NOVEMBER 2001

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER 2001

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

Secretary of Labor, MSHA v. Original Sixteen to One Mine, Inc., Docket No. WEST 2000-63-M, etc. (Judge Zielinski, October 19, 2001)

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 20, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-413-M
v.	:	A.C. No. 24-02087-05502
CONCRETE MATERIALS OF MONTANA, LLC	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 16, 2001, Chief Administrative Law Judge David F. Barbour issued an Order of Default dismissing this civil penalty proceeding for the failure of Concrete Materials of Montana, LLC ("Concrete Materials") to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on June 22, 2001, or the judge's Order to Respondent to Show Cause issued on August 20, 2001. The judge assessed civil penalties in the sum of $5,369.[1]

On November 8, 2001, the Commission received from Concrete Materials a request to vacate the judge's default order. Mot. In its request, Concrete Materials contends that it failed to timely respond to the Secretary's penalty assessment petition and the judge's show cause order because the relevant correspondence was sent to the wrong address. *Id.* It maintains that on September 11, 2000, pursuant to 30 C.F.R. § 56.1000, it informed the Department of Labor's Mine Safety and Heath Administration ("MSHA") that it was closing its South Boulder Grazing

[1] The penalties set forth in the Secretary's Petition for Assessment of Penalty equal the sum of $5,377.

Association Pit. *Id.* In addition, Concrete Materials contends that on November 27, 2000, it informed MSHA that it was opening its Medina Pit and provided the mine's new mailing address. *Id.* Concrete Materials asserts that, shortly after its Medina Pit opened, the mine was inspected and cited by MSHA. *Id.* It further contends that, after the inspection, all correspondence from MSHA pertaining to the citations and the judge's show cause order were mistakenly sent to the mailing address for its South Boulder Grazing Association Pit. *Id.* Concrete Materials maintains that this mailing error caused a delay in the Medina Pit manager receiving the relevant correspondence and, as a result, Concrete Materials failed to timely respond to the Secretary's penalty petition and the judge's show cause order. *Id.* Concrete Materials attached to its request the notices that it allegedly mailed to MSHA. Attach. 1, 2.

The judge's jurisdiction in this matter terminated when his decision was issued on October 16, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Concrete Materials' request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, we are unable to evaluate the merits of Concrete Materials' position. In particular, we note that, while Concrete Materials maintains that its Medina Pit was cited by MSHA, the relevant citations identify the cited mine as the South Boulder Grazing Association Pit. Because of this confusion in the record, and in the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See San Juan Coal Co.*, 23 FMSHRC 800, 801-03 (Aug. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA allegedly failed to send the

documents to the designated company official); *Agronics Inc.*, 21 FMSHRC 475, 475-77 (May 1999) (vacating default and remanding to judge where operator claimed it did not answer Secretary's petition or judge's show cause order because documents were allegedly sent to wrong company official). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2001-247-M
v.	:	A.C. No. 03-01232-05523
CARROLL COUNTY STONE, INC.	:	

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

ORDER

BY: Jordan and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 17, 2001, Chief Administrative Law Judge David F. Barbour issued an Order of Default dismissing this civil penalty proceeding for the failure of Carroll County Stone, Inc. ("Carroll County Stone") to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on June 25, 2001, or the judge's Order to Respondent to Show Cause issued on August 14, 2001. The judge assessed a civil penalty of $122 proposed by the Secretary.

On October 30, 2001, the Commission received from Randall Bailey, president of Carroll County Stone, a request to vacate the judge's default order. Mot. Bailey, apparently proceeding without counsel, asserts that, after receiving the penalty assessment petition, he was contacted by Goldie Smith[1] about the possibility of settling the case. *Id.* Bailey maintains that after he explained his company's position to Smith, she said she would investigate the matter and get back to him. *Id.* Bailey states that Smith did not subsequently contact him. *Id.*

[1] The record indicates that Smith is a paralegal with the Department of Labor. Sec'y Pet. for Assessment of Penalty at 3.

The judge's jurisdiction in this matter terminated when his decision was issued on October 17, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Carroll County Stone's request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, we are unable to evaluate the merits of Carroll County Stone's position. In particular, it is unclear from the record how the alleged communication with the Department of Labor about possible settlement terms would excuse the operator from its requirement to timely respond to the penalty assessment petition and the judge's show cause order. Thus, in the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Cent. Mountain Materials*, 23 FMSHRC 907, 908-09 (Sept. 2001) (vacating default and remanding to judge where pro se operator may have mistakenly believed that, having returned green card, it was not required to answer Secretary's petition); *Gen. Rd. Trucking Corp.*, 17 FMSHRC 2165, 2165-66 (Dec. 1995) (vacating default and remanding where pro se operator apparently confused about Commission's procedural rules). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the request for relief made here by Carroll County Stone, Inc. It is a matter of record that the company returned the green card in this matter, and we find it had ample grounds to delay filing an answer. We also note that the company is appearing pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *See Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Therefore, we disagree with our colleagues' conclusion that the merits of Carroll County Stone's position cannot be evaluated. Slip op. at 2.

Nevertheless, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
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November 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2000-63-M
	:	2000-78-M
ORIGINAL SIXTEEN to ONE MINE, INC.	:	2000-195-M

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

DIRECTION FOR REVIEW AND ORDER

BY: Verheggen, Chairman; Riley and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 26, 2001, the Commission received via facsimile from Original Sixteen to One Mine, Inc. ("Original Sixteen") a letter challenging the decision issued on October 19, 2001 by Administrative Law Judge Michael Zielinski. In his decision, Judge Zielinski in part vacated and/or dismissed, affirmed, and approved the settlement of various citations alleging violations of mandatory safety standards. 23 FMSHRC 1158 (Oct. 2001) (ALJ).

The judge's jurisdiction in this matter terminated when his decision was issued on October 19, 2001. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). In accordance with the Commission's procedural rules, the filing of a petition for discretionary review is effective upon receipt, and may be made by facsimile. 29 C.F.R. §§ 2700.5(d), 2700.70(a). Rule 70(d) also requires that in a petition for discretionary review, "[e]ach issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon." 29 C.F.R. § 2700.70(d); *see also* 30 U.S.C. § 823(d)(2)(A)(iii). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1).

In its letter, Original Sixteen "petitions for review" of the judge's decision, sets forth general grounds for requesting the review, and requests an extension of time to file necessary documentation. Letter from Original Sixteen to Commission of 11/26/01, at 1- 2. Original Sixteen explains that this case involves its first hearing and appeal and that it is unfamiliar with Commission procedure; that personnel instrumental in the preparation of appropriate documentation, including its president and corporate manager, have been unavailable after issuance of the judge's decision; and that its response time has been decreased due to delays in mail service occurring after September 11, 2001. We construe Original Sixteen's letter as a request to accept its late-filed petition for discretionary review. *See generally Kelley Trucking Co.*, 8 FMSHRC 1867, 1868 (Dec. 1986) (construing request for hearing as a request for relief from final order incorporating by implication a late-filed petition).

Original Sixteen filed its petition with the Commission on November 26, 2001, eight days past the 30-day deadline, but within the 40-day time period during which the Commission retains jurisdiction. Its petition also fails to meet the requirements of Rule 70(d). The Commission, however, has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 (Oct. 1999), *citing Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992); *Dykhoff, Jr. v. U.S. Borax Inc.*, 21 FMSHRC 1279, 1280 (Dec. 1999). The Commission has also entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980) (finding good cause where counsel for previously pro se complainant only obtained judge's decision 10 days prior to deadline for filing petition, and mailed petition on 30th day). In keeping with these principles, we conclude that Original Sixteen, which is not represented by counsel, has shown good cause for its late filing. *See generally Dykhoff*, 21 FMSHRC at 1280 (reconsidering previous order denying late-filed petition where pro se miner provided explanation of unfamiliarity with Commission procedure in motion for reconsideration).

Additionally, in the interests of justice, we conclude that Original Sixteen be afforded the opportunity to conform its petition to the requirements of the Mine Act and our Procedural Rules. *See Rostosky*, 21 FMSHRC at 1072-73. Therefore, upon consideration of Original Sixteen's petition, it is hereby granted for the limited purpose of affording Original Sixteen an opportunity to amend its petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

Original Sixteen must file any amended petition with the Commission, with service upon the Secretary of Labor, within 20 days. The Secretary may file an opposition to the amended petition within 10 days after service.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

Original Sixteen has failed to show good cause as to why its petition for discretionary review was filed eight days past the 30-day statutory time limit. Consequently, I would deny the petition as untimely.

Original Sixteen claims that slow mail delivery "due to the events of September 11, 2001" provided "short notice of response time." However, the Commission's docket office has verified that the October 19 decision was received by the operator on October 26, putting it on notice as of that date that any petition would have to be received at the Commission by the November 19 deadline. *See Duval Corp. v. Donovan*, 650 F.2d 1051 (9th Cir. 1981) (upholding Commission's denial of petition for reconsideration of dismissal of petition received 31 days after issue of the ALJ's decision when operator argued that it did not receive decision until six days after it was mailed).

Original Sixteen also claims that its "President was out of town on business . . . shortly after receiving the decision." Similarly, it states that its corporate manager, who, it asserts, played an important role in preparation of MSHA-related paperwork, was out of the office due to surgery. These vague allegations, even if assumed to be true, do not, in my view provide good cause as to why Original Sixteen was unable to comply with the 30-day statutory time limit. Indeed, in neither case are we provided with information about the length of the absence; we do not know whether the company officials were away for one day or one month.

Although I am mindful of the difficulty encountered by pro se litigants, good cause must still be shown when a petitioner seeks review of a judge's decision beyond the 30-day statutory time limit. In this case I would, for the foregoing reasons, deny the petition.

Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 30, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHN NOAKES	:	
v.	:	Docket No. CENT 2000-75-DM
GABEL STONE COMPANY	:	

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

DECISION

BY THE COMMISSION:

In this discrimination case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), brought by the Secretary of Labor on behalf of John Noakes against Gabel Stone Company, Inc. ("Gabel Stone"), Administrative Law Judge T. Todd Hodgdon awarded back pay to Noakes for Gabel Stone's discrimination against Noakes. 22 FMSHRC 1160 (Sep. 2000) (ALJ); 23 FMSHRC 171 (Feb. 2001) (ALJ). The Commission granted Gabel Stone's petition for discretionary review, but only on the issues of the mitigation of Noakes' damages and the amount of the back pay award. Direction for Review dated March 20, 2001. For the reasons that follow, we affirm the judge's decision as to those issues.

I.

Factual and Procedural Background

Noakes, a loader operator earning $7.00 per hour, was discharged by Gabel Stone in December 1998. 22 FMSHRC at 1161; 23 FMSHRC at 175. Immediately after his termination, Noakes applied for and received unemployment compensation and food stamp benefits through separate state agencies. Tr. 108-09; S. Penalty Br., Noakes Aff. at 1-2, ¶¶2-3. Each agency had

job search requirements that Noakes fulfilled. Noakes Aff. at 1-2, ¶¶2-3. In addition, he applied for work through temporary employment agencies. *Id.* at 2, ¶4; Tr. 216.

In January of 1999, Noakes also began taking classes during evening hours at Southwest Missouri State University in West Plains, Missouri, towards an associate's degree in computer science, with the idea of eventually obtaining a bachelor's degree. 23 FMSHRC at 175; Tr. 46-48. On February 2, 1999, Noakes obtained a weekend position with Town Square Internet in West Plains, and became a full-time Internet Technician there in June 1999. Tr. 106.

Noakes' discrimination complaint against Gabel Stone was filed on December 14, 1998, with the Department of Labor's Mine Safety and Health Administration. 22 FMSHRC at 1161. After a hearing, the judge determined that Noakes' discharge was discriminatory and therefore violated section 105(c)(1) of the Mine Act.[1] *Id.* at 1163-67. Though the judge ordered the parties to confer regarding the back pay due Noakes and the civil penalty to be assessed, they failed to agree on those issues and subsequently briefed their respective positions. *Id.* at 1167-68; 23 FMSHRC at 172.[2] In his supplemental decision and final order, the judge rejected Gabel Stone's claim that Noakes did not present any evidence that he looked for work to mitigate his damages. 23 FMSHRC at 174. The judge held that Gabel Stone had failed to carry its burden of demonstrating that Noakes did not make a reasonable job search, and found that, in any event, Noakes' affidavit established that he did make a reasonable effort to find, and in fact eventually found, another job. *Id.* at 174-75.

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[1] 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).

[2] The Secretary attached to her brief an affidavit from Noakes providing details of his attempts to find work after his discharge. *Id.* at 173. Gabel Stone filed a motion to strike the affidavit, which the judge attempted to resolve by having the parties depose Noakes, so that Gabel Stone would have the opportunity to cross-examine him on the affidavit. *Id.* at 172-73. The deposition was never held, however, as Gabel Stone refused to depose Noakes unless the judge issued all seven of the subpoenas it sought. *Id.* at 173. The judge refused as to all but two of the subpoenas, on the ground that the documents already provided to Gabel Stone by the Secretary clearly indicated that nothing else was available. *Id.*

The judge also found that Noakes' enrollment in college in January of 1999 was not sufficient to show, by itself, that Noakes had removed himself from the job market. *Id.* at 175. The judge was persuaded by the fact that all of Noakes' classes were at night, and that Noakes, while taking classes, obtained a part-time day job that eventually blossomed into a full-time job. *Id.* The judge concluded that Noakes was entitled to $9,157.60 in back pay, which was the amount of earnings Noakes lost from the time of his discharge until he secured full-time employment, less any interim earnings, plus interest. *Id.* at 176-77. The judge also assessed a $5,000 civil penalty against Gabel Stone. *Id.* at 177-79.

II.

Disposition

The scope of the Commission's review of a judge's remedial order, such as a back pay determination, is one of abuse of discretion. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997); *see also Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (applying standard to determination that discriminatee, as full-time student, was not ready, willing, and available for alternative employment and thus failed to mitigate her damages). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Reike*, 19 FMSHRC at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

With respect to back pay, the Commission has recognized that, while it "is ordinarily the sum equal to gross pay the employee would have earned but for the discrimination less his actual net interim earnings" a discriminatee's award of "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings.'" *Sec'y of Labor on behalf of Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982) (quoting *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941) ("[s]ince only actual losses should be made good, its seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he wilfully incurred."). Pursuant to 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. . . .
>
> . . . .
>
> In order to be entitled to back pay, an employee must at least make reasonable efforts to find new employment . . . . However, . . . [the employee is] held . . . only to reasonable

> exertions in this regard, not the highest standard of diligence. [T]he principle of mitigation does not require success; it only requires an honest good faith effort . . . .

NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1317-18 (D.C. Cir. 1972) (citations omitted) (alterations and emphasis in original) (cited with approval in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.16 (1982));[3] *see also Metric Constructors,* 6 FMSHRC at 231-33 (applying "reasonable efforts" standard to mitigation efforts of four discriminatees).

Failure to mitigate damages is an affirmative defense, and the burden of proving it is therefore on the operator. *See NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984); *Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1307 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984); *Metric Constructors*, 6 FMSHRC at 233; *Secretary of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 21 FMSHRC 1207, 1214 (Nov. 1999). The determination of whether the duty to mitigate has been met "is made on the basis of the factual background peculiar to each case." *Metric Constructors*, 6 FMSHRC at 232.

We have rejected a per se rule that an operator meets its burden simply by showing that the complainant attended college during the back pay period. *Jackson*, 21 FMSHRC at 1214. We emphasized in *Jackson* that a complainant'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." *Id.* Instead, we have held that to mitigate his damages, a discrimination complainant attending college is still expected to search for work and quit school if work becomes available. *Id.*[4]

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[3] "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). The NLRB continues to apply the same mitigation standard. *See, e.g., Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3rd Cir. 2001).

[4] Similarly, under other federal discrimination statutes where the employer bears the burden of proving a failure to mitigate on the part of the discriminatorily discharged employee, the discriminatee's attendance at school during the back pay period does not automatically establish that the employee failed to mitigate his damages during the time he was in school. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 838-39 (4th Cir. 2001) (Family and Medical Leave Act); *Dailey v. Societe Generale*, 108 F.3d 451, 456-57 (2d Cir. 1997) (Title VII); *Hanna*, 724 F.2d at 1307-09 (employer's reliance solely on Title VII discriminatee's college attendance to establish a failure to mitigate rejected). "Rather, the central question . . . is 'whether an individual's furtherance of his education is inconsistent with his responsibility to use reasonable diligence in finding other suitable employment.'" *Dailey*, 108 F.3d at 456-57 (quoting *EEOC v. Local 638*, 674 F. Supp. 91, 104 (S.D.N.Y. 1987)). A discriminatee who ceases her job search

Here, Gable Stone argues that Noakes's college attendance, by itself, established he had removed himself from the job market and thus failed to mitigate his damages. GSC Br. at 16. But, as our holding in *Jackson* set forth above makes clear, this argument must fail. As a threshold matter, we thus conclude that the judge did not abuse his discretion in rejecting this argument made by Gable Stone.

On the issue of Noakes's diligence in searching for substitute employment, the judge credited Noakes' statements regarding his employment search both in his affidavit[5] and in two state employment agency documents, copies of which had been submitted by Gabel Stone. 23 FMSHRC at 174-75. In his affidavit, Noakes states that he was required, in order to qualify for unemployment benefits, to engage in at least two employment inquiries each week, and that he consistently met or exceeded that standard. Noakes Aff. at 1, ¶2. Noakes also set forth how he was required, in order to qualify for food stamps, to register with a "work search organization," and that he sought employment through temporary employment agencies and "network[ed] through friends and family." *Id.* at 2, ¶3. In the state unemployment agency documents, Noakes specified the potential employers he had contacted the preceding week. Resp't Ex. 76, 77.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason to overturn the judge's crediting of Noakes with respect to his job search efforts. Consequently, the evidence supports the judge's determination that Gable Stone did not carry its burden of showing that Noakes failed to adequately search for a job. *See Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392-93 (7th Cir. 1975) (rejecting failure-to-mitigate claim where employer failed to show that discriminatee's job search did not include steps reasonable person would take in pursuing employment, and discriminatee was credited regarding extent of her search).

We also reject Gabel Stone's contention that Noakes failed to show that he diligently searched for a job between his termination and the January time period covered by his statements to the state employment agency. GSC Br. at 19, 21. As discussed, Gabel Stone is mistaken regarding the burden of proof in this instance. In addition, the judge determined that Noakes was

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and attends school after diligent efforts have proven fruitless will not necessarily be found to have failed to mitigate her damages. *See, e.g, Dailey*, 108 F.3d at 457.

[5] We find unavailing Gable Stone's argument that the judge improperly accepted the Noakes affidavit. *See* GSC Br. at 19. After the liability phase of the proceedings below, the judge properly directed the parties to confer regarding back pay (22 FMSHRC at 1167-68), and when the parties could not reach any agreement on the issue, properly conducted further proceedings, which included the filing of the Noakes affidavit by the Secretary. *See* 23 FMSHRC at 172-73. Gable Stone is hardly in a position to raise the propriety of the affidavit in light of the fact that the company failed to fully avail itself of the opportunity afforded it by the judge to cross examine Noakes on his affidavit in a deposition. *Id.*

diligent in his search for full-time employment (23 FMSHRC at 174), and the judge's crediting of Noakes' affidavit is more than enough evidence to support the judge's determination. While Gabel argues that state employment agency documents it submitted do not address the efforts Noakes made in the first month or so after his termination, Noakes' affidavit — credited by the judge as a "convincing[] demonstrat[ion] that [Noakes] made a reasonable effort to find" another job — does not support Gable Stone's suggestion that Noakes waited a month before beginning his job search efforts. *See id.*; Noakes Aff. at 1-2, ¶¶2-4.

The evidence also supports the judge's finding that the question whether Noakes would have chosen a full-time position over school is irrelevant in this case, given that Noakes' classes were held between 5:30 and 8:30 p.m. 23 FMSHRC at 175. This time period did not conflict with the 6:00 a.m. to 5:30 p.m. time period Noakes was required by state law to be available for work in order to qualify for the unemployment benefits. Noakes Aff. at 2 ¶5; *see Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir. 1985) (evidence showed that discriminatee's college attendance did not preclude her from holding down a full-time job); *see also Washington v. Kroger Co.*, 671 F.2d 1072, 1079 (8th Cir. 1982) (recognizing that full-time college student can, by attending classes at night, be full-time employee during the day, and that in such an instance discriminatee should not be held to have failed to mitigate damages).

Gable Stone also points out that, in the two state employment agency documents, Noakes declared that he would not have quit school to accept a full-time position that conflicted with his class schedule at night. GSC Br. at 18. However, the judge correctly held that Noakes' statements must be understood in the context in which they were provided: he was attending school in the evening, and had been discharged from a full-time day position. 22 FMSHRC at 175. The statements do not support the notion that Noakes intended that his college attendance preclude him from working full time, and indeed in each statement Noakes describes his availability and active search for a full-time day position. Resp't Ex. 76, 77.

Finally, as for whether the statements made by Noakes to the state employment agency that he would only accept a day position that paid at least $6.00 per hour establish that Noakes unreasonably restricted his job search, Gable Stone did not raise this issue to the judge when it had the opportunity to do so in response to the judge's request for the parties' positions on back pay. *See* GSC Supplemental Br. to ALJ. Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. 823(d)(2)(A)(iii); *accord* 29 C.F.R. 2700.70(d). *See Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1312-14 (Aug. 1992); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). In the absence of an explanation from Gable Stone why it failed to raise this issue before the judge, we cannot find good cause to consider Gabel Stone's arguments on the issue.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision on back pay and mitigation of damages.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 28, 2001

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

DECISION

BY THE COMMISSION:

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 second Decision on Remand setting the back pay owed Complainant Walter Jackson for his discriminatory discharge by Mountain Top Trucking Company ("Mountain Top"), Mayes Trucking Company, Elmo Mayes, and Anthony Curtis Mayes (collectively the "operators"). 22 FMSHRC 1391 (Dec. 2000) (ALJ). The Commission granted Jackson's petition for discretionary review ("PDR") challenging the judge's decision.[1] For the reasons that follow, the judge's decision is affirmed in result.

[1] The Secretary of Labor, who originally filed and presented the case on Jackson's behalf up through the second remand to the judge, neither requested review of the judge's decision nor filed a brief with the Commission. In addition to the representation provided by the Secretary, Jackson has been represented by private counsel throughout this case.

I.

Factual and Procedural Background

This is the third time the question of the back pay due Jackson has been before the Commission.[2] Following an evidentiary hearing, the judge determined that the operators' February 1995 discharge of Jackson from his position as a truck driver with Mountain Top was discriminatory and thus violated section 105(c)(1) of the Mine Act.[3] *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 19 FMSHRC 166, 181-86 (Jan. 1997) (ALJ). The judge subsequently held that Jackson's failure to attempt to reopen his temporary reinstatement application after his layoff from alternative employment he had obtained with Cumberland Mine Services ("Cumberland") constituted a failure to mitigate damages, and consequently awarded him back pay only through December 9, 1995, which was 60 days after Jackson's layoff from Cumberland. 19 FMSHRC 875, 880-83 (May 1997) (ALJ). On review, the Commission 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, 284-85 (Mar. 1999) (*Jackson I*).

In his first remand decision on the back pay due Jackson, the judge found that, in the record originally before him and the Commission, Jackson had not revealed his college attendance during approximately 3 months of the 16-month back pay period. 21 FMSHRC 913, 917-18 (Aug. 1999) (ALJ). The judge concluded that Jackson's college attendance was relevant evidence that should be considered on the mitigation issue, but felt constrained from addressing it by the limits placed on him by the Commission's remand decision. *Id.* at 918. Consequently, the judge awarded Jackson net back pay for the full back pay period, a total of $32,642.00 plus interest. *Id.* at 918-19.

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[2] The history of this proceeding is recounted in greater detail in *Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 21 FMSHRC 1207, 1208-11 (Nov. 1999) (*Jackson II*).

[3] 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).

In reviewing the judge's first remand decision, we agreed that there were legitimate outstanding issues regarding the extent to which Jackson was available to work during the back pay period, including whether Jackson had removed himself from the job market during the time he attended college. *Jackson II*, 21 FMSHRC at 1213-14. Consequently, we again remanded the case to the judge, with instructions to reconcile conflicting evidence on those issues and make credibility resolutions where necessary. *Id.* at 1214-15.

On the second remand, the judge held a 1-day hearing to take further evidence on Jackson's efforts to find employment during the back pay period, whether he suffered from any physical impairment during the period that interfered with his ability to work, and the impact, if any, of his college attendance on his availability for full-time employment. 22 FMSHRC at 1393. At the hearing, Jackson explained that, after losing his position with Mountain Top in February 1995 and being unable to find substitute employment, he enrolled in July 1995 for the upcoming fall semester at Union College in Barboursville, Kentucky, approximately 70 miles from his home. *Id.* at 1397; Tr. 27-33, 63-64. Jackson, who had previously obtained an Associate of Arts degree, had the ultimate goal of teaching math or science in junior or senior high school. 22 FMSHRC at 1397. Jackson's class schedule required him to attend classes throughout the day and well into the night on Tuesdays and Thursdays. *Id.*; Tr. 56.

The evidence regarding Jackson's efforts to find full-time work while he was enrolled in college was all provided by him. Before he began classes in late August 1995, Jackson started working full-time as a general laborer with Cumberland. 22 FMSHRC at 1397. Once his classes began, Jackson at first worked around his class schedule to put in 40 or more hours per week, but was working less than 40 hours per week when he was laid off from Cumberland in early October. *Id.* at 1397-98; Compl. Ex. 1. The only other work Jackson obtained between that time and fall 1996 was a week-long position in December 1995 with a Cumberland affiliate, the Garland Company. 22 FMSHRC at 1401; Tr. 37-42.

Contemporaneous evidence of Jackson's job search efforts after his layoff from Cumberland consists of copies of the completed forms for the period October 1995 to January 1996 that he was obligated to submit every 2 weeks to receive unemployment benefits from the Virginia Employment Commission ("VEC"). 22 FMSHRC at 1398-99; Tr. 32-33; Compl. Ex. 3. Each form listed a single employment "contact" Jackson had made each Monday, Wednesday, and Friday he was not working during that time period, for a total of 38 contacts. 22 FMSHRC at 1399; Tr. 55-56; Compl. Ex. 3.

To shorten his commute and reduce associated expenses, in January 1996 Jackson transferred from Union College to Southeast Community College ("SCC") in Cumberland, Kentucky, for the semester that ended in May 1996. Tr. 66-67, 79-83. After January 1996, Jackson's eligibility for unemployment compensation ceased, so he had no copies of completed unemployment benefits forms to submit as evidence. Tr. 237-38. For the period after January 1996, Jackson testified that he continued looking for work at the places he had applied to previously. Tr. 83-84.

With regard to both Union College and SCC, Jackson testified he would have left school if necessary to take a full-time position. Tr. 66, 70, 84. He also testified to using the services provided by the Kentucky Unemployment Insurance Office ("KUIO"), and investigating employment possibilities to which it referred him. Tr. 57-58. Jackson eventually obtained two successive positions in late 1996 due to KUIO referrals, the latter of which he still held in September 2000, at the time of the hearing. Tr. 25-27, 58-63.

In his subsequent decision, the judge initially indicated that he expected Jackson to show that, having enrolled in college, he continued looking for a full-time job and would have quit school if necessary to obtain one. 22 FMSHRC at 1397. After finding that the evidence presented by Jackson was insufficient to demonstrate that, the judge then addressed the issue specified by the Commission on remand, which the judge expressed as "the impact of Jackson's college attendance on his availability for employment." *Id.* at 1399. The judge rejected Jackson's assertion that he would have left college for a full-time job, determining that the weight of the evidence was to the contrary. *Id.* at 1401. Consequently, the judge concluded that the back pay period should not include the time during which Jackson was enrolled in college, and accordingly reduced the net back pay amount the operators owe Jackson to $16,515.40, plus interest. *Id.* at 1402-03.

II.

Disposition

The scope of the Commission's review of a judge's remedial order, such as a back pay determination, is one of abuse of discretion. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997); *see also Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (applying standard to determination that discriminatee, as full-time student, was not ready, willing, and available for alternative employment and thus failed to mitigate her damages). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Reike*, 19 FMSHRC at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

The Commission has previously held, including more than once in this proceeding, that "[t]he operator bears the burden of proof with respect to willful loss" of earnings by a discriminatee seeking back pay. *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984) (citing *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)), *aff'd* 766 F.2d 469 (11th Cir. 1985);[4] *see also Jackson I*, 21 FMSHRC at 284-85. With regard to college attendance, in *Jackson II* the

[4] "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*, 6 FMSHRC at 231. The NLRB continues to require an employer to show that the employee failed to mitigate his damages. *See, e.g., Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3rd Cir. 2001).

Commission stated that "[t]he burden of proof is on the operators to show that [Jackson] either did not seek [full-time] employment [during the time he was enrolled in college], or would not have quit college if it had become available." 21 FMSHRC at 1214 (citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1274 (4th Cir. 1985)).

Despite that clear statement, the judge stated that it was sufficient that the operators here came "forward with evidence of Jackson's college attendance" for "the burden [to] shift[] to Jackson to demonstrate that he was ready, willing and able to work, and actively looking for full-time employment during the back pay period." 22 FMSHRC at 1397. The judge erred in describing the operator's burden to show a failure to mitigate, particularly as to what must be shown regarding the impact of a discriminatee's enrollment in school. We plainly stated in *Jackson II* that "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." 21 FMSHRC at 1214.

This clearly means that something more than the mere evidence of college attendance is necessary to decide the issue in favor of the operators. In *Jackson II* we required the operators to additionally establish that either Jackson did not seek full-time employment while in college or would not have quit college to accept a full-time position. *Id.* Moreover, a review of the case law applying the burden of proof we articulated in *Jackson II* shows that courts look to the circumstances surrounding the discriminatee's school attendance and availability for full-time employment. For instance, in *Miller v. Marsh*, the court took into account evidence that the discriminatee's commitment to attend law school was unequivocal, which was indicated by, among other things, her resignation from her alternative employment upon entering school. 766 F.2d at 492. The judge here was therefore mistaken in believing that the operators had no way of showing that Jackson did not make reasonable efforts to find full-time work while in school, or would not have quit school to accept a full-time position.

In addition, courts have rejected the notion that the employer meets its burden of proof simply by establishing that the discriminatee's school attendance potentially conflicts with the ability to hold a full-time job. *See Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1307-09 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984). In the context of other federal discrimination statutes, courts have rejected a per se rule that school attendance is incompatible with the duty to mitigate damages. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 838-39 (4th Cir. 2001) (Family and Medical Leave Act); *Dailey v. Societe Generale*, 108 F.3d 451, 456-57 (2d Cir. 1997) (Title VII); *Huegel v. Tisch*, 683 F. Supp. 123, 125-26 (E.D. Pa. 1988) ("there is no per se rule that back pay is tolled during periods of enrollment in an education program. Rather, the issue is to be determined in the context of the factual matrix in a particular case."); *see also Metric Constructors*, 6 FMSHRC at 232 (determination of whether duty to mitigate has been met "is made on the basis of the factual background peculiar to each case").[5]

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[5] As the judge recognized (22 FMSHRC at 1400), the Fifth Circuit has stated:

On its face, the judge's apportionment of the burden of proving a failure to mitigate would appear to be an error of law and thus sufficient grounds to hold that he abused his discretion. *See Jackson I*, 21 FMSHRC at 284; *Reike*, 19 FMSHRC at 1258-60. However, the judge did not stop his analysis of the evidence at this point, but instead went on to acknowledge the Commission's remand instructions in *Jackson II*, recognizing that there is no per se rule that school enrollment establishes a failure to mitigate, and that the issue must be resolved on a case-by-case basis. 22 FMSHRC at 1399. More importantly, the judge also addressed the evidence which he found to contradict Jackson's assertions that he was looking for a full-time position and would have quit school if necessary to obtain one. *Id.* at 1400-01.

The judge, doubting that Jackson had actually applied to the employers he listed on his unemployment benefits forms, refused to credit Jackson's testimony and other evidence regarding his job search while enrolled in college, as well as Jackson's statements that he would have quit school if he had obtained a full-time position necessitating that he do so. *Id.* at 1399, 1401-02. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Here, record evidence supports the judge's negative credibility determination. As the judge pointed out, Jackson was less than forthcoming in this proceeding regarding his college attendance during the back pay period. 22 FMSHRC at 1401. Jackson did not divulge either semester of his college attendance during the judge's original consideration of the back pay issue (21 FMSHRC at 917), and only during the hearing held upon the second remand did he reveal his SCC attendance. 22 FMSHRC at 1396; Tr. 220-25.

As for his job search, Jackson testified that he filed an application at each employment contact listed on his VEC forms. Tr. 44, 49-51, 78-79. However, Jackson checked the "no" box next to "application taken" for all 38 of the employment contacts listed on the forms. Compl.

> [w]e take notice that the vast majority of full-time college students could not also hold down a full-time job, and that in the usual case when one decides to attend college on a full-time basis, it does curtail his present earning capacity and effectively removes him from the employment market.

Brady, 753 F.2d at 1276. Nevertheless, the court went on to examine whether the employer had shown that the discriminatee did in fact fall within that "vast majority of college students," and found that it had not. *Id.* at 1274, 1276.

Ex. 3. Without addressing the conflict between Jackson's testimony and the forms, the judge found the forms to be an admission by Jackson that he did not file applications with the employers listed. 22 FMSHRC at 1399, 1401. In addition, the judge found it significant that Jackson changed his position before the VEC with respect to whether he was available for full-time work. *Id.* at 1401. Jackson initially reported to the VEC that he was not available for work on Tuesdays and Thursday because of school, but after that stated that he was available to work each day. *Id.* at 1399; Tr. 230-31; Compl. Ex. 3. Based on the record evidence, we see no reason to overturn the judge's negative credibility determination.

In addition to refusing to credit Jackson's testimony, the judge drew several inferences to conclude that Jackson would not have quit school to take a full-time position. The Commission has recognized that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). In considering the evidentiary effect of inferences, the Commission has held that judges may draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (November 1989). In cases where more than one reasonable inference could have been drawn from the record, it is for the trier of fact to decide between those inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995).

In our opinion, some of the inferences the judge drew are reasonable and rational, given the nature of the issue. For example, the judge drew a negative inference from Jackson's change in position before the VEC regarding whether he was available for work each weekday. 22 FMSHRC at 1401. The judge was persuaded that Jackson's initial answer on the VEC form that he was not available for work on Tuesdays and Thursdays was the more reliable information, because the later statements were made by Jackson with the knowledge that he could not receive unemployment benefits if he was not available to work each day. *Id.* at 1399. The judge also found noteworthy Jackson's ability to find a brief, full-time position between college semesters with a Cumberland affiliate, the Garland Company. *Id.* at 1401. Accordingly, we conclude that inferences the judge properly drew support his failure-to-mitigate determination.[6]

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[6] We do not agree with the judge that, by only searching for a job on the days he did not have classes, Jackson unreasonably limited his job search. 22 FMSHRC at 1401. There is no authority for the proposition that a discriminatee must look for work each and every weekday to avoid being found to have failed to mitigate his damages. All that is required is a reasonable effort to find substitute employment. *See, e.g., Metric Constructors,* 6 FMSHRC at 231-33. Chairman Verheggen finds notable the judge's inference that, because Jackson had taken out a $4,100 student loan to attend 1995 fall semester classes at Union College, he was unlikely to quit school without finishing the semester. 22 FMSHRC at 1401.

While Jackson correctly points out that the operators themselves did little to prove that he failed to mitigate his damages (PDR at 17, 24),[7] employers may chose to use no more than the discriminatee's own testimony to show his failure to mitigate damages. *See Nord v. United States Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir. 1985). More importantly, the judge found that the record as it developed throughout the proceeding was sufficient to disprove the notion that Jackson was looking for full-time work and would have quit school to take a full-time position.[8]

In sum, we hold that, while the judge's initial statements about the burden of proof were erroneous, sufficient evidence under the applicable abuse of discretion standard supports his determination that Jackson was not seeking a full-time position for which he would have quit school if necessary. We therefore conclude that the judge did not abuse his discretion in determining that Jackson failed to mitigate his damages while attending college, and affirm the judge's determination in result.[9]

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[7] Jackson designated his PDR as his opening brief.

[8] Jackson argues that he only enrolled in college when all his efforts to find work proved fruitless, and cites cases in which discriminatees were found not have to failed to mitigate damages by attending school because, with time, it had become apparent that searching for alternative employment was futile. PDR at 20-23. Jackson's reliance on this point is inconsistent with his primary position before the Commission and the VEC, that he was actively seeking full-time employment, and would have accepted full-time work even if he had to quit school. Moreover, in the cases Jackson cites, the discriminatees by and large had given up on the idea of finding immediate full-time employment, and were instead going to school in order to again become active members of the workforce in the future. *See Miller v. AT&T Corp.*, 250 F.3d at 838-39; *Dailey*, 108 F.3d at 456-58; *Brady*, 753 F.2d at 1276; *see also Smith v. Am. Serv. Co. of Atlanta, Inc.*, 796 F.2d 1430, 1432 (11th Cir. 1986). Jackson's case is otherwise — he was hired full-time at Cumberland before he even started classes at Union College.

[9] Mountain Top concludes its brief by requesting that the Commission "reverse" the judge with respect to many of the rulings he made throughout these proceedings, both in favor of Jackson and in favor of the operators, going all the way back to the judge's original 1997 decision on the merits of Jackson's complaint. Op. Br. at 10. As we previously explained, because we denied review of the operator's PDR, those rulings are final, and the Commission lacks jurisdiction to review them. Unpublished Order dated April 4, 2001, at 2.

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's backpay award.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 28, 2001

RAG CUMBERLAND RESOURCES, LP,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 2000-181-R
	:	Citation No. 3657290; 7/6/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2000-182-R
ADMINISTRATION (MSHA),	:	Citation No. 3657291; 7/6/2000
Respondent	:	
	:	Docket No. PENN 2000-183-R
	:	Order No. 7076284; 7/6/2000
	:	
	:	Docket No. PENN 2000-207-R
	:	Order No. 2840951; 8/2/2000
	:	
	:	Docket No. PENN 2000-208-R
	:	Order No. 2840952; 8/2/2000
	:	
	:	Docket No. PENN 2000-209-R
	:	Order No. 3657297; 7/20/2000
	:	
	:	Docket No. PENN 2000-210-R
	:	Order No. 7078294; 7/20/2000
	:	
	:	Cumberland Mine
	:	Mine ID 36-05018
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2001-63-A
Petitioner	:	A.C. No. 36-05018-04200
v.	:	
	:	
RAG CUMBERLAND RESOURCES LP,	:	
Respondent	:	Cumberland Mine

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant/Respondent;
Susan M. Jordan, Esq., Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Feldman

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). These matters also concern a compensation case in Docket No. PENN-2000-204-C brought pursuant to section 111, 30 U.S.C. § 821, by the United Mine Workers of America (UMWA) on behalf of its members. The compensation case was stayed on January 30, 2001, pending the outcome of these proceedings. The consolidated hearing was conducted in Fairmont, West Virginia, in two sessions, from April 3 through April 6, 2001, and from July 24 through July 25, 2001. After the hearing recess in April 2001, the parties resolved several of the contested citations.

On June 26, 2001, I approved a settlement agreement in Docket No. PENN 2001-94 wherein Rag Cumberland Resources LP (Cumberland) agreed to pay a reduced civil penalty for Citation Nos. 2840951 and 2840952. These citations are the subjects of the contests in Docket Nos. PENN 2000-207-R and PENN 2000-208-R. Consequently, Cumberland has moved to **withdraw its contests in Docket Nos. PENN 2000- 207-R and PENN 2000-208-R.**

The Secretary moved to vacate Order Nos. 3657294 and 3657297 on March 29 and July 2, 2001, respectively. These orders are the subjects of the contests in Docket Nos. PENN 2000-209-R and Penn 2000-210-R. Consequently, Cumberland has moved to **withdraw its contests in Docket Nos. PENN 2000- 209-R and PENN 2000-210-R.**

The remaining contested citations and order in Docket Nos. PENN 200-181-R, PENN 2000-182-R and PENN 200-183-R, consist of 104(a) Citation No. 3657290 and related 107(a) imminent danger Order No. 7076284, and, 104(d)(1) Citation No. 3657291. Docket No. PENN 2001-63-A is the civil penalty case dealing with Citation Nos. 3657290, 3657291 and Order No. 7076284.[1] These citations concern bleeder conditions at the Cumberland Mine during the afternoon shift on July 5, 2000. The imminent danger order withdrew mine personnel who went into the bleeder entries during the early morning hours on July 6, 2000, to make ventilation changes. The specific area of the bleeder system that is in issue is the eastern perimeter located behind the gob that remained after a number of longwall panels had been mined. The parties have filed thorough post hearing briefs and reply briefs that have been considered in the disposition of these matters.

I. Statement of the Case

The explosive methane range of an air-methane mixture is 5% to 15%. As a general proposition, The Secretary's safety regulations require that methane concentrations in bleeder

[1] At Cumberland's request, on July 31, 2001, Chief Judge Barbour severed contested Citation Nos. 3657290 and 3657291 from unrelated citations in Docket No. PENN 2001-63 and placed these contested citations in Docket No. PENN 2001-63-A to facilitate resolution of the issues in these proceedings.

entries shall not exceed 2%.[2] These matters concern continued longwall operations during the afternoon shift on July 5, 2000, after several 3.6% methane readings were obtained at the surface of the No. 1 exhaust fan shaft that was used to ventilate the eastern perimeter bleeders. 104(a) Citation No. 3657290 alleges a significant and substantial (S&S) violation of the provisions of 30 C.F.R. § 75.334(b)(1) that require bleeder systems to dilute and move methane from worked-out areas away from active workings. 104(d)(1) Citation No. 3657291 cites an S&S violation of 30 C.F.R. § 75.363(a) that is attributed to Cumberland's unwarrantable failure. Section 75.363(a) requires all personnel, except those specified in section 104(c) of the Mine Act, 30 U.S.C. § 814(c), to be withdrawn from mine areas where there are hazardous conditions that pose an imminent danger. Section 104(c) of the Mine Act, however, permits persons designated by the mine operator to correct conditions that constitute an imminent danger.

As noted, the explosive range of methane is a 5% to 15% air-methane mixture. Concentrations below 5% are not explosive because they lack adequate methane. Concentrations above 15% are not explosive because they lack adequate oxygen. The Secretary asserts the 3.6% methane reading at the surface of the No. 1 shaft was indicative of potential explosive concentrations of methane in the travelable bleeders that were not being adequately ventilated away from the working face. Cumberland contends that the 3.6% methane at the shaft was representative of approximately 3.6% methane in the travelable bleeder entries, and, that the methane in the bleeder was being carried away from the working areas.

Significantly, despite repeatedly obtaining abnormally high methane readings of 3.6% at the surface of the No. 1 shaft as early as 3:30 p.m. on July 5, 2000, Cumberland continued normal longwall operations until midnight without determining if methane concentrations in the underground bleeder were approaching the 5% explosive range. It would have taken several hours for a mine examiner to travel the eastern perimeter bleeder entry to take the necessary methane concentration readings. (Tr. 490-91).

The dispositive question is not, as Cumberland suggests, whether the Secretary has met her burden of demonstrating methane bleeder concentrations were in the explosive range on July 5. (*C. Reply Br.* at 2). Although the burden of proof rests with the Secretary, the Secretary's *prima facie* burden of demonstrating the cited violations occurred is satisfied by establishing that there was a malfunction in the bleeder system. Having established a malfunction, the focus shifts to whether 3.6% methane exiting from the bleeder at the surface should have alerted a reasonably prudent person that underground bleeder readings were required to ensure that methane adequately was being diluted and carried away from active workings.

As discussed below, the Secretary, relying on the bleeder's ventilation design, as well as comparisons of previous methane readings at the shaft and in the travelable bleeder, has provided a reasonable basis for concluding that the 3.6% methane exiting the bleeder at the surface was indicative of potential explosive levels of methane in the bleeder below. In contrast,

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[2] The provisions of section 75.323(e), 30 C.F.R. § 75.323(e), the mandatory safety standard governing methane levels in bleeders, specifies that methane concentrations, determined by readings taken in a split of air immediately before that split joins another split of air, shall not exceed a 2.0 percent.

Cumberland's assertion that the 3.6% readings at the No. 1 fan were not indicative of explosive levels of methane in the bleeder entries is conjecture that could have been resolved if Cumberland had taken underground bleeder readings before continuing active mining. Having failed to do so, Cumberland's defense that the bleeder conditions on July 5 did not require the suspension of normal longwall operations because they were not hazardous is not supported by the evidence.

Consequently, Citation Nos. 3657290 and 3657291 shall be affirmed. However, as discussed below, 107(a) imminent danger Order No. 7076284, issued after midnight on July 6, 2000, when Cumberland already had removed all mine personnel, except those persons designated under section 104(c) of the Mine Act to correct the hazardous condition, shall be vacated.

II. Background

A. The Bleeder System

The Cumberland Mine is classified as a "gassy mine" because it liberates approximately 12 million cubic feet of methane per day. As a gassy mine, the Cumberland Mine is subject to increased Mine Safety and Health Administration (MSHA) inspections pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 823(i).[3] (Tr. 868-69, 1492). These matters concern a set of bleeder entries on the eastern perimeter of a number of longwall gobs at Longwall Section 42. (Ex. R-5).[4] The longwall gobs are all interconnected and air flows within and between them. The term "gob", as used in this decision, is the area where coal has been extracted from successive longwall panels, as well as from the development entries between the mined-out panels, where the roof has collapsed as a consequence of the mining cycle.

The active longwall panel on July 5, 2000, was the 90 butt longwall panel that is located at the northern end of the gob. *Id.* At the western perimeter of the gob there is a set of mains entries. *Id.* The southern perimeter of the gob is formed by another set of bleeder entries known as the 1B Right bleeders. *Id.* The split of air from the 1B Right bleeders meets the split of air from the eastern perimeter bleeders at the bottom of the No. 1 bleeder shaft. *Id.* The No. 1 bleeder shaft is a vertical shaft measuring approximately 600 feet deep from its base in the southeastern corner of the bleeder system to the surface. (Tr. 494-95; Ex. R-5). At the surface of the shaft is a bleeder exhaust fan. The No. 1 bleeder shaft is used solely to transport a diluted air-methane mixture from the bleeder entries underground to the surface and out of the mine.

As a general proposition, the gob liberates high concentrations of methane that must be safely diluted and carried away from working places where there are potential ignition sources. Thus, methane concentrations in the gob vary from 0% to 100%. As previously noted, methane levels in excess of 15% are not explosive because they lack sufficient oxygen. Bleeder entry systems are designed to dilute methane liberated from the gob in a controlled fashion. The

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[3] Under Section 103(i), gassy mines are subject to a minimum of one spot inspection every five working days at irregular intervals.

[4] Cumberland and government exhibits will be designated as "R" and "G", respectively.

Secretary's mandatory safety regulations require that methane concentrations shall not exceed 2.0% in a bleeder split of air to be measured before that split of air joins another split of air. 30 C.F.R. § 75.323(e). There are no other limits on methane concentrations in bleeders in the Secretary's regulations. (Tr. 818). However, MSHA has an informal, unwritten policy that methane concentrations below 4.5% in bleeder entries do not constitute an imminent danger. (Tr. 269, 402, 405, 419).

At Cumberland's longwall section, prior to beginning mining of the 90 butt panel on June 6, 2000, methane liberated from the gob into eastern perimeter was diluted from fresh air traveling in a southerly direction to the No. 1 Bleeder shaft. Upon commencement of mining of the 90 butt panel, the No. 2A Bleeder shaft and exhaust fan, located in the northeastern corner of the eastern perimeter of the bleeder system, became operational. (Ex. R-5). Thus, as of June 6, 2000, methane from the gob in the eastern perimeter bleeder entries was diluted by fresh air that was split and directed to the surface by either the No. 1 Bleeder shaft or the No. 2A Bleeder shaft. (Tr. 188-89, 1121, 1553).

As of June 6, 2000, air principally entered the bleeders at the northern end from the headgate of the 90 butt panel through entries known as the No. 1 and No. 2 sweeteners, as well as from the tailgate (also known as the 82 butt entries) through a regulator known as "Fred's Hole." (Tr. 1956-62). As air travels through the No. 1 and No. 2 sweeteners and Fred's Hole in a southerly direction in the eastern bleeders, it is split near a location in the vicinity of bleeder evaluation points (BEPs) 18 and 18A. (Tr. 192-4; Ex. R-5). BEPs are locations where there are regulators that control the amount of methane exiting the gob into the bleeder entries where the methane is diluted with fresh air and carried to the surface. (Tr. 1687). In the vicinity of BEPs 18 and 18A, some of this bleeder air is split and directed to the No. 2A bleeder shaft and some of the air goes to the No. 1 bleeder shaft. In essence, these two bleeder shafts compete for the air traversing through the eastern perimeter bleeders. (Tr. 1689-90).

As air travels through the eastern bleeders, air from the gob is vented into the bleeders at various BEP locations designated by numbers in descending order from north to south, specifically BEP Nos. 21, 20, 18, 18A, 8, 7 and 6. (Ex. R-5). As noted, at these locations the air coming out of the gob through regulators into the bleeder contains higher levels of methane. It is the function of the bleeder system to dilute these high methane levels with fresh air coursing the bleeder entries.

Between June 6 and July 5, 2000, BEPs 6, 7 and 8 were adjusted to their most closed positions, although air continued to come out of them. (Tr. 1671-72, 1676, 1910-11). Cumberland maintains they were closed because the methane released from the gob at these locations was creating lowered oxygen levels in areas of the eastern bleeders where miners were required to travel to pump water from the bleeder. (Tr. 1723-24, 1912). Although the BEP locations were approved by MSHA under the ventilation plan, Cumberland maintains MSHA approval for closing the regulators was not required because their closures were merely

adjustments performed within the operator's discretion.[5] (Tr. 902, 1672-73, 1808). During this period Cumberland also installed check curtains in entries across from BEP 22 to BEP 18. (654-55, 982). The closure of BEPs 6, 7 and 8, and the installation of check curtains from BEP 22 to BEP 18 prior to July 5, 2000, reduced the rate of methane that was being liberated into the eastern perimeter entries, consequently reducing the methane concentrations in the No. 1 shaft. The Secretary asserts these actions bottled up methane in the gob rather than properly ventilating methane from the gob. In this regard, the Secretary contends that such actions, over time, could result in an accumulation of unliberated methane that would eventually back-up from the bleeder system into working areas. (Tr. 621-24, 631, 762, 765, 780, 977,981-82, 992, 1732, 1734-35, 2016-18).

In addition to the methane concentrations exiting the gob at the BEPs along the eastern perimeter, methane also is ventilated from the southeast corner of the gob at locations in the vicinity of what were formally BEPs 3 and 4. (Ex. R-5). The southeast corner of the gob is the area of lowest pressure because of its proximity to the No. 1 fan. Consequently, Cumberland contends methane from this area tends to travel more easily into the bleeders and out the No. 1 shaft to the surface. (Tr. 899-900, 1800-01, 1819). There are also openings from the gob into the 1B Right bleeders in the southern perimeter. (Ex. R-5).

There were water accumulations in the eastern bleeders south of BEP 5A. Although Cumberland had set up a pumping system, this area of the bleeder remained inaccessible. Because of elevations in the mine floor, it was not expected that water levels would rise to the roof completely blocking air to the No. 1 shaft. Since June 6, 2000, the water levels south of BEP 5A had remained relatively constant in that the water gauge at the No. 1 fan, that measures fan resistance evidencing a possible blockage of the bleeders, remained fairly constant. However, Cumberland noted that the water gauge at the No. 1 bleeder fan had begun to rise in the days preceding July 5 reflecting a possible increase in the accumulated water in the vicinity of BEP 5A. (Tr. 1970).

B. Ventilation of the Longwall on July 5, 2000

As previously noted, the 90 butt longwall panel began retreat mining on June 6, 2000. It had retreated approximately 1500 feet by July 5, 2000. The longwall face was ventilated by coursing intake air down the headgate entries and directing the air across the longwall face. After sweeping the face, the air traveled along the edge of the gob in the tailgate entry, and into the No. 2 entry of the 82 butt where some of the air traveled inby back into the bleeders through Fred's Hole, and some of the air traveled outby in the No. 2 entry of the 82 butt. (Ex. R-5). Initially, the tailgate (the No. 1 entry of 82 butt) was an intake entry that joined the air sweeping the face at the tailgate and traveled into the bleeder system through Fred's Hole or back out through the No. 2 entry of the 82 butt to the Mains on the western perimeter. *Id.* Although air

[5] As discussed *infra*, while adjustments to regulators may not require MSHA approval, the closing of regulators that, in effect, void MSHA's approved BEP locations, may constitute a modification of the ventilation plan that requires MSHA approval. Cumberland has not been charged with a violation of its approved ventilation plan.

enters Fred's Hole to ventilate the bleeders, Fred Hole is actually located in the gob rather than in a bleeder entry. (Tr. 1751, 1904-05).

On July 3, 2000, a problem developed with the face ventilation on the longwall after air velocities at the face had dropped. This occurred because the resistance in the No. 2 entry of 82 butt had increased because of roof falls associated with the retreat of the 90 butt panel. The resistance to the return air flow resulted in a diminution of air flowing across the face. (Tr. 1120, 1125, 1554, 1557-58). Consequently, an air change was made on July 3, 2000, to change the longwall tailgate air in the No. 1 entry of 82 butt from intake air to return air. (Tr. 1118, 1120, 1554, 1558-59). The air change resulted in increased air flow across the longwall face. After the air change, the velocity of air at Fred's Hole was 49,000 cfm. (Tr. 1903, 1987-88).

The longwall face ventilation is designed to maintain pressure on the gob immediately behind the longwall shields. This prevents methane from the gob immediately behind the shields from coming out into the longwall face. (Tr. 1173). At the end of the face the air is split. Some of the air is directed toward the bleeder and the remaining air exits out the tailgate as return air. The area at the end of the face where the air is split is known as a "T-split." (Tr. 1802, 1834-36). A properly functioning T-split, in conjunction with a properly functioning bleeder system, maintains pressure differentials that are intended to prevent methane from the gob from backing up into the working face. (Tr. 1835-37).

C. Events of July 5 and July 6, 2000

During the day shift on July 5, 2000, MSHA Inspector Ronald Hixson was at the Cumberland Mine to participate in an ongoing MSHA inspection. Hixson reviewed the weekly examination books in the mine office. The normal methane concentration at the No. 1 bleeder shaft was approximately 1.6%. (Tr. 183-85). Hixson noticed that the methane readings at the No. 1 bleeder fan had been higher than normal during the previous two weeks. For example, the examination book entries reflected normal readings of 1.6% on May 18; 1.6% on May 24; 1.6% on May 30; and 1.4% on June 6. (Tr. 183-85; Ex. G-7). More recent readings were consistently higher in the 1.8% to 1.9% range. There was a 1.8% reading on June 14; a 1.9% reading on June 22, a 1.89% reading on June 30; and a 1.9% reading on July 3, 2000. (Ex. G-7).

At approximately 12 noon on July 5, Hixson traveled to the No. 1 bleeder fan with Michael Konosky, Cumberland's safety representative. Konosky took readings with his Exotector. The results indicated methane was exiting the fan shaft at concentrations from 1.8% to 2.2%. Hixson also took a bottle sample of air for laboratory analysis. The results, which were not known until July 13, showed 3.6% methane. (Tr. 212-13; Ex. G-2). Hixson left the mine at approximately 1:30 p.m. on July 5. At the time of Hixson's departure, he had no knowledge of bleeder shaft methane readings above the 1.8% to 2.2% range. (Tr. 206, 207-09, 469).

To ensure proper functioning of the bleeder system, the exhaust fans are monitored by water gauge pressure readings. The water gauge measures the degree of resistance caused by water accumulations that block bleeder entries. As water levels rise, resistance in the bleeder system rises causing the bleeder shaft fan to exert more pressure (work harder) to overcome

the resistance. Since the water gauge at the No. 1 fan had been rising, Fred Evans, Cumberland's mine foreman, convened a meeting on the morning of July 5, 2000, to discuss the increase in fan pressure. (Tr. 1132, 1562-63, 1970). Evans was concerned that the increase in pressure could cause too much methane to be drawn out of the gob at too fast a rate, thus increasing the concentration of methane in the bleeder. Evans was also concerned that the water pumps in the eastern perimeter south of BEP 5A may not have been working properly. In addition to water accumulations, a high water gauge reading could indicate other causes of increased resistance in the gob areas behind the longwall face or in the tailgate entry of the 82 butt. (Tr. 1795).

As a result of the meeting, Evans dispatched Jason Hustus, a Cumberland engineer, to the No. 1 shaft to obtain a methane reading. At approximately 3:30 p.m. on July 5 Hustus obtained a methane reading of 3.6% at the No. 1 shaft. Evans knew that Hixson and Konosky had obtained a 1.8% methane reading of at the No. 1 shaft earlier that same morning. Evans asked Hustus to recalibrate his methane detector and sent Hustus back for another reading. Once again Hustus obtained a reading of 3.6%.

Evans informed Gary DuBois, manager of engineering, and Robert Bohach, manager of safety, of Hustus' methane readings. At approximately 6:00 p.m. DuBois and Bohach went to the No. 1 shaft and took several methane readings of 3.6%. (1137-38, 1778). Concerned, they went to the 32-1 surface gob vent hole that is located in close proximity to the No. 1 shaft. (Ex. R-5). Gob bore holes are drilled from the surface into the strata above longwall panels to vent methane directly from the gob to the surface. Dubois and Bohach determined the bore hole was closed. They opened the surface hole and methane began to flow out. They tried to start a pump that was connected to the bore hole, but it was not operating. They notified a surface electrician to repair it.

After opening the bore hole, Dubois and Bohach returned to the No. 1 shaft where they once again obtained readings of 3.6% methane. (Tr. 1142, 1568, 1779). Dubois and Bohach returned to the portal to discuss what they believed was the appropriate course of action. They felt the high methane at the No. 1 shaft was caused by the high water gauge reading that resulted in too much methane being pulled out of the southeastern corner of the gob. They decided that changes to the No. 1 fan blade setting as well as air changes underground had to be made. Changing the fan blade would reduce the pressure the fan was pulling on the bleeder entries. A change in the fan pressure would require air changes underground, such as opening the sweeteners, to compensate for the reduced air pressure.

There are methane sensors on the longwall shearer, at the tailgate and at midface. The sensors on the shearer momentarily de-energize the shearer if levels of methane exceed 1%. The sensors at the tailgate and at midface shut down power on the face if methane exceeding 1% is detected. If methane was baking up from the gob, it usually would first be detectible at the face in the vicinity of the tailgate.

There were approximately 100 miners working underground with approximately 12 miners on the longwall section during the afternoon shift that began at 4:00 p.m. on July 5, 2000. Among the miners working at the longwall was Timothy W. Hroblak, who is a UMWA safety committeeman. Hroblak has been employed at the Cumberland Mine since May 1979. (Tr. 105). Hroblak testified that beginning at approximately 7:00 p.m., there were intermittent power shut downs triggered by the methane sensor at the tailgate. (Tr. 109). The face crew

could not determine the cause of the problem as the 1% methane detected by the sensor would dissipate within a few minutes after which power could be restored. (Tr. 109, 111-12, 149, 155). Hroblak went to the face and took several methane and air velocity reading that were all within normal limits below 1%. (Tr. 111-12 150, 151-52, 155, 375-76). Given the normal methane and air velocity readings at the face during the afternoon shift, Dubois and Bohach decided to make the ventilation adjustments at the start of the midnight shift since section 75.324, 30 C.F.R. § 75.324, requires keeping all personnel, except those making ventilation air changes, from going underground.

At approximately 8 p.m. on July 5, during the middle of the shift, the miners on the longwall were advised that there would be no "hot seat" changes because the midnight crew would be kept out of the mine so that air changes could be made. A "hot seat" change requires an afternoon shift member to remain at his work station until he is relieved by an arriving midnight shift employee. (Tr. 110, 113-15, 117, 1162).

Dubois and Bohach continued to monitor the conditions at the No. 1 fan as normal longwall operations continued. For example, Dubois obtained 3.6% methane readings at the No. 1 shaft at 7:30 p.m. and 10:30 p.m. (Tr. 1784, 1827-28). Dubois and Bohach decided they would withdraw miners from the mine if methane levels at the No. 1 fan rose above 4%. They based their decision on MSHA's informal policy of not considering methane levels of less than 4.5% to be an imminent danger; on the fact that a 4% concentration provided a 1% margin of error below explosive levels; on the fact that methane readings at the face were within normal limits despite several tailgate sensor shut downs; and the fact that the distance from the bottom of the number of the No. 1 shaft to the working section was over 9,000 feet. (Tr. 1150, 1152, 1158-59, 1351, 1790, 1826, 1829, 1893-96, 1953).

At midnight, at the end of the July 5, 2000, afternoon shift, Dubois and Bohach had a meeting with mine safety committee members who were exiting the mine, or who were arriving for work. (Tr. 117, 1160-61). They told the committeemen that there were problems at the No. 1 bleeder fan. The committeemen were informed, for the first time, that Cumberland had obtained 3.6% methane readings at the No. 1 bleeder shaft as early as 7:00 p.m. Hroblak and other committeemen became upset that normal mining had continued. Hroblak believed the amount of methane exiting the bleeder shaft was approximately half the methane concentrations at BEP 5A because the amount of methane exiting the fan was diluted by air from the 1B right bleeder entry in the southern perimeter. (Tr. 127). Thus, Hroblak believed the amount of methane in the bleeder eastern perimeter entries could have been in the explosive range between 5% and 7%. (Tr. 127-28). Hroblak stated that, had he known of the conditions at the surface of the bleeder shaft, he would have exercised his rights as a union safety committee member by immediately withdrawing all hourly personnel from the mine. (Tr. 128, 139). Upon leaving the mine, at approximately 12 midnight, Hroblak telephoned inspector Hixson to report the conditions at the mine. (Tr. 123-24, 226-27, 1160, 1161-62).

Consistent with the provisions of section 75.324, the July 6, 2000, midnight shift was not permitted to enter the mine because of the ventilation changes that were to be made. Power to the mine was de-energized and management personnel and several hourly employees entered

the mine to begin corrective action. The hourly employees were used as runners to relay communications from the bleeder entries to a telephone located in a headgate entry of the 90 butt panel. (233, 1851, 1899, Ex. R-5).

On the surface, Dubois went to the No. 1 bleeder shaft and changed the louvers at the main fan and the back-up fan to reduce the amount of pressure the fan was pulling. He also tested the back-up diesel generator. Adjusting the louvers, which took approximately 15 to 20 minutes, was completed at approximately 1:00 a.m. (Tr. 1161, 1163-64, 1787, 1789-90, 1845). Before leaving the No. 1 fan Dubois obtained another methane reading of 3.6%. (Tr. 1789). Dubois assigned a foreman to remain at the No. 1 shaft to continue monitoring the methane concentrations.

To evaluate the bleeder conditions, Cumberland management personnel Roger Peelor and Robert Kimutis traveled to BEP 5A, the farthest point inby the travelable bleeders, to measure the air flow and methane before air changes were made. (Tr.1582). It took approximately 1½ hours to walk to BEP 5A. (Tr. 1691-92, 1703). Peelor testified he took methane readings at approximately 1:30 a.m. at BEP 5A that ranged from 3.6% to 3.8% methane. (Tr. 1682, 1690-91). Peelor and Kimutis then adjusted the regulators at the No. 2A bleeder shaft to direct more air towards the No. 1 shaft. (Tr . 1574, 1683). This involved sliding the regulator doors by hand about one inch towards a more closed position that resulted in an approximate 8,000 cfm change in the air flow. (Tr. 1574, 1710-11, 1901).

Peelor and Kimutis also changed the openings at the No. 2 and No. 3 sweeteners by knocking out blocks that controlled the flow of air into the bleeders. (Tr. 1709). The blocks were removed gradually while air at the longwall face was monitored to ensure adequate air velocity was maintained. Once it was determined that ventilation of the face was not adversely affected, the sweeteners were opened further and the opening at Fred's Hole was restricted. (Tr. 1709, 1899-1900).

Opening the sweeteners permitted more fresh intake air to flow into the eastern perimeter bleeders. (Tr. 1166-67, 1574-75, 1577, 1689-90, 1693-94, 1962, 1982). Adjusting the regulator at the base of the No. 2A bleeder shaft decreased the air going into that shaft and increased the air flow to the No. 1 shaft. (Tr. 1578, 1595, 1693-94, 1982). Restricting the regulator at Fred's Hole reduced the amount of methane coming into the bleeder system at that location, diverting more methane to the southeast corner of the gob. (Tr. 1167-68, 1692, 1714). The regulator at Fred's Hole is normally closed once the active longwall panel had retreated a distance of approximately 2,000 feet. (Tr. 1500-02, 1906).

At approximately 1:30 a.m., Hixson, in response to the information provided by Hroblak, arrived at the Cumberland Mine while the air changes were in progress. (Tr. 229, 1179). Hixson met Bohach on the surface. Bohach told Hixson that the last reading at the No. 1 fan was 3.6% and that men were underground making air changes. (Tr. 234-35, 490). Methane readings were being telephoned to Bohach in the mine office every 15 to 20 minutes by employees stationed at the fan. Shortly after Hixson arrived at the mine, methane levels at the No. 1 fan reportedly had risen from 3.6% to 3.8%. (Tr. 231, 240, 1176, 1333-34). A subsequent reading taken at the fan between 2:30 and 2:45 a.m. was reported to Bohach as having increased to 4.2%. Bohach informed Hixson of the reading. (Tr. 240, 491, 1334, 1777).

Hixson telephoned his supervisor Robert Newhouse to discuss the bleeder shaft methane concentrations. (Tr. 240, 385 711). Newhouse telephoned Acting District Manager Kevin Stricklin. After evaluating the situation, Hixson was directed to issue an imminent danger order that would require Cumberland to immediately stop its air changes and remove everyone from the mine. (Tr. 385, 388, 711-12). At approximately 3:10 a.m., Hixson verbally issued a 107(a) imminent danger withdrawal order requiring everyone, including personnel making air changes, to leave the mine and vacate the No. 1 shaft area until the methane conditions had stabilized. (Tr. 239, 1335, 1778; Ex. G-3). Hixson was concerned that methane conditions were rising despite the fact that longwall operations had been suspended and no methane was being generated off the longwall face. (Tr. 534-35).

After the imminent danger order was verbally issued, readings at the fan dropped from 4.2% to 3.8%. (Tr. 1179, 1430). The next fan reading was taken at approximately 6:00 a.m. on July 6 by MSHA inspectors after the mine had ceased operations for over six hours. The methane exiting the fan at that time was 2.8%. (Tr. 1186). It took more than two hours for the miners underground to arrive at the surface because of the lengthy distance to be traveled. (Tr. 490-91). The last men underground exited the mine at 6:30 a.m. (Tr. 266).

Imminent Danger Order No. 7076284 was formally written and served on Cumberland by Hixson at approximately 9:00 a.m. on the morning of July 6. (Tr. 239; Ex. G-3, p.1). The imminent danger order was modified at 2:00 p.m. on July 6, 2000, to allow teams of company and MSHA personnel to go underground to evaluate the bleeder conditions. Methane concentrations exiting the fan had declined to 2.1% at that time. (Tr. 1190-91; Ex. G-3, p.3). The imminent danger order was modified again at 9:30 p.m. on July 6 to allow Cumberland to make additional ventilation adjustments underground. (Ex. G-3, p.4).

Citation No. 3657290 citing an alleged significant and substantial (S&S) violation of the mandatory safety standard in section 75.323(e) was issued to Cumberland by Hixson at 4:30 p.m. on July 6. Section 75.323(e) requires that methane concentrations in a bleeder split of air, before that split joins another split of air, shall not exceed 2.0%. Although Citation No. 3657290 attributed the cited violation to Cumberland's reckless disregard, the citation was issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and it did not allege an unwarrantable failure. (Ex. G-4).

Citation No. 3657290 was modified on July 7, 2000, to substitute section 75.334(b)(1), 30 C.F.R. § 75.334(b)(1), as the violated mandatory safety standard. Section 75.334(b)(1) requires bleeder systems to dilute and move methane-air mixtures away from active workings and into a return air course, or, to the surface of the mine. Simply put, section 75.334(b)(1) requires bleeder systems to function properly.

Finally, 104(d)(1) Citation No. 3657291 was issued by Hixson at 6:00 p.m. on July 6 citing an S&S violation of the provisions of section 75.363(a), 30 C.F.R. § 75.363(a), that specify, if conditions pose an imminent danger, all persons, except those referred to in section 104(c) of the Mine Act (persons designated by the operator to correct the condition), immediately must be withdrawn from the mine. The cited violation was attributable to Cumberland's unwarrantable failure.

III. Findings and Conclusions

A. 104(a) Citation No. 3657290

1. Fact of Violation

As a threshold matter, in defense of the subject citations, Cumberland asserts the 2% methane limit in bleeder splits of air in section 75.323(e) does not apply to a bleeder shaft. (*C. Br.* at 23-27). Thus, Cumberland seeks to undermine Citation No. 3657290, issued on July 6, 2000, because the citation initially alleged a violation of section 75.323(e). Section 75.323 provides:

> (e) *Bleeders and other return air courses*. The concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air, or in a return course other than as described in paragraphs (c) and (d) of this section, shall not exceed 2.0 percent.

The Secretary's mandatory standard in section 75.323(e) addresses the method of obtaining representative methane readings in components of bleeder systems to ensure the air coursing through the bleeder contains not more than 2% methane. Thus, not surprisingly, the standard requires methane concentration measurements to be taken in splits of air *before* the concentration of methane in these splits of air is diluted or otherwise altered by an additional split of air. As Cumberland states in its posthearing brief, "[t]he air from the 1B Right bleeders meets the air from the eastern perimeter bleeders at the bottom of the No. 1 bleeder shaft, a shaft from the surface used solely to transport air from the bleeder entries out of the mine." (*C. Br.* at p.2).

To obtain accurate methane concentrations in 1B Right, and in the eastern perimeter of the bleeder, it is clear that section 75.323(e) requires methane readings to be taken in both 1B Right and the eastern perimeter *before* these two splits of air meet. When these splits meet, they feed a new split of air- - the No. 1 bleeder shaft. The only method of obtaining a representative methane sample in the bleeder shaft is to measure the methane concentration before the air in the shaft joins another split of air - - the atmosphere. Moreover, it reasonably can be argued that the No. 1 bleeder shaft is a "return air course" as contemplated by section 75.323(e).

Accordingly, I am not persuaded by Cumberland's assertion that the 3.6% to 4.2% methane concentrations in the shaft on July 5 and July 6 are irrelevant, or otherwise entitled to little evidentiary weight, because such readings are not prohibited by section 75.323(e), the only regulation concerning permissible methane levels in bleeders. On the contrary, it is difficult to understand Cumberland's contention that the 2% limit in section 75.323(e) is inapplicable because it was on *actual notice* that section 75.323(e) does in fact apply to bleeder shafts. In this regard, Cumberland was previously cited on December 20, 1996, in Citation No. 7013734, for an excess of 2% methane in the No. 1 bleeder shaft. (Ex. R-6). The citation was issued after several bottle samples revealed methane of 2.2%, 2.84%, and 2.7% at the surface of the No. 1 shaft. The citation was terminated on October 23, 1997, after Cumberland made numerous

adjustments to its bleeder system over a ten month period, when methane in the shaft had been reduced from 2.5% to 1.7%. (Ex. R-6, p.2-7). Finally, the fact that the Secretary's mandatory safety standards impose a 2% methane limit in bleeder shafts was acknowledged succinctly by Roger Peelor, Cumberland's Senior Mining Engineer, when he testified that operating with 3.6% methane in a bleeder shaft is prohibited because "[i]t's the law." (Tr. 1726).

In an apparent effort to avoid Cumberland's assertion that a bleeder shaft is not "a split of air" as contemplated by section 75.323(e), the Secretary modified Citation No. 3657290 on July 7, 2000, to reflect an alleged violation of section 75.334(b)(1). Citation No. 3657290 states:

> The ventilation and bleeder system used for the longwall section and active gob failed to properly remove methane as required. There was 3.6% to 4.2% methane being coursed through the No. 1 Bleeder shaft. The methane concentration at 6:30 p.m. on 7/5/00 at the fan was 3.6%. The Company failed to make corrections immediately. They allowed the afternoon shift to continue to work until the end of their production shift. The persons exited the mine and corrections started around 12 midnight. The split exceeded the 2% limit.

(Ex. G-4, p.1). The July 7 citation modification added the following additional conditions:

> . . . . It has been determined that the bleeder system for the longwall is not functioning properly for the following reasons:
> 1. Methane exceeding 2.0% has been detected exhausting from the No. 1 bleeder fan.
> 2. Water has accumulated to the point that the airflow in the bleeder system has been obstructed.
> 3. BEP 6 BEP 7 have been closed without prior approval.
> 4. Low oxygen levels have been found in the travelable bleeder entry.

(Ex. G-4, p.3).

Section 75.334(b)(1) provides:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and *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.

(Emphasis added).

In applying section 75.334(b)(1) to the facts of this case, we start with the longstanding proposition that the "language of a regulation . . . is the starting point for its interpretation." *Dyer*

v. United States, 832 F. 2d 1062, 1066 (9th Cir. 1987)(citing *Consumer Prod. Safety Comm'n v. GTE Sylvania*, Inc, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The plain language of section 75.334(b)(1) requires that bleeder systems *both* continuously dilute *and* move methane-air mixtures away from active workings.

Notwithstanding the question of whether there is a 1:1 ratio between methane in the No. 1 shaft and methane in the eastern perimeter bleeder, the undisputed facts support the conclusion that methane in the bleeder was not being adequately diluted and carried away from the working face. Cumberland concedes the rising water gauge at the No. 1 shaft was indicative of restrictive air flow caused by water accumulations located inby BEP 5A, increased resistance caused by an increase in the gob area, and/or deteriorating conditions in the tailgate of the 90 butt panel caused by the panel's retreat. (*C. Br.* at 7). Indicia of restrictive air flow support the conclusion that the bleeder was not functioning properly.

Moreover, Cumberland's actions in this case reflect that the bleeder system was malfunctioning. Namely, before MSHA arrived at the mine, Cumberland took numerous methane readings during the afternoon shift at the No. 1 fan; Cumberland initiated air changes at the start of the next shift on midnight July 6; Cumberland adjusted the louvers on surface at the No. 1 fan; Cumberland adjusted the regulator at the base of the No. 2A bleeder shaft; Cumberland closed the regulator at Fred's Hole; and Cumberland opened the regulators on two sweeteners. In addition, in view of the restrictive air flow in the bleeder, activation of the tailgate sensor on several occasions during the July 5 afternoon shift is a further indication that methane was migrating back from the gob towards the working face. In short, the evidence in this case provides an ample basis for concluding that Cumberland's bleeder system was not adequately diluting and coursing methane through the bleeder system. **Accordingly, the Secretary has satisfied her burden of demonstrating a violation of section 75.334(b)(1).**

2. Significant and Substantial

In its Posthearing Brief, Cumberland has elected not to further argue the S&S designation in Citation No. 3657290 if the cited violation of section 75.334(b)(1) is affirmed. (*C. Br.* at p.19, n.8).

A violation is properly designated as significant and substantial in nature if, based on the particular facts surrounding the 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). The issue of whether a particular violation of a mandatory safety standard is S&S in nature must be resolved by assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (Aug. 1985). Consideration should be given to both the time the violative condition existed before the citation was issued and the time it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 12 (Jan. 1986).

The Secretary presented significant evidence to support her S&S designation concerning the hazards associated with a malfunctioning bleeder system in proximity to potential ignition sources generated during active longwall operations. When bleeder systems malfunction, methane can build to 5% to 15% explosive levels. These explosive levels of methane can back up through the tailgate into the working face where sparks generated during the coal extraction process are not uncommon. It is reasonably likely that an explosion at the longwall face would result in serious or fatal injuries.

Cumberland asserts there is a 1:1 ratio of methane concentrations between the No. 1 shaft and travelable eastern perimeter bleeders. The Secretary asserts the ratio is 1:2 in the No. 1 shaft as compared to the BEP 5A area of the bleeder. Cumberland did not take actual methane readings in the bleeder entries on July 5, 2000. Thus, at best, Cumberland contends the 3.6% methane at the shaft's surface was representative of the methane concentrations in the eastern bleeder. Cumberland's weekly examination records reflect that methane concentrations at the shaft were rising in the weeks preceding July 5, 2000. Rising methane concentrations are an indication that methane is not being effectively diluted and moved away from working places. In this regard, Peelor testified that the mine cannot continue to operate with 3.6% methane at the shaft not only because "[i]t's the law" but also because "there are hazards involved with that . . . [w]ith methane, you have a potential fuel. If you allow it to go unchecked, it can go into the explosive range." (Tr.1725-28). Thus, it is apparent that the abnormally high methane readings in the No. 1 shaft were indicative of a serious explosive hazard. **Accordingly the S&S designation in Citation No. 3657290 shall be affirmed.**

3. Negligence

The Secretary attributes the improperly functioning bleeder system to Cumberland's reckless disregard. The Secretary contends that to address its rising methane concentrations in the bleeder, Cumberland closed BEPs 6 and 7 in an effort to "bottle up" the methane in the gob by impeding it from flowing into the bleeders. Cumberland asserts it closed the BEPs to improve the oxygen levels in the travelable bleeder entries. The Secretary acknowledged there were low levels of oxygen in the travelable bleeders in her July 7 modification of Citation No. 3657290. (Ex. G-4, p.3).

Although the closing of BEPS 6 and 7 may have constituted a modification of Cumberland's ventilation plan that required MSHA approval, Cumberland was not cited for failing to follow its approved ventilation plan. Therefore, Cumberland's failure to consult MSHA before closing BEPs 6 and 7, when viewed in isolation, is not relevant to the issue of Cumberland's degree of culpability with respect to the violation of section 75.334(b)(1). The closure of these BEPs is relevant to the issue of negligence if the Secretary can demonstrate the closure of these regulators contributed to the high methane in the bleeders.

In determining the degree of negligence to be attributed to Cumberland with respect to its ineffective bleeder system, it is noteworthy that the July 5 bleeder problems occurred shortly after the July 3 air change that converted the intake air in the No. 2 tailgate entry to return air. It is reasonable to conclude that this adjustment, that was taken to maintain proper air velocity along the longwall face, ultimately necessitated additional bleeder adjustments, such as opening sweeteners, to increase the fresh air flow to the bleeders. Bleeder systems by nature require ongoing monitoring and adjustment after significant ventilation changes are made. In view of the

recent conversion of the No. 2 tailgate entry from intake to return air, it is not surprising that the bleeder's ventilation system required additional adjustments. Thus, the Secretary has not established, by a preponderance of the evidence, that Cumberland's closure of two BEP sites was a significant cause of the bleeder malfunction. In this regard, it is noteworthy that methane readings in the No. 1 shaft were within normal range in the days preceding July 5, 2000, after BEPs 6 and 7 had been closed. The record, therefore, supports no more than a moderate degree of negligence rather than the recklessness alleged by the Secretary.

4. Civil Penalty

The Secretary has proposed a $6,000 civil penalty for Citation No. 3657290. The parties have stipulated that Cumberland is a large operator with a favorable violation history, that it abated the cited violations in a timely manner, and that payment of the proposed penalties will not impair its ability to continue in business. Although the cited violation of section 75.334(b)(1) is serious in gravity, the reduction in the degree of negligence attributable to Cumberland from reckless disregard to moderate warrants a moderate reduction in the proposed civil penalty. **Accordingly, a $5,000 civil shall be imposed for Citation No. 3657290.**

B. 104(d)(1) Citation No. 3657291

1. Fact of Violation

Citation No. 3657291, issued by Hixson, cites a violation of the mandatory safety standard in section 75.363(a) that is attributed to Cumberland's unwarrantable failure. Citation No. 3657291 states:

> An accumulation of methane was detected at the No. 1 bleeder shaft. The methane ranged from 3.2 to 3.6% as detected at 6:30 p.m. on 7/5/00. The company failed to correct the condition immediately. The company also failed to remove [all persons except] those persons referred to in section 104(c) of the Act. The men were allowed to continue working their production shift until 11:30 p.m. It was after the men exited the mine that corrections were started. The methane was detected by a certified mine official.[6]

Section 75.363(a), the cited mandatory standard, provides:

> Any hazardous condition found by the mine foreman or equivalent mine official, or other certified persons designated by the operator for the purpose of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone

[6] Hixson testified that he inadvertently omitted the above bracketed words "all persons except" when he issued Citation No. 3657290. (Tr. 310-12). Cumberland does not claim that this clerical error in the citation misled or otherwise prejudiced it in its preparation for trial.

> entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone *except those referred to in Section 104(c) of the Act* shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

(Emphasis added).

Section 75.363(a) has two components. This safety standard requires hazardous conditions to be corrected immediately or to be dangered-off, and, if the hazard constitutes an imminent danger, everyone except those persons designated under section 104(c) of the Mine Act shall be removed from the affected area where the imminent danger exists. In this case it is not feasible to use a danger-off sign because hazardous bleeder conditions effect the entire mine. Thus, the question is whether the bleeder conditions during the afternoon shift of July 5, 2000, could be properly characterized as a hazard that must be corrected immediately because it constituted an imminent danger.

Analyzing whether the bleeder conditions on July 5 constituted an imminent danger is a matter of degree. For example, as previously noted, on December 20, 1996, MSHA issued to Cumberland Citation No. 7013734 for a violation of section 75.323(e) for methane in the subject No. 1 bleeder shaft in excess of 2.0% methane. (Ex. R-6, p.1). The citation was issued after several bottle samples revealed methane of 2.2%, 2.84%, and 2.7%. The bleeder violation, which was attributed to a moderate degree of negligence, was designated as non-S&S. After six extensions of the abatement termination date, the citation was terminated 10 months later on October 23, 1997, when methane in the shaft had been reduced from 2.5% to 1.7%. (Ex. R-6, p.2-7). Although the December 1996 bleeder shaft condition was designated as non-S&S, I note that the 2.8% methane in the shaft in December 1996 is 28.5% less than the 3.6% methane at the shaft's surface on July 5, 2000.

Although there was 3.6% methane in the shaft, we will never know the methane concentrations at BEP 5A during the July 5 afternoon shift because Cumberland did not obtain any readings in the travelable bleeder entries. Resolution of the imminent danger question must be viewed in the context of whether 3.6% methane in the shaft should have alerted a person exercising reasonable care to acquire additional knowledge of the fact in question (taking readings to determine whether there was explosive methane in the bleeder entries) or to infer its existence. *See Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981) (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (W.D.S.C. 1950).

Although there is no official MSHA policy, as a general proposition, MSHA considers methane levels in bleeder entries of 4.5% or more to be an imminent danger. (Tr. 820-21; Ex. R-3). At the hearing, Cumberland conceded it would have withdrawn all personnel from the mine if the methane readings at the No. 1 shaft rose above 4%. (Tr. 1794, 1829, 1953). Thus, the question is whether Cumberland should have believed there was a reasonable possibility of explosive methane in the travelable bleeders.

MSHA ventilation expert John Urosek testified that an excess of 2% methane exiting the bleeder fan "tells you there is a problem with the bleeder system." (Tr. 1029). The methane levels in the No. 1 shaft during the afternoon shift on July 5 were consistently at 3.6%. The methane spiked to between 3.8% and 4.2% in the early morning hours of July 6. The Secretary asserts these amounts of methane exiting a bleeder shaft were unheard of except in emergency situations. (Tr. 1725-28). Urosek testified he had never known of these levels of methane exiting a bleeder fan in an operating coal mine. (Tr. 1009). Even Peelor admitted he could not recall working in a mine when there was 4.2% methane in the bleeder shaft. (1725).

BEP 5A is located inby in the eastern perimeter more than one mile from the active longwall face. (Tr. 1803-04, Ex. R-5). Abnormally high concentrations of methane at BEP 5A is an indication that methane from the gob is migrating back toward the working face rather than being diluted and carried away to the surface. The Secretary's witnesses contend there is an approximate 2:1 ratio between the methane at BEP 5A and the methane at the No. 1 shaft. (Tr. 562, 681-82, 714, 719, 721, 724). Their conclusion is based on both the design and operation of Cumberland's bleeder system, as well as comparisons of contemporaneous BEP 5A and No. 1 shaft methane results.

With respect to the bleeder design, the eastern perimeter vents the greatest concentrations of methane consisting of methane that is liberated during active mining of the 90 butt panel. (Tr. 305). Air traveling down the 1B Right entry (the southern perimeter) joins and *dilutes* the air from the eastern perimeter *before* it enters the No. 1 bleeder shaft. (Tr. 497-98). The Secretary's assertion that the 1B Right air dilutes the eastern perimeter air is supported by Cumberland's weekly examination records. For example, during the period June 14, 2000, through June 30, 2000, methane at BEP 5A was 3.5%, while methane in 1B Right for the same period averaged only .6%. (Tr. 558-59, 562; Ex. G-7). Given the 3.6% methane at the No. 1 shaft on July 5, after the eastern perimeter air was mixed and diluted with 1B Right air, the Secretary argues that it is likely that methane in the eastern perimeter outby BEP 5A in the direction of the longwall face, beyond where air currents strongly travel towards the fan, exceeded the 5% explosive range for methane. (Tr. 242,-43, 496-98, 505, 564, 714, 719, 721, 724, 1024).

A comparison of BEP 5A and No. 1 bleeder shaft readings support the Secretary's claimed 2:1 ratio. For example, Cumberland's weekly examination records reflect average methane concentrations of 3.5% at BEP 5A, and 1.8% at the No. 1 bleeder fan, during the period June 14, 2000, through June 30, 2000. (Tr. 558-59, 562; Ex. G-7).

Cumberland maintains there is a 1:1 ratio of methane at the No. 1 shaft and BEP 5A. Cumberland bases its conclusion on an uncorroborated BEP 5A methane reading of 3.8% by Roger Peelor at approximately 1:30 a.m. on July 26 2000, that is similar to the 3.6% methane obtained at the fan. However, other pairs of methane readings do not support Cumberland's claimed 1:1 ratio. For example, when the first team of MSHA and Cumberland personnel went underground during the morning of July 6, 2000, methane at BEP 5A was 2.6% while methane at the No. 1 shaft was 2.2% methane. (Tr. 1049-50; Ex. G-3). Using the July 6, 2000, readings as an example, the BEP 5A methane is 18% greater than the concentration at the fan. Using this ratio, the 3.6% methane at the No. 1 fan on July 5 would be indicative of 4.25% at BEP 5A. Significantly, 4.25% methane in the bleeders is greater than the 4.0% that Cumberland admitted would justify withdrawing personnel from the mine.

While it is not clear whether or not methane levels actually exceeded 4.5% in the bleeders, it is clear that 3.6% at the fan was significant enough to raise serious concerns. Thus, Cumberland should have obtained bleeder readings to ensure there were no explosive levels of methane. In the absence of actual readings, Cumberland was obliged to err on the side of caution and infer the existence of a hazardous condition that warranted the immediate removal of all personnel except those designated under section 104(c) of the Mine Act who were necessary to evaluate and correct the potentially dangerous bleeder condition. **Accordingly the Secretary has demonstrated the fact of occurrence of a section 75.363(a) violation.**

2. Significant and Substantial

As previously noted, Cumberland has elected not to further argue the S&S designation in Citation No. 3657291 if the cited violation of section 75.363(a) is affirmed. (*C. Br.* p.19, n.8). Having found that the bleeder conditions on July 5 constituted an imminent danger because there was a reasonable likelihood of explosive levels of methane in the bleeder system during active longwall mining it is clear that the S&S criteria have been met. **Consequently, the Secretary's S&S designation shall be affirmed.**

3. Negligence

The Secretary attributes Cumberland's violation of section 75.363(a) to an unwarrantable failure. The term unwarrantable failure is taken from section 104(d) of the Mine 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. MSHA* 52 F.3d 13, 136 (7th Cir. 1995)(approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if aggravating factors exist such as the operator's knowledge of the existence of the violation, the length of time the violation existed, the extent of the violative condition, and whether the violation is obvious or poses a high degree of danger. All relevant facts and circumstances must be examined to determine if the operator's conduct is aggravated, and whether mitigating circumstances exist. *Eagle Energy Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citations omitted).

As early as the morning of July 5, 2000, Fred Evans, Cumberland's mine foreman, knew there were problems with the bleeder system based on the rising water gauge at the No. 1 bleeder shaft. Despite evidence of abnormally high readings of 3.6% methane at the shaft obtained by Hustus at approximately 3:30 p.m., as well as several additional 3.6% methane results obtained by Dubois and Bohach beginning at 6:30 p.m., Cumberland allowed longwall operations to continue and the miners were not advised of the potential hazard until the end of their shift. The fact that the methane sensor at the tailgate was activated during the afternoon shift on July 5 was an additional indication that the bleeder system was not effectively moving methane away from the working place.

Moreover, the violation posed a very high degree of danger. There was a significant possibility that rising methane levels inby BEP 5A could accumulate in the bleeder system and back up to the longwall face if the bleeder problem was not corrected immediately. (Tr. 127, 998-99, 1024). Potential ignition sources at the longwall face included sparks generated by the longwall shearers. (Tr.127, 1001, 1024-25). There were also numerous pieces of electrical equipment located in the face area. (Tr. 1024). In the event of an ignition, the explosion likely would have caused fatalities given the enormous quantity of explosive methane that could accumulate in the eastern perimeter bleeder that was more than 9,000 feet in length.

In short, it is clear that the violation was obvious, rather than undetected, given the repeated abnormally high methane readings in the bleeder shaft. The violation was allowed to continue to exist for an extended period of time throughout the July 5 afternoon shift. Finally, the violation was extremely dangerous. Additionally, Cumberland's failure to disclose the bleeder problem to its hourly employees is a further indication that its conduct was unjustified. In sum, Cumberland's conduct on July 5, 2000, is a classic case of the aggravating factors that are the hallmarks of an unwarrantable failure. **Accordingly, the Secretary has demonstrated that Cumberland's violation of section 75.363(a) was unwarrantable.**

4. Civil Penalty

The Secretary has proposed a civil penalty of $5,000 for 104(d)(1) Citation No. 3657291. However, Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

As previously noted, the parties have stipulated that Cumberland is a large operator; that it has a favorable violation history; that it abated the cited violations in a timely manner; and that payment of the proposed civil penalties will not impair its ability to continue in business. With respect to the seriousness of the gravity of the violation, it is clear that Cumberland was worried about the bleeder's safety during the July 5 afternoon shift. Its degree of concern is demonstrated by the actions of Evans who repeatedly directed Hustus, Bohach and DuBois to obtain additional methane readings at the No. 1 fan after Hustus' initial 3.6% reading at approximately 3:30 p.m. In fact, Evans apparently could not believe the high methane concentrations first detected by Hustus because Evans ordered Hustus to recalibrate his methane detector before Hustus was sent back to the shaft to obtain additional readings.

Despite continued high levels of methane exiting the bleeder, Cumberland's safety concerns were not communicated to the miners who continued to work the longwall. MSHA ventilation expert Urosek testified he had never known of methane levels in the 3.6% range exiting a bleeder shaft in an operating coal mine. (Tr. 1009). Peelor admitted he could not recall working in a mine when there was 4.2% in a bleeder shaft. (1725). Consequently, it is understandable that Hroblak testified that he would have exercised his rights as a UMWA safety committeeman and withdrawn all hourly personnel from the mine if he had known there was 3.6% methane in the bleeder shaft. (Tr. 128, 139). Under these circumstances, it is clear that

Cumberland's failure to disclose the abnormally high methane concentrations exiting the bleeder to the safety committeemen enabled Cumberland to complete the afternoon production shift without interruption before making the necessary ventilation changes in the bleeder.

A fundamental purpose of the Mine Act is to encourage mine operators ". . . with the assistance of the miners" to identify and eliminate unsafe conditions and practices in the Nation's mines. 30 U.S.C. § 801(e). This statutory goal is thwarted if mine operators are not dissuaded from withholding safety related information from miners to avoid production shut downs. Thus, Cumberland's failure to disclose the bleeder conditions during the afternoon shift on July 5, 2000, is an aggravating factor that warrants an increase in civil penalty.

Finally, with regard to negligence, the totality of circumstances evidencing Cumberland's failure to suspend production despite its knowledge of the potentially hazardous bleeder conditions demonstrates Cumberland's violation of section section 75.363(a) is attributable to a reckless disregard. **Accordingly, a civil penalty of $10,000 shall be imposed for 104(d)(1) Citation No. 3657291.**

C. 107(a) Imminent Danger Order No. 7076284

Imminent Danger Order No. 7076284, was verbally issued by Hixson at 3:30 a.m. The order withdrew all personnel who were then underground to make air changes to alleviate the high methane concentrations in the bleeder. Order No. 7076284, which was formally issued in writing at 6:30 a.m. on July 6, 2000, states:

> This imminent danger order is being issued to the mine due to methane that is exiting the mine through the No. 1 bleeder shaft. The methane detected measured from 3.2% to as high as 4.2%. All persons including persons involved in the air change must be removed from the underground portions of the mine. The sampling of the No. 1 bleeder shaft must be done from a remote location.

Order No. 7076284 was issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a). Section 107(a) in pertinent part, provides:

> If upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, *except those referred to in section 104(c)*, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

(Emphasis added).

Section 104(c) of the Mine Act, 30 U.S.C. § 814(c), concerns persons designated by the operator or the Secretary who are not subject to withdrawal orders. Specifically, section 104 provides, in pertinent part:

> (c) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:
>
> > (1) any person whose presence in such area is necessary, *in the judgment of the operator* or an authorized representative of the Secretary, to eliminate the condition described in the order[.]

(Emphasis added).

As an initial matter, there is an apparent inconsistency in the Secretary's prosecution of 104(d)(1) Citation No. 3657291 that, by its terms, cited Cumberland for not withdrawing all personnel except those 104(c) persons who were necessary to correct the cited hazardous condition, and imminent danger Order No. 7076284 that withdrew the same persons Citation No. 3657291 would have allowed underground. Obviously, had Hixson arrived at the Cumberland Mine prior to midnight on July 5, 2000, when longwall operations continued despite high bleeder shaft methane readings, Hixson would have been justified in issuing a 107(a) imminent danger order suspending normal mining operations and withdrawing all personnel from the mine. The issue here, however, is the propriety of a 107(a) withdrawal order issued after all persons involved in active mining had already been withdrawn, and only those persons designated by the operator under section 104(c)(1) of the Mine Act to correct the potential hazard were underground.

Resolution of this issue requires analysis of the statutory provisions of section 107(a). The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Energy West Mining Co. V. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

Here, section 107(a) explicitly exempts 104(c) persons from imminent danger orders. Section 104(c) delegates the authority to *either* the judgment of the operator, or, to the Secretary, to determine when and who to send into the mine to correct hazards. By its terms, section 104(c) does not require the operator to secure the Secretary's approval before it designates those persons it deems necessary to evaluate and correct a dangerous condition.

Although the statute grants the operator the discretion to exempt persons necessary to evaluate or correct hazardous conditions from the Secretary's withdrawal orders, the operator may not abuse its discretion by sending persons into mines who themselves are unnecessarily exposed to unacceptable levels of danger. Thus, the focus shifts to whether Cumberland abused its discretion after midnight on July 6, 2000, when it sent a team of ten men, comprised of seven management employees and three hourly miners, to evaluate the bleeder system and make ventilation changes.

At the time Hixson withdrew air-change personnel at 3:30 a.m. he reasonably concluded there was a substantial probability of explosive methane levels in the travelable bleeders based on shaft readings ranging from 3.6% to 4.2% methane. Thus, determining whether Cumberland abused its discretion when it sent personnel underground requires an analysis of potential sources of ignition. The ignition sources are limited to those present in the bleeder system as Cumberland had already suspended active mining and de-energized the longwall section.

As a preliminary matter, the Secretary asserted at the hearing that a stray bullet hitting the No. 1 shaft, or lightening striking the shaft, were ignition sources that warranted the 107(a) withdrawal order. These assertions were dismissed at the hearing because such sources of ignition, while possible, are highly improbable, and do not pose an imminent threat.

The Secretary relies on the possibility of a roof fall as a potential source of ignition. Although an unanticipated roof fall can occur at any time, the operative time period is the several hours personnel were underground to implement the air changes. To demonstrate Cumberland abused its 104(c) discretion requires a showing of some degree of imminence. The Commission has noted that the word "imminent" is defined as "ready to take place," "near at hand," "menacingly near," or "impending." *Utah Power & Light Co.*, 13 FMSHRC 1627 (October 1991). The Secretary has failed to identify any specific roof conditions that were in danger of imminent collapse. General speculation that a roof fall may occur before the air changes can be completed is not a basis for concluding that Cumberland abused its discretion when it sent personnel underground to make ventilation changes.

The Secretary also relies on potential sparks from doors on regulators, from tools to remove concrete block, and from bolts from spad guns, as potential ignition sources. In response, in its Reply Brief, Cumberland relies on a September 9, 1996, memorandum from Raymond A. Mazzoni, a mechanical engineer assigned to MSHA's Roof Control Division, concerning laboratory analysis of cable bolt sparks as a possible methane ignition source. In the memorandum Mazzoni concluded ". . . the risk of a methane ignition from cable bolt sparks was very remote." (C. Reply Br. at 22). This conclusion was drawn from tests demonstrating the spark temperature from a cable bolt was too low, the particle size was too small, and the duration of the spark was too short, to ignite methane.

To clarify the September 9, 1996, memorandum, the Secretary proffered a November 8, 2001, signed declaration by Mazzoni that cable bolts are distinguishable from roof bolts because they are made of flexible strands of cold-drawn steel rather than solid, hot-rolled steel bars.[7] Thus, the Secretary asserts the memorandum's conclusion, that the ignition potential for cable bolts is remote, does not apply to roof bolts. In any event, the Secretary does not contend that roof bolting was occurring in the bleeders during the air changes. In the final analysis, the Secretary has not shown that the ignition potential of a bolt being installed by a spad gun is greater than the ignition potential created by installation of a cable bolt.

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[7] The September 9, 1996, memorandum, which was not introduced by Cumberland at trial, was considered over the objections of the Secretary. However, the Secretary was provided with the opportunity to respond to the memorandum. The Secretary did so by offering Mazzoni's November 8, 2001, declaration.

As noted, the operative period for considering potential ignition sources is the period necessary to make the air changes. While sparks are common at the face during normal mining operations, speculation that a rare occurrence, such as a spark from opening a door or a regulator, or, a spark generated from a spad gun, may occur in the bleeder during an air change does not support the conclusion that there was an impending threat. In this regard, I credit the testimony of Peelor and Dubois that, in their experience, they had never seen sparks generated from moving regulator doors or hanging curtains or moving blocks. (Tr. 1696, 1699, 1810 1853). Moreover, miners making air changes in areas with explosive concentrations of methane are on a heightened state of alert to avoid actions that potentially could create ignition sources.

Thus, the Secretary has not shown more than a remote likelihood of ignition sources in the bleeder entries in the early morning hours of July 6, 2000, when air changes were being made. Consequently, the Secretary has not shown that Cumberland abused the discretion committed to it by section 107(a) when it sent persons underground to evaluate and correct the potentially hazardous bleeder conditions.

In reaching this conclusion, I recognize the Secretary's belief that it would have been more prudent to wait until methane conditions at the fan shaft had improved before initiating the air changes. In hindsight, the bleeder methane dissipated and the Secretary's belief proved to be correct. However, when viewed prospectively, delaying implementation of the air changes ultimately could have increased the risk if methane concentrations in the bleeder had continued to rise.

In the final analysis, Cumberland's decision to send personnel underground to make air changes in its bleeder system after midnight on July 6, 2000, when active mining had been suspended and all other personnel had been withdrawn from the mine, was within the scope of its authority under section 107(a) of the Mine Act. The evidence does not reflect that Cumberland abused its authority. **Accordingly, 107(a) imminent danger Order No. 7076284 shall be vacated.**

ORDER

1. Cumberland's request to withdraw its contests in Docket Nos. PENN 2000-207-R and PENN 2000-208-R because of its settlement of Citation Nos. 2840951 and 2840952 in Docket No. PENN 2001-94 **IS GRANTED**. **ACCORDINGLY**, the contests in Docket Nos. PENN 2000-207-R and PENN 2000-208-R **ARE DISMISSED**.

2. The Secretary's request to vacate Order Nos. 3657294 and 3657297 **IS GRANTED**. **ACCORDINGLY**, the contest proceedings in Docket Nos. PENN 2000-209-R and Penn 2000-210-R **ARE DISMISSED**.

3. In view of the above, **IT IS ORDERED** that 104(a) Citation No. 3657290 **IS MODIFIED** to reflect the cited violation was attributable to Cumberland's moderate degree of negligence. **ACCORDINGLY**, Citation No. 3657290 **IS AFFIRMED** as modified and the contest in Docket No. PENN 2000-181-R **IS DENIED**.

4. **IT IS FURTHER ORDERED** that 104(d)(1) Citation No. 3657291 **IS AFFIRMED. ACCORDINGLY**, the contest in Docket No. PENN 2000-182-R **IS DENIED.**

5. **IT IS FURTHER ORDERED** that 107(a) Order No. 7076284 **IS VACATED. ACCORDINGLY**, the contest in Docket No. PENN 2000-183-R **IS GRANTED.**

6. **IT IS FURTHER ORDERED** that RAG CUMBERLAND RESOURCES LP **SHALL PAY** a civil penalty of $15,000.00 is satisfaction of Citation Nos. 3657290 and 3657291. Payment is to be made within 40 days of the date of this decision. Upon timely receipt of payment, the civil penalty proceeding in Docket No. PENN 2001-63-A **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. NORTHWEST AGGREGATES, Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 99-353-M A. C. No. 45-03334-05508 DuPont Pit
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RICHARD INWARDS, employed by, NORTHWEST AGGREGATES, d/b/a, GLACIER NORTHWEST, Respondent	: : : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2000-481-M A. C. No. 45-03334-05518 A DuPont Pit

DECISION

Appearances: Deia W. Peters, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of Petitioner;
John M. Payne, Esq., Davis, Grimm & Payne, Marra & Berry, Seattle, Washington, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Northwest Aggregates and Richard Inwards pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. §§ 815 and 820(c). The petitions allege that the corporate operator and individual agent of the operator are each liable for two violations of mandatory safety and health standards. The Secretary proposes civil penalties totaling $10,000.00 as to Northwest and $6,500.00 as to Inwards. A hearing was held in Tacoma, Washington on June 12-13, 2001. Following receipt of the transcript, the parties submitted briefs.

For the reasons set forth below, I find that Northwest committed the violations alleged and impose civil penalties totaling $3,250.00. I further find that the Secretary failed to prove that Inwards was liable for the violations in his individual capacity and vacate the citations issued to him.

Background

On or about February 10, 1999, MSHA was notified by phone that an accident had occurred on February 5, 1999 at Northwest Aggregates' mine, the DuPont pit. It was reported that a front end loader had been partially covered by a slide of material down the pit wall and that the operator had been pinned in the cab. On February 11, 1999, Herbert Bilbrey, an MSHA inspector, went to the DuPont pit to investigate the accident. After conversing with witnesses and observing the scene, he issued citations to Northwest Aggregates alleging violations of mandatory health and safety regulations for failure to inspect and test ground conditions and using unsafe mining methods. Subsequently, a special investigation was conducted, which resulted in identical violations being charged against Northwest's superintendent, Richard Inwards, in his individual capacity. Those same charges were also made against Mark Snyder, the excavation crew foreman. However, the Secretary elected not to proceed against Snyder and the petition filed against him was dismissed on her motion.

Findings of Fact

Northwest Aggregates mines sand and gravel in the area around Tacoma, Washington. Mining operations were conducted for many years at two locations, the Steilacoom pit and the DuPont pit, which are located 7-8 miles apart. The minerals were deposited by glacier movement approximately 10,000 years ago and are very clean, i.e., there are minimal amounts of fines, or foreign material. The materials at the Steilacoom pit had approximately 1% fines and at the DuPont pit 3-4% fines. Deposits with less than 5% fines are classified as free draining granular deposits. The Steilacoom pit has been in operation since 1977 and the DuPont pit, comprising some 600 acres, opened formally in 1996. The DuPont pit operates under a permit that allows only 30 acres to be actively worked at one time, 10 acres being cleared, 10 acres being mined and 10 acres being reclaimed. The excavation portion of the operation, the pit, is located about one mile from the mine's offices.

The first step in the mining process involves clearing of the overburden using a bulldozer. The underlying sand and gravel is then scooped up with large front end loaders, CAT model 992's, and dumped onto a conveyor belt that transports the material from the pit area. The 992 loaders are very large machines. Northwest ordered the loaders with oversized, 23 foot wide, buckets. The buckets are 8 feet deep at the throat and 7 feet nine inches high. The distance from the teeth of the bucket to the front of the 8 foot diameter rear wheels is 23 feet. The operator sits about 13 feet above ground level. Two 992's are operated on two shifts and one dozer operates at the top of the pit, clearing overburden and pushing sand and gravel down the pit wall to the loaders. The material is generally free running, that is, it readily slides down the slope of the pit

wall to its natural angle of repose. This movement is referred to as sloughing and the loose material lying at the base of the wall is referred to as "the slough."

The mining method used by Northwest involves the use of loaders to mine the slough, i.e., scoop up the loose material that has sloughed down to the base of the pit wall. The loader operators were to "fan out," mining as wide an area as they could. Under normal conditions, the free running material would continue to slough to its natural angle of repose, and by the time they returned to an area newly sloughed material would be available. If, for some reason, the material in a particular area did not slough readily, or overhangs or ridges of unsloughed material appeared on the pit wall, the operators were supposed to avoid that area until it sloughed or call for the dozer to push material off the top and down the face of the pit wall, essentially forcing the material to slough. The loader and dozer operators, as well as the excavation foreman, Mark Snyder, and other employees had radios and could contact each other at will. The loaders dug downhill at an approximately 5 degree angle and as progress was made the pit wall became increasingly high. At the time of the accident on February 5, 1999, the wall was about 100 feet high. One of the dangers posed by a wall that high is that there is a large area of the slope in which hangups of material may occur. That material will eventually break loose, or slough, and can cause other material to slough resulting in a large amount of material sliding down the face of the wall to where the loader operators are working.

To avoid such dangers the loader operators were to fan out and mine the slough over a wide area at the base of the wall, thereby allowing time for the material to slough naturally, such that overhangs and hung up material would be eliminated by the time they returned to an area. In addition, the loader operators were to watch the high wall for such developments and avoid working below those areas until the material sloughed. They could also use their radios to contact the dozer operator or the excavation foreman to request that the dozer push material off the top of the wall, which would generate a slough. This mining method was used at the Steilacoom pit and also at other sand and gravel mines in the same area where the materials were similar to those being mined by Northwest. Stephen Dmytriw, a licensed civil engineer, certified MSHA safety instructor, an instructor at the Colorado School of Mines and a retired MSHA inspector, testified as an expert witness in civil engineering, mining techniques, slope stability and rock mechanics. He described the nature of the materials being mined and the mining method used by Northwest and several other sand and gravel mines in the area. In his opinion, the mining method used by Northwest was appropriate and safe and was identical to that used by other mines in that area.

On the morning of Friday, February 5, 1999, the day shift loader operators, William Wallace and Jack Zinski, reported for work at their normal time, approximately 6:00 a.m. It was raining and they commenced mining in the DuPont pit. About 7:00 a.m., they took a break to attend a weekly safety meeting of the excavation crew conducted by foreman Snyder. Following the meeting they returned to work. Zinski was mining on the left side of the approximately 400 yard wide pit wall and Wallace was mining on the right. Snyder had directed him to mine in that area earlier in the week, Tuesday or Wednesday, because the material there had a higher sand

content and the mine needed more sand. As Wallace mined the area, he did not fan out widely. Rather he mined an area only about 2-3 buckets, i.e. approximately 60 feet wide. He removed the loose slough at the bottom of the wall and used his bucket to remove some of the consolidated material at the base of the wall. A large slough occurred, burying the bucket of his loader and engulfing the front wheels. He tried to back the loader out, but was unable to do so, and called Zinski on his radio requesting help in digging his loader out of the slough. Zinski, who had just scooped a load of material, responded immediately, dumping his load as he proceeded toward Wallace. In the short time it took Zinski to reach Wallace a second major slough occurred that engulfed Wallace's loader and forced the windshield of the loader out of its frame pressing Wallace's chest against the back of the seat. Wallace could not breath. Fortunately, Zinski reached him quickly and was able to pull the windshield out of the material, which relieved the pressure enough for Wallace to breath. Zinski, other crew members, Snyder and Inwards, all of whom responded to radio calls for help, were able to extricate Wallace and his loader. Wallace was taken to a medical facility to see if he suffered any treatable injury.

While this was the first incident in which an loader operator had suffered an injury because of sloughing material, it was not the first time a loader had been partially engulfed. Wallace's loader had been partially engulfed in the summer of 1998. He had mined a fairly narrow area, creating a pocket, and material sloughed over his bucket and down around the front wheels of his loader, which had to be freed by the other loader. On other occasions, Snyder and Inwards had each seen Wallace mining too narrow an area, i.e., failing to fan out sufficiently, and had cautioned him and instructed him to mine a wider area. A loader operator on the second shift had also had his equipment partially engulfed on two occasions. He also had mined in a narrow area, creating a pocket. Snyder was not informed about those incidents until the second had occurred. Management officials and miners characterized the practice of mining in too narrow an area as digging into a "death trap." The danger created by that technique was that greater instability of the bank would be created and material could slough down around the sides of the loader as well as from the face, or front.

When Bilbrey conducted his investigation on February 11, 1999, six days after the incident, he spoke with management employees, including Inwards and Snyder, the loader operators, Wallace and Zinski, and visited the pit. The equipment was not there at the time and no mining was being done, ostensibly because there was an abundance of material. He was told that the area had been altered somewhat, in that the floor of the pit had been filled in such that the bank, then approximately 90 feet high, was slightly lower than it had been at the time of the accident. He took pictures of the pit area, including the location of the accident. He concluded that the bank, or high wall, was not in a stable condition because there were portions of the face that were not at the angle of repose. Conflicting statements were made that the dozer had been unavailable to push material down to the loaders from one to several weeks prior to the accident. He was told by Snyder that the mine had no policy on designating persons to inspect and test ground conditions and that no one had been specifically designated to do so.

He concluded that Northwest had violated two mandatory health and safety standards and issued citations for each. Following a special investigation, those violations were also issued against Inwards in his personal capacity.

Conclusions of Law — Further Factual Findings

Citation No. 4531826

Citation No. 4531826 alleged a violation of 30 C.F.R. § 56.3130, which requires the use of mining methods "that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks." The conditions he observed were noted on the citation as:

> Mining methods were not used that would maintain the wall, bank and slope stability in the pit where two 992 Cat front-end-loaders work daily on two shifts. An about 90 [foot tall] wall of sand and gravel was being mined single bench and the ground could not be controlled. On 2/5/99 an employee was engulfed in his 992 from the wall, pushing the windshield in his lap and burying him chest high in cab in material. The mine operator knew the ground conditions were bad and used a dozer to push material over until about 2-3 weeks ago. This is not the first time a front end loader has been covered up by the high wall. This violation is an unwarrantable failure to comply with a mandatory standard and presents a high degree of risk to miners in the pit. [The citation was modified on March 17, 1999 to add the following language.] Dick Inwards and Mark Snyder engaged in aggravated conduct constituting more than ordinary negligence in that they did not implement mining methods that maintained wall, bank and slope stability.

He determined that as a result of the violation it was highly likely that a fatal injury would occur, that one person would be affected, that the violation was significant and substantial, and, that the operator's negligence was high.

The Violation

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

Bilbrey issued the citation because he concluded that Northwest was not following its mining method on February 5, 1999.[1] His primary consideration was that the dozer had not been available to push material down to the loaders for at least a week and as a result the bank had become unstable and collapsed around Wallace's loader. He based his determination on his observations of the high wall on February 11, 1999 and conflicting statements made during the course of his investigation that the dozer had not been used to push material to the loaders for 1-2 weeks or 4-6 weeks prior to the accident. It is somewhat unclear who made these statements, but one source relied upon was Victor Ghilerghi, the assistant superintendent. Ghilerghi was a young college graduate who had been working for Respondent for approximately one year and was "learning the mining business." There is no evidence that he had any significant contact with the excavation operation.

Bilbrey observed the high wall on February 11, 1999, and thought that it was unstable. He noted some hangups and concluded that most of the sloughed material had come down naturally as opposed to having been pushed down by a dozer. He felt that the conditions verified statements to the effect that the dozer had not been used to push material for weeks prior to the accident. However, there was some evidence that the condition of the wall on February 11, 1999, had been altered since February 5, 1999. The loader operators, who were present during Bilbrey's inspection, stated that the bottom had been filled, in raising the elevation of the floor some 15 feet. It was unclear whether there had been material pushed off the top of the wall. There were relatively fresh dozer tracks on the top of the bank, but they were parallel to the wall, not perpendicular as they would have been for the pushing of material. Notably, the area identified as having been where the accident occurred was, in Bilbrey's opinion, in a safe condition with material at or near its angle of repose.

Zinski, Wallace and Snyder, however, testified that the dozer was working near the top of the bank around the time of the accident and had been pushing material to Zinski the day before the collapse. While there was some disagreement, it is apparent that a dozer can push material down the bank at a considerably faster rate than a loader can remove it. Consequently, Zinski was satisfied that the natural slough, augmented by the material pushed down the bank by the dozer the day before, had produced enough sloughed material for him to mine on the day of the accident. Wallace also testified that he had called for a dozer on prior occasions and that

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[1] There seems to be little question that the mining method ostensibly used by Northwest was appropriate. Bilbrey so testified. Dmytriw also offered expert opinion that, given the nature of the material, using front end loaders to mine the slough, fanning out and pushing material from the top of the bank with a bulldozer when necessary, was a perfectly safe mining method. That mining method was employed not only by Northwest, but also by several other surface sand and gravel mines in the area. Northwest's management personnel testified that its mining method had been used for decades without serious incident and that it had never been cited by MSHA for using an improper mining method in any of the once or twice yearly inspections of its operations.

material had been pushed to him in response, but that he had not called for a dozer to push material to him on February 5, 1999. It should be noted that Wallace had filed a lawsuit against Northwest as a result of the incident. The status of the case at the time of the hearing was that it had been dismissed without prejudice to its re-filing.

I credit the testimony of Snyder and Zinski, which was consistent with that of Wallace, likely an adverse witness, that the dozer was active in the area and had pushed material down the day before. Consequently, I reject Bilbrey's conclusion, perhaps justifiable in light of the conflicting statements made on the day of his inspection, that the dozer had not been available for weeks prior to the accident.

Although not noted by Bilbrey in the citation, the Secretary contends that Wallace was instructed to mine in a narrow area and his ability to fan out was restricted. The evidence on whether Wallace's ability to fan out was restricted and whether he raised concerns about it was in direct conflict. I decline to accept that argument as a cause of the accident. Wallace's testimony was somewhat inconsistent with respect to his mining efforts on and around the date of the accident. He testified that the area he had been instructed to mine in was narrow, restricting his ability to fan out until he dug down to Zinski's level and reached the base of the high wall. He testified further that the wall collapsed before he reached the base of the wall, but also admitted that he had gotten into the base of the wall before the collapse. The descriptions of the scene provided by those who rescued him indicated that he had dug into the high wall, beyond the natural slough line. Even if he had been instructed to mine in a relatively narrow area, the critical inquiry would still center on Wallace's ability to recognize unstable conditions and call for the dozer to push material down the bank to alleviate them.

Wallace also testified that the dozer was unavailable to push material to him that week. However, it is apparent from his testimony as a whole that his reference to "unavailability" described any situation where the dozer operator was doing something other than pushing material to Wallace, not that the dozer would or could not have responded had Wallace requested that material be pushed to alleviate unstable conditions where he was working. For example, Wallace stated that the dozer was pushing material to Zinski, a few hundred yards away, on the day before the accident and, presumably, could easily have responded to a request for assistance. However, Wallace claimed that the dozer had been "unavailable" to push material to him for about a week. Significantly, there is no evidence that he requested that the dozer push material to him that week and he testified that, on February 5, 1999, he did not request that a dozer push material to remedy unstable conditions in the area where he was mining and, in fact, stated that he did not observe any unstable conditions prior to his loader being engulfed.[2]

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[2] Wallace did testify that he had told Snyder earlier that week that the bank was too high and should be lowered by the dozer. Snyder denied that Wallace had raised any concerns with him. The height of the bank, in itself, would not present a dangerous or unstable condition. Witnesses described mining significantly higher banks at other sites without incident. Raising a general complaint about the height of the bank is markedly different than requesting a dozer to

Despite my rejection of the Secretary's contentions, it is clear that unsafe mining methods were being used on February 5, 1999 and that a violation was proven. However, the violation was attributable to Wallace's disregard of Northwest's established mining method, not the systemic unavailability of a dozer.

As Respondents themselves vigorously argue, Wallace was mining in a relatively narrow area. Unstable conditions developed because the wet material did not readily slough to its angle of repose. He failed to note the development of the instability, or mistakenly thought that the conditions did not pose a hazard. He did not raise the issue at the safety meeting. He did not cease mining in that area until the material sloughed naturally. Rather, he continued to mine the narrow area, did not use his radio to request that the dozer operator push material down to him, and actually worked into the consolidated material at the toe of the bank. He mined into a pocket and created unstable conditions that resulted in an extensive collapse of material around his loader that could easily have killed him.

It is well settled that under the Act mine operators are subject to a strict liability standard, i.e., an operator is liable for a civil penalty even though its supervisory employees are without fault with respect to the violation of a mandatory health and safety standard. *ASARCO, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989) (*aff'g* 8 FMSHRC 1632) and cases cited therein. That the violation was the result of an individual miner's actions does not absolve Northwest of liability for the violation. It does, however, affect the unwarrantable failure analysis. Northwest is, therefore, liable for the violation cited in Citation No. 4531826.

Significant and Substantial

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

In *Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Jan. 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

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remedy an unstable condition.

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

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The violation was S&S. The use of an unsafe mining method contributed to creation of a hazard, an unstable high wall, that resulted in a reasonable likelihood that an injury would occur and that the injury would be serious. While the Secretary need not prove that the hazard contributed to resulted in an accident or actually will result in an injury causing event, *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998), the hazard contributed to here actually did result in a serious, life threatening, injury to Wallace.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an 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). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

I do not find that the violation was the result of an unwarrantable failure by Northwest. The primary bases for Bilbrey's determination that the operator's negligence was high and that the violation was an unwarrantable failure were his conclusions that the dozer had not been available to push material to the loaders for a period of weeks prior to Wallace's accident and that other similar events had occurred in the past. The availability of a dozer was an important component of Northwest's mining method. While the material tended to slough naturally, it was often necessary to push material down the bank to eliminate unstable hangups of material and augment the natural slough. The unavailability of the dozer for an extended period of time would, indeed, be evidence of high negligence. However, as noted above, I have found that the dozer was, in fact, available to push material and had been used the day before the accident. Wallace also admitted that he had not called for a dozer to push material to him. With the availability of the dozer, Northwest's mining method was appropriate.

The fact that there had been past instances where loaders had been partially engulfed does not alter this conclusion. The weight of the evidence as to the cause of those incidents was that the operators had deviated from Northwest's established mining method, i.e., had mined in too narrow an area creating an unsafe pocket.[3] Those incidents had been appropriately dealt with by

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[3] There was evidence that the dozer was "unavailable" at the time of some of the prior incidents. However, as with Wallace's testimony, the references to unavailability reflect only that the dozer and/or the dozer operator were doing things other than pushing material to the involved loader operator at the time. There was no evidence that the loader operators had called for a dozer to push material to alleviate an unstable condition, or that such requests were not

Northwest. While the miners were not formally disciplined for their actions, they were, in essence, reprimanded. It would also have been reasonable to assume that the occurrences would have impressed upon the involved operators the very real dangers posed by deviations from the established mining method. Northwest was on notice that Wallace had, on two prior occasions, mined in too narrow an area. At least in retrospect, it could be faulted for not taking more aggressive actions to deter such conduct. However, its failure to do so does not amount to high negligence or aggravated conduct.[4]

It is significant that Northwest, which had used the same mining method for decades, had not been cited by MSHA for unsafe mining methods in any prior inspection. Lack of prior enforcement is not relevant to the determination of a violation but is relevant evidence on the issue of negligence. *See, U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1547-47 (Aug. 1993). I find that Northwest's negligence was low to moderate and that the violation was not the result of its unwarrantable failure.

Citation No. 4531825

Citation No. 4531825 alleged a violation of 30 C.F.R. § 56.3401, which provides, in pertinent part:

> § 56.3401 Examination of ground conditions.
>
> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas

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honored.

[4] Bilbrey also placed weight on the fact that the loader operators had made complaints about the operation several months before and occasionally thereafter. The conditions complained of, however, were related to the purchase of the new CAT 992's with the oversized buckets. When operated on a slight downgrade, i.e., digging down at 4-5 degrees, the rear wheels would hop when the loader was backed upgrade with its bucket full, jarring the machine and operator and requiring travel at a lower speed. The rear wheels also lost traction more easily and the machine was unable to back quickly away from the slough. In response, calcium chloride and water were put into the rear tires, creating more weight at that end of the loader. The operators were not entirely satisfied with that solution, however, and preferred to work on flat or level ground. Continued complaints about mining "downhill" were rejected, because there was nothing else that could be done about the problem and mining downhill was necessary to efficiently extract the material. While safety may have been a concern, it appears that the operators' complaints were grounded on performance issues, i.e., the uncomfortable bouncing and related increases in cycle time -- the time required to scoop a bucket of material, travel to the conveyor, dump it and return to get another load.

where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. * * *

The conditions he observed were noted on the citation as:

> The mine operator failed to designate a person or persons experienced in examining and testing for loose ground conditions at the pit. The pit foreman, Mark Snyder, stated that he was in charge of the pit and he did no such exam nor did he assign these duties. The ground conditions change rapidly with the heavy rains this time of year. The pit was not examined prior to work commencing and as ground conditions warrant. An employee was covered up with material from the wall operating a 992 front end loader on 2/5/99. This violation is an unwarrantable failure to comply with a mandatory standard. Mine pit runs two shifts. Failure to comply with this standard presents a high degree of risk to miners. [The citation was modified on March 17, 1999 to add the following language.] Pit foreman, Mark Snyder, engaged in aggravated conduct constituting more than ordinary negligence in that he was in charge of the pit and did not assign these duties of inspecting the ground conditions to anyone nor did he do the inspections himself.

He determined that as a result of the violation it was highly likely that a fatal injury would occur, that one person was affected, that the violation was significant and substantial, and, that the operator's negligence was high.

The Violation

Northwest had no formal policy, written or unwritten, of designating individuals to conduct examinations and testing of ground conditions either prior to the commencement of work or as conditions warranted during the work shift. Snyder was generally at the pit once a day or more, but there is no claim that his visits were made prior to work commencing or as dictated by changing ground conditions and he had not gone to the pit on February 5, 1999, prior to the accident.

Northwest's defense to this charge is that, by virtue of their job descriptions, the loader operators were supposed to continuously survey the high wall for unsafe conditions and, if the natural slough of material was insufficient, move to another area and call for the dozer to push material to eliminate the instability. This duty to keep an eye on the high wall was periodically reinforced at safety meetings. Consequently, Northwest argues, the loader operators had been designated to examine ground conditions and were doing so at the time.

This is clearly an after-the-fact justification, and an inadequate one. It is apparent that Northwest had made essentially no effort to comply with the regulation. Inwards and Snyder initially told Bilbrey that such examinations were not being done and that no one had been

designated to do them, including the loader operators.[5] Inwards admitted to Bilbrey that he was unaware of the specific regulation prior to the inspection, though he was aware of a regulation requiring miners to examine their workplace before beginning work. Bilbrey described a proper ground conditions examination as involving visual inspection of the entire high wall from the top and bottom to detect separations and other unsafe conditions, such as overhangs. No evidence was introduced to challenge Bilbrey's description of a proper examination. Assuming that the loader operators visually observed the high wall in the area they were removing material from, something they would presumably do in any event for their own safety, it is clear that Northwest had not designated anyone to conduct a proper ground conditions examination prior to work commencing and as conditions indicated and that such examinations and testing were not being done at the time of the accident.

Northwest argues that the loader operators were knowledgeable as to slough patterns, wind and weather conditions, ground conditions, break-offs, aggregate composition and excavation techniques and that they were appropriately designated by Snyder. However, while they had experience as miners in observing high walls as they worked, it is questionable that they had sufficient training or experience in conducting proper examinations of ground conditions, and testing them as indicated, to satisfy the standard. Dmytriw, an expert in the field of civil engineering and slope stability, testified that the material would slough naturally under most conditions, but, that it would slough less readily when it was wet. If it was saturated to the point that water would come off the wall, he opined that it would be very unstable and should not be mined. Wallace, one of the individuals Northwest relies upon as having been qualified to examine and test ground conditions, thought that the material sloughed *more* readily when wet. Bilbrey's notes also indicate that Wallace told him that it was raining heavily when the shift started on February 5, 1999, such that water was coming off the wall. Yet this unsafe condition was apparently not recognized or mentioned at the safety meeting.

Northwest could have achieved compliance with the regulation by designating all members of the crew to examine and test ground conditions, if they possessed the requisite qualifications.[6] However, it is apparent that the loader operators had not been designated to conduct proper examinations of ground conditions as required by the regulation and were not, in fact, conducting such examinations. While Northwest does not argue that Snyder had been designated to examine and test ground conditions, the same is true as to him. While he did visit the pit, generally on a daily basis, and would observe conditions there, including the high wall, there is no evidence that he had been designated to examine and test ground conditions as

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[5] Snyder testified that his statement that Northwest had no policy on designating individuals to examine ground conditions was addressed only to formal written policies. I reject that explanation. The statement itself was not qualified in any way and was consistent with other statements made by Snyder.

[6] The Secretary argues that designating all of the miners to conduct examinations and testing of ground conditions is, in essence, designating no one.

required by the regulation. There was no claim that he visited the pit prior to work commencing and he had not been to the pit on February 5, 1999, prior to the accident. Northwest violated the regulation.

Significant and Substantial

The violation was S&S. Failure to conduct a proper examination of ground conditions, and test where indicated, prior to work commencing and as conditions warrant, under continued normal mining operations would contribute to a hazard, the development of unstable conditions in the high wall. Particularly as the high wall reached heights of 100 feet, there was a considerable area over which hangups or other unstable conditions could develop. Bilbrey noted several such conditions when he observed the high wall on February 11, 1999. Weather conditions, most importantly the amount of rainfall, varied considerably and would affect the development of unstable conditions as the natural sloughing property of the material varied. The development of unstable conditions on a high wall would pose a reasonable likelihood that an injury would result and that the injury would be of a reasonably serious nature.

Northwest argues that the February 5, 1999, accident was entirely the result of Wallace's improper mining actions and that there is no evidence that a proper examination of ground conditions would have disclosed those unstable conditions. That argument misses the mark. As noted above, the Secretary need not prove that the hazard contributed to resulted in an accident or actually will result in an injury causing event. *Arch of Kentucky*, *supra*. Wallace's accident, aside from confirming the obvious — that an injury resulting from the hazard of unstable ground conditions in the high wall would likely be serious — has minimal bearing on whether the violation was S&S.[7]

Northwest also argues that the absence of any prior injuries from unstable ground conditions precludes a conclusion that an injury would be reasonably likely to occur as a result of the hazard contributed to. However, the absence of prior injuries is only one factor in the evaluation. The determination of whether a violation was S&S must be made assuming continued normal mining operations and I am convinced that the hazard contributed to by the

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[7] In any event, it is not at all clear that Northwest's assertion is correct. There is evidence of unusually heavy rainfall on the morning of February 5, 1999, such that water was coming off the high wall, an unstable condition. Even though the scene of the accident had been altered somewhat by the time of Bilbrey's February 11, 1999 inspection, he did observe several conditions that indicated instability in the high wall. The fact that the area where the accident occurred appeared to be at the angle of repose is hardly remarkable. It was material sloughing to its angle of repose that engulfed Wallace's loader. Even though Wallace's continued digging into the face of the wall no doubt exacerbated any unstable conditions, it is entirely possible that a proper examination and, if indicated, testing of ground conditions on the morning of February 5, 1999, would have identified unstable conditions and avoided the subsequent accident.

violation posed a reasonable likelihood of a reasonably serious injury occurring.

Unwarrantable Failure

Northwest and its managers, particularly Snyder and Inwards, should have been aware of the regulation and taken steps to comply with it. While the operator's negligence was at least moderate, I cannot agree with Bilbrey's conclusion that the violation was a result of Northwest's unwarrantable failure. The violation was longstanding, but, it had not been the subject of prior enforcement action and was not, in itself, a highly dangerous condition. The observations by the loader operators, foreman and superintendent were not sufficient to satisfy the requirements of the regulation. However, they did partially address the goal of inspecting for dangerous conditions. The prior instances of sloughs partially engulfing loaders were reasonably thought by Northwest to have been attributable to miners' deviations from established mining methods, not to any failure to examine ground conditions. The absence of enforcement action over a period of several years is a significant mitigating factor. Compare the facts in this case with those in *Wiser Construction*, 18 FMSHRC 1641 (Sept. 1996) (ALJ), where a similar violation was held to be the result of an unwarrantable failure where the operator had violated an imminent danger order issued some six months earlier and had had prior discussions with MSHA officials identifying the violative practice subsequently cited.

Individual Liability

The Act provides that a director, officer or agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in a recent Commission decision, *Target Industries, Inc.* 23 FMSHRC 945, 963 (Sept. 2001) (Commissioner Beatty):

> Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C.Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him

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

I find that the Secretary has failed to prove that Inwards was individually liable for the violations. As to the unsafe mining methods charge, Northwest's mining method was appropriate and safe. It was Wallace's deviation from it that resulted in the violation. The Secretary's theory as to Inwards was based upon allegations that he had instructed Snyder to direct Wallace to mine in a narrow area where his ability to fan out was restricted. However, the only evidence to support that contention was that Inwards had been observed overseeing the pit for a few minutes around the time that Wallace had been directed to mine in that area[8] and statements allegedly made by Snyder to Wallace. Both Snyder and Inwards denied that Inwards had any involvement in directing Wallace where to mine. Snyder testified that it was his determination that Wallace should mine in the area where there was a greater concentration of sand based upon his knowledge from observing the stockpiles that Northwest was low on sand. Even if Wallace had been instructed to work in a narrow area, restricting his ability to fan out, no safety hazard would have been presented as long as the dozer was available to push material augmenting the natural slough.

The Secretary also relies upon statements allegedly made by Snyder to the loader operators that their continued complaints about the loaders and mining downhill had been transmitted to Inwards and that he refused to take further action beyond having calcium chloride put into the rear tires. However, as noted above, those complaints were not prompted by safety concerns and Inwards' failure to further address them was dictated by legitimate business considerations. There was nothing more that could be done about the weight balance of the loaders and switching to smaller buckets would have cut production. Likewise, mining at a slight downward angle of approximately 5 degrees was necessary to effectively mine the deposit. Neither the loaders, nor the practice of mining downhill posed significant safety risks if Northwest's mining method was followed.

The charge that Inwards failed to assure that qualified individuals were designated to properly examine and test ground conditions carries more weight. Inwards should have been aware of the regulation and made sure that it was complied with. However, he had been in a position of authority for many years during which Northwest had conducted operations in essentially the same manner. He was personally aware that MSHA inspectors had inspected Northwest's mines on numerous prior occasions and had never issued a citation for failure to comply with that regulation or otherwise indicated that Northwest's compliance was lacking. Under the circumstances, I do not find that Inwards' failure to assure that qualified individuals

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[8] Inwards had broken his ankle in November of 1998 and began working on a part-time basis in late January, being driven to work by his wife. He was not cleared to return to work full-time until February 11, 1999, the date of Bilbrey's inspection.

had been designated to conduct proper examinations of ground conditions and perform testing where indicated, was due to aggravated conduct. Rather it was due to ordinary negligence.

Accordingly, the citations issued to Inwards in his individual capacity will be vacated.

The Appropriate Civil Penalty

Northwest's DuPont pit is a medium sized mine, with approximately 77,161 hours worked per year and its controlling entity is also a medium sized operation with 1,050,112 hours worked per year. It has a moderate history of violations, with 38 violations having been issued over 32 inspection days in the 24 months preceding the issuance of the subject citations. Respondent did not argue in its brief that payment of the proposed civil penalties would threaten its ability to continue in business. In light of these facts, I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Respondent's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Respondent's business.

The proposed civil penalty for Citation No. 4531825 was $4,500.00. The violation was sustained. However, the violation was held to have been the result of low to moderate negligence and not the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $750.00 for this violation.

The proposed civil penalty for Citation No. 4531826 was $5,500.00. The violation was sustained. However, the violation was held to have been the result of moderate negligence and not the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $2,500.00 for that violation.

ORDER

The citations issued to Inwards in his individual capacity, Citations No'd. 4531825A and 4531826A, are hereby **VACATED** and the petition in Docket No. WEST 2000-481-M is hereby **DISMISSED**.

Citations No'd. 4531825 and 4531826, issued to Northwest are hereby affirmed, as modified, and Northwest is directed to pay a civil penalty of $3,250.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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