op Mine). The operator is engaged in the mining of underground coal in the Bear Canyon Mine.

2. The mine has one active development and one active retreat pillar working sections, both of which use remote-controlled Joy 14CM15 continuous mining machines, Joy shuttle cars, Lee Norse TD-142 single-boom roof-bolting machines, and a Fletcher DDR-13-B-CW double-boom roof-bolting machine to install supplemental supports. In the area of the accident, main entries had been previously developed and room and pillar retreat mining methods were being utilized.

3. The mine employs 44 underground miners and 27 surface employees, and has a daily production of approximately 982 tons of coal. The mine works two nine hour production shifts and one nine hour overlapping maintenance shift each day, seven days per week.

4. On August 24, 1997, at the Bear Canyon No. 2 mine, a miner, employed by C.W. sustained fatal injuries when he fell under or in front of the path of a moving shuttle car.

5. The roof-control plan at the time of the accident shows by diagram the typical pillar extraction sequence in which two adjacent pillars are split vertically in tandem with the splits parallel to each other. The plan expressly provides in writing that stress conditions may require temporary "variations from sequence shown" in the diagrams.

6. The Order/Citation No. 4890930 charges C.W. with violating its roof-control plan in two specific respects (1) it split Pillar No. 6 perpendicular to Pillar No. 5 and (2) it split Pillar No. 6 all the way through before Pillar No. 5 was fully mined.

7. The roof-control plan does not define the gob area and does not use or even mention the term "gob."

8. The 2A cut of Pillar No. 6 that split Pillar No. 6 all the way through was made to relieve the stress that was causing hazardous bouncing in the Pillar 5 and 6 area where the miners were working.

9. After splitting Pillar No. 6 all the way through to relieve the stress causing the hazardous bouncing, the crew made cuts 3, 4, 5, 6 and 7 in Pillar No. 5 in the proper sequence called for in the approved roof-control plan.

10. The August 24, 1997, cave of the roof in fully mined-out area consisting of what was Pillars No. 3, 4 and the left half of Pillar No. 5 was not a premature cave. It was a planned, hoped-for, anticipated cave that went no further on the 24th of August than planned. The roof did not cave in the split off right half of Pillar No. 5 where Cyril Jackson, the operator of the remote-controlled miner, and his helper Samuel Jenkins were working.

11. The preponderance of the evidence presented fails to establish that in making cuts 6 and 7 in Pillar No. 5, the miners entered the gob or that they violated any provision in the mine's approved roof-control plan.

DISCUSSION AND FURTHER FINDINGS

C.W.'s roof-control plan at the relevant time (Pet.'s Ex. 4) shows the typical pillar extraction sequence. This typical extraction sequence is not spelled out in words but appears in the diagram sequence shown on page 16 of Petitioner's Ex. 4. It shows two adjacent pillars with splits parallel to each other. In addition, however, the plan specifically spells out in words that "stress conditions may require temporary variations from the sequence shown." (Emphasis added). (Tr. 127-128).

C.W. presented credible evidence that it split Pillar No. 6 perpendicular to the split in Pillar No. 5 because of certain geologic features in the roof of the No. 6 entry which extended into Pillar No. 6, that would subject the miners who would be working in the split to the hazard of being injured by the falling of the immediate roof if they split Pillar No. 6 parallel to the split in Pillar No. 5. There was no contrary evidence.

Before Pillar No. 6 was split, it was examined by C.W. personnel to determine the safest way to split Pillar No. 6. They observed roof fractures in the roof of entry No. 6 which continued through to Pillar No. 6. These roof fractures were nearly parallel to the split in Pillar No. 5. C.W. personnel knew from past experience in the mine that if the pillar is split in the same direction as the roof fractures, the immediate roof above the split between the fractures becomes unstable and falls out. Thus it creates a hazard of the immediate roof falling and injuring the miners working below within the split, even though the roof is properly bolted. (Tr. 278, 488). Consequently to avoid this danger to the miners working in the split, C.W. split Pillar No. 6 perpendicular to the roof fracture lines and thus perpendicular to the split in Pillar No. 5. They believed they were splitting Pillar No. 6 in the safest way for the safety of the miners and were following the requirements of the roof-control plan and the provision of § 75.220(a)(1) which requires additional measures if unusual hazards are encountered.

In the citation, Inspector Jerry O.D. Lemon charges C.W. with violating its roof-control plan in two specific respects: (1) it split Pillar No. 6 perpendicular to the split in Pillar No. 5 and (2) it split Pillar No. 6 all the way through before Pillar No. 5 was fully mined. C.W. concedes that it did (1) and (2) but assert that did not constitute a violation of its roof-control plan under the facts and circumstances of this case.

C.W. presented credible evidence that if Pillar No. 6 were split parallel to the roof fractures that were observed going into Pillar No. 6, the coal underneath that was supporting the fractured coal would be removed. C.W. personnel, from past experience, knew this removal of support under the fractured area would create a hazardous condition that would allow the

immediate roof above the split between the fractures to fall out on the miners who would be working below on the floor of the split.

Inspector Lemon who issued the citation testified that, because of the hazardous bounce problem C.W. was having, the 2A cut that split Pillar No. 6 all the way through was not a violation of the plan. That cut through Pillar No. 6 relieved the stress that was causing the bouncing, but after splitting Pillar No. 6 all the way through the miners should not have gone into the area where the 6 and 7 cuts of Pillar No. 5 were made because cutting all the way through Pillar No. 6 made those cuts part of the gob. Respondent's witness vigorously denied that cutting through Pillar No. 6 made the 6 and 7 cut area of Pillar No. 5 part of the gob and presented credible evidence to that effect.

After Pillar No. 6 was split all the way through perpendicular to the split in Pillar No. 5, the remote-control miner was used to make cuts 3, 4, 5, 6 and 7 in Pillar No. 5 in the sequence called for by the approved roof-control plan.

I credit the testimony of Cyril Jackson, first called as a witness by the Secretary and later by Respondent. He was the operator of the miner (machine) on the afternoon shift of August 24, 1997, and had just completed cuts No. 6 and 7 in the right half of Pillar No. 5. As he started to back the miner out of cut No. 7 in the right half of Pillar No. 5, the planned and hoped-for cave of the roof in the gob area (that at that time consisted of the mined out Pillar No. 3, No. 4 and the split-off left half of Pillar No. 5 that was adjacent to Pillar No. 4 area) began to cave. Messrs. Jackson and Jenkins knew the anticipated cave was occurring because they felt the blast of air caused by the caving roof pushing the air out of the gob space as the roof in the mined out Pillars No. 3, 4 and left half of 5 caved. Mr. Jackson testified that there was nothing unusual about the cave; that it did not cave prematurely; that it caved just where they planned, hoped and expected it would cave. It did not cave in the area where he and Samuel Jenkins were working. The split-off right half of Pillar No. 5 did not cave at all. (Tr. 410).

Mr. Jackson testified he and Mr. Jenkins ran outby when they felt the blast of air caused by the cave-in because that was the prudent thing to do. All miners in the pillar section exit outby quickly when the planned, anticipated, hoped-for cave occurs because of the remote possibility that any cave may go farther than planned or anticipated.[1] If Messrs. Jackson and Jenkins just stayed where they were when they first felt the air blast from the hoped-for cave they would not have been hurt and, of course, the fatal accident would not have occurred.

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[1] Witness called by the Secretary, as well as Respondent, testified that when any planned, anticipated cave occurs, all miners in the pillar section run outby as it is the prudent thing to do. Bruce Andrews, the MSHA coal mine inspector, who was one of the two persons selected by MSHA to make the investigation of the accident and to write the accident report, testified it is typical among all miners in the pillar section to run when they feel that air blast that tells them the planned cave is occurring. He testified they run outby using the fastest, safest exit route. Its the prudent thing to do because of the possibility of any cave going farther than planned or expected.

At the hearing Jerry O.D. Lemon, the inspector who made the investigation, wrote and issued the citation, acknowledged that C.W. did not violate its roof plan in splitting Pillar No. 6 perpendicular to the split in Pillar No. 5 nor in splitting Pillar No. 6 all the way through before Pillar No. 5 was fully mined. Inspector Lemon testified that the violation consisted of the miners' going into the area of cut 6 and 7 of Pillar No. 5 after splitting Pillar No. 6 all the way through. This was based upon Mr. Lemon's belief that splitting Pillar No. 6 all the way through perpendicular to the split in Pillar No. 5 made the area at cuts 6 and 7 of Pillar No. 5 a part of the gob. Inspector Bruce Andrews testified to the same effect, namely, that the violation in this case consisted of making cuts 6 and 7 of Pillar No. 5 after splitting Pillar No. 6 all the way through. (Tr. 76).

In addition to the testimony of Cyril Jackson, I credit the testimony of Kenneth H. Defa, the mine superintendent, and Charles Reynolds, the mining engineer.

Kenneth H. Defa, mine superintendent for C.W. has worked underground in the mine for 30 years and has held about every position in the mine. He has been involved in making decisions as to which way to pull a pillar for 20 years. He has pulled thousands of pillars and has been "real successful" in pulling pillars without an accident. Other mine operators have sent their personnel over to observe how he pulls pillars in the Bear Canyon mine. He has participated in developing the roof-control plans that were in effect during the time that he was pulling pillars at Co-op Mine and for C.W.

Mr. Defa testified that he had a discussion with Lee Smith who was in charge of roof control in the Denver office in 1989. At that time the mine's roof-control plan depicted step by step, several different ways pillars could be pulled. This made the plans fairly bulky, cumbersome and hard to follow. At the time of their discussion Lee Smith told him "people know that when you're pulling pillars, things are going to change from pillar to pillar, from day to day and that all that stuff was not necessary. And, he asked that we condense the plans down as small as we could possibly make it, and still understand what the methods were."

Mr. Defa did not believe that any of the modifications of the roof plan after 1989, which the mine developed and the District Manager approved, prohibited him from making the split in adjacent pillars perpendicular to each other when faced with geologic conditions that make it hazardous to split a pillar parallel to the split in the adjacent pillar. Mr. Defa continued to do this when he believed he was required to do so for the safety of the miners. There was no indication from anyone to him that the plan, even under the latest modification of April 1997, did not permit him to do so. A number of the inspectors have observed him pulling pillars in the sequence and procedures the mine used in pulling Pillars No. 5 and 6 in August 1997, and none have ever indicated to him he shouldn't or couldn't do so, under any of the amendments that have been made to the mine's roof control plan. Mr. Defa is of the opinion that splitting Pillar No. 6 perpendicular to the split in Pillar No. 5 does not make the area of cuts 6 and 7 of the No. 5 pillar part of the gob. In all his many years of underground mining experience, he has never heard the

gob described by anyone in a way that would, under the circumstances we have in this case, make the area of the cuts 6 and 7 of Pillar No. 5 part of the gob.[2]

Mr. Defa testified that the cave of the gob area on August 24, 1997, did not travel any further than planned, expected or anticipated.

Mr. Jackson testified that when he and Mr. Jenkins felt the blast of the wind from the hoped-for cave of the gob area and started exiting outby, no material had fallen in the area of the right half of Pillar No. 5 and, in particular, no material had fallen on the miner. (Tr. 407). He was positive it was not going to cave on the right half of Pillar No. 5 because neither the timbers in the split of No. 6 pillar nor the turn row timber which they had set up was taking any weight. Also the double turn-row timbers in Entry 6 and crosscut 16 were not taking weight. It did not "cave anywhere differently" than where he 'hoped' it would cave. There was no cave in the right half of Pillar No. 5 at all.

Mr. Jackson testified that about 40 minutes after the fatal accident, he again entered the right half of Pillar No. 5 where he and Mr. Jenkins had been working "to see if anything changed." The only change he noticed was that a little bit of rock had rolled out of the gob by the miner and a little bit on the cutter head drum. The roof had not caved at all where he took cuts No.6 and 7 from Pillar No. 5. The next morning he went to that area again and noticed some rock that had fallen on the miner since he last saw the miner the day before. Credible evidence was presented that it was not unusual for a period of time up to 16 to 24 hours after a cave for there to be changes such as additional top rock falling without any new mining being done. This is due to the fact that previous mining activity continues to work on the pillar after a cave. None of the mine inspectors who testified saw the area in question until the day after the planned cave of the gob area (consisting of what was Pillars No. 3, 4 and left half of Pillar No. 5) occurred.

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[2] *See* American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 239 (2d ed. 1997) defining gob as follows:

> gob (a) A common term for goaf. (Fay, 1920) (b) To leave coal and other minerals that are not marketable in the mine. (Fay, 1920) (c) To stow or pack any useless underground roadway with rubbish. (Fay, 1920) (d) To store underground, as along one side of a working place, the rock and refuse encountered in mining. (Hudson, 1932) (e) The space left by the extraction of a coal seam into which waste is packed or the immediate roof caves. (CTD, 1958) (f) A pile of loose waste in a mine, or backfill waste packed in slopes to support the roof. (Ballard, 1955) (g) Coal refuse left on the mine floor. (Kerson, 1938) (h) The material so packed or stored underground. (Hudson, 1932) (i) To fill with goaf or gob; to choke, as a furnace as gobbed or gobs up. See also *gobbing*. (Webster 2nd, 1960)

Charles Reynolds has been the mining engineer and environmental coordinator for C.W. since 1995. He graduated from the University of Utah College of Mines and Earth Sciences in 1991 with a bachelor's degree in mining engineering and has a professional engineer license from the State of Utah since 1987. He worked from 1991 to 1995 for Magnum Engineering Consultants as a mining engineer. (Tr. 473-475). He did consulting work for the Bear Canyon and other mines including roof design and control and is an active member of the Utah Mining Association of Engineers and has taken a course at NIOSH on roof-control analysis and roof stability. He has become competent in the use of three computer modeling programs which help evaluate pillar stability and roof control. He has customized the program to the Bear Canyon Mine. He has taken a course given by NIOSH on roof-control analysis and stability. He also took a course on bleeder and gob evaluation.

Mr. Reynolds is familiar with the roof-control plan in effect at the time of the August 1997 accident. He helped "in putting" that plan together. He testified that if Pillar No. 6 had been split parallel to the split in Pillar No. 5, "You would be taking a chance of having some immediate roof, the top two to four feet, fall out in the area where the men would be working." (Tr. 489). In his opinion, splitting Pillar No. 6 perpendicular to the split in Pillar No. 5 has no effect on inducing the cave in the mined-out area of Pillars No. 3, 4 and the left half of 5.

Mr. Reynolds testified that splitting Pillar No. 6 all the way through, perpendicular to the previous split in Pillar No. 5 and then mining the left half of Pillar No. 5 did not change the gob line. It did not extend the gob line into the right half of Pillar No. 5. Never in his experience, education or training has he ever heard of the gob defined in a way that under the facts of this case make cuts 6 and 7 in the right half of Pillar No. 5 a part of the gob.

Mr. Reynolds helped the inspectors with the investigation of the accident and he never heard any of them say there was anything wrong with taking cuts no. 6 and 7 from Pillar No. 5 after splitting Pillar No. 6 all the way through. At the end of his direct examination the last question and the answer given by Mr. Reynolds was as follows:

> Q. In your opinion, having helped to author the roof control plan and being familiar with the conditions that were there at the time, did splitting Number 6 through and then mining the right half of Pillar Number 5 violate the provisions of the roof control plan?
>
> A. No, it didn't.

CONCLUSION

The parties presented conflicting evidence as to what was the best and safest mining practice and procedure when a pillar adjacent to a pillar split vertically, must, for valid safety reasons, be split perpendicular to the split in that adjacent pillar. It is not for me to decide in this case what is the best or safest mining procedure to be following under the facts of this case. I only find and conclude that on the basis of the evidence presented in this case that a preponderance of the evidence of record fails to establish that Respondent violated its roof-control plan on August 24, 1997, as charged in Citation No. 4890930. The citation is **VACATED** and this proceeding is **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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

Carl E. Kingston, Esq., 3212 South State Street, P.O. Box 15809, Salt Lake City, UT 84115 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-134
Petitioner	:	A. C. No. 15-17979-03510
v.	:	
	:	No. 6 Mine
DAGS BRANCH COAL CO., INC.	:	
Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Dags Branch Coal Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $6,173.00. A hearing was held in Pikesville, Kentucky. For the reasons set forth below, I affirm the citations and order and assess a penalty of $6,173.00.

During the trial, counsel for the Respondent announced that the company was withdrawing its contest of Citation No. 9982163, involving respirable dust samples, and would pay the civil penalty sought by MSHA. (Tr. 129.) As the Secretary had no objection to that disposition, it was accepted. (*Id.*) The penalty will be assessed at the end of this decision.

Background

The No. 6 mine is an underground coal mine, owned and operated by Dags Branch Coal Co. in Pike County, Kentucky. On September 23, 1998, MSHA Ventilation Specialist and Coal

Mine Inspector Thomas M. Charles was sent to the mine to conduct a health and safety inspection, including reviewing the mine's bleeder system.[1]

Inspection of the bleeder system was included because "second mining" or "pillaring" was being performed in the mine. "Second mining" or "pillaring" occurs when miners retreat out of a section of the mine in which advanced mining has ceased, removing the remaining pillars as they go. As a result, the roof of the mine collapses as the pillars are removed and the area becomes known as "gob" area. The bleeder system is designed to sweep the gob area with air and prevent accumulations of methane or other noxious gases.

On arriving at the mine, Charles was informed by James Miller, the section foreman, that the bleeder system was blocked with water. Charles and Miller then went underground to the working section where the section crew was removing its equipment from the pillar line after having finished mining a pillar. At this time, Charles checked the seven entries on the section for airflow. He concluded that air was flowing from the gob onto the active section from entries one, two and three.

As a consequence of this test, Charles issued Citation No. 4515035, alleging a violation of section 75.334 of the Secretary's health and safety standards, 30 C.F.R. § 75.334,[2] because:

> Air from pillared works is passing onto the active 001-0 MMU.[3] Pillar recovery work is being conducted on the 001-0 MMU without an operative bleeder system. This allows air which has passed through the gob area to travel back onto the active working section. The top end of the gob area of the 001-0 MMU is cut-through into an adjacent panel to provide ventilation of the gob area, and to allow air to flow away from the active workings. There is an E.P.[4] at that location. According to statements made by the foreman and crew, this E.P. and top end of the adjacent panel

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[1] "A bleeder system is an airway that's provided to be maintained open so that you can have airflow within it to sweep the area to keep it free from accumulations of methane and blackdamp, anything that could accumulate in it." (Tr. 21.)

[2] Inspector Charles testified that the specific part of section 75.334 that he found Dags Branch to have violated was section 75.334(b)(1), 30 C.F.R. § 75.334(b)(1). (Tr. 20.) That section requires that: "During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine."

[3] *M*echanized *M*ining *U*nit.

[4] *E*valuation *P*oint.

were found to be blocked by water last night on the 2nd shift. Mining operations were performed today. Air was found passing from the gob back onto the section via entries number one, two and three.

(Govt. Ex. 2.)

Inspector Charles traveled up the adjacent panel to the area of the evaluation point, where he encountered water. Based on his inspection in this area, he issued Order No. 4515036, for a violation of section 75.370(a)(1), 30 C.F.R. § 75.270(a)(1).[5] The order states:

> The approved ventilation plan which shows a description of the bleeder system to be used at this mine and requires that bleeder entries be maintained free from obstructions such as roof falls or water [] is not being complied with in the 001-0 active bleeder panel. Water accumulation, roofed, has blocked air flow from the top end of the panel. Travel to the evaluation point is blocked by water in the number one mains at survey station #146. According to statements made by James Miller [,] Foreman. [*Sic.*] This was found by the 2nd shift foreman last night. Coal was produced on the 001-0 pillaring section today.

(Govt. Ex. 4.)

Findings of Fact and Conclusions of Law

In its brief, the company concedes that both of these violations occurred and that they were "significant and substantial."[6] The Respondent argues, however, that neither of the violations was "unwarrantable." Based on the operator's concession, and the evidence presented at the hearing, I conclude that Dags Branch violated sections 75.334(b)(1) and 75.370(a)(1), as alleged, and that the violations were "significant and substantial." Contrary to the company's

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[5] Section 75.370(a)(1) requires, in pertinent part, that: "The operator shall develop and follow a ventilation plan approved by the district manager. The Plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

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

position, I also conclude that the violations were the result of its unwarrantable failure to comply with the regulations.

Unwarrantable Failure

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998). In this case, the operator knew of the violations and deliberately chose to mine coal rather than attend to the violations.

The inspector testified that he found these violations to be unwarrantable because the mine's management was aware of the conditions and elected to mine coal before correcting them. He related that the foreman, Miller, "indicated to me that he was aware that the gob air had been

passing back onto the section due to the bleeder system being blocked and that they had been instructed to go ahead and mine the blocks." (Tr. 32.) Inspector Charles further described a conversation that he had with Linton Griffith, a fifty percent owner of the mine, about the conditions in the mine; i.e. the water in the gob and his knowledge of that water in the section that was mining coal. He said that Griffith " told me that the mine had been down for two or three shifts on a stacker belt thrower, that they had to mine coal and that they needed to get those blocks mined so that they could move the section." (Tr. 33.)

The Respondent argues that the violations were not unwarrantable because, with respect to Citation No. 4515035, the inspector was not present in the mine while mining was actually being performed. The operator maintains that air was moving through the gob area to the return air course at that time. Concerning Citation No. 4515036, it is the company's position that because there is no evidence that the water in the mine actually reached the roof, a finding of unwarrantable failure is not appropriate. Neither contention is persuasive.

Inspector Charles testified that there was a large stream of coal coming off of the belt when he arrived at the mine and that coal was being mined as he was going to the working section, but that mining had ceased by the time he arrived at the section. Thus, mining had only been stopped for a short time when he found air coming out of the gob onto the area where work had recently been ongoing. It was his opinion that the air would have had to have been flowing the same way while coal was being mined "[b]ecause of the way the ventilation controls were installed and in order for them to maintain airflow for the mine, period." (Tr. 121.)

To counter this evidence, the Respondent relies on the equivocal assertion of Miller that he was taking continuous air readings "in the area" while the pillars were being mined and no return air was coming out of the gob onto the section. (Tr. 140.) To explain the inspector's findings, which neither he nor anyone else disputes, Miller speculated that damage to a ventilation curtain could have occurred when the equipment was being moved out of the section.

There is less to these professions than meets the eye. Miller did not testify that he took readings in the three entries where the air was flowing from the gob to the section. No one testified that moving the equipment did, in fact, damage any ventilation controls. Furthermore, since the equipment was being pulled out of the section, no one explained how it could have damaged a curtain located in the opposite direction from which the equipment was being moved; how curtains in three entries could have been damaged at the same time, all in the time between the cessation of mining and Charles' arrival; or, if the curtains were not damaged at the same time, how no mining occurred while any one of them was damaged.

Turning to the order, there is no direct evidence as to whether the water in the mine reached the roof or not. Neither the inspector nor Miller traveled through the water to observe its level. Inspector Charles testified that the water must have reached the roof because he could not detect any movement of air in any of the seven entries of No. 1 mains where the toe of the water was encountered. Miller agreed that Charles did not detect any air movement in most of the entries, but stated that Charles did detect movement in the No. 1 entry.

The inspector also testified that the company had removed parts of stoppings in two areas of the No. 1 mains which changed the air flow in the mine in violation of the mine's ventilation control plan. Miller did not dispute this but claimed that he thought the removal of the stoppings was permitted.

I find the inspector's testimony to be credible on these issues. While I find that circumstantial evidence supports a finding that the water was in contact with the roof someplace in the mine, such a finding is not necessary in view of the uncontroverted evidence that the bleeder entries had not been maintained free of water for at least 24 hours after it was discovered, that travel to the evaluation point was blocked by water, and that the stoppings had been partially removed, all of which violated the ventilation plan.

In accepting the testimony of Inspector Charles over that of Miller and Griffith, I find it very significant that neither Miller, on whom both the order and citation were served, nor Griffith protested to the inspector, or apparently to anyone from MSHA, that air was not flowing from the gob onto the working section while coal was being mined, that moving the equipment must have damaged the ventilation curtains or that the water did not block any air flow. Miller said he did not say anything because he lets the owners take care of violations. Griffith testified that he was concerned about the characterization of the violations as unwarrantable, but did not explain why he did not present any factual defense.

Furthermore, I find it determinative that neither Miller, nor Griffith, nor the company in its brief, denied that they had decided to finish mining the pillars before taking care of the problems caused by the water. Griffith, when specifically asked whether he had ordered the completion of mining before taking care of the water, stated: "I'm saying I have never told in my lifetime a mine foreman to do something that would endanger men." (Tr. 192.) When read carefully, it is apparent that this is not a denial that he ordered the mining to be completed.

I find that the operator intentionally chose to finish the pillaring of the section before taking care of the water problem, which it had been aware of since the second shift the night before. Accordingly, I conclude that both of these violations were the result of the company's unwarrantable failure to comply with the regulations. *See, e.g., Lion Mining Co.*, 19 FMSHRC 1774, 1778 (November 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1770 (November 1997); *Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997).

Civil Penalty Assessment

The Secretary has proposed penalties of $3,000.00 each for Order No. 4515036 and Citation No. 4515035 and $173.00 for Citation No. 9982163. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that Dags Branch is a small-to-medium-size operator and that the civil penalties in this proceeding will not affect the operator's ability to continue in business. (Govt. Ex. 1.) The evidence also indicates that for the two years prior to these violations, the company had received 180 citations. (Govt. Ex. 10.) From this I conclude that the operator's violation history is average. I further conclude that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. Finally, I conclude that the gravity of these violations was fairly serious and that the company's negligence with respect to Order No. 4515036 and Citation No. 4515035 was high and with respect to Citation No. 9982163 it was moderate.

Taking all of this into consideration, I conclude that the penalties proposed by the Secretary are appropriate. Accordingly, I will assess penalties of $3,000.00 for Order No. 4515036, $3,000.00 for Citation No. 4515035, and $173.00 for Citation No. 9982163.

Order

Order No. 4515036 and Citation Nos. 4515035 and 9982163 are **AFFIRMED**. Dags Branch Coal Company, Inc., is **ORDERED TO PAY** a civil penalty of **$6,173.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., 841 Corporate Drive, Suite 101, Lexington, KY 40503 (Certified Mail)

/nj