COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY AND AUGUST 2006

Review was granted in the following cases during the months of July and August:

Secretary of Labor, MSHA v. Laskey-Clifton Corporation, Docket No. WEST 2006-211-M. (Judge Melick, June 8, 2006)

Secretary of Labor, MSHA v. Neiswonger Construction, Docket No. PENN 2006-26-M. (Chief Judge Lesnick, unpublished Default Order, March 23, 2006)

Secretary of Labor, MSHA v. Tresca Brothers Sand & Gravel, Inc., Docket No. YORK 2005-118-M. (Chief Judge Lesnick, unpublished Default Order, November 2, 2005)

Review was denied in the following case during the months of July and August:

Secretary of Labor, MSHA v. Hosea O. Weaver & Sons, Inc., Docket No. SE 2005-301-M. Premature Petition for Review filed August 11, 2006.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2006-307-M
	:	A.C. No. 15-05484-79301
v.	:	
CARMEUSE LIME & STONE INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 18, 2006, the Commission received from Carmeuse Lime & Stone Inc. ("Carmeuse") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 8, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order No. 6108303 to Carmeuse. Mot. at 1. Carmeuse contested the order on November 18, 2005. *Id.* That contest is the subject of Docket No. KENT 2006-77-RM, which is currently on stay before Commission Administrative Law Judge T. Todd Hodgdon. On February 16, 2006, Carmeuse received from MSHA a proposed penalty assessment for Order No. 6108303, but the company states that although it intended to contest the proposed penalty, it failed to timely do so because of inadvertence or mistake. Mot. at 2. The Secretary states that she does not oppose Carmeuse's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2006-117-M
v.	:	A.C. No. 12-02322-75619 E24
AUSTIN POWDER COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 31, 2006, the Commission received from Austin Powder Company ("Austin Powder") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Austin Powder states that on January 3, 2006, it received from the Department of Labor's Mine Safety and Health Administration ("MSHA") the proposed penalty assessment at issue. Mot. at 1; Aff. of Kris Bibey. Austin Powder states that a contest was completed by the company's safety auditor, but through clerical error, the completed form was not mailed to the Secretary. Mot. at 1-2. The company states that it discovered its mistake during a violation and penalty history audit and attempted to file a contest, but was told by MSHA that the contest was untimely. *Id.* at 2. The Secretary states that she does not oppose Austin Powder's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2006-212-M
	:	A.C. No. 09-00721-85313
v.	:	
HANSON AGGREGATES SOUTHEAST, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 9, 2006, the Commission received from Hanson Aggregates Southeast, Inc. ("Hanson Aggregates") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 24-25, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation Nos. 6080501 and 6080502 to Hanson Aggregates's Fayette County Quarry. Mot. at 1. The company contested the citations; these contests are the subject of Docket Nos. SE 2006-177-R and SE 2006-178-R, which are currently on stay before Commission Administrative Law Judge Jacqueline Bulluck. MSHA issued a proposed penalty assessment for the two citations on April 12, 2006, which Hanson Aggregates failed to contest because it believed that the contest proceedings before Judge Bulluck "sufficed to cover the penalty proceedings." Mot. at 1. The Secretary states that she does not oppose Hanson

Aggregates's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 2006-24 A.C. No. 44-05217-75599 E24
AUSTIN POWDER COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 31, 2006, the Commission received from Austin Powder Company ("Austin Powder") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Austin Powder states that on January 3, 2006, it received from the Department of Labor's Mine Safety and Health Administration ("MSHA") the proposed penalty assessment at issue. Mot. at 1; Aff. of Kris Bibey. Austin Powder states that a contest was completed by the company's safety auditor, but through clerical error, the completed form was not mailed to the Secretary. Mot. at 1-2. The company states that it discovered its mistake during a violation and penalty history audit and attempted to file a contest, but was told by MSHA that the contest was untimely. *Id.* at 2. The Secretary states that she does not oppose Austin Powder's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-386-M
	:	A.C. No. 26-01089-78497 M703
v.	:	
AIR POLLUTION TESTING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 4, 2006, the Commission received from Air Pollution Testing, Inc. ("Air Pollution Testing") a letter requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 26, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Air Pollution Testing the proposed penalty assessment at issue. The company asserts that it sent the form to MSHA indicating that it wished to contest the proposed penalties, but subsequently learned that it had been listed as delinquent on MSHA's database. The Secretary of Labor states that she does not oppose Air Pollution Testing's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-387-M
	:	A.C. No. 05-04483-32619 H783
v.	:	
CRALL & BOWES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 8, 2006, the Commission received a letter from the president of Crall & Bowes, Inc. ("Crall & Bowes") requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary filed a response to Crall & Bowes's letter on May 12, 2006.

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

On July 21, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent a proposed penalty assessment to Crall & Bowes, a copy of which is attached to the company's letter and is captioned as case No. 05-04483-32619 H783. The proposed assessment became a final Commission order on September 4, 2004. Crall & Bowes states in its letter that it believed the case had been resolved in proceedings before the Commission in Docket No. WEST 2004-360-M. Crall & Bowes attached to its letter a copy of an order approving the penalty in and dismissing Docket No. WEST 2004-360-M. However, the proposed penalty

assessment Crall & Bowes now seeks to reopen, No. 05-04483-32619 H783, was not in Docket No. WEST 2004-360-M, which instead concerned another proposed assessment with a similar case number, 05-04483-27382 H783.

The Secretary states in her response that she opposes the Commission granting Crall & Bowes's request for relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment at issue became a final Commission order. *See J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying several requests to reopen filed more than one year after the penalty proposals at issue had become final orders, noting that under Rule 60(b) of the Federal Rules of Civil Procedure, any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered).

Crall & Bowes failed to timely contest the proposed assessment before us. Therefore, it became a final Commission order 30 days after the company received it.

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

However, under Rule 60(b) any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, Crall & Bowes has requested reopening of the proposed assessment more than one year after it became a final Commission order. Because Crall & Bowes waited well over a year to request relief, its request is untimely. *J S Sand & Gravel*, 26 FMSHRC at 796. Accordingly, Crall & Bowes's motion is denied and this proceeding is dismissed.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 11, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2006-172-M
	:	A.C. No. 01-00043-32236
LEHIGH CEMENT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 26, 2006, the Commission received from Lehigh Cement Company ("Lehigh") a motion made by counsel to reopen a penalty assessment that the company believed had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary responded to Lehigh's motion in a letter dated May 2, 2006.

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

In its motion, Lehigh states that on July 15, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent the company the proposed penalty assessment at issue, and that a company official timely contested two of the five citations listed in the proposed assessment. Mot. at 2-3; Earl Aff. at 2. On March 20, 2006, however, Lehigh states that it received a notice from MSHA stating that the penalties against it were delinquent. Mot. at 2.

In her response to Lehigh's motion, the Secretary states that Rule 60(b) of the Federal Rules of Civil Procedure (from which the Commission has found guidance in evaluating requests to reopen final orders) "is inapplicable," and Lehigh's motion would not be time barred, because

"the proposed penalty assessment[was] effectively contested in a timely manner." Sec'y Response at 1.

Having reviewed Lehigh's motion and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Lehigh timely contested it. We deny Lehigh's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 11, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 2006-173-M A.C. No. 01-00043-49139 A
GARY STRUNK, employed by LEHIGH CEMENT COMPANY	: : :	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 26, 2006, the Commission received a motion made by counsel on behalf of Gary Strunk, an employee of Lehigh Cement Company, to reopen a penalty assessment against Strunk that he believed may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary responded to Strunk's motion in a letter dated May 2, 2006.

Under the Commission's Procedural Rules, an individual charged under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

In his motion to reopen, Strunk states that on February 11, 2005, he received a proposed penalty assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 3; Strunk Aff. at 2. Strunk further states that when he attempted to schedule a "pre-contest meeting" with MSHA through his legal counsel, MSHA responded that the proposed assessment had already been contested. *Id.* Strunk's counsel nevertheless filed a timely contest of the proposed assessment. Mot. at 3; Ex. 5. However, Strunk states that on

March 20, 2006, he received a notice from MSHA stating that the penalty against him was delinquent. Mot. at 2.

In her response to Strunk's motion, the Secretary states that Rule 60(b) of the Federal Rules of Civil Procedure (from which the Commission has found guidance in evaluating requests to reopen final orders) "is inapplicable," and Strunk's motion would not be time barred, because "the proposed penalty assessment[was] effectively contested in a timely manner." Sec'y Response at 1.

Having reviewed Strunk's motion and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Strunk timely contested it. We deny Strunk's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2006-118
ADMINISTRATION (MSHA)	:	A.C. No. 11-00877-75030
	:	
v.	:	Docket No. LAKE 2006-119
	:	A.C. No. 11-00877-77796
WABASH MINE HOLDING COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On May 30, 2006, the Commission received from Wabash Mine Holding Company ("Wabash") motions made by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 15, 2005 and January 19, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Wabash the proposed penalty assessments at issue, which were received by the company on February 7 and 9, 2006. Motions at 1. Wabash states that although it intended to contest the assessments, it failed to do so in a timely fashion because of a misunderstanding as to who was to file the contest. *Id.* at 1-2. The Secretary states that she

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2006-118 and LAKE 2006-119, both captioned *Wabash Mine Holding Company* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

does not oppose Wabash's requests for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 13, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2006-720-M A.C. No. 46-02805-82053
v.	:	
U.S. SILICA COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 23, 2006, the Commission received from U.S. Silica Company ("U.S. Silica") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On April 4, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to U.S. Silica the proposed penalty assessment at issue. The company asserts that it had intended to contest four of five citations listed in the proposed assessment. Mot. at 2; Glennon Aff. ¶¶ 4-5. However, the company mistakenly paid the proposed assessment instead. Mot. at 2. The Secretary of Labor states that she does not oppose U.S. Silica's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 13, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2006-63-M A.C. No. 28-00546-80200 A
JOSEPH HONACHI, employed by WHIBCO, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 26, 2006, the Commission received a motion made by counsel on behalf of Joseph Honachi, a former employee of Whibco Inc., to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Counsel filed an amended motion on June 27, 2006.

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

In his motion to reopen, Honachi states that when he received the proposed penalty assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA") in February 2006, he gave it to Whibco Inc. office staff "for processing." Am. Mot. at 1-2. Honachi further states that, although he intended to contest the assessment, he failed to do so in a timely fashion "due to staff turnover" at Whibco Inc., and that the "uncontested forms were only discovered when [his] case was assigned to the undersigned counsel." *Id.* at 2. The Secretary does not oppose Honachi's request for relief.

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

Having reviewed Honachi's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge to determine whether good cause exists to reopen this proceeding. If it is determined that such relief is appropriate, this cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 14, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2006-120
ADMINISTRATION (MSHA)	:	A.C. No. 33-01159-10178
	:	
v.	:	Docket No. LAKE 2006-121
	:	A.C. No. 33-01159-14802
THE OHIO VALLEY COAL COMPANY	:	
	:	Docket No. LAKE 2006-122
	:	A.C. No. 33-01159-26070

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On May 30, 2006, the Commission received a letter from the corporate safety director of The Ohio Valley Coal Company ("Ohio Valley Coal") requesting that the Commission reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 8 and December 10, 2003, and May 5, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Ohio Valley Coal the proposed penalty

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2006-120, LAKE 2006-121, and LAKE 2006-122, all captioned *The Ohio Valley Coal Company* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

assessments at issue. Ohio Valley Coal states that "[c]ontest forms were filed with the Civil Penalty Compliance Office," but that MSHA has told the company that it has been unable to locate the contest forms. In her response to Ohio Valley Coal's letter, the Secretary states that although she "has no record that the penalty contest forms . . . were received by MSHA," she further states that she "has no basis . . . for questioning that those forms were sent to [MSHA] as asserted" by Ohio Valley Coal. Accordingly, the Secretary does not oppose the company's requests for relief.

On the record before us, we are unable to determine whether Ohio Valley Coal timely contested the proposed penalty assessments. If the company did so, the proposed assessments have not become final orders of the Commission and the company's requests for relief would be moot. However, if Ohio Valley Coal failed to timely contest the proposed assessments, we would not be able to grant the relief requested. Under Rule 60(b) of the Federal Rules of Civil Procedure,[2] any motion for relief from a final order must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, Ohio Valley Coal has requested reopening of proposed assessments more than one year after they became final Commission orders if the company did not file a timely contest. *See J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

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

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Ohio Valley Coal timely contested the proposed penalty assessments at issue. If it is determined that the company did file timely contests, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Ohio Valley Coal failed to timely contest the proposed assessments, the Chief Judge shall dismiss these consolidated proceedings.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2006-26-M
v.	:	
NEISWONGER CONSTRUCTION, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 3, 2006, Chief Administrative Law Judge Robert Lesnick issued to Neiswonger Construction, Inc. ("Neiswonger") an Order to Show Cause for failing to answer the Secretary of Labor's petition for assessment of civil penalty. On March 23, 2006, Chief Judge Lesnick issued an Order of Default entering judgment for the Secretary and directing Neiswonger to pay the proposed civil penalty immediately.

On May 1, 2006, the Commission received a letter from William Klingensmith, Neiswonger's superintendent, seeking review of the Chief Judge's default order. This letter, however, offers no explanation for why the company failed to file an answer or respond to the Chief Judge's show cause order. Instead, the letter states "all letters were replied to within the [requisite] time frame." The Secretary has not filed a response to Neiswonger's request for relief.

The Chief Judge's jurisdiction in this matter terminated when he issued his default order. 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 review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Here, Neiswonger did not file a timely petition for review, and consequently, the Chief Judge's order became a final order of the Commission on May 2, 2006. 30 U.S.C. § 823(d)(1).

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

Upon review of the record, we have determined that the wording of the Order to Show Cause did not conform to the Commission's Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311 (March 1996).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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601 NEW JERSEY AVENUE, NW

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July 14, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2006-432-M
v.	:	A.C. No. 02-02672-21378
DS MINE & DEVELOPMENT LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 15, 2006, the Commission received a letter from DS Mine & Development LLC ("DS Mine & Development") requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On March 16, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to DS Mine & Development the proposed penalty assessment at issue. The company states that it contested the proposed assessment in a timely fashion, but that a "response to that contest was never received." In her response to DS Mine & Development's letter, the Secretary states that although she "has no record that the penalty contest form . . . was received by MSHA," she further states that she "has no basis . . . for questioning that this form was sent to [MSHA] as asserted" by DS Mine & Development. Accordingly, the Secretary does not oppose the company's request for relief.

On the record before us, we are unable to determine whether DS Mine & Development

timely contested the proposed penalty assessment. If the company did so, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot. However, if DS Mine & Development failed to timely contest the proposed assessment, we would not be able to grant the relief requested. Under Rule 60(b) of the Federal Rules of Civil Procedure,[1] any motion for relief from a final order must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, DS Mine & Development has requested reopening of a proposed assessment more than one year after it became a final Commission order if the company did not file a timely contest. *See J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

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

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether DS Mine & Development timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that DS Mine & Development failed to timely contest the proposed assessment, the Chief Judge shall dismiss this proceeding.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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July 20, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2006-195-M A.C. No. 32-00730-81412
v.	:	
AGGREGATES CONSTRUCTION, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 11, 2006, the Commission received from Aggregates Construction, Inc. ("Aggregates Construction") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Aggregates Construction states that in March 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to the company the proposed penalty assessment at issue. Mot. at 1. Aggregates Construction further states that when it contested a number of related penalty assessments, the contest of the proposed assessment at issue "was inadvertently left out" despite the company's intention to contest it. *Id.* at 1-2. The company discovered its mistake when it received a "past due" payment notice from MSHA. *Id.* at 2. The Secretary of Labor states that she does not oppose Aggregates Construction's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2006-460-M
v.	:	A.C. No. 26-02302-44079
GOLDEN PHOENIX MATERIALS, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 22 and July 5, 2006, the Commission received two letters from Golden Phoenix Materials, Inc. ("Golden Phoenix") requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 29, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Golden Phoenix the proposed penalty assessment at issue. The company states that it contested the "MSHA decision" "within the allotted time period," and that MSHA received the contest, but that it "may not have been properly forwarded to the relevant department." The Secretary of Labor states that she does not oppose Golden Phoenix's request for relief.

On the record before us, we are unable to determine whether Golden Phoenix timely contested the proposed penalty assessment. If the company did so, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot.

However, if Golden Phoenix failed to timely contest the proposed assessment, we would not be able to grant the relief requested. Under Rule 60(b) of the Federal Rules of Civil Procedure,[1] any motion for relief from a final order must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, Golden Phoenix has requested reopening of a proposed assessment more than one year after it became a final Commission order if the company did not file a timely contest. *See J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

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

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Golden Phoenix timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Golden Phoenix failed to timely contest the proposed assessment, the Chief Judge shall dismiss this proceeding.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 21, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2006-386
ADMINISTRATION (MSHA)	:	A.C. No. 15-18629-81483
	:	
v.	:	Docket No. KENT 2006-387
	:	A.C. No. 15-18629-83815
MARSH COAL COMPANY	:	
	:	Docket No. KENT 2006-388
	:	A.C. No. 15-18629-73612
	:	
	:	Docket No. KENT 2006-389
	:	A.C. No. 15-18629-75890
	:	
	:	Docket No. KENT 2006-390
	:	A.C. No. 15-18629-86540

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 5, 2006, the Commission received a letter from Marsh Coal Company ("Marsh Coal") requesting that the Commission reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Accompanying the letter were copies of the proposed penalty assessments at issue. The Secretary of Labor filed a response to Marsh Coal's letter on July 11, 2006.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2006-386, KENT 2006-387, KENT 2006-388, KENT 2006-389, and KENT 2006-390, all captioned *Marsh Coal Company* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

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

On November 29, 2005, and January 3, February 28, March 28, and May 2, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessments to Marsh Coal. In its letter, Marsh Coal states that it is unable to pay the assessments ("we don't have the money"). The company offers no explanation, however, for its failure to timely contest the proposed assessments. In her response, the Secretary states that Marsh Coal "identifies no legally cognizable grounds for requesting reopening" because the company's "stated reason of not having the money to pay does not meet any of the legal requirements of Rule 60(b)" of the Federal Rules of Civil Procedure. S. Resp. at 2.

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

Because Marsh Coal's request for relief does not explain the company's failure to contest the proposed assessments, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2006-196-M
	:	A.C. No. 14-01484-79826
v.	:	
HOLLIDAY SAND AND GRAVEL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 12, 2006, the Commission received from Holliday Sand and Gravel Company ("Holliday") a letter requesting that the Commission reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 8, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Holliday the proposed penalty assessment at issue. The company asserts that it telephoned Ron Pennington (presumably an MSHA official) and was told to write on the bill that the two relevant citations were in the process of being contested. Holliday states that it did so, but that MSHA's Civil Penalty Compliance Office told the company that the paperwork was not received. The operator asserts that, after it received a bill in May 2006, it again sent the bill back, advising the compliance office that it was contesting the citations. The Secretary of Labor states that she does not oppose Holliday's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2006

SECRETARY OF LABOR,	:	Docket No. CENT 2006-200-M
MINE SAFETY AND HEALTH	:	A.C. No. 14-01635-74774
ADMINISTRATION (MSHA)	:	Docket No. CENT 2006-201-M
	:	A.C. No. 14-01635-80401
v.	:	Docket No. CENT 2006-202-M
	:	A.C. No. 14-01477-80283
NELSON QUARRIES, INC.	:	Docket No. CENT 2006-203-M
	:	A.C. No. 14-01478-77337
	:	Docket No. CENT 2006-204-M
	:	A.C. No. 14-01478-82614
	:	Docket No. CENT 2006-205-M
	:	A.C. No. 14-01597-77364
	:	Docket No. CENT 2006-206-M
	:	A.C. No. 14-01597-80316
	:	Docket No. CENT 2006-207-M
	:	A.C. No. 14-01277-74668
	:	Docket No. CENT 2006-208-M
	:	A.C. No. 14-01277-82615
	:	Docket No. CENT 2006-209-M
	:	A.C. No. 14-01277-80289

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 14, 2006, the Commission received from Nelson

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2006-200-M, CENT 2006-201-M, CENT 2006-202-M, CENT 2006-203-M, CENT 2006-204-M, CENT 2006-205-M, CENT 2006-206-M, CENT 2006-207-M, CENT 2006-208-M, and CENT 2006-209-M, all captioned *Nelson Quarries, Inc.* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

Quarries, Inc. ("Nelson Quarries") a letter requesting that the Commission reopen ten penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In late 2005 and early 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Nelson Quarries the proposed penalty assessments at issue. Nelson Quarries asserts that it contacted MSHA and understood that it was not to pay the assessments pending review of the citations. In response, the Secretary states that MSHA indicated that the company did not need to pay assessments related to other pending citations but did need to pay the assessments in this proceeding. However, the Secretary concludes that, in light of the company's confusion over whether it should pay, she does not oppose Nelson Quarries's request for relief.

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

Having reviewed Nelson Quarries's requests, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Nelson Quarries's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2006-406
	:	A.C. No. 15-02709-87642
v.	:	
HIGHLAND MINING COMPANY, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 12, 2006, the Commission received from Highland Mining Company, LLC ("Highland") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

In February 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued eight citations to the Highland 9 Mine. Mot. at 1-2. The company timely contested the citations. The contest proceedings are currently on stay before Commission Administrative Law Judge T. Todd Hodgdon.[1] *Id.* When MSHA subsequently proposed penalties for the citations, Highland paid them. *Id.* at 2. The company now contends that it made the payment inadvertently. *Id.* The Secretary states that she does not oppose Highland's request for relief.

[1] The contest proceedings underlying the proposed penalty assessment at issue in this request to reopen (Proposed Assessment No. 15-02709-87642) are as follows: KENT 2006-189-R, KENT 2006-190-R, KENT 2006-194-R, KENT 2006-195-R, KENT 2006-196-R, KENT 2006-202-R, KENT 2006-227-R, and KENT 2006-229-R.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2006-769 A.C. No. 46-01436-78898
v.	:	
CONSOL ENERGY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 7, 2006, the Commission received from Consol Energy, Inc. ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On July 19, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation Nos. 7124679 and 7124684 to Consol's Shoemaker Mine. Mot. at 1. The company timely contested both citations. The contest proceedings are currently on stay before Commission Administrative Law Judge Michael E. Zielinski. *Id.* (citing Docket Nos. WEVA 2005-211-R and WEVA 2005-213-R). When MSHA subsequently proposed penalties for the contested citations in Proposed Penalty Assessment No. 46-01436-78898, Consol paid them. Mot. at 1-2. The company now contends that it made the payments inadvertently. *Id.* at 2. The Secretary states that she does not oppose Consol's motion.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief

from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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August 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2005-116-M
v.	:	A.C. No. 19-01114-56147
R.J. CINCOTTA COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). This is the second time that this case has come before us. On February 6, 2006, we issued an order remanding the matter to Chief Administrative Law Judge Robert J. Lesnick to determine whether good cause existed for the failure of R.J. Cincotta Company, Inc. ("Cincotta") to respond to a show cause order issued by Chief Judge Lesnick. On April 11, 2006, Chief Judge Lesnick issued an order denying Cincotta's request to reopen the penalty assessment and ordered payment of the penalty.

On May 2, 2006, the Commission received from the Secretary of Labor a motion to relieve Cincotta from the April 11 order of default and order to pay. In the Secretary's motion, her counsel asserts that shortly after the proposal for assessment of civil penalty was served on Cincotta in July 2005, a settlement was reached in early August 2005. Mot. at 2. Counsel states that he telephoned the Office of Administrative Law Judges and reported the matter settled. *Id.* The Secretary did not, however, file a motion to approve settlement. Counsel also asserts that he telephoned the Office of the Administrative Law Judges notifying the person to whom he spoke that the matter was settled, after the judge issued an order to show cause on August 18, 2005. *Id.* Counsel states that he also told the operator that he had reported the matter settled. *Id.* Again, however, no motion was filed setting forth the particulars of the settlement. On November 2, 2005, an order of default was issued. On January 17, 2006, the Commission received a letter from Cincotta requesting that the case be reopened. We remanded Cincotta's request to the Chief Judge on February 6, 2006.

While on remand, the Secretary filed a motion for approval of settlement with the judge. However, counsel did not explain that the matter had been settled the previous August, nor that the Secretary had delayed in filing the settlement motion. *See* Sec'y Mot. for Approval of Settlement and Order. On the record before him, the judge denied Cincotta's request to reopen. The Secretary then filed the instant motion to relieve respondent from the order of default, alleging that the Secretary's delay in filing the settlement motion resulted from counsel's absence due to the illnesses of his elderly parents. Mot. at 3; Aff. ¶ 7.

The judge's jurisdiction in this matter terminated when his decision was issued on April 11, 2006. 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). 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). The judge's order became a final decision of the Commission on May 22, 2006.

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

Although the Chief Judge has once denied Cincotta's request to reopen this case, it appears from the record that the Judge was never made aware that the Secretary had entered into a settlement agreement with Cincotta and was responsible for the delay in filing the appropriate pleadings with the Commission. Accordingly, in light of the Secretary's admitted failure to timely file a motion for approval of settlement, in the interest of justice, we hereby reopen this matter and remand it to the Chief Judge for a determination of whether the motion for settlement should be approved, and for other appropriate relief pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. YORK 2005-118-M A.C. No. 19-00364-55319
v.	:	
TRESCA BROTHERS SAND & GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 2, 2005, Chief Administrative Law Judge Robert J. Lesnik entered an order of default against Tresca Brothers Sand & Gravel, Inc. ("Tresca"). On May 2, 2006, the Commission received a motion from the Secretary of Labor requesting that the Commission relieve Tresca from the order of default.

The judge's jurisdiction in this matter terminated when his decision was issued on November 2, 2005. 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). 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). The judge's order became a final decision of the Commission on December 12, 2005.

On May 3, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Tresca the proposed penalty assessment at issue. In the Secretary's motion, her counsel asserts that in early August 2005, a settlement was reached between the parties and counsel for the Secretary called the Commission's Office of Administrative Law Judges to report that the case was settled. Mot. at 2. The Secretary did not, however, file a motion to approve settlement. On September 12, 2005, an order to show cause was issued requiring that Tresca file

an answer with the judge. According to the Secretary's counsel, he again notified the Office of Administrative Law Judges by telephone that the matter had been settled. Aff. ¶ 6. Again, however, no motion was filed setting forth the particulars of the settlement. On November 2, 2005, an order of default was entered against Tresca. Almost four months later, on February 27, 2006, the Secretary filed a motion for approval of settlement. On April 11, 2006, the judge sent a letter to the parties indicating that he was unable to rule on the motion as his jurisdiction had terminated when he issued the default order. The Secretary then filed the instant motion to relieve respondent from the order of default, alleging that the Secretary's delay in filing the settlement motion resulted from counsel's absence due to the illnesses of his elderly parents. Aff. ¶ 7.

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

In light of the Secretary's admitted failure to timely file a motion for approval of settlement, in the interest of justice, we hereby reopen this matter and remand it to the Chief Judge for a determination of whether the motion for settlement should be approved, and for other appropriate relief pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2006-280
	:	A.C. No. 01-02901-83883
v.	:	
DRUMMOND COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 26, 2006, the Commission received from Drummond Company, Inc. ("Drummond") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On March 29, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent a proposed penalty assessment to Drummond for two orders issued to the company by MSHA on December 1, 2005. Mot. at 1; Ex. A. Drummond states in its motion that it had already timely contested the orders, which are the subject of Docket Nos. SE 2006-59-R and SE 2006-60-R. Mot. at 1. Those proceedings are currently on stay before Commission Administrative Law Judge T. Todd Hodgdon. Drummond states that it failed to timely contest the proposed penalty assessment at issue due to inadvertence. *Id.* The Secretary states that she does not oppose Drummond's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 22, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 2002-207
v.	:	WEST 2002-278
PLATEAU MINING CORPORATION	:	

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), concern two citations alleging safety violations involving the ventilation system of the Willow Creek Mine, operated by Plateau Mining Corporation ("Plateau"). 25 FMSHRC 738 (Dec. 2003) (ALJ). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the citations following an accident at the mine on July 31, 2000, which resulted in two fatalities and numerous injuries to miners. *Id.* at 739-40. Administrative Law Judge Richard Manning affirmed Citation No. 7143395 alleging that the ventilation system was not functioning as required by 30 C.F.R. § 75.334(b)(1),[1] and that the violation was significant and substantial ("S&S"). *Id.* at 743-57. In addition, the judge affirmed Citation No. 7143396 alleging that Plateau had failed to comply with

[1] 30 C.F.R. § 75.334(b)(1) provides:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

its ventilation plan in violation of 30 C.F.R. § 75.370(a)(1)[2] but determined that the violation was not S&S. *Id.* at 757-60. Plateau filed a petition for discretionary review, challenging the judge's findings that it violated sections 75.334(b)(1) and 75.370(a)(1) and that its violation of section 75.334(b)(1) was S&S. The Commission granted the operator's petition. For the reasons that follow, the judge's determination that Plateau violated section 75.370(a)(1) is reversed, and the judge's determination that Plateau violated section 75.334(b)(1) stands as if affirmed.

I.

Factual and Procedural Background

Plateau, which was then a subsidiary of RAG American Coal, Inc., operated the Willow Creek Mine, an underground coal mine in Carbon County, Utah, until the mine was closed after the accident at issue in this case. 25 FMSHRC at 738. The mine had three operating sections: two continuous miner sections, and the D-3 longwall panel, which was the third longwall panel that had been developed at the mine. *Id.* A mine fire had occurred on the D-1 panel, the first panel mined, on November 25, 1998, after a roof fall in the worked-out area ignited methane. *Id.* at 740; Tr. 37-38. Unlike D-2, the D-3 panel would not be separated from the previous panel by a solid barrier of coal. 25 FMSHRC at 740-41. Rather, the D-3 panel immediately abutted the D-2 panel, which had been sealed off after it had been mined. *Id.* at 739. MSHA granted Plateau's petition for modification, allowing Plateau to use a two-entry system to develop the D-3 panel headgate entries.[3] *Id.*; Tr. 139. The remaining one entry of the two headgate entries that had been driven to develop the D-2 panel served as the sole tailgate entry for the D-3 panel. Gov't Ex. 31, App. I.

Retreat longwall mining began on the D-3 longwall panel on July 17, 2000. 25 FMSHRC at 739; Jt. Ex. 1, Stip. 16. The face of the D-3 longwall panel was 815 feet wide and the panel

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[2] 30 C.F.R. § 75.370(a)(1) provides in part:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372.

[3] The petition also allowed Plateau to use a two-entry system to mine the D-1 and D-2 panels. 25 FMSHRC at 739; Tr. 139. A two-entry system uses two entries for longwall headgate and tailgate development. Tr. 35-36. The two-entry system is used to minimize the hazards created by roof stresses. 25 FMSHRC at 741; Tr. 35, 140-41. However, this minimizes the availability of air passages provided by additional entries for the movement of air. Tr. 62, 608-09, 1207.

was projected to be about 4200 feet long. 25 FMSHRC at 739. Mining the D-3 panel presented a number of challenges because of the amount of methane liberated, the depth of the cover over the coal seam, and the resultant roof conditions, including the occurrence of roof and rib bounces. *Id.* at 740-41. In addition, mining released liquid hydrocarbons, which were roughly equivalent to 15% gasoline, 35% kerosene, and 50% light lubrication oil. *Id.* at 739, 741. The ventilation plan for the D-3 panel had been given particular attention by MSHA because of the difficult mining conditions at the mine and the D-1 panel fire in 1998. *Id.* at 740.

On the D-3 panel, behind the rubble zone of the "gob," or the area that had been mined by the longwall, two entries ran parallel along the width of the longwall panel from headgate to tailgate. *Id.* at 741. These entries were referred to as "setup rooms" because they had been used to set up the longwall when the D-3 panel was being prepared for mining. *Id.* Once mining began, the setup room closest to the longwall shields (the "No. 1" or "outby" setup room) became part of the rubble zone.[4] *Id.*; Tr. 45.

The panel was ventilated by a flow-through bleeder system with multiple bleeder entries at the rear of the panel. Tr. 46. In a flow-through bleeder system, air flows through the worked-out area into the bleeder system, and the bleeder entries are separate from the worked-out area. *Id.* A blowing fan installed on the surface forced approximately 850,000 cubic feet per minute ("CFM") of air into the mine. Tr. 40.

Immediately behind the No. 2 setup room, the setup room farthest from the longwall shields, there were two L-shaped crosscuts (referred to as "doglegs"), one on the headgate side and one on the tailgate side. 25 FMSHRC at 741; Gov't Ex. 31, App. I. The headgate dogleg connected the No. 1 headgate entry with the No. 2 setup room. 25 FMSHRC at 741; Tr. 45, 70. The tailgate dogleg connected the No. 2 tailgate entry with the No. 2 setup room. Gov't Ex. 31, App. I. Behind the doglegs and setup rooms was a block of coal. 25 FMSHRC at 741. Behind the block of coal were three bleeder entries, which ran parallel to the longwall face. *Id.* The No. 1 bleeder entry, farthest from the longwall shields, was used to bring intake air to a sump pump at the back of the bleeders.[5] *Id.* The other two bleeder entries were return entries. *Id.*

The ventilation plan included three alternative methods for ventilating the D-3 panel. *Id.* The approved method being used on July 31 ventilated the panel by forcing air across the longwall face from the headgate to the tailgate. *Id.* Intake air was brought to the face from the No. 2 entry of the headgate through the last open crosscut. *Id.* After the air ventilated the face, it

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[4] On the map attached to the judge's decision, the judge mislabeled the No. 2 setup room as the "No. 1 setup room," and mistakenly referred to the No. 2 setup room as the No. 1 setup room and vise-versa, throughout his decision (*see, e.g.*, 25 FMSHRC at 741, 752, 758). P. Br. at 3 n.3; Tr. 45, 70. The error was harmless, however.

[5] The pump operated to keep water from accumulating in the bleeder entries. 25 FMSHRC at 742; Tr. 46-47.

was coursed through the tailgate inby toward the bleeder entries and passed through Measuring Point Locations ("MPLs") 7 and 8. *Id.* at 741-42. A small amount of the intake air from the No. 2 entry of the headgate entered the last open crosscut and was directed out through the No. 1 headgate entry, which was the belt entry. *Id.* at 742. Intake air also traveled from the No. 2 headgate entry directly to the bleeders through MPLs 5 and 6. *Id.* In addition, intake air traveled up the No. 2 tailgate entry, joined with the air that had ventilated the face, and then was coursed through MPLs 7 and 8. *Id.*

Intake air traveled through the gob area through various ventilation pathways. *Id.*; Gov't Ex. 3. Air flowed out of the rubble zone into the setup rooms, and then to the tailgate side and through the regulators at MPLs 7 and 8. 25 FMSHRC at 742. Intake air also entered the No. 1 setup room from the headgate through a regulator at MPL 4, which was between the Nos. 1 and 2 headgate entries. *Id.* Intake air traveled up the No. 1 headgate entry, inby the longwall shields, through a hole in an undercast (sometimes referred to in the transcript as an "overcast") built at the intersection of the No. 1 entry with the No. 2 setup room, through the regulators at MPLs 7 and 8, and into the bleeder entries. *Id.* Air from the longwall panel entered the bleeder entries at MPLs 5, 6, 7, and 8 and traveled approximately 8,000 feet, where the bleeder air joined another split of air just outby MPLs B1, B2 and B3.[6] 25 FMSHRC at 746 n.6, 749. MPL B1 was designated as a measuring point under 30 C.F.R. § 75.323(e).[7] *Id.* at 748, 749.

Seals were constructed to separate the Nos. 1 and 2 headgate entries once the longwall retreated outby each crosscut. *Id.* at 742. The ventilation system was not designed to course air from the headgate side of the gob back into the headgate entries to the bleeders. *Id.* This is because the headgate portion of the gob was the lowest elevation, and methane, which is lighter than air, would tend to migrate to the tailgate side of the gob. *Id.*

The approved plan also required the use of an automated atmospheric monitoring system ("AMS"). *Id.* at 743. This system was designed to provide instantaneous information about the mine's ventilation system by giving information on air velocities, as well as methane, oxygen, and carbon monoxide levels. *Id.* AMS sensors were installed at MPL 1 (the tailgate intake to the longwall), MPL 5 (the headgate No. 2 entry bleeder connector regulator), MPL 6 (headgate No. 1 entry bleeder connector regulator), MPL 7 (tailgate No. 2 entry bleeder connector regulator), MPL 8 (tailgate No. 1 entry bleeder connector regulator) and MPL B1 (D-1 tailgate No. 1 entry near the D Northeast Mains). Gov't Ex. 31 at 21.

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[6] MPLs B1 and B2 were located between crosscuts 6 and 7 in the D-1 tailgate Nos. 1 and 2 entries, which now formed part of the bleeder for D-3, and MPL B3 was located between crosscuts 6 and 7 in the No. 3 entry of the D seam bleeders. Gov't Ex. 31 at 20.

[7] Section 75.323(e) provides in part that "[t]he concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air . . . shall not exceed 2.0 percent." 30 C.F.R. § 75.323(e).

Plateau had an internal protocol which required certain actions when various levels of methane were measured at designated locations. P. Ex. 15. When methane measured 4% at MPLs 7 and 8, the operator was to cease longwall production. 25 FMSHRC at 746; P. Ex. 15; Gov't Ex. 31 at 21. At 4.5% methane, the mine was to be evacuated. 25 FMSHRC at 746; Gov't Ex. 31 at 21; P. Ex. 15. When methane measured 1.95% at MPL B1, the operator was to cease production until methane levels decreased to 1.75%. Tr. 1052; Gov't Ex. 31 at 21. If methane exceeded 2%, the operator was to "shut down and make corrections," while at 2.5%, the operator was to evacuate the mine. Tr. 1052.

On July 31, 2000, mining on the D-3 panel had progressed approximately 250 feet. 25 FMSHRC at 741. Plateau was expecting to intersect the first gob vent borehole, which was designed to remove methane from the gob, in approximately 100 feet. *Id.* at 742; Tr. 1005, 1057-58. At approximately 10:14 p.m., the longwall de-energized as it approached the tailgate on its third clean-up pass. 25 FMSHRC at 739. The crew re-energized the longwall after 42 minutes at 10:56 p.m. *Id.* Later that evening and into the following morning, a series of events in the worked-out areas of the D-3 longwall panel resulted in numerous injuries to miners, including two fatal injuries. Jt. Ex. 1, Stip. 17. The operator and the Secretary of Labor differ in their explanations of the events.

The Secretary believes that at 11:48 p.m., a relatively small roof fall occurred on the headgate side of the gob, between the longwall face and the setup rooms. 25 FMSHRC at 739. The fall ignited a small pocket of methane and other gaseous hydrocarbons. *Id.* The flame traveled inby to a small methane accumulation in the gob near the setup rooms, which resulted in the first explosion. *Id.* The miners believed that the forces they felt occurred because the gob experienced its first major cave of the roof. *Id.* The first event disrupted ventilation at the longwall, which prevented methane from being removed from the gob through the bleeder entries. *Id.* As liquid hydrocarbons became involved in the fire, two subsequent explosions occurred. *Id.* After the second explosion, miners were ordered to evacuate. *Id.* at 739. At approximately 12:17 a.m. on August 1, a fourth explosion occurred. *Id.* at 740.

Plateau believes that at about 11:48 p.m., the shearer was stopped on the headgate side of the face while Shield No. 1 was advanced. *Id.* At that time, there was a significant cave of the roof in the gob. *Id.* The large roof fall ignited hydrocarbons. P. Post-Hr'g Br. at 17. In addition, the roof fall likely disrupted ventilation in the panel, which permitted methane to come into contact with the hydrocarbon fire and caused the subsequent explosions. *Id.* at 15; 25 FMSHRC at 740.

After an investigation, MSHA issued Citation No. 7143395 alleging a violation of section 75.334(b)(1), Citation No. 7143396 alleging a violation of section 75.370(a)(1), and other citations which are not the subject of these proceedings. 25 FMSHRC at 738 n.1, 763. In Citation No. 7143395, the Secretary stated that the bleeder system's effectiveness was impaired by a limited mine ventilating potential, the configuration and distribution of airflow in the bleeder system and worked-out areas, and temporary controls installed within the worked-out

area that restricted airflow. *Id.* at 743; Gov't Ex. 2. The temporary controls that allegedly restricted airflow included check curtains in the crosscuts between the setup rooms, a curtain in the headgate dogleg, and the undercast in the intersection of the No. 1 headgate entry and the No. 2 setup room. 25 FMSHRC at 751. Citation No. 7143396 alleged that Plateau violated section 75.370(a)(1) because the temporary controls were left intact after retreat mining commenced but were not shown on the longwall start-up ventilation plan approved on July 7, 2000. *Id.* at 757; Gov't Ex. 4. Plateau challenged Citation Nos. 7143395 and 7143396, and the matter proceeded to hearing before Judge Manning.

As to Citation No. 7143395, the judge determined that Plateau was not controlling air passing through the gob so as to continuously dilute and move methane-air mixtures and other gases from the gob into the bleeders as required by section 75.334(b)(1). 25 FMSHRC at 745, 763. The judge found that the Secretary failed to prove two of three reasons that she argued demonstrated a violation of the standard, namely, that Plateau was improperly distributing air through the gob (*id.* at 750-51), and that temporary ventilation controls restricted air flow in the gob (*id.* at 751-53). The judge determined, however, that the Secretary proved a violation of section 75.334(b)(1) because the ventilation system was overextended and could not handle the levels of methane liberated. *Id.* at 751. In so concluding, the judge relied upon evidence that methane levels increased (*id.* at 746-47), that the measuring point under section 75.323(e) showed artificially low methane readings (*id.* at 748-49), and that the accident was caused by the ignition of a small pocket of methane-air mixture that had accumulated on the headgate side of the rubble zone. *Id.* at 753-54. The judge further concluded that the operator could violate section 75.334(b) even if it complied with its ventilation plan, and that Plateau should have been on notice that its bleeder system was not functioning properly on July 31. *Id.* at 746. The judge held that the violation was S&S and assessed a civil penalty of $25,000, the amount proposed by the Secretary. *Id.* at 757, 763.

As to Citation No. 7143396, the judge determined that Plateau had violated section 75.370(a)(1) by failing to comply with its ventilation plan but determined that the violation was not S&S.[8] *Id.* at 758-60. In so holding, the judge rejected the Secretary's theory that two of the three temporary ventilation controls, namely, the curtains in the setup rooms and the curtain in the dogleg, violated Plateau's ventilation plan. *Id.* at 758. However, he agreed that the undercast violated the ventilation plan because it functioned as a regulator, and Plateau had failed to seek modification of the plan to include the undercast. *Id.* at 759. The judge assessed a penalty of $1,000 rather than the penalty of $20,000 proposed by the Secretary. *Id.* at 760, 763; Pet. for Assess. of Pen.

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[8] In concluding that the violation was not S&S, the judge determined that the Secretary failed to prove that Plateau's failure to completely remove the undercast contributed to the explosions. 25 FMSHRC at 760.

II.

Disposition

A. Citation No. 7143396, Section 75.370(a)(1)[9]

Plateau argues that the judge erred in finding a violation of section 75.370(a)(1) because Plateau's ventilation plan did not depict the undercast. P. Br. at 30-33. It asserts in part that there is no evidence that the undercast inhibited airflow. *Id.* at 31. Plateau submits that the judge's finding that the undercast should have been shown in the ventilation plan as a regulator is also erroneous because the undercast did not function as a regulator. *Id.* The Secretary responds that the judge's finding of violation should be affirmed. S. Br. at 45-50.

Section 75.370(a)(1) provides in part that an "operator shall develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1). A ventilation plan is required to specify the "location of ventilating devices such as regulators, stoppings and bleeder connectors used to control air movement through the worked-out area." 30 C.F.R. § 75.334(c)(4); *see also* 30 C.F.R. § 75.371(bb).

The undercast was located inby the longwall shields at the intersection of the No. 1 headgate entry and the No. 2 setup room. 25 FMSHRC at 742; Tr. 51, 70. The undercast was part of the approved ventilation plan during longwall setup and continuous miner development in the D-3 panel and was originally constructed to separate air coursing into the No. 2 setup room from air coursing over the undercast. Tr. 736, 1035-36; J. Ex. 3. The amended ventilation plan, which was approved on July 7, 2000 and applied to the startup of longwall mining in the D-3 panel, did not include the undercast. 25 FMSHRC at 758; S. Br. at 46; Tr. 110-12; Gov't Ex. 5; Jt. Ex. 1.

We conclude that the judge erred in determining that Plateau should have sought to modify the July 7 ventilation plan to include the undercast as a ventilation device used to control air movement through the worked-out area. 25 FMSHRC at 759. It is undisputed that Plateau created a 3 by 4 foot hole in the undercast in order to allow water and air to travel through the undercast.[10] *Id.* at 759; Tr. 496, 620, 1038-41. It is also undisputed that MSHA's computer simulations showed that, as a statistical matter, the breached undercast would have no significant

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[9] Commissioner Jordan dissents from Part II.A of this opinion. *See* slip op. at 20-22.

[10] At the time of the citation, MSHA mistakenly believed that the hole in the undercast was smaller than 3 feet by 4 feet. Tr. 620, 675, 1321. MSHA stated in part that the undercast had been "left intact" in the citation issued to Plateau for failing to include the undercast in its July 7 ventilation plan. Gov't Ex. 4.

effect on the movement of air through the worked-out area.[11] Tr. 633-35, 638, 1184, 1321; Gov't Exs. 28, 29. Moreover, it is undisputed that the breached undercast no longer functioned as an undercast to separate air courses. 25 FMSHRC at 759; Tr. 192, 496, 1041-42, 1267. Accordingly, the breached undercast no longer constituted a "ventilating device[] . . . used to control air movement through the worked-out area." 30 C.F.R. § 75.334(c)(4).[12]

Furthermore, the judge erred in characterizing the breached undercast as a regulator. 25 FMSHRC at 759. The Commission has recognized that the term "regulator" means "a door, of any size, located in a stopping" which "can be opened or closed as needed." *VP-5 Mining Co.*, 15 FMSHRC 1531, 1532 n.3 (Aug. 1993) (citing Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* ("*DMMRT*") 910 (1968); *see also DMMRT* 451 (2d ed. 1997) ("Regulators are usually set in doors as adjustable, sliding partitions that can be varied to the desired opening."). The breached undercast had no such capability of adjustment. In fact, during a ventilation technical evaluation of the D-3 panel that took place on July 26, five days before the accident, MSHA Field Office Supervisor Gene Ray took oxygen and methane readings at the breached undercast without recognizing the breached undercast as a regulator that should have been included in Plateau's ventilation plan. Tr. 487-88, 494-96, 865, 873, 875-76.

Accordingly, because the breached undercast did not function as a ventilation device that controlled air through the worked-out area, we reverse the judge's determination that Plateau violated section 75.370(a)(1) by failing to seek modification of its plan to allow the breached undercast to remain in place. We therefore vacate Citation No. 7143396 and the penalty assessed by the judge.

B. Citation No. 7143395, Section 75.334(b)(1)

Plateau argues that its bleeder system complied with the requirements of section 75.334(b)(1) and that the judge erred in finding a violation. P. Br. at 13, 18-19. It maintains that the judge erred in interpreting the standard to prohibit methane accumulations in a gob, and that the judge's conclusion that its ventilation system was overextended is not supported by substantial evidence. *Id.* at 13-30. Plateau asserts that the judge also erred by relying upon a misinterpretation of section 75.323(e) and in concluding that a violation of section 75.334(b)(1)

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[11] Although two of MSHA's witnesses stated that they believed the undercast would have impacted airflow, they acknowledged that the computer simulations did not show a significant impact on airflow caused by the breached undercast. Tr. 635, 1321.

[12] Our dissenting colleague effectively interprets the regulatory language that a plan is required to specify devices "used to control air movement" to mean that a plan must depict any device that might affect air flow, even to an insignificant degree. Slip op. at 21-22. Such an overly broad interpretation essentially ignores the "used to control air movement" language and would appear to encompass within the regulatory parameters such things as mining equipment left in an area that might have a de minimus impact on airflow.

could exist even if the operator complied with its ventilation plan. *Id.* at 18-23, 26. Finally, Plateau submits that section 75.334(b)(1) does not provide criteria for determining the effectiveness of a bleeder system, and that the judge's finding that Plateau knew or should have known that its system was not functioning effectively was not supported by substantial evidence. *Id.* at 14, 24-25, 26.

The Secretary responds that the judge's determination that Plateau violated section 75.334(b)(1) should be affirmed. S. Br. at 50. She states that the judge properly accepted her interpretation of the standard that methane must not be allowed to accumulate in the gob, and that such an interpretation is supported by the standard's plain language, the legislative history and purpose of the underlying statutory provision, and Commission precedent. *Id.* at 14-23. The Secretary maintains that the judge properly determined that a violation of section 75.334(b)(1) could exist even if an operator were in compliance with its ventilation plan and that the operator's contrary contention would render section 75.334 superfluous. *Id.* at 23-26. She submits that the judge did not misinterpret, or even interpret, section 75.323(e) and properly relied on the standard in determining that the operator violated section 75.334(b)(1). *Id.* at 26-32. The Secretary asserts that substantial evidence supports the judge's findings that the operator violated section 75.334(b)(1) and that the operator had notice that the bleeder system was not functioning properly. *Id.* at 32-45.

Section 75.334, entitled, "Worked-out areas and areas where pillars are being recovered," sets forth, in part, ventilation requirements for such areas, the circumstances under which such areas must be sealed, and ventilation plan requirements. 30 C.F.R. § 75.334. Section 75.334(b)(1) requires that during pillar recovery, a bleeder system shall be used "to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine." 30 C.F.R. § 75.334(b)(1). Section 75.334 is derived from section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2). The purpose of section 303(z)(2) of the Mine Act "is to require bleeder systems continuously to dilute, render harmless, and carry away methane effectively within the bleeder system and to protect active workings from the hazards of methane accumulations." *RAG Cumberland Res., LP*, 26 FMSHRC 639, 647 (Aug. 2004), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished).

The Commission has recognized that although section 75.334(b)(1) does not literally set forth a requirement that a bleeder system shall function effectively, such a requirement is implicit in the standard's language and underlying purpose. *Id.* Thus, consistent with its underlying statutory purpose, the Commission has read section 75.334(b)(1) to require a bleeder system "to control air passing through the area and continuously to dilute and move methane-air mixtures away from active workings and into a return or to the surface in an effective manner." *Id.* That is, "a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations." *Id.*

Section 75.334(b)(1) is broadly worded, and the concept of "effectiveness" is a general one. As the Commission has previously observed, however, "[m]any standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982), *quoting Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). Nevertheless, such broad standards must afford reasonable notice of what is required or proscribed. *Alabama By-Products*, 4 FMSHRC at 2129. When faced with a challenge that a safety standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, the "reasonably prudent person test."[13] *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The appropriate test "is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). The Commission has recognized that various factors that bear upon what a reasonably prudent person would do include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP*, 18 FMSHRC at 1345.

Commissioners are evenly divided regarding whether the judge correctly determined that Plateau violated section 75.334(b)(1). Commissioners Jordan and Young would affirm the portion of the judge's decision holding that Plateau violated section 75.334(b)(1). Chairman Duffy and Commissioner Suboleski would vacate the judge's determination of violation and remand for further proceedings. The effect of the split decision is to allow the judge's affirmation of Citation No. 7143395 and assessment of penalty to stand. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The separate opinions of the Commissioners follow.

III.

Separate Opinions of the Commissioners

Commissioner Young, in favor of affirming the judge's determination that Plateau violated section 75.334(b)(1):

A. Interplay between 30 C.F.R. §§ 75.370(a) and 75.334(b)

Although the Commission has determined that Plateau did not violate 30 C.F.R. § 75.370(a)(1) by failing to seek modification of its ventilation plan to incorporate the breached

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[13] In *RAG Cumberland*, the operator did not argue that it failed to receive adequate notice that section 75.334(b)(1) applied to the cited conditions but merely submitted that reading the standard to require adequate dilution could "potentially deprive operators of due process notice." 26 FMSHRC 647 n.14. In contrast, Plateau has raised the issue of notice. P. Br. at 14, 24-25, 26.

undercast, I would reject Plateau's assertion that such a holding precludes the Commission from finding that Plateau violated section 75.334(b)(1).

Ventilation regulations and ventilation plan provisions were designed to recognize that mine ventilation is a dynamic process. The provisions of section 75.334 set forth a level of safety required at all mines, while ventilation plan provisions specify precautions and practices applicable to the particular conditions at a mine. 57 Fed. Reg. at 20,868, 20,900 (May 15, 1992). Such plan provisions are not limited to implementing the substantive provisions of the Secretary's ventilation regulations, but may provide for protection in addition to the standards they implement. *See C.W. Mining Co.*, 18 FMSHRC 1740, 1745 (Oct. 1996) (stating that roof control plan provisions are not limited to implementing regulations).

The Commission has previously held that compliance with a mine's roof or dust control plan does not preclude a finding of violation of the underlying roof or dust control regulations. *See, e.g., Southern Ohio Coal Co.*, 10 FMSHRC 138, 140-41 (Feb. 1988) (concluding that compliance with an approved roof control plan is not controlling for purposes of determining compliance with roof control regulation); *Utah Power & Light Co.*, 12 FMSHRC 965, 969 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) (concluding that compliance with the terms of a dust control plan does not preclude a finding that an operator violated the terms of a dust control regulation). Similarly, an operator cannot avoid a finding of violation of section 75.334(b)(1) by arguing that it was complying with the provisions of its ventilation plan. Rather, an operator is required to comply with ventilation plan provisions, which encompass conditions specific to a mine, in addition to the more general requirements of section 75.334, which establish a general baseline which all mines must meet. Conditions in a mine may change unexpectedly so that compliance with specific ventilation plan provisions may not necessarily assure that the general protections imposed by ventilation regulations are being met. Thus, an operator is required to address its bleeder system if the bleeder system is not effectively controlling air though the worked-out area as required by section 75.334, even if the operator is complying with the terms of its ventilation plan. Tr. 698. Accordingly, I would affirm the judge's determination that an operator may be found to have violated section 75.334(b)(1) even though it has not violated its ventilation plan. 25 FMSHRC at 746.

B. Violation of section 75.334(b)(1)

1. Substantial evidence

I would affirm the judge's determination that Plateau violated section 75.334(b)(1). I find substantial evidence in the record to support the judge's conclusion that Plateau's bleeder system failed to effectively ventilate the worked-out area of the D-3 panel as required by section 75.334(b)(1). In particular, as discussed below, in the context of unusually challenging mining conditions, the mine ventilation system was operating with a "limited mine ventilating potential," methane levels were increasing and had exceeded a regulatory limit at MPL B1. Additionally, readings at MPL B1 were artificially low. The record supports the judge's conclusion that the

bleeder system was not adequate to overcome these challenges as Plateau proceeded to increase production, and that the resultant conditions led to an ignition, several explosions and multiple fatalities.

The judge's findings of fact must be analyzed through the lens of the statutory substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Under this test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). The fact that evidence in the record may support a position adverse to the judge's decision is not determinative. Rather, the Commission's review is statutorily limited to whether the judge's findings of fact were supported by "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *See, e.g., Jim Walter Res. Inc.*, 19 FMSHRC 1761, 1767 n.8 (Nov.1997) (citing *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). The Commission has recognized that it is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1283 (Dec. 1998).

Mining the D-3 panel presented a number of extraordinary challenges. Mining liberated large quantities of methane and released liquid hydrocarbons, and the liquid hydrocarbons in turn created hydrocarbon vapors. 25 FMSHRC at 739, 740-41. The depth of the ground cover over the coal seam resulted in stresses during mining, such as roof and rib bounces. *Id.* at 740-41. In addition, Plateau used a two-entry system to develop the D-3 panel headgate entries. *Id.* at 739. A two-entry system provides fewer entries through which air can flow than a system with a greater number of entries. Tr. 62, 608-09, 1207. This increases the demands placed on the available entries. Tr. 62; . This combination of factors can compound the hazards in the mine. A little more than two years prior to the subject accident, the mine had experienced an explosion in the D-1 panel, which also used a two-entry system, after a roof fall in the worked-out area ignited methane. 25 FMSHRC at 739; Tr. 37-38.

Ventilating the D-3 panel also presented challenges that had not previously been experienced at the mine. The D-3 panel was the first panel at the mine that would not be separated from the previous panel by a solid barrier of coal. 25 FMSHRC at 740-41. Rather, the D-3 panel immediately abutted the D-2 panel. *Id.* at 739. Because of this design, the No. 2 headgate entry of the D-2 panel served as the sole tailgate entry for the D-3 panel. Gov't Ex. 31, App. I. The No. 1 tailgate entry of the D-3 panel was sealed as part of the gob of the D-2 panel. *Id.* The No. 1 entries of the D-1 and D-2 panels had not been similarly sealed at the time that those panels had been mined. Tr. 1207. Thus, as Plateau's witness, Robert Derick, an expert in ventilation and mine fires, testified, the "D-3 was really the beginning of the challenging future." Tr. 1207-08.[1]

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[1] The record shows that the estimated methane capacity of the D-3 panel was based on the range of concentrations that the mine experienced on the D-1 and D-2 panels. Tr. 1001-02. Given the critical differences between the panels, as discussed above, it would appear that

Confronted by these difficult circumstances, it appears that there was a "limited mine ventilating potential." Gov't Ex. 2 (Citation No. 7143395); Tr. 106-07. Kerry Hales, Plateau's mine manager (Tr. 731-32) and Stephan Jones, one of the mine's engineers (Tr. 769), agreed that the mine fan was operating at capacity and that no additional air could be added to the system. Tr. 762, 799. In addition, the regulators at MPLs 7 and 8, the point where all airflow left the gob and entered the No. 3 bleeder entry, were wide open. Tr. 606, 798-99. Thus, there was no capacity to induce more airflow through those regulators. Tr. 606, 799. Mine Manager Hales acknowledged that without the gob vent boreholes or horizontal degassing system in place, the system had reached its maximum capacity for methane dilution and dispersal.[2] Tr. 762.

It is also undisputed that in the days prior to the subject accident methane liberation increased at the D-3 panel as longwall mining increased. 25 FMSHRC at 746. On July 19, three days after mining began on the panel, methane measured between 0.5% and 1% at MPLs 7 and 8. 25 FMSHRC at 746; Gov't Ex. 31 at 27, Fig. 3. Between July 25 and 30, methane levels at MPLs 7 and 8 averaged around 1.5%, although levels reached 3% on July 24 at MPL 8. 25 FMSHRC at 746; Gov't Ex. 31, Fig. 3. On July 31, methane at MPL 7 was measured between 2.5 and 3.0%, and was measured at 3.5% at MPL 8. *Id.*

Methane liberation also increased at MPLs B1, B2, and B3, the location where airflow was measured from the D seam bleeders and the D-1 tailgate. Gov't Ex. 31 at 20, 27. On July 18 and 19, methane was measured at MPL B1, MPL B2 and MPL B3 at approximately 2.5 million cubic feet per day ("CFD"). 25 FMSHRC at 747; Gov't Ex. 31 at 27. On July 25 and 26, 2000, methane liberation was measured at approximately 6.34 million CFD, and on July 31, methane liberation had increased to over 7 million CFD. 25 FMSHRC at 746-47; Gov't Ex. 31 at 27.

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methane liberation and the capacity of the panels would be inappropriate for comparison. Moreover, as noted by the Secretary (S. Br. at 43), there was no evidence admitted regarding the reliability of the studies used by Plateau to estimate capacity. Although a finding regarding the methane capacity of the D-3 panel would have been relevant, given this evidence, the judge's failure to make such a finding is of no avail.

[2] While my colleagues contend that the ventilation system was operating well within its capacity (slip op. at 26-28 & n.7), I view this admission by Plateau's mine manager to be highly probative and amply supported by the record. It also appears that Plateau did not promptly cease production, but that the exceedances occurred while production was idle and prompted no investigation or action by Plateau. *See* Gov't Ex. 31 at 21, 30; Tr. 103, 107, 164, 762, 793, 802, 812.

There were also increased methane readings at MPL B1, the section 75.323(e) measuring point.[3] Gov't Ex. 31, Fig. 3. On July 19, methane at MPL B1 measured between 0.5% and 1.0%. *Id.* On July 21, methane averaged between 1 and 1.5% at MPL B1. *Id.*; 25 FMSHRC at 746. On July 31, 2000, the action level at MPL B1 was exceeded on at least 2 occasions. 25 FMSHRC at 748; Gov't Ex. 31 at 21 and Fig. 3; Tr. 164, 1252; P. Br. at 24. The first exceedance occurred at approximately 2:48 a.m. and lasted 11 minutes, while the second exceedance occurred at 3:33 a.m. and lasted approximately 40 minutes. Tr. 164; Gov't Ex. 31 at 21. It is undisputed that, although both measurements exceeded the action level of 1.95%, one measurement also exceeded the 2% limit set forth in section 75.323(e). 25 FMSHRC at 746; Gov't Ex. 31, Fig. 3; P. Br. at 19-20.

The judge credited the testimony of John Urosek, the chief of the ventilation division in MSHA's Pittsburgh Safety and Health Technology Center (Tr. 533-34), that the methane readings obtained at MPL B1 were artificially low as the result of fresher air leaking into the system. 25 FMSHRC at 748. Urosek testified that on July 31, methane at MPLs 7 and 8 averaged about 3%. *Id.*; Tr. 598-99, 655. He stated that the methane measured was less than 2% by the time the airflow reached MPL B1 because the airflow from the worked-out area was diluted before it reached MPL B1. Tr. 599-601; 25 FMSHRC at 748. Urosek explained that there was a significant amount of leakage between the No. 1 bleeder entry, which brought intake air to the sump pump, and the No. 2 bleeder entry which carried air from the gob to MPL B1. 25 FMSHRC at 748; Tr. 599-601, 641, 1370-74. I see no basis to overturn the judge's credibility determination. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (a judge's determinations may not be overturned lightly); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981) (a judge's credibility determinations are entitled to great weight).

The judge's findings are also supported by other substantial evidence in the record. MSHA Supervisory and Special Investigator Gary Wirth estimated the amount of leakage to be approximately 50,000 CFM. 25 FMSHRC at 748; Tr. 101; Gov't Ex. 31 at 22. In addition, intake air that came from the No. 2 headgate entry through MPLs 5 and 6 provided a sweetener by entering the No. 3 bleeder entry without ventilating the worked-out area. Tr. 48-50; 25 FMSHRC at 748. Wirth also testified that the intake air that coursed up the No. 2 tailgate entry traveled through MPLs 7 and 8 without ventilating the worked-out area, and thus provided a sweetening effect. Tr. 81-84.

Based on the record, the judge found that if this sweetening effect had not occurred, methane levels at the 75.323(e) measuring point would have been above 2% on a fairly regular basis beginning on July 30. 25 FMSHRC at 748; Tr. 50, 83, 100-01, 601-02. Urosek testified that after the airflow traveled through MPLs 7 and 8, it was diluted to a range between 2.3 and

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[3] Section 75.323(e) provides in part that the concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air shall not exceed 2%. 30 C.F.R. § 75.323(e).

2.6%, and that if there had been no leakage, readings at MPL B1 would also have been between 2.3 and 2.6%.[4] 25 FMSHRC at 748; Tr. 599.

Monitoring the methane levels at a section 75.323(e) measuring point is critical to evaluating the effectiveness of a bleeder system. 25 FMSHRC at 748-49; Tr. 1370. As Urosek also testified, the readings at MPL B1 were critical to evaluating the effectiveness of the D-3 panel's bleeder system because the amount of methane at such locations indicates whether there is enough airflow in the system. *Id.* He explained that more than 2% methane indicates that the system needs to be changed and either needs more airflow or less methane. Tr. 595, 652, 1370-71. Urosek stated that section 75.323(e) measuring points are designed so that an operator can detect small changes or trends of increasing methane and make changes and adjustments before the 2% level is exceeded. Tr. 1389. He observed that, prior to the accident, measurements at MPL B1 showed a trend of increasing methane indicating that adjustments and changes needed to be made. Tr. 1389-90. Plateau's president, John DeMichiei, acknowledged that if methane exceeded 2% at a 75.323(e) evaluation point, the situation might reflect an inadequate bleeder system and should be addressed. Tr. 1288. Plateau's general manager at the mine, Charles Burggraf, also acknowledged that if methane exceeded 2%, the mine "would have to shut down and make corrections." Tr. 979, 1052. Of course, any correction would have required Plateau to investigate the exceedance of the 2% methane level, an occurrence that should have borne some urgency, given the increasing methane trend and the challenging circumstances involved in mining the D-3 panel. Nonetheless, it appears that Plateau did not take measures to investigate the cause or effect of the exceedance of the 2% limit at MPL B1, or to make adjustments to its system. Tr. 762, 802.

In fact, it appears that Plateau proceeded to accelerate production, as planned, which could only increase, rather than decrease, methane levels. It is undisputed that the liberation of methane spiked at times that production was high and decreased during idle periods. 25 FMSHRC at 746; Gov't Ex. 31 at 28, Fig. 4; Tr. 89, 195. Mine Manager Hales and Mining Engineer Jones testified that while the increasing trend in methane in late July had been noticed, the only response that the mine could take, given that maximum ventilation capacity had been reached, was to slow down or cease production. Tr. 762, 793, 802, 812. Nonetheless, Plateau

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[4] The last recorded airflow at MPLs 7 and 8 prior to the accident was approximately 185,600 CFM of air. Gov't Ex. 31 at 22. Wirth testified that three small splits entered the bleeder system but did not ventilate the gob, namely, a split from the No. 2 intake entry that entered the bleeder system at MPL 5 (5,200 CFM), and at MPL 6 (14,500 CFM), and a third split of intake air, approximately 65,000 CFM, which was directed into the No. 1 bleeder entry and measured 15,000 CFM when it reached the pump (50,000 CFM). Gov't Ex. 31 at 22; Tr. 100-01; Gov't Ex. 7. The total airflow for this worked-out area (MPLs 5, 6, 7, and 8 and the pump) was 220,300 CFM of air. Approximately 331,600 CFM of air was measured exiting from MPLs B1, B2, and B3. Gov't Ex. 31 at 22. The Secretary submitted that approximately 111,000 CFM of air that was not used to ventilate the gob and was not acknowledged in the ventilation plan, was leaking into the bleeder system. *See* S. Br. at 30-31 n.10; S. Post-Hr'g Br. at 12-13.

increased production during the days preceding the accident. Gov't Ex. 31, Fig. 4; Tr. 89-90, 98. Up until approximately July 30, production averaged about four longwall passes per day shift and one to one-and-a-half passes per evening shift. Tr. 89; Gov't Ex. 31, Fig. 4. On July 30, there were eight passes mined during the day shift and four passes during the evening shift. *Id.* On July 31, there were six-and-a-half passes mined during the day shift and, during the evening shift in which the accident occurred, there were three-and-a-half passes mined. *Id.*

As the judge acknowledged, factors that must be considered in evaluating the readings at MPL B1 include the approximately 8,000-foot distance between MPL B1 and the point where ventilation from the gob entered the bleeder entries, as well as significant leakage outby the gob. 25 FMSHRC at 749. Such evidence does not make consideration of the readings at MPL B1 erroneous, however. Rather, these facts reinforce the judge's conclusion that "the readings at MPL B1 gave a false impression that Plateau's bleeder system was functioning properly when it actually was not." *Id.* That is, readings at MPL B1 were a critical indicator that the bleeder system was ineffective because actual methane levels at MPL B1 were likely to be higher than those recorded at MPL B1 after dilution.[5]

As previously discussed, Plateau's mining of the D-3 panel limited the system's ability to effectively control and continuously dilute and move unanticipated methane-air mixtures. The judge found that when an operator can no longer continuously dilute and move methane from the gob, there is a high risk that an explosive air-mixture will accumulate in the gob, and that such an accumulation developed at the mine on July 31. 25 FMSHRC at 749.

I agree with the judge that the occurrence of the accident was an additional factor establishing a violation of section 75.334(b)(1). *Id.* at 753. The Commission has long recognized that the "fact of an accident . . . does not by itself necessarily prove or disprove the existence of a violation." *Old Ben Coal Co.*, 10 FMSHRC 1800, 1804 n.4 (Oct. 1982); *Consolidation Coal Co.*, 20 FMSHRC 227, 240 (Mar. 1998) (Commissioners Riley and Verheggen), *aff'd*, 1999 WL 335777 (4th Cir. 1999). However, the Commission has explained that even though a standard may be violated regardless of whether an accident has occurred, an accident may "sometimes shed light on an unsafe situation that had escaped previous notice or citation." *Old Ben*, 10 FMSHRC at 1804 n.4. Although an accumulation of methane may not, in

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[5] I disagree with my colleagues' conclusion that the judge erred by failing to give primary consideration to measurements at MPLs 7 and 8 in determining the bleeder system's efficacy under section 75.334(b)(1). Slip op. at 28-29. First, it is not clear that the readings at MPLs 7 and 8 provided a materially more accurate picture of methane in the gob given that those readings were diluted by intake air from the No. 2 tailgate entry. Tr. 81-84. Moreover, my colleagues effectively deem the readings at MPL B1 irrelevant, contrary to the inherent significance of MPL B1 as the measuring point established by section 75.323(e) and its underlying statutory provision as an indicator of the effectiveness of the bleeder system. The 2% limit set by section 75.323(e) was exceeded at MPL B1 even though the judge found leakage diluted the methane reading at that measuring point.

and of itself, establish a violation of section 75.334(b)(1), a small explosive methane-air mixture near the rubble zone constitutes additional evidence demonstrating that Plateau's bleeder system was unable to effectively control the methane-air mixtures and continuously dilute and move such mixtures from the worked-out area away from the active workings.

In sum, as methane levels were increasing and had exceeded the 2% limit at MPL B1, the operation and evaluation of the mine ventilation system was impeded both by a limited potential for effectively diluting and dispersing the methane and by air flows which produced artificially low readings at MPL B1. Given these challenging conditions at the mine, I conclude that substantial evidence supports the judge's determination that Plateau's bleeder system was not effectively ventilating the worked-out area of the D-3 panel as required by section 75.334(b)(1).

2. Notice

Substantial evidence in the record supports a determination that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.334(b)(1) would have recognized that Plateau's bleeder system failed to control and continuously dilute and move methane-air mixtures from the worked-out area away from active workings as required by the standard.[6] A reasonably prudent person, having knowledge of the circumstances of Plateau's mine, would know that the mine was operating at its maximum ventilation capacity under difficult mining conditions. Mine Manager Hales and Mining Engineer Jones agreed that the mine fan was operating at capacity and that no additional air could be added to the system, and that there was no further capacity to induce more airflow through the regulators at MPLs 7 and 8. Tr. 606, 762, 799. Mine Manager Hales acknowledged that the system had reached its maximum capacity for being able to dilute and carry away methane without the gob vent boreholes or horizontal degassing system in place. Tr. 762.

Moreover, a reasonably prudent person, considering the standard's requirement that a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations, would have recognized a disruption in the effectiveness of the system. The disruption was manifest in the increasing levels of methane and an exceedance at the section 75.323(e) measuring point. Jones and Hale testified that they were aware of an increasing trend in methane in late July. Tr. 762, 793, 802, 812. Hales acknowledged that methane readings "were a little high," and that they had been "struggling with it for a few days, trying to reach the next gob vent borehole," and that reaching the borehole

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[6] Although the judge did not explicitly apply the Commission's "reasonably prudent person test," he concluded that Plateau should have been on notice that its bleeder system was not functioning properly on July 31. 25 FMSHRC at 746. Contrary to my colleagues' assertion that this conclusion injects subjectivity into the process (slip op. at 31), the judge merely inferred constructive notice from the circumstances. This is not improper. *See generally Dolese Bros. Co.*, 16 FMSHRC 689, 693-94 (Apr. 1994) (affirming finding of violation upon application of reasonably prudent person test where judge in part inferred constructive knowledge).

would have alleviated the "methane problem." Tr. 752-53. Hales testified that the increasing trend in methane was of particular concern because the fan was at full capacity. Tr. 762. Hales and Jones testified that the operator's only option was to slow down or cease production to let the methane bleed off. Tr. 762, 812. Nonetheless, even with this information, the operator increased production and did not take the corrective action required. Tr. 88-90, 98, 106-07; Gov't Ex. 31, Fig. 4. Given this evidence, I would reject Plateau's assertion that it failed to receive adequate notice that its bleeder system violated the requirements of section 75.334(b)(1). P. Br. at 14, 24-25, 26.

3. Significant and substantial

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

I would reject Plateau's argument that its alleged violation of section 75.334(b)(1) is not S&S because the events that occurred on July 31 were unlikely. PDR at 13 n.7; P. Br. at 12 n.8. In effect, Plateau is arguing that the judge should have confined his consideration to whether an injury-producing event was reasonably likely to occur during continued mining operations. The "'operative time frame for determining if a reasonable likelihood of injury exists includes *both* the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.'" *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (quoting *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)) (emphasis added); *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005). The conditions creating the potential for injury occurred prior to the citation and, in fact, resulted in multiple fatal injuries. 25 FMSHRC at 739. Thus, the judge appropriately considered the violative conditions that existed prior to the citation. *Id.* at 756-57.

C. Conclusion

For the foregoing reasons, I would affirm the judge's determination that Plateau violated section 75.334(b)(1) and that the violation was S&S.

Michael G. Young, Commissioner

Commissioner Jordan, in favor of affirming the judge's determinations that Plateau violated 30 C.F.R. §§ 75.334(b)(1) and 75.370(a)(1):

I agree with the reasoning and conclusions expressed in Commissioner Young's opinion affirming the judge's determination that Plateau violated section 75.334(b)(1) and that the violation was S&S. I also agree with his analysis affirming the judge's determination that an operator may be found to have violated section 75.334(b)(1) even though it has complied with the terms of its ventilation plan. However, I would also affirm the judge's ruling that Plateau violated section 75.370(a), and therefore dissent from the majority's holding regarding that citation.

Section 75.370(a)(1) provides in relevant part that an "operator shall develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1). Sections 75.334(c)(4) and 75.371(bb) set forth an illustrative list of ventilation devices that must be included in a ventilation plan based upon the device's function to control air through a worked-out area. *See* 30 C.F.R. § 75.334(c)(4) (stating that a ventilation plan must specify the "location of ventilating devices *such as* regulators, stoppings and bleeder connectors *used to control air movement through the worked-out area*" (emphasis added)); *see also* 30 C.F.R. § 75.371(bb). By the regulations' plain language, if a ventilation device controls air through a worked-out area, it must be included on a ventilation plan. The regulations do not set forth limitations on the types of ventilation devices that must be specified, nor do they set forth limitations on the locations of the ventilation devices. Thus, under the plain terms of the standards, if the breached undercast controlled air movement through the worked-out area, it was required to be shown in the ventilation plan.[1]

In determining whether substantial evidence[2] supports the judge's finding, it is therefore important to keep in mind exactly what is and what is not relevant under this regulation. Whether the undercast controlled air movement is dispositive; whether the undercast was

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[1] The undercast at issue here was not included in the ventilation plan. Gov't Ex. 4.

[2] When reviewing a judge's findings of fact, the Commission must by statute apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Under this test, the Commission may not "substitute a competing view of the facts for the view [a judge] reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). The fact that evidence exists in the record to support a party's position adverse to the judge is not determinative. Rather, the Commission's review is statutorily limited to whether the judge's findings of fact were supported by "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *See, e.g., Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1767 n.8 (Nov. 1997) (citing *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)).

functioning as a regulator is not.[3] Whether the undercast had an impact on air movement is pertinent; whether that impact was "significant" is not. Consequently, the majority's rationale for reversing the judge, slip op. at 7-8, is grounded on assertions that have nothing to do with the plain meaning of the regulation at issue.

Substantial evidence supports the judge's conclusion that the breached undercast was inhibiting the flow of air up the No. 1 headgate entry into the No. 2 setup room, although it may have done so to an insignificant degree. 25 FMSHRC 738, 759 (Dec. 2003) (ALJ); Tr. 112-13, 118-19, 620, 638-39, 1321. Testimony from MSHA witnesses supports this conclusion. For instance, MSHA official Gary Wirth stated that the overcast "was still functioning to limit airflow in that area and, therefore, played a role in inhibiting airflow on the headgate side in the worked-out area. . . . [T]hat three-by-four hole would not have rendered that overcast completely in effective [sic]." Tr. 112-13, 118. MSHA ventilation expert John Urosek, testified that the overcast "would impact the air flow on the headgate," Tr. 620, and that "the overcast, and the holes in the overcast . . . would have impacted. We have that from experience. . . . [A hole in the overcast] will control air flow." Tr. 638-39.

MSHA's ventilation staff expected the undercast to be removed, leaving the area completely open in accordance with the approved ventilation plan. 25 FMSHRC at 759; Tr. 110-12; Gov't Ex. 5; Jt. Ex. 1. Instead, Plateau retained the undercast and created a three-by-four foot hole in it, to allow water and air to travel through it. 25 FMSHRC at 759. Although the breached undercast may not have affected airflow in the worked-out area to a significant degree, the area of the No. 1 headgate at the location of the breached undercast was less than completely open. P. Ex. 3B. Thus, as the judge found, the operator was required to seek to modify its plan to include the breached undercast. 25 FMSHRC at 759.

I reject Plateau's argument that the judge's determination of violation should be reversed because there is no requirement to obtain MSHA approval of ventilation control devices that

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[3] The operator argues that the judge's decision should be reversed because his ruling is based on his finding that the undercast was a regulator, an issue not raised by the Secretary or addressed by the parties below. P. Br. at 31. Although the parties did not litigate whether the breached undercast acted as a regulator, they litigated whether the undercast affected airflow through the worked-out area. *See* S. Post-Hr'g Br. at 29-31; P. Post-Hr'g Br. at 58-59. In addition, as the Secretary argues, S. Br. at 48, the citation sets forth the Secretary's position that Plateau violated section 75.370(a)(1) because the undercast controlled air movement through the worked-out area but was not depicted in the ventilation plan. Gov't Ex. 4. In addition, Plateau litigated whether the undercast controlled air movement. P. Post Hr'g Br. at 59 ("the breached [undercast] had no effect on the ventilation of the worked-out area . . . . Thus the presence of the breached [undercast] provided no support for a violation of the ventilation plan."). Thus, the parties litigated the underlying basis for the judge's determination.

exist in the gob.[4] P. Br. at 31. The parties do not dispute that the undercast existed in the worked-out area. *Id.* at 32. As discussed above, however, section 75.334(c)(4) and 75.371(bb) require ventilation devices that control air through a worked-out area to be included in a ventilation plan and do not set forth any limitations based on the location of a ventilation device. Moreover, as the Secretary submits, S. Br. at 49, the purpose of the standard is to inform MSHA of the locations of ventilation devices and allow MSHA to decide whether to approve those devices. Unauthorized changes in a ventilation plan can have unintended effects on ventilation. 25 FMSHRC at 760. In short, the evidence put forth by Plateau regarding that the undercast was in the gob and could not be maintained or examined, Tr. 1200, is irrelevant.

I also reject Plateau's argument that it should not have been cited for violating its ventilation plan because MSHA inspectors observed the breached undercast and failed to cite it as a violation of the ventilation plan. The Commission has refused to acknowledge estoppel as a defense to a violation, holding that MSHA was not estopped from issuing a citation because the operator relied on MSHA's previous actions. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981); *see also Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984). Rather, MSHA's failure to previously cite a disputed condition is appropriately considered in the context of the operator's negligence. Here, the judge noted that Inspector Ray's tacit approval of the breached undercast supported a low negligence finding. 25 FMSHRC at 759.

For the foregoing reasons, I respectfully dissent.

Mary Lu Jordan, Commissioner

[4] The Secretary asserts that the Commission need not reach Plateau's argument that a ventilation device in a gob, effective or not, does not have to be in a ventilation plan, because Plateau failed to raise the issue before the judge. S. Br. at 48-49. However, as Plateau contends, it appears that Plateau raised the issue before the judge. Tr. 1200; P. Post-Hr'g Br. at 61.

Chairman Duffy and Commissioner Suboleski, in favor of vacating the judge's determination that Plateau violated 30 C.F.R. § 75.334(b)(1) and remanding:

A. Overview

This is a case in which MSHA had little evidence that the ventilation system was malfunctioning, yet the mine experienced an explosion and fire. Prior to the first explosion, air volumes were above design levels and all measuring points were within expected ranges. The explosion itself was caused by a very small amount of methane (50 cubic feet), a volume that would not be unexpected at the fringe of the rubble zone. However, MSHA found what it believed to be the causes of a distribution problem, near the headgate at the inby corner of the gob, where the explosion was believed to have originated. This problem, which was allegedly caused by a combination of a largely intact undercast, an un-removed check curtain, and a series of check curtains in the set up rooms, combined to restrict air flow in this corner, and resulted in a violation of section 75.334(b)(1). However, trial testimony showed that these obstructions were not present and MSHA's primary case fell apart.

In the course of presenting that case, MSHA witnesses pointed out that the mine fan was at capacity; that, as production increased from start-up at the longwall, methane levels were rising; that the tailgate-side bleeder regulators were open as wide as possible to maximize air flow across the face and gob; that it took a great deal of air to dilute the methane level from the face and gob to the 2% concentration limit specified at the point where the bleeder air enters another air stream; and that once, two shifts before the explosion, the system's ability to dilute to the 2% level, i.e., the bleeder-system capacity, had briefly been reached. Finally, MSHA testified that Plateau's only recourse when it reached system capacity was to temporarily halt production.

The judge, rather than dismissing the case, used these circumstantial facts to construct an entirely new theory of the case since MSHA had failed to prove that the ventilation system had significant distribution problems. Moreover, he added a crucial element that directly contradicted the testimony of the MSHA witnesses – that the volume of air in the gob was inadequate. For the following reasons, we find that the judge's analysis was incorrect and we would remand to him for reconsideration of his decision.

B. Section 75.334(b)(1)

We disagree with the conclusions reached by our colleagues, who would affirm the judge's finding that Plateau violated section 75.334(b)(1). Our disagreements with the judge's decision lie in three areas. First, some of the judge's factual findings are not supported by the record. In this regard, the judge failed to explain or address conflicting evidence on several key issues. Second, the judge drew conclusions or inferences that were not warranted by the underlying facts. Finally, the judge did not adequately address, under Commission precedent, whether Plateau had notice that, under the Secretary's regulation, its bleeder system was in violation because it was not moving and diluting methane in the gob area.

These errors largely flow from the basis for the judge's decision – that there was an inadequate volume of air in the bleeder system. The theory of the judge's decision stands in contrast to the Secretary's litigation theory – that volume was not the problem, but the air in the system was not being distributed properly within the gob. Significantly, if the Secretary and the judge cannot agree on the basis for determining whether the bleeder system was operating effectively, it is unclear how Plateau could have responsively addressed any performance problems in the system under section 75.334(b)(1).

We begin our analysis of the judge's decision by noting, "The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). "The preponderance standard, in general, means proof that something is more likely so than not so." *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838. Further, the occurrence of an ignition is not, in and of itself, evidentiary proof of an inadequate bleeder system. *Consolidation Coal Co.*, 20 FMSHRC 227, 240 (Mar. 1998) (Comm'rs Riley and Verheggen) (citing *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 758 (May 1992); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (Oct. 1982)).

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Further, the Commission has held 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). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.*

Finally, we apply the principles established by the Commission regarding notice. Slip op. at 10. In a case such as this, the existence of a violation turns on whether the Secretary can establish that a reasonable operator familiar with the conditions in the mine, including the mine's history of methane liberation and the capacity of its ventilation system, would have made adjustments to the bleeder system so as to ensure that methane continuously and effectively was diluted and moved away from active workings and into a return. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (the reasonably prudent person test must be based on

conclusions drawn by an objective observer with knowledge of relevant facts that must be reasonably ascertainable prior to the alleged violation).

Under section 75.334(b)(1), Plateau was required to use its bleeder system "to control the air passing through the [worked out] area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine." 30 C.F.R. § 75.334(b)(1). In *RAG Cumberland Res., LP*, 26 FMSHRC 639, 647 (Aug. 2004), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished), the Commission read section 75.334(b)(1) to require that a ventilation system must function effectively in order to comply with the regulation. The Commission has also noted that not every accumulation of methane in the gob is a violation of this requirement. *See VP-5 Mining Co.*, 15 FMSHRC 1531, 1539 (Aug. 1993) ("If the Secretary believes that air flowing through a gob should contain no more than 4% methane as it enters bleeder entries, he should consider promulgating a safety standard containing such a requirement."); *Island Creek Coal Co.*, 15 FMSHRC 339, 350 (Mar. 1993) ("If the Secretary believes that specific accumulations of methane create a hazard in gobs or other inactive areas of underground coal mines, he should consider promulgating safety standards to deal with this problem."). Here, the Secretary conceded as much before the judge. 25 FMSHRC 738, 744 (Dec. 2003) (ALJ).[1]

Consistent with this approach to interpreting the regulation, MSHA investigator David Wirth testified, "there will be some point within [the longwall gob] that the methane will be in the explosive range." Tr. 203. MSHA experts Stephan and Urosek testified to the same effect. Tr. 531-32; 663-64. Indeed, because methane is liberated at a level of 100% and has to be diluted to the 2% level at the section 75.323(e) measurement point, methane will be found at explosive levels, on a transient basis, in the gob. 25 FMSHRC at 747. Nevertheless, the judge concluded, "Methane must not be allowed to accumulate in the gob because explosive concentrations are likely to develop . . . ." *Id.* This conclusion is contrary to record testimony. Moreover, this conclusion appears to have influenced, to a large degree, the judge's analysis of Plateau's bleeder system and its ability to dilute and control methane in the gob.[2] We would

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[1] The Secretary's position on this point before the Commission is less clear; nevertheless, the Secretary has failed to explain under what circumstances a small accumulation of methane, such as the one that caused the initial explosion at Plateau's mine, becomes a violation under section 75.334(b)(1). *See* S. Br. at 18-21.

[2] Earlier in his decision, the judge inconsistently stated, "The presence of explosive levels of methane in the gob does not establish a violation of the Mine Act or the Secretary's safety standards." 25 FMSHRC at 745.

instruct the judge not to rely on this consideration in determining whether Plateau's bleeder system met the requirements of section 75.334(b)(1) on remand.[3]

In addition to this fundamental misunderstanding regarding the operation of the ventilation system in the gob, the judge made other factual findings at odds with the record. In further analyzing Plateau's bleeder system, the judge found that the system "was *over-extended* so that it could not, on July 31, 2000, control the air passing through the [worked-out] area so as to continuously dilute and move methane-air mixtures and other gases from the gob into the bleeders." 25 FMSHRC at 746 (emphasis added). The judge's finding on this point does not reflect record testimony and relies on evidence not probative of the issue. Moreover, his analysis fails to address conflicting evidence.[4]

The underpinning of the judge's finding, *id.*, that the bleeder system was over-extended, was MSHA investigator Wirth's testimony that the main mine fan was operating at or near capacity and that the operator could not make any adjustments to bring in additional airflow or create additional pressure. Tr. 58-59. However, the fact that the mine fan was running at maximum is unrelated to the capacity of the bleeder system to handle the level of methane being liberated at the mine.[5] Nor is the capacity of the mine fan, by itself, probative of the adequacy of the bleeder ventilation system. In this regard, it is significant that the judge failed to address the testimony of Plateau's general manager Charles Burggraf, who testified that the mine's ventilation system was operating well within the limits of methane levels that it was designed to handle. Tr. 1004-05. *See* P. Ex. 4A (degasification chart). We would instruct the judge to address this testimony and any contrary evidence on remand.[6]

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[3] As the judge noted, the occurrence of an explosion in the gob does not indicate the ventilation system was not operating effectively under section 75.334(b)(1). 25 FMSHRC at 745, *citing Consolidation Coal*, 20 FMSHRC at 240.

[4] A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). The substantial evidence standard of review requires the Commission to weigh all probative evidence and to examine the fact finder's rationale in arriving at the decision. *Pittsburgh & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2245-46 (Nov. 1993) (citing *Universal Camera*, 340 U.S. at 487-88. The judge's broad statement that "Any evidence or argument not discussed herein that is inconsistent with my findings and conclusions is hereby rejected[,]" 25 FMSHRC at 744, is not adequate given the complex factual and technical issues in this case.

[5] That is, because the fan could not do more does not indicate it was not doing enough.

[6] Our colleagues compound the omission of the judge by adopting the Secretary's post-accident allegation in the citation, stating that "it appears" that Plateau had "limited mine ventilating potential." Slip op. at 13. Such a conclusory statement, however, cannot substitute

The judge, in concluding that there was an insufficient quantity of air moving methane from the gob, also found that there was not a sufficient air pressure drop between the last open crosscut in the headgate entries and the connection between the gob and the bleeder entries. 25 FMSHRC at 747. From that finding, the judge further concluded, "As the methane levels increased, the amount of intake air sweeping the gob actually decreased because of increased resistance to air movement in the gob." *Id.* at 747-48.

Initially, the judge's suggestion that there was an insufficient air pressure differential is incorrect and contrary to record evidence. MSHA's own ventilation expert, Urosek, testified, without contradiction, that the pressure differential was sufficient. Tr. 665, 1366-67. Other record evidence is also at odds with the judge's findings. The last open crosscut in the headgate entries is outby MPLs 5 and 6, and regulators at that point were only slightly open to prevent excess air from escaping into the bleeder entries (under Plateau's ventilation plan no more than 10% of the air could be allowed through). Tr. 48-50. Because MPLs 5 and 6 are upstream of MPLs 7 and 8, the pressure drop from the last open crosscut in the headgate to the bleeder entries in the tailgate section (MPLs 7 and 8) must be even larger than to outby MPLs 5 and 6. Thus, the pressure drop from the last crosscut in the headgate entry to the connection to the bleeder entry was large.

Even if the factual basis for the judge's analysis were correct, his conclusion – "the amount of intake air sweeping the gob actually decreased because of increased resistance to air movement in the gob," 25 FMSHRC at 747-48 – is not probative of the issue of whether the volume of air sweeping the gob was sufficient. The record reflects that as roof falls occur in the gob, there is increased resistance to airflow. Tr. 76, 169-70, 668. However, that occurrence is not determinative of whether there is sufficient air entering the gob. While the pressure differential between the headgate and tailgate entries impacts the volume of air sweeping the gob, it does not prove whether sufficient flow exists. In fact, there was no allegation or evidence of insufficient flow through the gob presented by the Secretary.[7] Decreased flow is not the same as insufficient flow.

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for the record review that we would ask the judge to make. Moreover, our colleagues state that a finding regarding the methane capacity of Plateau's bleeder system in the D-3 longwall panel would be "of no avail" in deciding this case. Slip op. at 12-13 n.1. At best, this statement is contradictory, given their willingness to embrace the Secretary's allegation noted above. *See also* slip op. at 13-14 (analyzing levels of methane liberation). For purposes of reviewing the judge's finding that the system was "over-extended" and reaching the ultimate conclusion whether the system was able to continuously dilute and move methane, we conclude that such a finding is an essential part of such an analysis. 25 FMSHRC at 746.

[7] Two of the Secretary's witnesses, investigator Wirth (Tr. 61) and ventilation expert Urosek (Tr. 645), testified that there was not a volume problem.

In sum, the judge's reliance on pressure differentials between the headgate and bleeder entries is factually incorrect, and his conclusion regarding the decrease in air sweeping the gob based on resistance in the gob does not support a conclusion that there was an insufficient airflow in the mine.

A further basis for the judge's finding that the bleeder system was over-extended was his finding that the section 75.323(e) measuring point, MPL B1, had reached capacity. 25 FMSHRC at 748. As the judge correctly recognized, methane levels in the mine increased as production at the longwall picked up and as the gob grew in size. *Id.* at 746. This trend began when production started on July 17 and continued through July 31, and was reflected by the readings at MPLs 7 and 8, where air left the gob and entered the No. 3 bleeder entry. *Id.* During this same period, methane readings at MPL B1 also increased. *Id.* In his decision, the judge placed particular reliance on the occurrence of increased readings at MPL B1 that twice reached actionable levels, above 1.95% methane, and briefly exceeded the 2% level on July 31, two shifts prior to the shift when the explosion occurred. *Id.* Plateau's protocol required the cessation of production at the face when methane registered at the actionable level, a fact that we would instruct the judge to consider on remand.[8] Tr. 595.

The judge's analysis reflects a fundamental misunderstanding of the relationship between the section 75.323(e) measuring point and compliance with section 75.334(b)(1). MPL B1 measured the combined airstream from five distinct air flows: the face, the gob, the headgate, the tailgate, and the sump pump and was located over 8000 feet from the gob. *See* Gov't Ex. 31, App. I. Notwithstanding the elevated readings at MPL B1, methane levels at MPLs 7 and 8 remained below actionable levels throughout the period preceding the accident. These readings gave a much more accurate picture of methane in the gob because these measurement points were the closest to the gob and captured readings in the bleeders before gob air exited and mixed with air from the headgate and sump pump. Tr. 84-85. Therefore, the judge's reliance on readings at MPL B1 to support his conclusion that there was a violation of section 75.334(b)(1) was misplaced.[9] *See also RAG Cumberland*, 26 FMSHRC at 650 (air in the eastern bleeder entry

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[8] Reaching capacity is signaled by exceeding action levels at the evaluation points, and having excess capacity is demonstrated by staying below those levels. Here, the record shows that, two shifts prior to the explosion, methane measurements at MPL B1 briefly reached action levels of 1.95% twice. Thus, the ventilation system was operating well within capacity 100% of the time on the shift during which the accident occurred and the immediately preceding shift, and over 95% of the time on the day of the accident. Finally, our colleagues' implication that Plateau should have addressed the elevated readings at MPL B1 by changing the ventilation system ignores the realities of the ventilation plan approval process and the fact that Plateau timely and effectively addressed the high readings by ceasing production, as required by its protocol.

[9] We disagree with our colleagues that Plateau somehow erred by not investigating the "cause or effect of the exceedance . . . at MPL B1." Slip op. at 15. *See also* slip op. at 13 n.2. Plateau performed exactly as its protocol demanded by ceasing production (which had stopped

likely had higher methane levels before it was diluted by air and exited from the mine through the bleeder shaft). Significantly, there is no evidence that we can glean from the record testimony that readings at MPLs 7 and 8 would have indicated that the ventilation system was not operating effectively. We would instruct the judge to give primary consideration to measurements at MPL 7 and 8 in determining the bleeder system's efficacy under section 75.334(b)(1) on remand.

The judge further erred in his lengthy consideration of the injection of "sweetened" air into the bleeder system which resulted in lowering methane levels at the section 75.323(e) measuring point, MPL B1. 25 FMSHRC at 748-49. As noted above, the judge's primary focus under section 75.334(b)(1) should have been on MPLs 7 and 8, which were the best indicators of the methane level in air coming out of the gob. It is not alleged that Plateau was doing anything improper under section 75.323(e) or its ventilation plan by the leakage of intake air into its bleeder system. Thus, the judge's finding that the sweetened air "artificially lower[ed] the methane concentrations" at MPL B1 is without factual or legal significance and we would instruct him not to consider the matter on remand.[10]

To the extent that the judge considered the readings at MPLs 7 and 8 at all, he examined them primarily in relation to readings at MPL B1. Not surprisingly, the judge initially noted that, as production increased, readings at MPLs 7 and 8 increased. 25 FMSHRC at 749. The judge further noted that the spread between methane readings at MPLs 7 and 8 and those at MPL B1 was growing from 0.25%, prior to July 28, to 0.75% by July 31. *Id.* at 749-50. Based on this factual circumstance, the judge concluded that "gob airflow was becoming a smaller percentage of the total airflow at MPL B1" and, therefore, "methane was accumulating in the gob more rapidly than the ventilation system was able to dilute and move it into the bleeders." *Id.* at 750. However, the judge's conclusion simply does not follow from the facts.

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prior to the high reading because of a shift change). Further, with the idling of production, methane levels at MPL B1 dropped, as intended by Plateau's protocol. In these circumstances, we fail to see what Plateau would have investigated.

[10] Because what Plateau was doing here was permissible, indeed intended under section 75.323(e), the judge's suggestion, reinforced by our colleagues' analysis, slip op. at 12, 14-17, that the measurement point was improperly placed, because of its distance from the gob and injection of additional air, is not well taken. Indeed, only the Secretary can change the section 75.323(e) measurement point through notice-and-comment rulemaking. Labeling this determination as a credibility issue, 25 FMSHRC at 748, slip op. at 14, does not change the legal nature of the ruling, which is to move the location of the section 75.323(e) measurement point within the bleeder system. Finally, even while chastising Plateau for allegedly inappropriately diluting the air stream measured at MPL B1, our colleagues nevertheless give primacy to readings taken there over those taken at MPLs 7 and 8. This displays a misunderstanding of the purposes of these distinct measuring points.

First, the basis for the judge's conclusion is mathematically incorrect. As the level of methane at MPLs 7 and 8 increased, the difference between those readings and readings at MPL B1 would grow regardless of whether the percentage of air going through MPLs 7 and 8 decreased, remained constant, or even modestly increased.[11] Second, it is apparent from the record that methane readings at MPL B1 were not probative of the volume of gob airflow. The record shows that bleeder air at MPL B1 came from multiple areas of the mine, including the face where increasing amounts of methane were liberated as production increased. Thus, unless the effect of methane liberation from the face, as well as airflow from other areas, could be eliminated, any correlation between the difference in readings at MPL B1 and MPLs 7 and 8, and gob airflow is tenuous at best.

Finally and most significantly, the judge's further conclusion, drawn from the readings at MPL B1 and MPLs 7 and 8, that methane was accumulating in the gob too rapidly to be removed by ventilation simply does not follow from the record evidence. An increase in the level of methane being removed from the gob and an excess accumulation are not the same thing. An increase in the level of methane at MPLs 7 and 8, by itself, could just as logically lead to the conclusion that the ventilation system was operating effectively. Moreover, methane liberation at the face also would cause an increase in the level of methane at MPLs 7 and 8.

Even if methane levels at MPL B1 and MPLs 7 and 8 were increasing, the judge's ultimate conclusion – that methane was accumulating more rapidly than the ventilation system was able to remove it, 27 FMSHRC at 750 – does not follow from this. As we have noted, higher levels of methane at these measurement points were expected as production increased and the gob area expanded. Methane levels at MPLs 7 and 8 never reached actionable levels. Even the Secretary's own expert, Stephan, opined that the initial explosion that touched off the later more serious explosions occurred as a result of the ignition of a very small amount of methane, approximately 50 cubic feet. Thus, we believe that the judge should rely on other record evidence if he is to support this conclusion.

Because of these factual discrepancies in the judge's decision, a remand to the judge to reevaluate the record evidence would be warranted. In addition, for the reasons more fully

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[11] For example, if the air from MPLs 7 and 8 remained at a constant 75% of the total air flowing to MPL B1 and contained 1.5% methane, while the remainder of air contained 0.5% methane, then the air at MPL B1 would contain 1.25% methane [(1.5% x 0.75) + (0.5% x 0.25) = 1.25%]. The difference between the methane levels at the MPLs is: (1.50% - 1.25%) or 0.25%. Now, if the methane content at MPLs 7 and 8 increases to 3.5% and nothing else changes, the level at MPL B1 becomes 2.75% [(3.5% x 0.75) + (0.5% x 0.25)] and the difference between the methane levels at the MPLs increases to: (3.50% - 2.75%) or 0.75%. Furthermore, even if the "gob flow" were to increase to 85% of the total in the second case, the difference between the MPLs would have risen from 0.25% to 0.45%, contrary to the judge's conclusion that a rising difference indicates a decrease in flow from the gob.

discussed below, we would instruct the judge to also further analyze the notice issue before him, using the correct legal standard.

C. Notice

We disagree with the judge's terse analysis of whether a reasonably prudent person would have been on notice that there was a violation of section 75.334(b)(1). The judge concluded, "I agree with the Secretary that Plateau *should have been on notice* that its bleeder system was not functioning properly on July 31, 2000." 25 FMSHRC at 746 (emphasis added). However, the Commission has long rejected a subjective approach to the reasonably prudent person test. *See Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). Rather, as the Commission has explained, "[T]he reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation." *U.S. Steel*, 27 FMSHRC at 439 (citation omitted). The judge's reliance on a "should have known" test substitutes a subjective standard that the Commission has long eschewed. Therefore, for this additional reason, his decision should be vacated and remanded for application of the correct legal standard that is set forth above, slip op. at 24.

We would instruct the judge to consider the factual circumstances surrounding the ventilation system prior to July 31 on remand. As the judge noted, 25 FMSHRC at 745, the only numerical requirement in the safety standards is that methane cannot exceed 2% in the return air just before it joins another split of air.[12] 30 C.F.R. § 75.323(e). However, section 75.334(b)(1), the regulation alleged to have been violated here, has no numerical standards against which an operator's ventilation plan may be evaluated. In addition, Plateau was in full compliance with its ventilation plan. While we do not agree with Plateau's position that complying with an approved ventilation plan is an absolute defense to a citation under section 75.334(b)(1),[13] MSHA's involvement at this mine was much more extensive.

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[12] Our colleagues' *de novo* analysis of the record relating to notice ignores the crucial question of *how* a reasonably prudent operator would know that the ventilation system was not operating effectively in light of measurements that were, except in the two instances previously noted, within permissible and expected ranges. *See* slip op. at 17-18. In an effort to address this issue, our colleagues describe the two exceedances at the section 75.323(e) measurement point and the elevated readings at MPLs 7 and 8 as evidencing a "disruption" in the system. However, the Secretary has never alleged that Plateau violated the terms of its approved ventilation plan in any regard.

[13] "Once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1624 (Aug. 1994) (citations omitted). Major changes in the plan require MSHA's approval before they can be implemented. *Id.*

Further, there is little in the record to suggest that there was a problem in the gob. All volume measurements appear to have been within the desired range. Measurements of methane levels at MPLs 7 and 8 were within the acceptable range. The methane level at MPL B1 had also remained below the action level for all of this shift and the previous shift, after twice briefly exceeding that level two shifts prior. Plateau's protocol dictated that an elevated level of methane would be addressed by a cessation of production, and the methane level at MPL B1 had fallen below the action level during the idle period. While we leave it to the judge to thoroughly review the record, we can find no evidence to indicate that there were dangerous levels of methane accumulating in violation of section 75.334(b)(1), that the system was in any way not performing as expected, or that there was any reason to suspect that the system was not performing as expected. Given the above facts, it is difficult to ascertain how a reasonably prudent operator would have known that there was a violation of the regulation.

Finally, we note that it is difficult to ascertain how a reasonably prudent operator should have responded to the problems that the Secretary found in the ventilation system. The Secretary presented several experts at trial who testified that Plateau failed to adequately distribute air in the gob. The judge rejected the Secretary's theory and concluded that the problem was one of inadequate volume of air. 25 FMSHRC at 750-51. In fact, Plateau responded to the elevated readings at MPL B1 as its protocol required.[14] Absent other evidence that the ventilation system was not performing as expected, it is not evident to us what further actions a reasonably prudent operator should have taken.

In sum, we would instruct the judge to apply the reasonably prudent person test from the perspective of an objective mine operator who considers the totality of factual circumstances and evaluate all conflicting testimony and evidence that are relevant to this inquiry on remand. *U.S. Steel*, 27 FMSHRC 444.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

[14] The elevated readings at MPL B1 actually appeared near the start of an idle shift, possibly reflecting the length of time that it would take air to travel the long distance from the face and gob to the section 75.323(e) measuring point.

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 25, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-507-M A.C. No. 26-02561-78021
v.	:	
LONGVIEW CONSTRUCTION AND DEVELOPMENT, INC.	:	Docket No. WEST 2006-508-M A.C. No. 26-02651-80870

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 31, 2006, the Commission received from Superior Sand & Gravel, Inc.[2] ("Superior") a letter requesting that the Commission reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2006-507-M and WEST 2006-508-M, both captioned *Longview Construction and Development Inc.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

[2] As explained further in this order, in January 2006, Longview Construction and Development Inc. ("Longview") changed its name to Superior Sand & Gravel, Inc.

In January and February 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent proposed penalty assessments to Longview Construction and Development, Inc. ("Longview") for citations issued to the company by MSHA in April and November 2005. Effective January 2006, however, the company's legal name was changed from Longview to Superior, and the company's address also changed. Superior states in its request that it failed to timely contest the proposed penalty assessments at issue because MSHA had mailed the assessments to its former address and, by the time that it received the assessments in March 2006, more than 30 days had passed. The Secretary states that she does not oppose Superior's request for relief.

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

Having reviewed Superior's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Superior's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[3]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

[3] In the event that this case proceeds, the judge may entertain a motion to amend the case caption to reflect the company's new name, as appropriate.

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August 25, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2006-228-M A.C. No. 14-01478-87955
v.	:	Docket No. CENT 2006-229-M A.C. No. 14-01277-87965
NELSON QUARRIES, INC.	:	Docket No. CENT 2006-230-M A.C. No. 14-01597-90759

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On August 7, 2006, the Commission received from Nelson Quarries, Inc. ("Nelson Quarries") a letter requesting that the Commission reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In May and June 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Nelson Quarries the proposed penalty assessments at issue. Nelson Quarries explains that it overlooked these dockets when submitting a previous request for

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2006-228-M, CENT 2006-229-M, and CENT 2006-230-M, all captioned *Nelson Quarries, Inc.* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

relief to the Commission on July 11, 2006, and it requests that these dockets be reopened along with the others. *See Nelson Quarries, Inc.*, 28 FMSHRC ___, Nos. CENT 2006-200-M through CENT 2006-209-M (Aug. 2, 2006) (order remanding dockets to judge). The Secretary responds that, due to the company's confusion over whether it should pay the proposed assessments at issue based upon information the company received from MSHA, she does not oppose Nelson Quarries's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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August 29, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos.	SE 2005-301-M
	:		SE 2006-131-M
v.	:		SE 2006-167-M
	:		
HOSEA O. WEAVER & SONS, INC.	:		

ORDER

On August 11, 2006, the Commission received from Hosea O. Weaver & Sons, Inc. ("Weaver") a Petition for Discretionary Review, or in the Alternative, Petition for Interlocutory Review, in these consolidated proceedings. This petition sought review of Commission Administrative Law Judge David F. Barbour's July 13, 2006 order denying Weaver's motion for summary decision and granting the Secretary of Labor's motion for summary decision on the issue of whether the Department of Labor's Mine Safety and Health Administration ("MSHA") had jurisdiction over the activities in question. On August 15, 2006, the Secretary of Labor filed a response opposing Weaver's petition and moving that it be dismissed.[1]

Also on August 11, 2006, Weaver filed with Judge Barbour a motion for certification of his interlocutory ruling to the Commission, pursuant to Commission Rule 76(a)(1)(i). The judge denied Weaver's motion on August 17, 2006.

Under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2004), and the Commission's procedural rules, relief from a judge's final decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 20 C.F.R. § 2700.70(a). Here, however, the judge's order was an interlocutory ruling on motions filed by the parties, not a final disposition of the proceedings. Thus, we cannot consider Weaver's petition under Commission Procedural Rule 70(a).

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[1] The Secretary filed a supplemental motion in opposition to Weaver's petition on August 24, 2006.

The Commission's rule on interlocutory review sets forth the prerequisites for such review, stating that the Commission may grant interlocutory review only after a judge "has certified . . . that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding," or "denied a party's motion for [such] certification . . . and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion." 29 C.F.R. § 2700.76(a)(1). Here, Weaver filed its petition for interlocutory review prematurely because the judge had not yet ruled on the company's pending motion for certification.

Accordingly, we grant the Secretary's August 15 motion to dismiss.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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August 29, 2006

SECRETARY OF LABOR,	:	Docket Nos. PENN 2004-73-R
MINE SAFETY AND HEALTH	:	PENN 2004-74-R
ADMINISTRATION (MSHA)	:	PENN 2004-75-R
	:	PENN 2004-85-R
v.	:	PENN 2004-86-R
	:	PENN 2004-87-R
CUMBERLAND COAL RESOURCES, LP	:	PENN 2004-88-R
	:	PENN 2004-104-R
	:	PENN 2004-105-R
	:	PENN 2004-181
	:	PENN 2005-8

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

DECISION

BY THE COMMISSION:

In these contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), Administrative Law Judge Michael E. Zielinski affirmed two imminent danger orders and three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cumberland Coal Resources, LP ("Cumberland") alleging that Cumberland had violated 30 C.F.R. § 75.334(b)(1).[1] 27 FMSHRC 295 (Mar. 2005) (ALJ). Cumberland filed a petition for discretionary review of the

[1] Section 75.334(b)(1) sets forth requirements for the function of a bleeder system in an underground coal mine as follows:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

30 C.F.R. § 75.334(b)(1).

judge's decision, which the Commission granted. For the reasons that follow, we affirm the judge's decision in part and reverse in part.

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, a large, underground coal mine in Greene County, Pennsylvania. *Id.* at 296. In 2003, Cumberland was preparing to mine Longwall Panel No. 49 ("LW49") which, at a size of more than 12,000 feet long and 1,250 feet wide, was to be the largest panel that Cumberland had ever mined. *Id.* at 296-97. For ventilation purposes, Cumberland initially had planned to use a bleeder fan system, in which bleeder entries would be connected to a bleeder shaft located inby, or behind, LW49. *Id.* at 297. However, Cumberland realized that LW49 would be ready for production weeks or even months before the bleeder shaft would be operational. *Id.* In October 2003, Cumberland abandoned plans to use the bleeder shaft and, instead, decided to use a wraparound bleeder system for the first 10,000 feet of mining on LW49. *Id.* With the wraparound bleeder system, airflow would be generated by existing fans located outby LW49 used to pull air out of the tailgate entries. *Id.*; Jt. Stip. 14. On November 7, Cumberland submitted to MSHA an addendum to its ventilation plan,[2] describing provisions specific to LW49, and proposing that, in April 2004, a bleeder shaft would be constructed within an air shaft located outby LW49 to enhance the ventilation system. 27 FMSHRC at 297. On December 9, MSHA approved the ventilation plan addendum for the first 8,000 feet of mining. *Id.*; Jt. Exs. 1 & 1A.

On December 28, mining activity began on LW49. 27 FMSHRC at 298. In early January 2004, LW49 experienced a number of "gas outs," i.e., interruptions in mining due to high levels of methane measured by monitors located at the longwall face and tailgate.[3] *Id.* Cumberland then made three changes in the airflow of the LW49 ventilation system without seeking or obtaining MSHA's prior approval. *Id.* at 298-99. First, on January 4, Cumberland changed the No. 3 tailgate entry from an intake to a return air course. *Id.* at 298; Jt. Stip. 19. Second, on January 7, Cumberland reversed the direction of airflow in the No. 1 headgate entry (the belt entry) to move air outby from the face, and switched the No. 3 headgate entry from a return to an intake air course. 27 FMSHRC at 299; Jt. Stip. 20. Cumberland sent a letter to MSHA requesting approval of these changes on January 8. 27 FMSHRC at 299; Jt. Ex. 3. Third, on January 11, Cumberland moved a regulator located on the tailgate side to change pressure from outby to inby. 27 FMSHRC at 299; Jt. Stip. 22. Cumberland submitted an addendum to its ventilation plan, incorporating these changes, on January 12. 27 FMSHRC at 299; Jt. Ex. 4.

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[2] Cumberland's ventilation plan had been approved on March 3, 2003. 27 FMSHRC at 298; Jt. Stip. 16; Jt. Ex. 2.

[3] The mine is very gassy and is subject to spot inspections every 5 days pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i). 27 FMSHRC at 298.

On January 13, MSHA Inspector Anthony Guley and MSHA Assistant District Manager Thomas Light conducted a spot inspection of the mine pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i). 27 FMSHRC at 299. Guley and Light were concerned by conditions they encountered on LW49, including low airflows and higher than expected methane concentrations, which they believed indicated that the bleeder system was not working adequately. *Id.* at 300-01. Guley and Light observed the changes that had been made and determined that the December 9 ventilation plan was no longer being followed. *Id.* at 299. Guley thereupon issued Cumberland a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for failure to obtain MSHA's approval before implementing changes to its ventilation plan.[4] *Id.*

On January 14, representatives of MSHA, Cumberland, and the United Mine Workers of America ("UMWA") participated in a meeting at which the LW49 ventilation system was discussed. *Id.* at 301. MSHA scheduled a comprehensive ventilation survey of LW49 to be conducted on January 16. *Id.* On January 15, Cumberland performed its own evaluation of the bleeder system and determined that it was working effectively. *Id.*

On January 16, MSHA, Cumberland, and UMWA representatives conducted a ventilation survey of the LW49 wraparound bleeder system. *Id.* at 301-02; Tr. 471-72. Approximately seven teams, consisting of three or four people each, collected information about the bleeder system by taking altimeter readings to determine ventilating pressures, anemometer readings to determine airflow velocities, pressure gauge readings to determine pressure differentials, smoke tube readings to determine airflow directions and airflow velocities for specific distances, and methane readings using handheld detectors and bottle samples. 27 FMSHRC at 301; Jt. Stip. 27; Jt. Ex. 7; Tr. 87-88, 466-67, 471-81, 487. Based on the results of the survey, MSHA determined that the bleeder system was fragile and was ineffectively ventilating the longwall panel. 27 FMSHRC at 302; Tr. 162-63, 503-05; Gov't Exs. 25 & 26. Consequently, MSHA Inspector Robert Penigar issued Cumberland Citation No. 7083200 alleging a violation of section

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[4] The citation, which is not at issue in these proceedings, alleged a violation of 30 C.F.R. § 75.370(a)(1) and (d), which require that an "operator shall develop and follow a ventilation plan approved by the district manager" and that material changes to the plan must be approved before implementation. 27 FMSHRC at 299-300; Jt. Ex. 5.

75.334(b)(1).[5] 27 FMSHRC at 302. Cumberland agreed not to operate LW49 until the ventilation problems were resolved. *Id.*

On January 18, MSHA, Cumberland, and UMWA personnel met to discuss changes to the LW49 wraparound bleeder system. *Id.* On January 19, MSHA re-evaluated the bleeder system but, despite improvements, MSHA determined that the system remained ineffective. *Id.*; Tr. 548-49; Gov't Exs. 27 & 28. Additional changes were made, and another evaluation was performed on January 20. 27 FMSHRC at 302; Gov't Exs. 29 & 30. Although the bleeder system was improved, MSHA determined that it was still fragile and its capacity to dilute methane was limited. 27 FMSHRC at 302.

On the night of January 20, the survey results and MSHA's requirements for approval of a new ventilation plan were discussed at a meeting. *Id.* MSHA insisted upon additional monitoring points because it believed that, due to lack of airflow in the No. 2 tailgate entry, the designated bleeder evaluation points ("BEPs") were not providing accurate information about conditions in the bleeder system. *Id.*; Tr. 167. Specifically, in addition to BEPs 30, 30A, and 30B,[6] MSHA required monitoring points within the gob at crosscuts 82 and 85, using steel pipes installed through stoppings between the No. 1 and No. 2 tailgate entries so that methane in the

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[5] Citation No. 7083200 states:

> The bleeder system for the active LW49 longwall section, MMU 011, was determined to be ineffective in controlling the flow of air through the bleeder system to continuously dilute and move methane-air mixtures from the gob and away from the active workings. A ventilation survey conducted by MSHA inspectors and engineers from MSHA Technical Support on 01/16/2004 showed that the bleeder system was not adequate to move methane out of the gob and away from the face. The operator was cited on 01/13/2004 for not complying with the ventilation plan approved on December 9, 2003 when it was found the longwall was not being ventilated in a manner approved in the plan. Coal will not be mined with the longwall until ventilation changes are made to correct the bleeder system deficiencies and a plan submitted and approved by the District Manager showing the revised bleeder system.

Gov't Ex. 1 at 1. The citation designates the violation as significant and substantial ("S&S") and characterizes the operator's degree of negligence as moderate. *Id.*

[6] BEPs 30 and 30B were located inby the longwall face at the back corner on the tailgate side of LW49. BEP 30A was moveable in advance of the longwall face on the tailgate side of LW49. Jt. Exs. 1A & 10A; Tr. 286, 394, 1314-15.

No. 2 tailgate entry[7] could be measured by testing air flowing through the pipes into the No. 1 tailgate entry. 27 FMSHRC 302. MSHA also required a monitoring point in the No. 1 tailgate entry between crosscuts 73 and 74. *Id.* MSHA insisted upon specific methane limits at those monitoring points, i.e., limits of 4.5% for the BEPs and the monitoring points at crosscuts 82 and 85 and 2.0% for the monitoring point between crosscuts 73 and 74. *Id.*

Cumberland objected to MSHA's gob-sampling requirements as unprecedented and unreasonable. *Id.* Nevertheless, on January 21, Cumberland submitted and MSHA approved a new ventilation plan incorporating MSHA's requirements. *Id.* at 303; Jt. Exs. 10 & 10A. As the operation of LW49 resumed, MSHA inspectors were assigned to monitor the bleeder system 24 hours a day, taking measurements at the established monitoring points every 2 hours. 27 FMSHRC at 304, 316. On January 24, MSHA Inspector Ronald Hixson issued an imminent danger order pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a), and a citation alleging a violation of section 75.334(b)(1) when he measured methane concentrations above 5.0% at a location in the No. 2 tailgate entry of LW49 between crosscuts 83 and 84. *Id.* at 304; Gov't Exs. 2, 3, & 33. On January 25, MSHA re-evaluated the bleeder system and determined that it was still fragile. 27 FMSHRC at 304; Tr. 588, 603; Gov't Ex. 32.

On January 29, representatives from Cumberland met with Assistant Secretary of Labor for Mine Safety and Health David Lauriski and other MSHA personnel to complain that MSHA's insistence upon the additional monitoring points and methane limits within the gob was unprecedented and unjustified. 27 FMSHRC at 305; Jt. Stip. 42. The meeting, however, did not resolve Cumberland's complaint. 27 FMSHRC at 305. Cumberland then sought assurances from MSHA that, if it were to convert the wraparound bleeder system to a bleeder fan system, the monitoring in the No. 2 tailgate entry would no longer be required. *Id.* Cumberland began developing a plan to make operational the previously-planned bleeder shaft behind LW49. *Id.*

On February 4, MSHA Inspector Ronald Tolliver detected sudden increases in methane concentrations along the tailgate side of LW49, including a methane concentration of 4.8% at the monitoring point in the No. 2 tailgate entry in the gob at crosscut 85, and, consequently, issued Cumberland Order No. 7066999 alleging an imminent danger and Citation No. 7067000 for a violation of section 75.334(b)(1).[8] *Id.* at 304; Gov't Ex. 34. On February 7, Tolliver again

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[7] The No. 2 tailgate entry served as an intake airway outby BEP 30A, but became part of the gob on the inby side of the longwall face. *See* Jt. Ex. 10A.

[8] Order No. 7066999 states:

> The bleeder system used in the no. 49 Longwall panel failed to continuously dilute and move methane air mixtures and dust from the worked out area away from the active section. Methane was detected on the tailgate side, in the no. 2 entry, at the no. 85 crosscut at 4.8%. This was due to an airchange (removal of

detected sudden increases in methane concentrations along the tailgate side of LW49, including a methane concentration of 5.0% at the monitoring point in the No. 2 tailgate entry in the gob at crosscut 85, and issued Order No. 7067001 alleging another imminent danger and Citation No. 7067003 for another violation of section 75.334(b)(1).[9] 27 FMSHRC at 304; Gov't Ex. 35. Also on that date, MSHA approved Cumberland's plan to make operational the previously-planned bleeder shaft. 27 FMSHRC at 305; Jt. Stip. 48.

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a ventilation control in the headgate side of the #2 entry).

Gov't Ex. 5 at 1.

Citation No. 7067000 states:

> The bleeder system for the active LW49 longwall section, MMU 011, was determined to be ineffective in controlling the flow of air through the bleeder system to continuously dilute and move methane-air mixtures from the gob and away from the active workings. This was due to an adjustments [sic] to the ventilation controls in the no. 2 entry of the headgate side.

Gov't Ex. 4 at 1. The citation designates the violation as S&S and characterizes the operator's negligence as moderate. *Id.*

[9] Order No. 7067001 states:

> The bleeder system used in the no. 49 Longwall panel failed to continuously dilute and move methane air mixtures and dust from the worked out area away from the active section. Methane was detected on the tailgate side, in the no. 2 entry at the no. 85 crosscut at 5.0%.

Gov't Ex. 6 at 1.

Citation No. 7067003 states, in pertinent part:

> The bleeder system for the active LW49 longwall section, MMU 011, was determined to be ineffective in controlling the flow of air through the bleeder system to continuously dilute and move methane-air mixtures from the gob and away from the active workings.

Gov't Ex. 7 at 1. The citation designates the violation as S&S and characterizes the operator's negligence as moderate. *Id.*

Mining activity on LW49 was stopped from February 13 until the bleeder shaft was completed, more than a month later. 27 FMSHRC at 305. On February 14, while miners were moving a regulator on the headgate side of LW49, MSHA Inspector James Conrad issued an imminent danger order and a citation alleging a violation of section 75.334(b)(1) when he detected 5.1% methane at BEP 31 located in the No. 2 headgate entry between crosscuts 88 and 89. *Id.* at 304; Tr. 987-1013; Gov't Exs. 8, 9, & 36. After Cumberland converted to the bleeder fan system, no further ventilation problems or delays were experienced. 27 FMSHRC at 305. Cumberland challenged the orders and citations, and the matter proceeded to hearing.

The judge affirmed the citation issued on January 16 and the orders and citations issued on February 4 and 7, but vacated the orders and citations issued on January 24 and February 14. *Id.* at 332. With regard to the January 16 citation, the judge determined that the bleeder system was not functioning effectively as required by section 75.334(b)(1), and that a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the system's ineffectiveness. *Id.* at 305-15. Regarding the February 4 and 7 orders and citations, the judge determined that the sudden increases in methane concentrations presented imminent dangers to miners and that the bleeder system was not functioning effectively, in violation of section 75.334(b)(1). *Id.* at 323-27. The judge concluded that the violations were S&S and the result of moderate negligence. *Id.* at 315-16, 327. Accordingly, he assessed civil penalties totaling $2,496, the amount proposed by the Secretary for the violations. *Id.* at 332.

II.

Disposition

On appeal, Cumberland argues that substantial evidence does not support the judge's affirmance of the citation issued on January 16 and the orders and citations issued on February 4 and 7.[10] PDR 15-23; C. Br. 17-23, 28-31; C. Reply Br. 2-10. It asserts that the LW49 wraparound bleeder system was functioning adequately and effectively as required by section 75.334(b)(1). *Id.* Cumberland also asserts that the judge erred in determining that it had notice that the bleeder system violated the standard. PDR 11-15; C. Br. 10-17; C. Reply Br. 11-13. In addition, Cumberland argues that the judge erred in finding that the inspector did not abuse his discretion in issuing the imminent danger orders. PDR 23-27; C. Br. 23-27. Cumberland requests that the Commission vacate the orders and citations, as well as the associated civil penalties assessed by the judge.

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[10] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) ("*R&P*") (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The Secretary responds that the judge's decision should be affirmed. She contends that substantial evidence supports the judge's conclusions that Cumberland violated section 75.334(b)(1) because the citations were based on significant problems with the bleeder system. S. Br. 12-25. The Secretary also asserts that the judge correctly determined that Cumberland was on notice that the bleeder system violated the standard. *Id.* at 25-30. In addition, she argues that the judge correctly found that the inspector did not abuse his discretion in issuing the imminent danger orders. *Id.* at 30-34.

A. Citation No. 7083200 (January 16, 2004)

Section 75.334(b)(1) requires that, during pillar recovery, a bleeder system shall be used "to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine." 30 C.F.R. § 75.334(b)(1). Section 75.334 is derived from section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2), the purpose of which is to "require bleeder systems continuously to dilute, render harmless, and carry away methane effectively within the bleeder system and to protect active workings from the hazards of methane accumulations." *RAG Cumberland Res. LP*, 26 FMSHRC 639, 647 (Aug. 2004), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005).

The Commission has recognized that, although section 75.334(b)(1) does not literally set forth a requirement that a bleeder system shall function effectively, such a requirement is implicit in the standard's language and is consistent with the standard's underlying statutory purpose. *Id.* Thus, the Commission has read section 75.334(b)(1) to require a bleeder system "to control air passing through the area and continuously to dilute and move methane-air mixtures away from active workings and into a return or to the surface in an effective manner." *Id.* In other words, "a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations." *Id.*

Substantial evidence supports the judge's determination that, on January 16, the LW49 wraparound bleeder system was not functioning as required by section 75.334(b)(1). MSHA's survey results show that a very small pressure differential in the No. 2 tailgate entry between crosscuts 83 and 87, i.e., 0.02 inches of water,[11] produced airflow in an outby direction. 27 FMSHRC at 310; Gov't Ex. 26 (showing pressures of -0.67 inches of water at crosscut 87 and -0.69 inches of water at crosscut 83, and an airflow quantity of 8,123 cubic feet per minute ("cfm") near crosscut 83); Tr. 519-21. In the No. 2 tailgate entry between crosscuts 87 and 88, there was no perceptible movement of air in either direction. Gov't Ex. 26; Tr. 511. At crosscut

[11] An "inch of water" is a unit of pressure equivalent to 0.036136 pounds per square inch ("psi"). Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 276 (2d ed. 1997).

88, there were airflow quantities of 4,306 cfm entering BEP 30B from the ladders[12] and 4,042 cfm exiting BEP 30 in the No. 2 tailgate entry, indicating that there was no net movement of air in the tailgate portion of the gob. Gov't Ex. 26; Tr. 556, 1129-30. Thus, the methane-air mixture in the back corner of the tailgate was not being continuously diluted and moved away from the worked-out area as required by the standard. Based on these survey results, we believe the judge reasonably concluded that the bleeder system was ineffective.

We reject Cumberland's assertion that the judge erred in finding that the January 16 citation for the ineffective bleeder system was not duplicative of the January 13 citation for failure to comply with the ventilation plan. PDR 18; C. Br. 20-21. The Commission has held that citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993). As the judge recognized, the January 13 and 16 citations allege non-compliance with different duties and are not based on the same acts or omissions. 27 FMSHRC at 313. Additionally, the fact that both citations were abated by the approval of the January 21 ventilation plan does not render them duplicative. As the judge found, different aspects of the January 21 plan addressed the separate deficiencies, i.e., noncompliance and ineffectiveness, that gave rise to the citations. *Id.* Moreover, the judge aptly noted that Cumberland could have abated the January 13 citation by conforming the bleeder system to the December 9 ventilation plan rather than formulating a new plan for MSHA's approval. *Id.* at n.20; *see* Jt. Ex. 5 at 2 (extending citation "to give the operator additional time to comply with the approved plan or to formulate a new plan and get it approved").

Likewise, we reject Cumberland's assertion that the judge erred in determining that Cumberland's attempt to comply with a ventilation plan was not a defense to the January 16 citation. PDR 18; C. Br. 21. The Commission has previously held that compliance with a mine's roof or dust control plan does not preclude a finding of a violation of the underlying roof or dust control regulations. *See, e.g., Southern Ohio Coal Co.*, 10 FMSHRC 138, 140-41 (Feb. 1988) (concluding that compliance with an approved roof control plan is not controlling for purposes of determining compliance with a roof control regulation); *Utah Power & Light Co.*, 12 FMSHRC 965, 969 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) (concluding that compliance with the terms of a dust control plan does not preclude a finding that an operator violated the terms of a dust control regulation). Similarly, an operator cannot avoid a finding of violation of section 75.334(b)(1) by arguing that it was complying with the provisions of its ventilation plan. Rather, an operator is required to comply with ventilation plan provisions, which specify precautions and practices applicable to the particular conditions at a mine, in addition to the more general provisions of section 75.334, which set forth a level of safety required at all mines. *See* 57 Fed. Reg. 20,868, 20,900 (May 15, 1992). Given that conditions in a mine may change unexpectedly, compliance with specific ventilation plan provisions may not

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[12] The ladders are two sets of entries behind LW49. The inner ladder is used to set up the longwall face, and it eventually collapses and becomes part of the gob. The outer ladder is used for ventilation between the headgate and tailgate. Tr. 48, 72-74, 107-09; *see* Jt. Exs. 1A & 10A.

necessarily assure that the general protections afforded by ventilation regulations are being met. Therefore, Cumberland was required to comply with section 75.334(b)(1) independent of the ventilation plan approval process, and it could be charged with violating the standard even if it was fully complying with its approved ventilation plan. *See Plateau Mining Corp.*, 28 FMSHRC ___, slip op. at 11 & 20 (separate opinions of Comm'rs Young and Jordan), Nos. WEST 2002-207 & WEST 2002-278 (Aug. 22, 2006).

With regard to Cumberland's argument that it lacked notice of the violation, we recognize that section 75.334(b)(1) is broadly worded and that the concept of "effectiveness" is a general one. As the Commission has previously observed, however, "[m]any standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (quoting *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981)). Nonetheless, such broad standards must afford reasonable notice of what is required or proscribed. *Alabama By-Prods.*, 4 FMSHRC at 2129. When faced with a challenge that a safety standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The appropriate test "is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Substantial evidence supports the judge's determination that a reasonably prudent person would have recognized that the bleeder system was not functioning as required by section 75.334(b)(1). As discussed above, MSHA's survey results indicated that the methane-air mixture in the back corner on the tailgate side of LW49 was not emerging from the inby BEPs. In essence, the back corner of the tailgate was a dead airspace. In view of this fact, we believe that a reasonably prudent person would have recognized that the bleeder system failed to continuously dilute and move the methane-air mixture from the worked-out area away from the active workings.

Based on the foregoing, we conclude that substantial evidence supports the judge's determination that, on January 16, Cumberland violated section 75.334(b)(1) and that Cumberland had adequate notice that its bleeder system was not functioning as required by the standard. Accordingly, we affirm the judge's conclusion and his assessment of civil penalty.

B. Order No. 7066999 (February 4, 2004) and Order No. 7067001 (February 7, 2004)[13]

In his decision, the judge concluded that Tolliver did not abuse his discretion in issuing the imminent danger orders on February 4 and 7. 27 FMSHRC at 327. In reaching this

[13] Commissioner Jordan dissents from Part II.B of this opinion. *See* slip op. at 27.

conclusion, the judge found that "Tolliver did not act solely on the basis of a single excessive methane reading, either on February 4 or 7." *Id.* Rather, the judge found that Tolliver "considered the presence of excessive methane and unexplained sudden rises in methane in the system as a whole, and reasonably determined that the conditions he encountered on February 4 and 7 presented imminent dangers to miners." *Id.*

As we explain more fully below, substantial evidence does not support the judge's determination that Tolliver reasonably concluded that, based on the information available to him at the time he issued the orders, the conditions on February 4 and 7 amounted to imminent dangers. Thus, we conclude that Tolliver abused his discretion.

Section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). The concept of imminent danger is not limited to hazards that pose an immediate danger. *R&P*, 11 FMSHRC at 2163 (citing *Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974)); *see also Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996); *VP-5 Mining Co.*, 15 FMSHRC 1531, 1535 (Aug. 1993); *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). Rather, "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *R&P*, 11 FMSHRC at 2163 (quoting *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted)). To support a finding of imminent danger, an inspector must find that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's finding "unless there is evidence that he has abused his discretion or authority." *R&P*, 11 FMSHRC at 2164 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)).

We conclude that the judge erred in holding that, on February 4 and 7, Inspector Tolliver did not abuse his discretion in issuing the imminent danger orders.

First, the record indicates that Tolliver did not exercise any discretion in concluding that the conditions posed imminent dangers to miners because, prior to his inspections, he received instructions to issue the orders if he found methane in excess of the limits specified in the January 21 plan. Specifically, Tolliver testified that, on January 31, Pete Krosunger, another MSHA inspector, instructed him to write an imminent danger order and a section 75.334(b)(1) citation if he found more than 4.5% methane at any of the monitoring points. Tr. 829-30, 889. Tolliver also testified that, on February 4, Guley gave him the same instructions. Tr. 832-33, 860, 890, 901-02.

Although an inspector must have considerable discretion in issuing imminent danger orders (*R&P*, 11 FMSHRC at 2164), the constraints on discretion arise here from the directives given to Tolliver to issue the orders based on a single criterion. This precluded the inspector from conducting a requisite reasonable investigation of the facts in exercising his discretion. While safety must be the paramount concern, the extraordinary measure of shutting down a mine with a withdrawal order compels safeguards to ensure that an inspector's discretion is not abused. *See, e.g.*, *Island Creek*, 15 FMSHRC at 347-48 (vacating imminent danger orders issued as a result of methane accumulations in a gob area where Secretary failed to meet her burden of proving that it was reasonable for inspectors, based on information available, to conclude that mine conditions constituted imminent danger). Here, MSHA approved the procedures in Cumberland's ventilation plan for de-energizing the longwall and taking corrective actions when methane readings in excess of 4.5% were obtained at any of the monitoring points. Jt. Ex. 10 at 2; Tr. 902. However, based on contrary directions given to him, Tolliver issued the imminent danger orders before Cumberland could take such measures. Tolliver's adherence to prior instructions without additional indicia of a hazardous condition, "which could reasonably be expected to cause death or serious physical harm before such condition . . . can be abated" (30 U.S.C. § 802(j)), clearly amounted to an abuse of his discretion.[14]

Second, substantial evidence does not support the judge's finding that "Tolliver did not act solely on the basis of a single excessive methane reading" at crosscut 85 when issuing the imminent danger orders. 27 FMSHRC at 327. In fact, Tolliver explicitly and repeatedly testified that the bases of his imminent danger orders were the elevated methane readings at crosscut 85. Tr. 847, 854, 887, 891, 902-03, 913, 918. For instance, when asked why he issued the imminent danger order on February 4, Tolliver's response was "[b]ecause at the 85 crosscut, I had 4.8 on my hand-held detector." Tr. 847. Despite a generalized expression of concern for "the safety of the miners," the elevated methane readings provided the sole evidentiary basis for Tolliver's concern.

We also find unavailing the judge's finding that Tolliver's decisions to issue the orders "were grounded more on his bona-fide concerns for, and evaluation of, the safety of miners, than on a mechanical application of instructions related by other inspectors." 27 FMSHRC at 326. The judge attempted to identify additional bases to support Tolliver's imminent danger determinations by pointing to evidence of subsequent readings that Tolliver obtained at the

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[14] Tolliver's actions in issuing the orders were also contrary to an MSHA policy that an inspector cannot use section 107(a) orders for "control purposes" in the absence of an imminent danger. I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Sec. 107, at 34 (2003) ("*PPM*"); *see* Oral Arg. Tr. 48-49. Tolliver was instructed that, if he detected methane levels above 4.5%, he was to issue imminent danger orders pursuant to section 107(a) without any further consideration. In doing so, MSHA was using the orders as means to control methane levels in the bleeder system. Even though the *PPM* is not binding on MSHA, we find that its prohibitions are particularly appropriate here where MSHA's instructions removed Tolliver's independent judgment in issuing the imminent danger orders.

monitoring points at crosscut 82 and between crosscuts 73 and 74 as indications of a "rapid rise in methane concentrations" throughout the system. *Id.* However, Tolliver never testified that he considered this evidence in issuing the orders. In fact, Tolliver testified that once he obtained the readings at crosscut 85 in excess of 4.5%, he issued the orders, took bottle samples, and then exited the mine. Tr. 864, 886. The judge even noted that the subsequent readings were obtained by Tolliver on his way out of the mine, *after* he had issued the imminent danger orders. 27 FMSHRC at 326. Thus, they could not have served as a basis for Tolliver's imminent danger determinations.

The judge also pointed to the "unexplained sudden rises in methane in the system as a whole" as a substantiating reason for Tolliver's imminent danger determinations. *Id.* at 326, 327. However, Tolliver's lack of understanding of the conditions throughout the mine at the time he issued the orders in fact undermine his determinations that the conditions on February 4 and 7 amounted to imminent dangers. Tolliver testified that, at the time he issued the orders, he did not know specific conditions in certain areas of the mine. Tr. 851-53, 856-59, 863-64, 878, 881-83, 888, 897, 898, 900, 904, 907-08. For example, as the judge noted, Tolliver admitted that "he did not know, on either [February 4 or 7], whether there were high methane concentrations in the face area," despite testifying that he was concerned that methane was coming off the gob onto the face. 27 FMSHRC at 325; Tr. 882, 896, 908. Nor did Tolliver inquire as to the cause of the rise in methane level, despite admitting that he overheard miners discuss a curtain adjustment on the headgate. Tr. 858-59, 888, 905-06. Tolliver also testified that he did not know the distance between crosscut 85, where he obtained the elevated methane readings, and the face, where he was concerned about a potential ignition source. Tr. 863-86. Thus, the record evidence as a whole substantially detracts from the judge's conclusion that Tolliver did not base his orders solely on the methane readings at crosscut 85.[15]

Moreover, the evidence refutes Tolliver's rationale for his imminent danger orders. Contrary to Tolliver's vague concerns that gob air was coming onto the face, there were no elevated methane readings at the face. Tr. 1380-81, 1522-23, 1581-85, 1621-24, 1642-43, 1744-48. As the judge noted, the "methane levels at all monitoring points declined to acceptable levels" shortly after Tolliver issued the orders and the record indicates that the sudden rise in methane occurred when a curtain on the headgate was adjusted. 27 FMSHRC at 325-26; Tr. 1536, 1741-44, 1749-50. Finally, the record reveals that no additional actions were required to abate the citations and terminate the orders. 27 FMSHRC at 325; Tr. 1744-45. The judge failed to reconcile the foregoing evidence with his conclusion that Tolliver did not abuse his discretion. Tolliver's stated concerns about a potential explosion and the safety of the miners cannot

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[15] We disagree with our dissenting colleague's contention that the judge credited Tolliver's testimony that the bases of his imminent danger orders were more than the crosscut 85 readings. Slip op. at 32. Tolliver testified that the readings at crosscut 85 were the sole bases for them (Tr. 891), and our colleague cannot avoid the lack of record support for the judge's conclusion by labeling his finding as a credibility determination.

overcome this contrary evidence or his lack of knowledge and inquiry, as evidenced by his testimony, of the conditions present at the time he issued the orders.

In sum, because the instructions left Tolliver no discretion to make an independent judgment as to the existence of the imminent dangers and substantial evidence does not support the judge's finding that Tolliver acted on circumstances beyond the elevated methane readings at crosscut 85, we regard his issuance of the orders as abuses of discretion. Our conclusion that Tolliver abused his discretion is limited to the unique circumstances of this case and is based on the Secretary's failure to demonstrate that, based on the information available to Tolliver at the time, it was reasonable for him to conclude that the conditions in the mine constituted imminent dangers. *See Island Creek*, 15 FMSHRC at 347-48.

Based on the foregoing, we conclude that substantial evidence does not support the judge's affirmance of the imminent danger orders. Accordingly, we reverse the judge and vacate Order Nos. 7066999 and 7067001 and the associated civil penalties.

C. Citation No. 7067000 (February 4, 2004) and Citation No. 7067003 (February 7, 2004)

Commissioners are evenly divided regarding whether the judge correctly determined that, on February 4 and 7, the LW49 wraparound bleeder system was not functioning as required by section 75.334(b)(1). Commissioners Jordan and Young would affirm the portion of the judge's decision holding that Cumberland violated section 75.334(b)(1) on February 4 and 7. Chairman Duffy and Commissioner Suboleski would reverse that portion of the judge's decision and vacate the citations. The effect of the split decision is to allow the judge's decision to stand as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The separate opinions of the Commissioners follow.

III.

Separate Opinions of the Commissioners

Commissioner Young, in favor of affirming Citation Nos. 7067000 and 7067003:

At issue here is whether Cumberland violated 30 C.F.R. § 75.334(b)(1) on February 4 and 7, 2004. The judge below thoroughly considered the record evidence and concluded that the sudden increases in methane, combined with other circumstances present in Cumberland's mine on the operative dates in question, amounted to violations of section 75.334(b)(1). I find no material error of law in the judge's decision. The Commission's role on review is thus limited to determining whether substantial evidence supports the factual findings on which the judge has based his conclusion of the violations. Under this test, the Commission may not "substitute a competing view of the facts for the view [a judge] reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

Based on the record evidence, I conclude that substantial evidence supports the judge's determination that, on February 4 and 7, the LW49 wraparound bleeder system was not functioning effectively, in violation of section 75.334(b)(1).[1] 27 FMSHRC 295, 323-27 (Mar. 2005) (ALJ). This finding is supported by evidence that sudden increases in methane concentrations at or near the explosive range were detected at the monitoring point at crosscut 85 in the No. 2 tailgate entry. *Id.* at 326-27. In addition, sudden and significant methane increases were detected at other monitoring points along the panel's tailgate side, indicating a build-up of methane in the bleeder system. *Id.* at 325-27, 331.

On February 4, Inspector Tolliver found a significant increase in the methane concentration of the air exiting the BEP 30 regulator. 27 FMSHRC at 326; Gov't Ex. 34. The methane concentration had increased from 2.0% at 12:39 p.m. to 3.0% at 1:22 p.m. *Id.* Tolliver then proceeded to the monitoring point at crosscut 85 where he found that the methane concentration of air flowing out of the sampling tube[2] had increased from 3.0% at 12:37 p.m. to 4.8% at 1:25 p.m., a level that exceeded the 4.5% limit specified in the January 21 plan. 27 FMSHRC at 324, 326; Gov't Ex. 34; Jt. Exs. 10 & 10A; Tr. 847-48, 945-48. While there is some question about the accuracy of Tolliver's methane reading, the judge's conclusion that it was supported by comparable measurements obtained by Cumberland and UMWA personnel using their handheld detectors is not inherently unreasonable. *See* 27 FMSHRC at 324; Tr. 847-48, 892, 917-18, 943-48, 960 (the measurements were taken twice and the detectors differed no more than three to four tenths). Tolliver took two bottle samples, then issued the imminent danger order and citation, shutting down production. Tr. 209, 849-66, 918-19, 948-49. After Tolliver issued the imminent danger order, and as he exited the mine, he took additional measurements and found that methane at the monitoring point at crosscut 82 had increased from 3.3% at 12:35 p.m. to 4.4% at 1:30 p.m., methane at BEP 30A had increased from 1.1% at 12:25 p.m. to 1.6% at 1:35 p.m., and methane at the monitoring point in the No. 1 tailgate entry between crosscuts 73 and 74 had increased from 1.8% at 12:20 p.m. to 2.1% at 1:40 p.m. 27 FMSHRC at 326; Gov't Exs. 18 & 34.

On February 7, Tolliver experienced a similar situation. 27 FMSHRC at 326; Tr. 869. Methane levels at the various monitoring points were relatively steady and within acceptable limits, with the exception of the monitoring point between crosscuts 73 and 74, which was fluctuating in the 2.0% range and causing interruptions to production. 27 FMSHRC at 326; Gov't Ex. 20; Tr. 870. At approximately 10:00 a.m., however, methane levels began to climb

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[1] Unlike our review of the imminent danger orders (slip op. at 10-14), the standard of review of a section 104(a) citation is grounded solely on the conditions as they existed — i.e., whether substantial evidence supports the judge's finding of a violation based on the record evidence — not on the inspector's knowledge or discretion.

[2] Tolliver's readings were taken through a tube installed approximately 1 foot from the roof rather than through the pipe installed approximately 3 feet from the floor. *See* Tr. 593-602; Gov't Exs. 18 & 20.

dramatically. 27 FMSHRC at 326; *see* Gov't Ex. 20 (showing methane increasing at crosscuts 82 and 85 and BEPs 30 and 30B). At 12:20 p.m., Tolliver measured a methane concentration of 5.0% flowing out of the sampling tube at crosscut 85, a substantial increase over the previous reading of less than 3.0% approximately 2 hours earlier and a level that exceeded the 4.5% limit specified in the January 21 plan. 27 FMSHRC at 326; Gov't Exs. 6, 7, 20, & 35; Jt. Exs. 10 & 10A; Tr. 871-72, 875, 953. The judge again found that Tolliver's methane reading was consistent with readings taken by accompanying Cumberland and UMWA personnel, who obtained comparable measurements using their handheld detectors. 27 FMSHRC at 325; *see* Tr. 871-72, 874, 917-18, 952-55 (the measurements were taken twice and the detector readings were "about the same" and "pretty close"). Tolliver took bottle samples and then issued the imminent danger order and citation. 27 FMSHRC at 325; Tr. 873-88. At 12:35 p.m., Tolliver also measured a methane concentration of 4.1% at BEP 30B. Tr. 903-05, 965-66.

Moreover, Tolliver testified that on February 4, when he "hit this spike . . . or this slug [of methane] at 85 crosscut, [he] knew that something had happened" and he was "afraid . . . that the gob air might be coming on the face air on the longwall." 27 FMSHRC at 324-26; Tr. 851-52; *see also* Tr. 949-50, 965-66 (similar concerns of Jeffrey Mihallik, UMWA safety committee member). Tolliver explained that he "didn't think they had enough positive pressure on the gob to carry away the methane on the back." Tr. 856-57. He considered the amount of methane detected at crosscut 85 as an indication that the bleeder system "wasn't working properly" and that it was "not effective." Tr. 856, 858. Once more, on February 7, Tolliver was concerned by the rapid increase in methane concentrations, stating that he was "afraid the methane was coming off the gob, going to the active longwall face" because he thought "there wasn't enough pressure on the back side." 27 FMSHRC at 326; Tr. 878, 881; *see also* Tr. 955, 959, 965-66 (similar concerns of Mihallik). Again, Tolliver considered the high methane concentration as an indication that the bleeder system was "ineffective." Tr. 880-81, 883.

Likewise, the testimony of MSHA's expert, John Urosek, also supports the judge's determination that the bleeder system was ineffective on February 4 and 7. According to Urosek, the size of the gob had increased due to continued mining and the bleeder system had become more fragile and incapable of handling methane liberation. Tr. 1150, 1155. Urosek opined that the sudden increases in methane, in conjunction with the airflow changes caused by the adjustment or movement of curtains on the headgate, indicated that methane was "sitting in the internal air flow paths" of the gob, extending "all the way to the face." 27 FMSHRC at 325; Tr. 1150-52, 1155-56. Urosek stated, "we don't know what the pressure differentials were" across the longwall face and into the tailgate entries, but "[w]e know that they were insufficient to cause the air flow to move in the proper direction to dilute the methane."[3] Tr. 1232-34, 1247-48, 1256-57. Urosek explained that "the inadequate pressure differentials, and therefore the low air

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[3] The only readings known on February 4, were an airflow quantity of 15,876 cfm and a pressure differential of 0.25 inches of water at BEP 30B (Tr. 895), and on February 7, an airflow quantity of 15,120 cfm and a pressure differential of 0.25 inches of water at BEP 30B (Tr. 903-04). *See* C. Post-Hearing Br. 46 n.22; PDR 23; C. Br. 30 (correcting transcript to read "0.25").

flows . . . allowed that methane to stay very close to that longwall face, so changes, inadvertent or on purpose, that occur somewhere in the system could allow that methane to come on the longwall face." Tr. 1248-49. The judge appears to have credited Urosek's testimony over that of Cumberland's witnesses who did not believe that methane was backing up to the face because there were no high methane readings at the face and the pressure differentials and airflows were away from the face toward the back of the gob. *See* 27 FMSHRC at 325, 327 (citing Tr. 1380-81, 1522-23, 1581-85, 1621-24, 1642-43, 1744-48). Based on the testimony of MSHA's expert, the judge could thus reasonably conclude that the bleeder system was not effectively diluting and moving methane away from the active workings.

The record also indicates that shortly after Tolliver issued the orders and citations on February 4 and 7, methane levels at all the monitoring points decreased to acceptable levels, and production resumed each evening. 27 FMSHRC at 325-26; Gov't Ex. 18. In both instances, the increase in methane was temporarily caused by the adjustment of a ventilation curtain on the headgate side of LW49. 27 FMSHRC at 325; Tr. 858-59, 905, 951, 958, 1536, 1741-45. Nevertheless, even a minor adjustment can have a significant impact, as evidenced by the facts here, where the margin between acceptable levels of methane and highly dangerous explosive levels of methane was so narrow. This is particularly significant considering the fragile nature of Cumberland's bleeder system and the challenging mine environment. 27 FMSHRC at 302. Cumberland's mine was identified as a gassy mine subject to spot inspections every 5 days pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i), and had been having significant problems with its wraparound bleeder system. 27 FMSHRC at 298-99. All of these factors could reasonably be construed as showing that the bleeder system was incapable of continuously diluting, rendering harmless, and carrying away increased levels of methane entering the system.

On appeal, Cumberland attempts to raise as a defense that it did not have adequate notice that MSHA would rely on the readings it obtained at locations other than BEPs, such as the No. 2 tailgate entry which effectively was part of the gob, to evaluate the bleeder system. PDR 14-15; C. Br. 14-17; C. Reply Br. 13. However, the defense is unavailable here. Cumberland's January 21 ventilation plan clearly designated numerous locations within the bleeder system, including the locations at issue here, as monitoring points where data was to be collected. 27 FMSHRC at 302-03; Jt. Exs. 10 & 10A. While the ventilation plan merely identified action levels, rather than set absolute limits for methane at all designated monitoring points, it is reasonable to expect that MSHA would use the data collected at these points to evaluate the bleeder system. Indeed, that was the point of the additional monitoring locations. As MSHA's Assistant District Manager Thomas Light testified, the evaluation point at crosscut 85 was necessary because the original evaluation point at BEP 30 "didn't actually give us any indication of what was happening on this tailgate side of the bleeder system . . . so in effect, we weren't evaluating the bleeder system [using BEP 30]." Tr. 167. Light further testified that the evaluation points are established "based on what is actually necessary to evaluate the adequacy of the system." Tr. 168. MSHA Inspector Ronald Hixson and expert witness John Urosek also testified about the need for the additional evaluation points, including the point at crosscut 85. Tr. 743-45, 1260-61. If continuous effectiveness is, as we have held, a requirement for all bleeder systems, Cumberland

cannot assert that it lacked notice when monitoring points established by MSHA to evaluate system effectiveness (with the operator's acceptance) were, in fact, used to determine whether the bleeder system was operating effectively.[4]

In this case, the data collected adequately support the judge's finding that the system was not effectively diluting and carrying away methane on February 4 and 7.[5] Because Cumberland

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[4] My colleagues confuse the notice question by focusing on whether Cumberland received adequate notice "regarding how the new data [obtained at crosscut 85] would be used for enforcement purposes" and whether "MSHA officials had informed Cumbreland that they believed an excessive reading at crosscut 85 would constitute a violation of the standard." Slip op. at 24, 25. However, the readings at crosscut 85 were but one of several indicia of the system's ineffectiveness which the judge found in support of the violations. Moreover, the Commission has not required that an operator receive actual notice of the Secretary's interpretation of a cited standard. Rather, the Commission has applied, as my colleagues acknowledge (slip op. at 23-24), an objective standard of notice, i.e., the reasonably prudent person test. *E.g.*, *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). As discussed above, Cumberland reasonably would have known that MSHA would rely upon the methane readings obtained at the additional monitoring points, including crosscut 85, to determine whether its bleeder system was operating effectively.

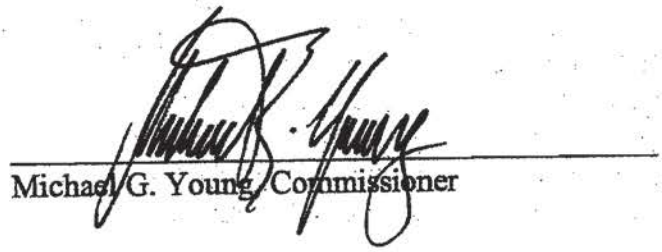
Furthermore, while Cumberland could have refused to adopt what it and my colleagues have characterized as an "unprecedented" monitoring of the gob (Oral Arg. Tr. 5; slip op. at 21), and then challenged the citation, it instead faxed to MSHA its revised ventilation plan including the provision it now challenges on notice grounds. Tr. 169 (Hixson testified that MSHA received the plan by fax and a phone call agreeing to the stipulations required).

[5] The evidentiary threshold for proving a ventilation system is ineffective under section 75.334(b)(1) varies significantly from the burden required to establish that the violation amounts to an imminent danger. *See* 30 U.S.C. § 802(j) ("'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated*" (emphasis added)); *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (to support a finding of imminent danger, an inspector must find that "the hazardous condition has a *reasonable potential to cause death or serious injury within a short period of time*" (emphasis added)). In particular, intermediate measures which might address a bleeder system's ineffectiveness, including adjustments to the system and suspension of production, would not sufficiently ameliorate the hazard of an imminent danger found by an inspector so as to prevent serious injury or death to miners. While I conclude that the record here supports the judge's findings of the section 75.334(b)(1) violations, as noted previously (*supra*, slip op. at 11), the record cannot sustain the conclusion that the inspector reasonably applied his discretion and considered the facts known or available to him upon reasonable investigation to determine that the conditions amounted to an

was able to negotiate its ventilation plan with MSHA through the plan approval process, Cumberland can be held to both know the content of the plan and be bound by its provisions. Thus, it is neither unfair nor inappropriate for MSHA to rely upon readings taken at designated monitoring points in the No. 2 tailgate entry to determine whether the bleeder system was functioning as required. Accordingly, I conclude that Cumberland had adequate notice here.[6]

In sum, I believe that substantial evidence supports the judge's findings that, on February 4 and 7, there were sudden and significant increases in methane concentrations along the tailgate side of LW49, particularly at the monitoring point at crosscut 85, indicating a build-up of methane in the bleeder system. Based on the circumstances in this case, the judge correctly determined that, on both dates, Cumberland violated section 75.334(b)(1) because its bleeder system failed to effectively dilute and move methane away from the active workings.

For the foregoing reasons, I would affirm the judge's decision regarding the February 4 and 7 citations.



Michael G. Young, Commissioner

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imminent danger.

[6] I reject Cumberland's argument that it cannot be cited for violating section 75.334(b)(1) because it was in compliance with its January 21 ventilation plan. PDR 18-19; C. Br. 23. As discussed *supra*, Cumberland's duty to comply with the ventilation plan and its duty to have an effective bleeder system are separate and distinct and section 75.334(b)(1) can be enforced irrespective of ventilation plan requirements. *See* 27 FMSHRC at 312 n.19.

Chairman Duffy and Commissioner Suboleski, in favor of reversing and vacating Citation Nos. 7067000 and 7067003:

We disagree with our colleagues' determination to affirm the judge's ruling upholding the citations issued to Cumberland on February 4 (Citation No. 7067000) and February 7 (Citation No. 7067003) and would reverse that portion of the judge's decision. Although we agree with our colleagues that Cumberland violated 30 C.F.R. § 75.334(b)(1) on January 16, our review of the record indicates that the circumstances surrounding the February 4 and 7 citations are significantly different from those on January 16. We dissent on two separate grounds. The judge's determination that Cumberland violated section 75.334(b)(1) on February 4 and 7 is not supported by substantial evidence, and, in any event, Cumberland was not provided sufficient notice concerning what constituted a violation of the standard and how certain data would be used by MSHA for enforcement purposes.

A. Substantial Evidence

We conclude that there is not substantial evidence to support the conclusion that Cumberland's ventilation system was ineffectively diluting and removing methane from Longwall Panel No. 49 on February 4 and 7. Rather, the evidence shows only that certain action levels in Cumberland's revised ventilation plan had been triggered — action levels that required production to cease temporarily. As explained below, MSHA's citations were based on an unprecedented theory of measuring methane levels within the gob itself to allege that a ventilation system was not functioning effectively.

At the outset, it is highly significant that the judge never directly addressed in any detail the specific issue of whether the conditions on February 4 and 7 constituted a violation of section 75.334(b)(1). Instead, the judge focused on the separate issue of whether the inspector's issuance of imminent danger orders on those dates should be upheld and concluded that the inspector "did not abuse his discretion" in issuing the imminent danger orders. 27 FMSHRC 295, 325-27 (Mar. 2005) (ALJ). Without further discussion, he then summarily stated that: "For the reasons stated above, I find that the bleeder system was ineffective on February 4 and 7, as alleged in Citation Nos. 7067000 and 7067003. It was not effectively ventilating the area within the bleeder system and protecting the active workings from hazardous methane accumulations." *Id.* at 327. However, facts that would justify the issuance of an imminent danger order might or might not establish that section 75.334(b)(1) had been violated. The latter issue involves a separate inquiry. *See Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (imminent danger orders can be issued regardless of whether the Mine Act or the Secretary's regulations have been violated). Thus, the judge's failure to adequately discuss the evidence that he believed established violations of section 75.334(b)(1) on February 4 and 7 apart from the imminent danger orders would require, at the very least, a remand. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (remand is appropriate when judge fails to adequately address evidentiary record and explain reasons for decision).

Moreover, our decision to vacate the February 4 and 7 imminent danger orders in this case seriously calls into question the judge's conclusion that the Secretary met her burden of proving that section 75.334(b)(1) was violated on those same dates. In Part II.B of this opinion, a majority of the Commission concludes that substantial evidence does not support the judge's decision to uphold the February 4 and 7 imminent danger orders and that the inspector abused his discretion in issuing the orders. Slip op. at 10-14. The majority holds that Inspector Tolliver improperly exercised his discretion because he had been instructed by other inspectors to issue imminent danger orders for any methane readings that exceeded any monitoring limits in Cumberland's revised January 21 ventilation plan. 27 FMSHRC at 324; *see* slip op. at 11-12. Just as the inspector was directed to issue imminent danger orders if readings exceeded 4.5% at crosscut 85, he was likewise directed to issue citations for those same readings. *Id.* Accordingly, it is unclear to what extent the inspector exercised independent judgment in charging that the ventilation system was functioning ineffectively in violation of section 75.334(b)(1).

In deciding whether the conditions at Cumberland's mine on February 4 and 7 constituted a violation of section 75.334(b)(1), it is important to recognize what Inspector Tolliver did *not* find. The inspector did not find any indication that the system was failing to continuously dilute and move air away from the active workings. He did not find that methane levels had reached action levels at any of the BEPs.[1] He did not find an excess level of methane in the travelable bleeder entries. He did not find weak air flow in the gob. He did not find that there were high readings at the face or that any alarms at the face had been triggered. 27 FMSHRC at 325; Tr. 882, 896, 908. Finally, he did not find that the air was moving in the wrong direction in any of the entries or in the gob.

Although all the factors outlined above would indicate that the system was functioning effectively, MSHA nevertheless issued the two citations in question based on readings taken in the gob itself. This unprecedented approach raises serious problems. The inspector took methane readings at monitoring pipes that had been installed at MSHA's insistence in crosscut 85, which is clearly located in the dilution zone of the gob. It is undisputed that methane levels will pass through the explosive range (5% to 15%) within the dilution zone of the gob. Indeed, the Secretary's own witnesses testified that the gob may contain air with methane mixtures anywhere between 0% and 100% and that the gob is expected to have regions in which explosive methane levels will be found. Tr. 709-10, 1031-32, 1219, 1225. Methane levels in the gob itself have never been a basis for citing an operator for violating ventilation standards. *See Island Creek Coal Co.*, 15 FMSHRC 339, 350 (Mar. 1993) ("If the Secretary believes that specific accumulations of methane create a hazard in gobs or other inactive areas of underground coal mines, he should consider promulgating safety standards to deal with this problem."). The proper test of whether a ventilation system is functioning effectively is whether an adequate quantity of air continues to move in the right direction and whether the air is adequately diluted by the time it reaches the BEPs and enters the travelable bleeder entries. *See RAG Cumberland*

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[1] Indeed, the inspector apparently did not even attempt to take a subsequent reading at BEP 30 or BEP 30B after detecting a methane reading of 4.5% at crosscut 85.

Res. LP, 26 FMSHRC 639, 648-51 (Aug. 2004), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (ventilation system was ineffective where air quantities were inadequate and high methane readings were occurring in travelable bleeder entries).

The judge seems not to have fully comprehended the critical fact that the high methane readings on February 4 and 7 took place, not in a travelable bleeder entry or at a designated BEP, but in the gob — an area in which the presence of explosive methane mixtures was not unexpected or contrary to any regulation. Indeed, the judge's opinion contains no explanation of his rationale for relying upon the gob readings at crosscut 85 in upholding the February 4 and 7 citations. The readings in crosscut 85 may have been a warning to watch for high methane levels at the BEPs and travelable bleeder entries and, by the terms of the revised ventilation plan, they required that power to the face be cut off.[2] However, they did not establish that the system was ineffective — particularly given the fact that all other readings indicated that the system was functioning effectively. There is no evidence to show that there was insufficient air volume to dilute methane below the required level at the BEPs.

Although the judge also relied on increases in methane levels that took place at other monitoring points within the tailgate entry to support the imminent danger orders (27 FMSHRC at 326-27), those increases are not sufficient to conclude that the ventilation system itself was failing. First, while the judge found that the inspector did not act solely on the basis of a single high methane reading in crosscut 85 on each day, we have already concluded, in vacating the February 4 and 7 imminent danger orders, that this finding is not supported by substantial evidence. Slip op. at 12-14. Second, methane fluctuations in the gob are to be expected and can be caused by a number of sources. Indeed, the short-duration increases in readings in the tailgate entries were caused by specific events. On both February 4 and 7, the increases were preceded by the adjustment of a ventilation curtain in a headgate entry. Transitory increases in readings following such events would not be unexpected. Because the inspector was instructed by his supervisors to issue a citation if the reading at crosscut 85 in the gob exceeded 4.5%, the inspector failed to make an overall assessment of the ventilation system to determine whether it was functioning effectively. Although the inspector cited indications of methane fluctuations in

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[2] MSHA had insisted that Cumberland install the pipes in crosscut 85 after Cumberland was cited for violating section 75.334(b)(1) on January 16. 27 FMSHRC at 302. The January 21 revised ventilation plan provides that a methane reading exceeding 4.5% at certain monitoring points, including the one in crosscut 85, "will cause power to be deenergized on the longwall face and immediate corrective action to be taken." Jt. Ex. 10. Although the revised ventilation plan called for the pipes to be installed, the plan does not provide that a reading exceeding 4.5% at crosscut 85 indicates that the system is functioning ineffectively or that section 75.334(b)(1) has been violated.

the gob, he did not otherwise establish that air quantities were inadequate, that airflow was reversed, or that the critical measurements at the BEPs exceeded permissible levels.[3]

For the reasons set forth above, we conclude that the judge's decision to uphold the February 4 and 7 citations is not supported by substantial evidence. Given all the indications that the system was functioning effectively on those dates, the readings within the gob itself and transitory increases in readings at certain other monitoring points do not provide a sufficient basis for concluding that Cumberland's ventilation system was failing to effectively dilute and move methane away from the active workings on February 4 and 7.

B. Notice

We further conclude that the February 4 and 7 citations should also be vacated because MSHA did not provide adequate notice to Cumberland as to how it would interpret and apply the standard and the January 21 revised ventilation plan, and what criteria it would use in issuing citations. In particular, MSHA took the unprecedented approach of relying on methane readings in the gob to charge that section 75.334(b)(1) was being violated.

We note that the judge's opinion did not address at all Cumberland's arguments below that it was denied fair notice with regard to the February 4 and 7 citations. Although the judge did address the question of notice in connection with the January 16 citation (27 FMSHRC at 313-15), that discussion does not resolve the notice issue for the February 4 and 7 citations. In particular, resolution of the notice issue hinges in large part on certain provisions in the January 21 revised ventilation plan and MSHA's new policy regarding how those provisions would be used for enforcement purposes. Accordingly, because the judge never addressed the notice issue for the February 4 and 7 citations, at the very least, a remand of the notice issue would be necessary.

To avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

> [T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous

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[3] Our colleagues also contend that the testimony of MSHA's expert witness, John Urosek, supports the judge's determination that the ventilation system was ineffective on February 4 and 7. Slip op. at 16-17, 32-33. However, while the judge noted Urosek's testimony in discussing the imminent danger orders (27 FMSHRC at 325), he did not purport to rely upon it for any purpose. In any event, the judge could have relied upon Urosek's testimony only if he had also discussed and weighed the directly countervailing testimony of three of Cumberland's witnesses (Robert Kimutis, Robert Bohach, and John Dzurino). *See id.*

> condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Prods. Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The Commission has explained that

> the reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based on the totality of the factual circumstances involved, not just those which tend to favor one party or the other.

U.S. Steel Mining Co., 27 FMSHRC 435, 439 (May 2005) (citations omitted).

Application of the reasonably prudent person test here demonstrates that such an objective observer would *not* have concluded that the ventilation system for LW49 was functioning ineffectively within the meaning of section 75.334(b)(1) on February 4 or 7. As explained above with regard to whether violations of the standard occurred on those dates, the reasonably prudent person would have been aware of the fact that all the principal indicators showed that the ventilation system was effectively diluting and moving methane away from the working section. Methane levels at all the BEPs were in the acceptable range. Methane levels in the travelable bleeder entries were in the acceptable range.[4] There was not weak air flow in the gob. No alarms at the face had been triggered. Air was not moving in the wrong direction. Although the reading in excess of 4.5% at crosscut 85 in the gob required, under the revised plan, that the face be deenergized, this would not have indicated that the system itself was ineffective. In a gassy mine such as this, ceasing production after such an action level is reached is not at all unusual. Nothing in the revised plan provided that triggering the action level constituted a violation of the standard, and there was no evidence that MSHA officials had informed Cumberland that they believed an excessive reading at crosscut 85 would constitute a violation of the standard.

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[4] We note that, downstream of the longwall face at the monitoring point between crosscuts 73 and 74, the methane levels fluctuated around the 2% level. Gov't Exs. 18 & 20. However, this is indicative of inadequate dilution in meeting the 30 C.F.R. § 75.323(e) standard and not indicative of a violation of section 75.334(b)(1).

Similarly, transitory increases in certain readings in the tailgate entries would not have indicated that the system was functioning ineffectively. The reasonably prudent mine operator would have inquired into the cause of the rise in methane levels and become aware that ventilation curtains in the headgate entries had been adjusted shortly before the increases. The high reading at crosscut 85 and the momentary increases in the tailgate entries would have simply alerted a reasonably prudent mine operator that readings at the face, the BEPs, and the travelable bleeder entries should be closely watched to determine if those readings would reach their action levels. The evidence indicates that they did not. *In short, a reasonably prudent mine operator, aware of the relevant facts on February 4 and 7, would not have concluded that the system was functioning ineffectively.* It follows that Cumberland did not have adequate notice of what MSHA believed constituted a violation of section 75.334(b)(1) and what conduct MSHA expected from it.

Our colleagues argue that Cumberland cannot raise lack of notice as a defense here because the January 21 revised ventilation plan designated certain locations within the bleeder system, including crosscut 85, as monitoring points where data would be collected. According to them, "[w]hile the ventilation plan merely identified action levels [for those new monitoring points], rather than set absolute limits for methane at all designated monitoring points, it is reasonable to expect that MSHA would use the data collected at these points to evaluate the bleeder system." Slip op. at 17.

We strongly disagree. Despite the fact that MSHA insisted that the new monitoring points be included in the revised ventilation plan, there is no evidence — in the language of the plan or elsewhere — that MSHA provided notice to Cumberland regarding how the new data would be used for enforcement purposes. Cumberland could reasonably expect that the data — including methane readings from the gob itself — would be used to gauge generally how well the wraparound bleeder system was doing after certain modifications. It could also reasonably expect that, if the action levels in the gob were triggered, MSHA would look at the ventilation system for LW49 in its totality to determine if the system was functioning effectively and that the determination would be based on the traditional indicators — methane readings at the BEPs, in the travelable bleeder entries, and at the face as well as measurements of air quantities and direction. Cumberland could not reasonably expect that MSHA would be taking the unprecedented approach of treating high methane readings in the gob itself as violating its regulations and that the new monitoring points would be used primarily as enforcement weapons.

More specifically, the problem of lack of notice is heightened here by the fact that MSHA's internal policy was apparently to use readings above 4.5% from crosscut 85 as a sufficient basis for issuing citations to Cumberland for violating section 75.334(b)(1). Inspector Tolliver was instructed to issue a citation if the 4.5% level was exceeded. 27 FMSHRC at 324. In other words, an excessive reading from crosscut 85 would apparently not be just one factor to be considered in determining whether the ventilation system was functioning effectively; instead,

MSHA would treat such a reading as a *per se* violation of the standard.[5] This indicates that not only was Cumberland not given proper notice of MSHA's interpretation of the standard and plan provisions, but that Cumberland may have been affirmatively misled by MSHA regarding the reasons why the new monitoring points were being required.[6]

Because MSHA was changing its long-standing policy regarding how methane readings from within the gob itself would be used for enforcement purposes, it was incumbent upon the agency to advise Cumberland of the policy change *before* taking enforcement action. "Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (additional rulemaking was necessary where an agency's new interpretation of a regulation conflicted with the long-standing interpretation given to it by local agency officials).

In short, when MSHA decided to issue citations for methane levels in the gob rather than at the bleeder entries and BEPs, Cumberland was entitled to notice of the change in the interpretation and application of the standard and the ventilation plan. We would vacate the February 4 and 7 citations for lack of notice.

For the foregoing reasons, we would reverse the judge's decision regarding Citation Nos. 7067000 and 7067003 and vacate the citations and the associated penalties.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

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[5] Indeed, as a majority of the Commissioners has held in this case, "substantial evidence does not support the judge's finding that 'Tolliver did not act solely on the basis of a single excessive methane reading' at crosscut 85 when issuing the [February 4 and 7] imminent danger orders." Slip op. at 12.

[6] Cumberland had agreed to MSHA's provision to cut power to the section when methane levels exceeded 4.5% at the gob monitoring points. There is no indication that Cumberland was aware that the monitoring points would be used for any other purpose.

Commissioner Jordan, in favor of affirming Citation Nos. 7067000 and 7067003 and Order Nos. 7066999 and 7067001:

I agree that substantial evidence supports the judge's determination that on January 16, Cumberland violated 30 C.F.R. § 75.334(b)(1) because its bleeder system failed to effectively dilute and move methane away from the active workings. I also concur with Commissioner Young's analysis and conclusion affirming the portion of the judge's decision holding that Cumberland violated section 75.334(b)(1) on February 4 and 7.[1] However, I dissent from the majority's decision to reverse the judge and vacate the imminent danger orders issued on those dates.

Section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)). The Commission has held that an "abuse of discretion" is found when "there is *no evidence* to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (citations omitted and emphasis added) (affirming the judge's determination that the inspector did not abuse his discretion when he issued an order extending abatement time).

Substantial evidence supports the judge's determination that MSHA Inspector Ronald Tolliver exercised appropriate discretion when he issued imminent danger orders on February 4 and 7. 27 FMSHRC 295, 323-27 (Mar. 2005) (ALJ). The judge found that Tolliver's actions were based on his detection of sudden and significant increases in methane concentrations at crosscut 85 and other locations along the tailgate side of Longwall Panel No. 49 ("LW49"). This indicated to the inspector that methane might be moving toward the active longwall face. *Id.* at 326-27.

My colleagues contend the judge's conclusion is without adequate support. They claim that when Tolliver issued the imminent danger orders he "lack[ed an] understanding of the conditions throughout the mine." Slip op. at 13. They fault the inspector for failing to thoroughly investigate numerous conditions at the mine, including the distance to the face from where the methane was measured along the tailgate. *Id.* Detecting elevated methane levels is not sufficient for the majority; they would have the inspector determine the cause of the elevated

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[1] I do not concur with footnotes 1 and 5 of Commissioner Young's separate opinion.

methane before taking action. My colleagues consider Tolliver's rationale for issuing the imminent danger orders as little more than "vague concerns that gob air was coming onto the face." *Id.*

However, Tolliver's actions must be viewed against the backdrop of Cumberland's efforts to get its ventilation plan approved. Cumberland initially planned to ventilate LW49 with a bleeder fan system; however the bleeder shaft was not operational when the longwall was ready for production. 27 FMSHRC at 297. In order to avoid a shutdown Cumberland had to resort to another method of ventilation. The operator decided upon a wraparound bleeder system and submitted a plan to MSHA for approval of that design. *Id.* In December 2003, MSHA approved Cumberland's plan, but limited approval to the first 8,000 feet of mining. *Id.* at 297-98.

The following month, while conducting a section 103(i) spot inspection,[2] MSHA determined that Cumberland was not mining in accordance with the approved ventilation plan. *Id.* at 299. In certain locations airflow was in a direction opposite from what had been approved. Tr. 140-42, 152-54. At the longwall face, they measured air velocity and quantity significantly less than what had been reported in the books (77,000 cfm vs. 40,000-50,000 cfm). Tr. 345. Furthermore, the inspectors encountered conditions, such as low air flows and higher than expected methane concentrations, that signaled an inadequate bleeder system. 27 FMSHRC at 300-01.

Also during January, MSHA became concerned about insufficient ventilation pressures in LW49 that would allow gob air (from the worked-out area) to move toward the longwall face. *See* Tr. 511-12; Gov't Exs. 25 & 26. Sufficient pressure is necessary to move methane located behind the longwall shields away from the longwall face because certain events, such as a roof fall behind the shields, can force gob air into the face area, carrying methane with it. Tr. 1249.

MSHA conducted a ventilation survey[3] and confirmed that the bleeder system was fragile and not effectively ventilating the gob of the longwall panel. 27 FMSHRC at 301-02; Tr. 162-63, 503-05; Gov't Exs. 25 & 26. Cumberland agreed not to operate the longwall until the ventilation problems were resolved. 27 FMSHRC at 302.

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[2] Section 103(i) of the Mine Act applies to certain gassy mines and requires MSHA to conduct spot inspections every 5 days at irregular intervals. 30 U.S.C. § 813(i).

[3] Approximately seven teams, consisting of three or four people each, participated in the survey. The teams collected information about the bleeder system by taking altimeter readings to determine the ventilating pressures, anemometer readings to determine airflow velocities, pressure gauge readings to determine pressure differentials, smoke tube readings to determine airflow directions and airflow velocities for specific distances, and methane readings using handheld detectors and bottle samples. 27 FMSHRC at 301; Jt. Stip. 27; Jt. Ex. 7; Tr. 87-88, 466-67, 471-81, 487.

Over the next 4 days, MSHA conducted two additional ventilation surveys, concluding each time that despite improvements, the system remained fragile and its capacity to dilute methane was limited. *Id.* On January 21, Cumberland submitted and MSHA approved a new ventilation plan, which included certain additional monitoring points that MSHA had required. *Id.* at 302-03; Jt. Exs. 10 & 10A. Although MSHA approved the plan, it remained concerned about the system's ability to continuously dilute and remove methane from the worked-out areas. 27 FMSHRC at 302. Indeed, the agency's concern was such that, when production resumed, MSHA assigned its inspectors to the bleeder system 24 hours a day, and required them to take methane measurements at established monitoring points every 2 hours. *Id.* at 304, 316.

In accordance with this undertaking, Tolliver had been inspecting the bleeder system everyday from January 31 through February 7. *Id.* at 304, 326-27; Tr. 829-32, 866, 868. Tolliver's methane measurements were steady except for February 4 and 7, when he measured sudden and significant increases, including near-explosive concentrations (i.e., 4.8% and 5.0%) along the tailgate side of LW49, prompting him to issue the imminent danger orders in question. 27 FMSHRC at 304, 323-27; Tr. 846-47, 855, 872-76, 879.

My colleagues have determined that these imminent danger orders cannot be upheld because Tolliver had been instructed to issue such an order if the methane level exceeded 4.5% at certain specified evaluation points. In their view, since Tolliver lacked the discretion not to issue an imminent danger order when he detected methane levels in excess of that amount, his decision to issue the orders amounts to an abuse of discretion. Slip op. at 12. My colleagues deem "unavailing" the judge's determination that Tolliver's decisions to issue the orders "were grounded more on his bona-fide concerns for, and evaluation of, the safety of miners, than on a mechanical application of instructions related by other inspectors." *Id.* (quoting 27 FMSHRC at 326). Substituting their view of the record for the conclusion drawn by the judge, the majority concludes that the instructions deprived Tolliver of the ability to make an independent judgement as to the existence of an imminent danger. *Id.* at n.14 & 14.

Although my colleagues give lip service to the substantial evidence standard of review of the judge's finding here, they fail to actually apply it. Under this test, we are not only limited to considering "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at 3 (4th Cir. Dec. 30, 1997), but we also may not "substitute a competing view of the facts for the view the [judge] reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) (the "sensibly deferential" substantial evidence standard of review does not allow the court to reverse reasonable findings and conclusions, even if it would have weighed the evidence differently).[4]

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[4] My colleagues' reliance on *Island Creek Coal Co.*, 15 FMSHRC 339 (Mar. 1993), slip op. at 12, is misplaced. The Commission's decision to vacate the imminent danger order in that case was based "on the narrow ground that substantial evidence supports the judge's

While it is not apparent to this Commissioner that the Mine Act would necessarily invalidate an imminent danger order that was issued under the factual scenario adopted by my colleagues, there is no need to reach that question in the matter at hand. As demonstrated below, the judge's determination that Tolliver issued the orders based on his own knowledge and safety concerns is supported by persuasive record evidence.[5] For instance, when asked why he issued an imminent danger order on February 4, Tolliver stated:

> For the safety of the miners. I didn't know what was coming off of the longwall face. I knew something had happened, because I was getting pretty steady methane readings during that time, and I didn't know what happened.
>
> At the time, I was afraid that — that the gob air might be coming on the face air on the longwall.

Tr. 851

Tolliver issued the order, not because he was robotically following instructions, but because the methane level indicated to him that the bleeder system was not working properly:

> Q. . . . What was it that you were concerned could happen?
>
> A. An explosion.
>
> . . . .
>
> Q. An explosion of the methane?
>
> A. Yes.

---

determination that MSHA failed to meet its burden of proving that it was reasonable for the inspectors, based on the information available at the time, to conclude that the conditions in the mine constituted an imminent danger." 15 FMSHRC at 348. The Commission declined to "reweigh the evidence in this case or to enter de novo findings based on an independent evaluation of the record." *Id.* at 347. Here, in contrast, the majority adheres to no such constraints. Morever, in *Island Creek* the Commission specifically pointed out that its affirmance "should not be construed as circumscribing an inspector's authority or indeed his *obligation* to issue a section 107(a) order whenever he finds that an imminent danger exists." *Id.* at 348 (emphasis added).

[5] As a threshold matter, before he issued the orders, Tolliver was well aware that Cumberland was operating with a very fragile bleeder system. Tr. 860, 868.

The argument that the inspector simply followed instructions and issued the orders solely on the basis of a single methane measurement was considered and rejected by the judge. 27 FMSHRC at 325-27. As he explained:

> Cumberland argues that Tolliver issued the orders and citations solely because of the readings at the #85 crosscut monitoring point. While he testified to that effect, Cumberland reads too much into his responses to specific leading questions on cross-examination. Tr. 891. I find that the better interpretation of his responses was that the crosscut #85 readings were the precipitating factors for issuance of the orders and citations. His testimony, as a whole, evidences that he was concerned as much about the sudden rise in methane readings within the system, and the absence of any immediate explanation for them, as he was about the crosscut #85 readings themselves. He also considered the unfolding events with an understanding that the bleeder system was fragile. Tr. 868.
>
> . . . .
>
> . . . Tolliver did not act solely on the basis of a single excessive methane reading, either on February 4 or 7. He considered the presence of excessive methane and unexplained sudden rises in methane in the system as a whole, and reasonably determined that the conditions he encountered on February 4 and 7 presented imminent dangers to miners. He did not abuse his discretion in issuing the orders.

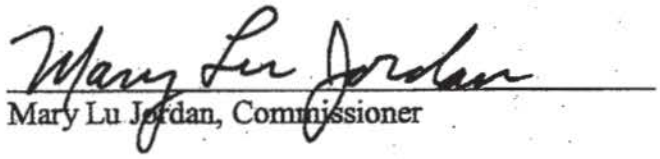
27 FMSHRC at 326-27. In effect, the judge made a credibility determination, which we should not disturb except in extraordinary circumstances not found here. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992) (quoting *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984)).

The testimony of MSHA's expert John Urosek also supports the judge's determination that Tolliver did not abuse his discretion in issuing the imminent danger orders. *See* 27 FMSHRC at 325. Urosek opined that the sudden increases in methane in conjunction with the airflow changes caused by the adjustment or movement of curtains on the headgate indicated that methane was "sitting in the internal air flow paths" of the gob, extending "all the way to the longwall face." *Id.*; Tr. 1150-52, 1155-56. He explained that the fragile bleeder system "allowed that methane to stay very close to that longwall face, so changes, inadvertent or on purpose, that occur somewhere in the system could allow that methane to come on the longwall face." Tr. 1248-49. Urosek stressed the urgent nature of the hazardous conditions, stating that, since the methane accumulations were

"already there" when Tolliver detected them, explosions could have occurred before Tolliver "even got there." Tr. 1161-62.[6]

Based on my review of the record, I cannot conclude that there is "no evidence to support the [inspector's] decision," *Energy West*, 18 FMSHRC at 569. Consequently, I find that the judge correctly concluded that Tolliver's issuance of the imminent danger withdrawal orders on February 4 and 7 did not amount to an abuse of discretion. Accordingly, I would affirm his determinations.

For the foregoing reasons, I would affirm the judge's decision regarding the February 4 and 7 citations and orders.



Mary Lu Jordan, Commissioner

[6] Urosek also testified about James Conrad's discovery of a 5.1% methane level on February 14 and explained that if the methane had ignited, an explosion could have propagated towards the face in milliseconds. Tr. 1161. In fact, when asked whether there would have been enough time for Conrad to let the operator know that something was wrong so that it could make change, Urosek responded succinctly: "Mr. Conrad would not have had time to say, 'Oh, crap.'" Tr. 1161.

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August 30, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and	:	
UNITED MINE WORKERS OF AMERICA	:	Docket No. SE 2003-160
v.	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), was brought by the Secretary of Labor against Jim Walter Resources, Inc. ("JWR"). This proceeding followed an extensive investigation into two explosions that occurred on September 23, 2001, at JWR's No. 5 Mine in Tuscaloosa County, Alabama, resulting in the deaths of 13 miners and injuries to several others. The Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations and six orders for violations of mandatory safety standards. All of the eight violations were alleged to be significant and substantial ("S&S"), and seven of the violations were alleged to be due to JWR's unwarrantable failure to comply with the applicable standard. The Secretary proposed penalties totaling $435,000.

The case was assigned to Administrative Law Judge David Barbour. The United Mine Workers of America (UMWA), which represents JWR miners, intervened in the proceeding. The parties engaged in extensive pretrial discovery. Prior to trial, JWR filed a motion for summary decision, which was denied. 26 FMSHRC 623 (July 2004) (ALJ). The judge presided over a 24-day trial during which 65 witnesses testified, and 396 exhibits were admitted into evidence. Thereafter, the judge issued a decision, 27 FMSHRC 757 (Nov. 2005) (ALJ), in which

he dismissed six of the eight violations and affirmed, but modified, the remaining two orders. The judge's dismissal and modification of the citations and orders resulted in a reduction in the proposed penalties to $3,000.

Both the Secretary and JWR filed petitions for review with the Commission. The Secretary sought review of: (1) the judge's dismissal of the order alleging a violation of 30 C.F.R. § 75.1101-23(a) for JWR's failure to evacuate miners after the first explosion; (2) the judge's rejection of the S&S designation of the order charging a violation of section 30 C.F.R. § 75.1101-23(c) for JWR's failure to conduct fire drills; and (3) the judge's reduction of penalties for the two violations that he found. The Secretary did not seek review of the judge's dismissal of violations relating to inadequate roof support and inadequate rock dusting, both of which were alleged to have led directly to the deaths of the 13 miners.

JWR sought review of: (1) the judge's determination that JWR violated the fire drill requirement in section 75.1101-23(c); (2) the judge's determination that JWR violated section 30 C.F.R. § 75.360(b)(3) by failing to conduct a preshift examination in an area of the mine where work was scheduled; and (3) the judge's determination that the violation of the preshift examination requirement was S&S and due to JWR's unwarrantable failure. The Commission granted both the Secretary's and JWR's petitions for review.

For the reasons that follow, the judge's decision on the violations and associated special findings on review is affirmed. However, we vacate his decision with regard to the penalties imposed as a result of the two violations found and remand for further explanation.

I.

Factual and Procedural Background

The No. 5 Mine ("the mine"), located approximately two miles north of Brookwood, Alabama, is one of several underground bituminous coal mines JWR operates in that area. 27 FMSHRC at 758; Gov't Ex. 10 (MSHA Investigation Report) at 2. In 2001, before the explosions, the mine was producing slightly more than 500,000 tons of coal per quarter and employed 318 contract miners and 70 salaried miners. *Id.* Miners worked on three shifts: (1) the 11:00 p.m. to 7:00 a.m. midnight shift; (2) the 7:00 a.m. to 3:00 p.m. day shift; and (3) the 3:00 p.m. to 11:00 p.m. afternoon or evening shift. 27 FMSHRC at 760 n.5; Tr. III 380.

JWR mined the No. 5 Mine using a single longwall for most coal removal. 27 FMSHRC at 758-59. The longwall began producing coal on the H panel approximately a week before the accident. Gov't Ex. 10 at 2. To develop longwall panels, JWR used continuous mining machines, and in September 2001 the development units were the Nos. 4 and 6 Sections. 27 FMSHRC at 759; Gov't Ex. 10 at 2. Coal was mined from the Blue Creek Seam, an extremely soft seam that tends to liberate high quantities of methane. 27 FMSHRC at 759. As a result, the mine is considered to be very gassy. *Id.*

During the day shift on Friday, September 21, water was observed coming from the roof in the No. 4 Section near Survey Station ("SS") No. 13333, which was located three crosscuts outby the face. *Id.* at 760; Gov't Ex. 10 at 4. Supplemental roof support was added there. *Id.* On the following shift, power was advanced and the belt was moved up to the second crosscut outby the face. *Id.* At that time, the scoop battery charging station was moved up to the third crosscut outby the face, adjacent to the SS 13333 intersection. *Id.*

Mining resumed for the next two shifts (September 22 midnight and day), and water was again observed dripping at the SS 13333 intersection. *Id.* Coal was not mined during the following two shifts — the September 22 afternoon maintenance shift and the September 23 midnight shift. 27 FMSHRC at 760-61; Gov't Ex. 10 at 4. The mine foremen did not detect any deterioration in roof conditions on those shifts. *Id.*

A. September 23 Midnight and Day Shifts

Albert "Jack" Dye, Jr., was assigned to conduct the preshift examination of the No. 4 Section for the incoming September 23 day shift. *Id.* at 761. Dye's supervisor that night was Randy Hagood. *Id.* at 806. Because of a fan check, Dye could not go underground during his shift at first, but he nevertheless began his preshift examination by 4:00 a.m. *Id.*; Tr. III 447.

Dye was to examine, among other areas of the mine, the Nos. 4 and 6 Sections. Tr. III 382-83. According to Dye, when he asked Hagood whether he should completely examine those sections, Hagood told him to examine the electrical installations, which included power centers and scoop chargers. 27 FMSHRC at 806; Tr. III 383-84. Consequently, Dye's examination terminated at the power center on each section, and he did not examine the face of either section. 27 FMSHRC at 806; Tr. III 384-90, 395; Gov't Ex. 83-C. Dye did not examine further because, with the power remaining off after the fan check, no work could occur inby the power centers on the next shift until power was restored. 27 FMSHRC at 806; Tr. III 384, 447-49, 486-88. When he went underground, Dye believed that no one would be working on the No. 4 Section during the shift. 27 FMSHRC at 806. Upon exiting the mine around 6:30 a.m., Dye completed his written preshift report, which indicated that no hazards were found in the areas examined, including the power center and scoop battery charger on the No. 4 Section. *Id.*; Gov't Ex. 36-C.

No production was scheduled for the Nos. 4 and 6 Sections on the oncoming day shift, but miners were to perform general maintenance work there. 27 FMSHRC at 806; Gov't Ex. 10 at 5; Tr. IV 127. Upon his arrival at the mine, maintenance foreman John Puckett checked Dye's preshift report and learned that Dye had not examined beyond the power center on the No. 4 Section. 27 FMSHRC at 806 & n.56; Tr. IV 126-27, 131-32, 195.

There were eight men working under Puckett during that day shift. Electricians Ray Milam and Don Coleman were to work on the No. 6 Section, while electricians Jeff Gerald and Ike Smith would work on the No. 4 Section, along with roof bolters David Terry and Johnny Sealy. Tr. IV 132-33. Also on the crew were scoop operator Larry Jessee and general laborer

. . . .

Q. . . . So was that the reason that you issued the 107(a)?

. . . .

A. Yes.

Tr. 854-55.

Tolliver's rationale for issuing the order on February 7 was similar:

Q. . . . Why did you issue the imminent danger order?

. . . .

A. . . . I was concerned of the miners on the 49 longwall section, the safety of the miners.

Q. Do you know how many miners were on the longwall?

A. At least seven.

. . . .

Q. Now, what was it about this high methane reading and the face, or in the longwall face, that you were concerned with?

A. An ignition or explosion due to the concentrations I was getting from the 85 crosscut.

. . . .

Q. . . . [W]hat was the problem with the methane being where it was in relation to the people at the face?

A. I was afraid the methane was coming off the gob, going to the active longwall face. . . . [T]here wasn't enough pressure on the back side.

Tr. 876-78.

Joe Phillips. Tr. IV 133. While Jessee and Phillips went to retrieve roof bolts they would deliver to the No. 4 Section, Puckett took the other six men on a man trip to the No. 4 Section. Tr. IV 134-35. Milam and Coleman waited on the bus while Puckett took the other four crew members to the power center, where he had them wait at a nearby dinner hole while he examined the face area of the No. 4 Section. Tr. IV 135-36.

Puckett considered the inspection to be both a supplemental preshift examination to Dye's examination, as well as an onshift examination. 27 FMSHRC at 807 n.57; Tr. IV 162-66, 202-06. When Puckett called to report the results of his inspection, those results were recorded only as an onshift examination. 27 FMSHRC at 807 n.57; Tr. IV 231; JWR Ex. 111.

Because power had not yet returned to the No. 4 Section, Puckett, upon completing his examination, directed the two electricians to make repairs on a continuous miner and told the two roof bolters to move supplies up from an outby supply hole. Tr. IV 206.[1] Puckett thereafter left the No. 4 Section for the No. 6 Section with the two other electricians, and conducted a similar examination there. Tr. IV 206-09. The maintenance work on the No. 6 Section occupied Puckett until he performed a preshift examination of the No. 6 Section for the oncoming shift and then returned to the No. 4 Section to examine it. Tr. IV 209-29. During his examination of the No. 4 Section, Puckett noticed that the roof problem was getting worse, so plans were made for greater roof control measures to be taken on the next shift before mining resumed. 27 FMSHRC at 761-62; Tr. IV 227-29; Gov't Ex. 10 at 5-6.

B. September 23 Afternoon Shift

At the start of the September 23 afternoon shift, around 3:00 p.m., 28 hourly miners and four supervisors went underground for a shift devoted to maintenance work. 27 FMSHRC at 762; Gov't Ex. 10 at 6. One production foreman for the shift was to supervise work in and around the longwall, while the other, Tony Key, was responsible for supervising the Nos. 4 and 6 Sections. 27 FMSHRC at 762; Gov't Ex. 10 at 6. Also underground were a belt foreman and outby foreman Dave Blevins. 27 FMSHRC at 762 & n.6; Gov't Ex. 10 at 6. The Communications Officer ("CO") at the mine, Harry House, supervised the communications room on the mine's surface for the 12-hour period that would begin around 5:00 p.m. Tr. V 337; Gov't Ex. 10 at 6.

When Key and members of his crew arrived shortly after 4:00 p.m. at the No. 4 Section, it was apparent that the roof problems Key had been alerted to earlier by Puckett's preshift exam were getting even worse. 27 FMSHRC at 762-63; Gov't Ex. 10 at 7. After some preparatory work, Key and two miners, Gaston "Junior" Adams and Michael McIe, began to build cribs in the No. 2 entry, starting about 50 feet outby the SS 13333 intersection where the roof was

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[1] Electrical power did not return to the section during the shift to allow work to be done at the face. As a result, the alternative assignments occupied the miners on the No. 4 Section for almost the entire shift. Tr. IV 206-07; Gov't Ex. 10 at 5.

deteriorating, while another crew member, motorman Jim "Skip" Palmer, delivered the supplies they needed. 27 FMSHRC at 763; Gov't Ex. 10 at 8-9. Before that work progressed very far, however, a large rock fell, and then the entire roof in that intersection collapsed. 27 FMSHRC at 763; Gov't Ex. 10 at 8. A scoop battery, which was hung from roof bolts and connected to the battery charger by cables that were not energized, was in the area where the roof collapsed. 27 FMSHRC at 763; Gov't Ex. 10 at 7-8.

With Adams and McIe nearby, Key started walking outby the fall. 27 FMSHRC at 763; Gov't Ex. 10 at 8. He intended to de-energize the section and to telephone a report of the fall to the communications room so that MSHA could be contacted, when the first explosion occurred at around 5:20 p.m. *Id.* This detonation blew Key, McIe, and Palmer, who was at the end of the track, further outby, while Adams was pinned under debris. 27 FMSHRC at 763-64; Gov't Ex. 10 at 8-9. Key's back was injured while McIe suffered from burns and back and rib injuries. 27 FMSHRC at 763; Gov't Ex. 10 at 8. Key, McIe, and Adams were separated by the explosion, and had a hard time seeing each other in the dusty atmosphere, especially given that Key and McIe had lost their hard hats and lamps. 27 FMSHRC at 764; Gov't Ex. 10 at 9. After McIe took Adams' hat and lamp, Key found McIe. *Id.* The two concluded that Adams could not be moved because of his injuries, and they began their journey out of the mine. *Id.* Many of the other miners underground felt effects from the explosion immediately or soon thereafter. 27 FMSHRC at 764; Gov't Ex. 10 at 9-10.

As a result of ventilation disruptions caused by the first explosion, another, much larger explosion occurred approximately 55 minutes later. 27 FMSHRC at 769 & n.14; Gov't Ex. 10 at 16. As set forth in great detail in the judge's decision, the 12 miners who, in addition to Adams, perished in the second explosion had come from other areas of the mine and entered or approached the No. 4 Section. Most if not all of the 12 miners were responding to assist in bringing Adams out after learning of his situation from Key and the other injured members of his crew, or from communications with CO House (after he had spoken with Key). In addition, some of the miners may have believed that miners other than Adams needed assistance, and some may have believed there was a fire that needed to be extinguished. *See* 27 FMSHRC at 764-70; *see also* Gov't Ex. 10 at 9-17.

C. Rescue and Recovery Operations and Subsequent Investigation

After it was determined that 13 miners were missing, extensive rescue efforts were undertaken by three mine rescue teams. 27 FMSHRC at 770-71; Gov't Ex. 10 at 17-20. Four miners were found in the 4 East Section, three of whom were dead and a fourth who died the next day. 27 FMSHRC at 771; Gov't Ex. 10 at 18-19. The rescue team's findings regarding the damage and conditions in the No. 4 Section led to the conclusion that no other miners could have survived. 27 FMSHRC at 771; Gov't Ex. 10 at 20. The mine was flooded in order to put out a fire, and in early November 2001 a team was able to locate and recover the bodies of Adams and eight other miners near SS 13333. 27 FMSHRC at 771-72; Gov't Ex. 10 at 20-21.

Following its investigation into the explosions at the No. 5 Mine, MSHA issued eight citations and orders in this proceeding. As noted, only three of these orders are presently before the Commission.

Order No. 7328082 charges JWR with violating section 75.1101-23(a) for failing to follow, after the first explosion, the evacuation procedures in its "Fire Fighting and Evacuation Plan," dated July 15, 1999 (Gov't Ex. 34 at 2-7, hereafter "FFEP"). The violation was alleged to be S&S and due to JWR's unwarrantable failure. Gov't Ex. 2.

Order No. 7328085 charges JWR with violating section 75.1101-23(c) by failing to conduct fire drills at 90-day intervals for all miners. The violation was alleged to be S&S and due to JWR's unwarrantable failure. Gov't Exs. 4, 4A.

Order No. 7328105 charges a violation of section 75.360(b)(3) because JWR improperly limited the September 23 preshift examination of the No. 4 Section, prior to the oncoming day shift, to areas from the beginning of the section up to and including the power center, and excluded the areas inby the power center, *e.g.*, the working section, where work was scheduled. The violation was alleged to be S&S and caused by JWR's unwarrantable failure. Gov't Ex. 7 at 1.[2]

D. Judge's Decision[3]

With regard to Order No. 7328105, the judge found that JWR had scheduled miners to perform maintenance work on the No. 4 Section prior to Dye's preshift examination on September 23. 27 FMSHRC at 808. Based on that finding, the judge concluded that Dye's failure to inspect all areas in the No. 4 Section, including "working places," violated section 75.360(b)(3). *Id.* He further concluded that the violation was S&S, based in part on finding that Puckett and his crew had entered an area in the No. 4 Section that had not been inspected. *Id.* at 809-10. He also concluded that the violation was due to JWR's unwarrantable failure because Puckett took his crew into an area that had not been examined, indicating a serious lack of reasonable care. *Id.* at 811.

In addressing Order No. 7328082, the judge reviewed his prior decision on JWR's motion for summary decision (27 FMSHRC at 623-28), and again concluded that JWR could be cited

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[2] Initially, the order also alleged that during the preshift examination, Dye failed to identify that the section of the mine he inspected was inadequately rock dusted. Gov't Ex. 7 at 2. The judge dismissed that portion of the order, and it has not been appealed.

[3] We describe herein only those portions of the judge's decision that are before us on appeal. We do not attempt to summarize the judge's analysis of his dismissal of the alleged violations relating to inadequate roof support and rock dusting because that analysis has no bearing on the issues presently before the Commission.

under section 75.1101-23(a) because the standard applied to explosion-related emergencies. 27 FMSHRC at 814-15. However, because the standard was not restricted to fires, the judge then examined the applicable plan to determine whether it implicitly or explicitly included provisions relating to explosions. *Id.* at 815. On the record before him, the judge concluded that JWR's FFEP applied only to "fires" and, therefore, JWR was not in violation for having failed to follow the evacuation procedure in the FFEP after the first mine explosion. *Id.* at 815-17.

With regard to Order No 7328085, the judge concluded that the language of the governing regulation, section 75.1101-23(c), is clear in requiring that all miners must participate in fire drills at least every 90 days. *Id.* at 819. The judge held that the regulation is also clear in requiring a "simulation" of actions required in an operator's firefighting and evacuation plan. *Id.* The judge further concluded that the record indicated that JWR violated the standard by failing to ensure that all miners had participated in simulated fire drills at least every 90 days. *Id.* at 820-24. The judge determined that the violation was not S&S because JWR regularly instructed its miners in firefighting practices and techniques. *Id.* at 824-25. Finally, the judge rejected the unwarrantability designation because JWR "honestly believed" that it was in compliance with the standard based on the Secretary's previous failure to cite it and its reliance on the Secretary's Program Policy Manual ("PPM"). *Id.* at 826.

II.

Disposition

A. Section 75.1101-23(a)

Order No. 7328082 charged JWR with violating section 75.1101-23(a) after the first explosion by failing to follow the evacuation procedures set forth in the FFEP adopted pursuant to that standard. Gov't Ex. 2. In ruling upon JWR's pre-trial motion for summary decision, the judge held that, as a matter of law, an operator could be cited under section 75.1101-23(a) for failing to comply with its approved fire fighting and evacuation plan in the case of an explosion. 26 FMSHRC at 627-28. In other words, he concluded that the regulation could be interpreted to authorize MSHA to require that operators' plans address explosion-related emergencies as well as fire-related emergencies. *Id.* However, he further ruled that material facts were in dispute and that the Secretary had the burden of showing at trial that JWR had actually contravened the requirements of the FFEP. *Id.* at 628. He did not decide whether the FFEP actually covered explosion-related emergencies. The judge subsequently denied JWR's motion for reconsideration or certification of his ruling to the Commission for interlocutory review. 26 FMSHRC 734 (Aug. 2004) (ALJ). The Commission denied JWR's petition for interlocutory review. 26 FMSHRC 754 (Sept. 2004).

Following the hearing, the judge again denied JWR's request to reconsider his decision, reaffirming his earlier ruling. 27 FMSHRC at 814-15. The judge went on to hold, however, that according to the FFEP's explicit and implicit terms, the only event that would trigger the

evacuation requirements of the plan was a fire that could not "be extinguished or brought under positive control." *Id.* at 815-17 (quoting FFEP, sect. V.a.8). Because the FFEP contained no reference to evacuation in the event of explosion, the judge vacated the order. *Id.* at 816-17, 827.

1. Interpretation of Section 75.1101-23(a)

Before addressing the applicability of the FFEP to evacuations following explosions, we first decide whether the regulation governing the FFEP in this case, section 75.1101-23(a), applies to explosions and, therefore, whether JWR could be cited under the regulation. Based on the language of the regulation and the principles governing mine plans, we conclude that section 75.1101-23(a) did provide general authority for MSHA to require that emergency plans cover explosion-related emergencies. In section A.2, infra, we address the separate question of whether the FFEP did, in fact, cover explosion-related emergencies.

At the time of the explosions, section 75.1101-23(a) provided:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to [MSHA].
>
> (1) The approved program of instruction shall include a specific fire fighting and evacuation plan designed to acquaint miners on all shifts with procedures for:
>
> (i) Evacuation of all miners not required for fire fighting activities;
>
> (ii) Rapid assembly and transportation of necessary men, fire suppression equipment, and rescue apparatus to the scene of the fire; and,
>
> (iii) Operation of the fire suppression equipment available in the mine.
>
> (2) The approved program of instruction shall be given to all miners annually, and to newly employed miners within six months after the date of employment.

30 C.F.R. § 75.1101-23 (2001).[4]

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[4] Initially by emergency temporary standard ("ETS") (*see* 67 Fed. Reg. 76,658 (Dec. 12, 2002)), and later in a final rule (*see* 68 Fed Reg. 53,037 (Sept. 9, 2003)), due in part to the two explosions in this case (68 Fed. Reg. at 53,038), MSHA moved section 75.1101-23 to the renamed "Subpart P–Mine Emergencies." In Subpart P, new 30 C.F.R. § 75.1501 requires operators to designate, for each shift that miners are underground, a responsible person who will

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 a meaning would lead to absurd results. *See 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)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

JWR contends that section 75.1101-23(a) was directed only at fire-related emergencies, and thus should not be read to extend to explosion-related emergencies. JWR Resp. Br. at 2-9. Here, the judge read the standard's requirement that an operator's fire fighting and evacuation program include instruction in the "proper evacuation procedures to be followed in the event of an *emergency*" to authorize MSHA to require that the program cover not only fire-related emergencies, but responses to other emergency situations as well, such as explosions. 30 C.F.R. § 75.1101-23(a) (2001) (emphasis added); 26 FMSHRC at 626-28; 27 FMSHRC at 814-15.

The language of section 75.1101-23(a) provides MSHA sufficient latitude to require that emergency plans approved under that section address explosion-related emergencies. If MSHA had intended the standard to apply only to fires, MSHA could have easily used the term "a fire" instead of "an emergency." It did not. Given MSHA's use of the broad term "emergency" in section 75.1101-23(a), we reject the argument that the order here should have been vacated on the ground that section 75.1101-23(a) could not apply to explosion-related emergencies.[5] We, therefore, conclude that the regulation, by its terms, applies to all types of emergencies, including those caused by explosions.

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take charge during mine emergencies involving a fire or explosion or gas or water inundation, and obligates that person to initiate and conduct an immediate mine evacuation when such emergencies present an imminent danger to miners. New 30 C.F.R. § 75.1502 amends former section 75.1101-23 by, among other things, adding a requirement that operators adopt and follow a mine emergency and firefighting program.

[5] JWR would also have the Commission read "emergency" in section 75.1101-23(a) to refer to only a fire emergency because the regulation appeared in Subpart L, entitled "Fire Protection," whereas MSHA regulations elsewhere addressed emergency situations in general. JWR Resp. Br. at 3-6. We do not read Subpart L as narrowly as JWR does and further note that the emergency-related regulations JWR cites are located throughout Part 75 and were not confined to any one subpart. Indeed, the Secretary had previously published a description of the regulation as being one that required an operator to "adopt a program for mine evacuation in the event of an emergency, such as fire or *explosion*." 60 Fed. Reg. 23,567 (May 8, 1995) (MSHA Semi-Annual Unified Agenda) (emphasis added).

JWR also contends that Order No. 7328082 was invalid because section 75.1101-23(a) only required that an operator obtain MSHA's approval for a training program covering elements listed in the regulation, which it had done. JWR Resp. Br. at 12-16. According to JWR, section 75.1101-23(a)(2) specifies only when and how often the program of instruction must be given to miners; nothing more was required of JWR, including that it adhere to the program in emergencies. *Id.* at 13, 16. It points out that, in contrast, other MSHA regulations imposing a plan obligation require operators to follow the plan. *Id.* at 17-20 (citing 30 C.F.R. §§ 75.370 (ventilation control), 75.220(a)(1) (roof control), and 71.301(c) (respirable dust control)).

We conclude that JWR's interpretation of section 75.1101-23(a) would contravene the clear Congressional intent that plan provisions be enforced as mandatory standards.[6] JWR's suggestion that all the standard required of it in this instance was to adopt a training plan and provide training with respect to emergency responses, with no obligation whatsoever to follow the plan during a fire or other emergency, is an overly literal construction that is inconsistent with the regulation's purpose. Moreover, the absence of explicit language in section 75.1101-23(a) requiring an operator to follow the plan's provisions does not excuse an operator's failure to do so. In *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976), a decision cited with approval in the legislative history of the Mine Act, the court held that approved ventilation plans under the Mine Act's precursor, the Federal Coal Mine Health and Safety Act of 1969, are enforceable even though its enforcement provisions were, as a literal matter, triggered only by violations of mandatory standards.

In summary, we conclude that section 75.1101-23(a) provided general authority for MSHA to require that emergency plans approved under that regulation contain provisions

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[6] The legislative history of the Mine Act states:

> [I]n addition to mandatory standards applicable to all operators, *operators are also subject to the requirement set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards*. . . . The Committee notes with approval that individual mine plan adoption and implementation procedures have been sustained by the federal Court of Appeals for the District of Columbia circuit (*Ziegler Coal Company v. [Kleppe]*, 536 F.2d 398 (1976)). Thus, the Committee fully expects the individual mine plan technique to continue to be utilized by the Secretary in appropriate circumstances.

S. Rep. No. 95-181 at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978) ("*Legis. Hist.*") (emphasis added).

addressing evacuations in case of explosions. Below we address the issue of whether the FFEP approved by MSHA did, in fact, impose evacuation procedures in the case of explosions.

2. Interpretation of the FFEP[7]

The parties agree that the FFEP does not contain a provision that expressly addresses JWR's obligation to evacuate the mine in the event of an explosion. According to the Secretary, she intended under section 75.1101-23(a) that documents such as the FFEP would govern evacuations not just during fires but during any emergency. S. Br. at 10-11. The Secretary argues that JWR, having drafted the plan's provisions and having obtained MSHA's approval pursuant to the terms of the standard, cannot claim that the evacuation provisions do not apply to emergency situations other than fires. *Id.* at 11-12. In essence, the Secretary is requesting the Commission to supply a provision that could have been included in the FFEP but was not.

Commission precedent does not support the Secretary's approach. In *Jim Walter Resources, Inc.*, 9 FMSHRC 903 (May 1987), the Commission addressed the process by which mine plans are adopted by operators and their provisions enforced by the Secretary, including cases in which the plan is ambiguous on an issue. The Commission held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan* and that the cited condition or practice violates the provision." *Id.* at 907 (emphasis added). The Commission further held that, while "'it should not be presumed lightly that terms [in an approved] plan do not have an agreed upon meaning,'" in the event a plan provision is found to be ambiguous, the Secretary must "dispel the ambiguity" by establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent enforcement. *Id.* (quoting *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981)).[8]

The Secretary made no attempt below to meet her burden under *JWR* by establishing, through testimony of those involved in drafting and approving the FFEP, the intent of the

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[7] Commissioner Jordan dissents from her colleagues' decision in this part (Sec. II.A.2). *See* slip op. at 32-37.

[8] As an alternative to applying the *JWR* standard of review to the FFEP, the Secretary urges the Commission to defer to any reasonable interpretation she offers of an ambiguous plan or provision of a plan, citing as authority the Commission's decision in *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995). S. Br. 14-15. Subsequent case law demonstrates that *Energy West* did not alter the *JWR* standard of review with respect to ambiguous plan provisions. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998) ("[w]hen a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement.").

Secretary or JWR with respect to JWR's evacuation obligations under the plan after an explosion. Neither did the Secretary rely upon the manner in which the plan was implemented or enforced as a mandatory standard.

We agree with the judge that neither JWR nor the Secretary appeared to have considered how the FFEP applied in the event of an explosion. *See* 27 FMSHRC at 816 n.63. Moreover, as the judge discussed, the scant enforcement history on the issue tends to contradict the Secretary's position. *See id.* (citing 1993 explosion resulting in injuries and damaged ventilation controls in which actions similar to those taken by miners in this case were not cited despite a plan similar to the FFEP being in effect). Finally, we agree with JWR that the broadening of the successor plan to the FFEP so that explosions would be covered by evacuation orders indicates that the Secretary, as well as JWR, recognized that the FFEP simply did not apply to the situation that followed the first explosion. JWR Resp. Br. at 30; JWR Ex. 266 (successor plan to FFEP adopted before promulgation of ETS, discussed supra n.4).

Instead of presenting evidence of MSHA's and JWR's understanding of JWR's obligations to evacuate under the FFEP in the case of an explosion, the Secretary relies upon other provisions in the FFEP to establish that the plan was violated. In particular, the Secretary contends that the judge erred by failing to consider the FFEP provision that stated that "[a] supervisor or designated person will assemble all men promptly and lead the way during the evacuation" (hereinafter referred to as the "assemble and lead" provision). S. Br. at 13-21 (citing FFEP at 3).[9] According to the Secretary, that provision applied generally to any evacuation the operator undertook, not just to evacuations in response to a fire. *Id.* at 14-15, 17-18. The Secretary argues that the "assemble and lead" provision is written without "limiting language" and therefore cannot be limited to evacuations undertaken in response to a fire. *Id.* at 18.

We do not agree with the Secretary that the "assemble and lead" provision establishes the parties' intent with respect to post-explosion evacuations. The language of the provision does not address what events trigger its operation. FFEP at 3. The judge properly ruled that the first question that must be answered is whether the FFEP required an *evacuation* in the event of an explosion. 27 FMSHRC at 816-17. The only triggering events for an evacuation that were directly addressed in the document are carbon monoxide monitor alarms and fires which cannot be brought under control. FFEP at 2, 5. In short, the "assemble and lead" provision established *how* evacuations were to be carried out in the event of an emergency, but other provisions of the FFEP must be read to determine *when* an evacuation was required.

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[9] We agree with the judge that the FFEP was poorly drafted and is confusing. *See* 27 FMSHRC at 821 & n.70. For example, it was divided into five sections, but some of the section numbers were repeated, and the titles given to the sections do not necessarily accurately describe their substance. The "assemble and lead" provision is contained in the second Section II in the document (FFEP at 2-3), and inexplicably uses the term "the evacuation" despite there being no previous reference to the need to evacuate.

In *United Mine Workers of America v. Dole*, 870 F.2d 662 (D.C. Cir. 1989), the court held that MSHA always retains final responsibility for deciding what must be included in a plan and quoted from legislative history indicating that final mine plans result from the Secretary's "exercise [of] judgment with respect to the content of such plans." *Id.* at 669 n.10 (quoting S. Rep. No. 95-191 at 25, *Legis. His.* at 613). It follows that the Secretary ultimately bears responsibility for a mine plan's silence on a subject. We thus do not agree with the Secretary that, because under section 75.1101-23(a) she *could* have withheld approval of the FFEP for its failure to set forth evacuation procedures to be followed in all emergencies, the evacuation provisions that were included in the approved FFEP must be interpreted to include all emergencies.

We conclude that, except for carbon monoxide alarms or fires that could not be controlled, the FFEP was silent with respect to the circumstances that would trigger the evacuation of the mine. Consequently, absent evidence establishing the intent of JWR and the Secretary that the FFEP would apply to explosion-related evacuations, we cannot conclude that the FFEP was violated in this instance by JWR.[10] The judge correctly concluded that, while "a provision requiring miners to evacuate in the event of an explosion . . . may have been highly desirable . . . [and] necessary to fully effectuate miner safety[,] . . . the Secretary cannot at this late date supply through an administrative law judge's decision something she wishes she had insisted on more than 6 years ago." 27 FMSHRC at 817.

Accordingly, we affirm the judge's dismissal of Order No. 7328082.

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[10] The Secretary attempts to raise one final argument, contending that an evacuation was, in fact, occurring after the first explosion, but that JWR failed to adhere to the assemble and lead provision in carrying out the evacuation, and thus violated the FFEP. S. Br. at 21-33. The claim that an evacuation was occurring, which is based solely on the testimony of two JWR employees regarding what they believed occurred underground (S. Br. at 21-22 (citing Tr. V 382-83, XII 223-24, 265)), contradicts the underlying order and is inconsistent with the Secretary's theory of the case below. *See, e.g.,* Order No. 7328082 (alleging violation when "[m]iners were *not evacuated* from the mine after an explosion damaged critical ventilation controls.") Gov't Ex. 2 (emphasis added). To the extent the Secretary's argument could be viewed as an alternative theory of the violation, it is one that the judge never had an opportunity to address. The issue has therefore not been adequately preserved for review under the Mine Act, and we decline to consider it. *See* 30 U.S.C. §113(d)(2)(A)(iii) ("[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); *see also* Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

B. Section 75.1101-23(c)

Order No. 7328085 charges JWR with violating section 75.1101-23(c) by failing to conduct fire drills at 90-day intervals before the events of September 23, 2001. Gov't Exs. 4, 4A. At the time of the explosions, section 75.1101-23(c) required in pertinent part:

> Each operator of an underground coal mine shall require all miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in such a drill . . . at intervals of not more than 90 days . . . .
>
> (1) The operator shall certify by signature and date that the fire drills were held in accordance with the requirements of this section. Certifications shall be kept at the mine and made available on request to an authorized representative of the Secretary.
>
> (2) For purposes of this paragraph (c), a fire drill shall consist of a simulation of the actions required by the approved fire fighting and evacuation plan described in paragraph (a)(1) of this section.

30 C.F.R. § 75.1101-23(c) (2001).

The judge held that the training conducted by JWR did not satisfy its obligation under section 75.1101-23(c) to conduct for "all" miners "a simulation of the actions required by the" FFEP. 27 FMSHRC at 819-24. The judge concluded that a violation was established by the testimony of eight JWR miners that they had not participated in an on-site simulation of the actions required in the FFEP, and that the records that JWR had provided MSHA to meet the certification requirements of the standard were insufficient to demonstrate otherwise. *Id.* at 822-24.[11] Citing *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997), the judge further found that the plain meaning of section 75.1101-23(c) provided JWR with adequate notice of the standard's requirements in this instance. *Id.* at 819 n.68.

The judge affirmed the order but not the allegations that the violation was S&S and attributable to JWR's unwarrantable failure, and reduced the Secretary's proposed penalty from $55,000 to $500. *Id.* at 819-26. We address below whether a violation was established, whether

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[11] At trial, copies of fire and emergency response training records for many JWR miners were submitted, and miners and JWR officials testified that such training included periodic escapeway walks, hands-on training and demonstration of fire fighting equipment, safety meetings, group discussions, role playing and putting out mock fires, using a self-contained self-rescuer ("SCSR"), instruction on the danger of methane, and first aid training. *See* 27 FMSHRC at 823, 825 & n.73. The Secretary, however, noted an absence of documentation establishing participation by many miners. Gov't Ex. 4, 4A.

JWR had adequate notice of what was required by the standard, and whether the judge properly determined that the violation was not S&S and was of moderate gravity.[12]

1. Violation

JWR argues that the judge erred in interpreting section 75.1101-23(c) to require that operators must certify that simulations were conducted for "all" miners. JWR Br. at 20, 26-30. JWR also contends that such an interpretation is contrary to the Commission's decision in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983). *Id.* at 27-28. The Secretary maintains that the judge correctly interpreted the standard according to its plain meaning to require that all miners participate in fire drills. S. Resp. Br. at 35-39.

Below, the judge held that "'all miners' means exactly what it says" in section 75.1101-23(c) and that the standard was not satisfied when only some miners participated in the required fire drills. 27 FMSHRC at 820-21. We agree with that plain meaning interpretation of the regulation.[13]

JWR does not dispute the evidentiary basis for the judge's finding "that there was a general lack of on-site simulations at the mine," and his finding is supported by substantial evidence.[14] *See* 27 FMSHRC at 822-23. The judge carefully read the FFEP to find the specific

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[12] The Secretary did not appeal the judge's unwarrantable failure determination.

[13] Contrary to JWR's position, the Commission's decision in *Southwestern* does not foreclose interpreting section 75.1101-23(c) to find that JWR violated the standard here because not "all" miners were found to have participated in the required fire drills. In *Southwestern*, the Commission held that the requirement of 30 C.F.R. § 77.1710(g) that each miner wear a safety belt and line did not make an operator a guarantor that miners would do so, but instead only obliged operators to require miners to wear such equipment. 5 FMSHRC at 1675. However, the Commission pointedly stated that its holding was limited to the language of section 77.1710(g). *Id.* The obligation imposed upon JWR to require that "all" miners participate in fire drills is distinguishable from the operator's obligation at issue in *Southwestern* because, among other things, JWR was in complete control of the scheduling and documentation of those exercises.

[14] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, in reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

duties that miners and supervisors were required to perform under that plan and thus needed to be simulated during the fire drills required by section 75.1101-23(c). *See* 27 FMSHRC at 821-22. The judge then credited the testimony of eight miners, none of whom could recall having participated in a "hands on" fire drill or fire fighting simulation in the months, or even, in the case of some of the miners, years preceding the explosions. *Id.* at 822. 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 basis to overturn the judge's credibility findings in this instance.

Moreover, based on those miners' similar accounts, the judge inferred that there had been a general lack of on-site simulations at the mine. 27 FMSHRC at 823. "[T]he substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.* Based on the foregoing evidence, the judge reasonably inferred that JWR generally failed to conduct the required simulations. Consequently, we conclude that substantial evidence supports the judge's determination that not all miners had participated in the simulated actions required by section 75.1101-23(c). Thus, a violation of that standard was established.

2. Notice

Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

JWR contends that it lacked fair notice here because the series of exercises in which it required its miners to participate under the FFEP were, in effect, approved in MSHA's Program Policy Manual ("PPM") in effect at the time,[15] and through the agency's enforcement policy, as sufficient to satisfy the quarterly drill requirement of section 75.1101-23(c). Accordingly, JWR argues that the judge erred when he concluded that JWR could be penalized for failing to recognize that only simulations satisfied the standard. JWR Br. at 22-25, 31-35.

As the judge found and we agree, section 75.1101-23(c) clearly required operators to conduct quarterly fire drills in which "all" miners are to participate. In addition, by its plain

[15] JWR Ex. 146 (excerpt of V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 105-06 (1994)).

terms the regulation stated that such fire drills were to be simulations of the actions required by the applicable fire fighting and evacuation plan, which here was the FFEP. 30 C.F.R. § 75.1101-23(c)(2) (2001). "The Commission has held that, where 'the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.'" *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)).

Moreover, the PPM is consistent with section 75.1101-23(c). Although the PPM states that "various types of training will constitute a fire drill," that language applied only to those drills conducted pursuant to the fire fighting and response program of instruction under section 75.1101-23(a), which applied to training of new miners and annually training of experienced miners. The PPM language was not directed at the requirement of subsection (c) that a fire drill be conducted quarterly, an additional requirement of that subsection. The only language of the PPM that was directed at subsection (c) does not establish that MSHA considered JWR's piecemeal method of fire response instruction to constitute a fire drill under section 75.1101-23(c).[16] We therefore affirm the judge's determinations that JWR violated section 75.1101-23(c) and had adequate notice of its requirements.

3. S&S and Gravity of the Violation

In deciding whether the violation of section 75.1101-23(c) was S&S, the judge noted the record evidence showing JWR's No. 5 mine to be one of the gassiest in the country and one which had experienced occasional fires. 27 FMSHRC at 824. The judge concluded, however, that because JWR regularly instructed its miners in fire fighting practices and techniques, it was not reasonably likely that the failure to conduct fire drills that met the requirements of section 75.1101-23(c) would result in an injury. *Id.* at 825. Accordingly, he found that the violation was not S&S. *Id.* The judge further held that, while none of the fatalities in this case was due to JWR's failure to comply with former section 75.1101-23(c), it is conceivable that the failure to conduct on-site, hands-on fire drills for all miners could have serious consequences in the event of a fire. *Id.* Therefore, he found that the violation of the standard was moderately serious for penalty assessment purposes. *Id.*

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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[16] Significantly, the title for this part of the PPM was limited to include only "75.1101-23(a) and (b)." The title thus generally indicates that the guidance to be provided by the PPM was restricted to those first two subsections of section 75.1101-23, and was not directed at the third and final subsection, (c), which JWR is alleged to have violated here.

> 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The Secretary asserts that the judge erred in his determination that the third *Mathies* element was not established because he did not consider the testimony of MSHA official Kenneth Murray regarding the critical importance of on-site simulations. S. Br. at 40, 43 (citing Tr. IX 81-82).[17] We do not agree.

The judge's decision reflects that he fully considered the importance of JWR miners being trained in various fire response measures. At the outset of his S&S analysis, the judge recognized that

> [i]f JWR had failed to train its miners to fight a fire, the likelihood of the miners exhibiting ineptitude in fire suppression techniques when confronted with a fire, the likelihood of their confusion in how to respond to a fire, and even the likelihood of panic in the event of a fire would be increased.

27 FMSHRC at 824-25. Consequently, the judge concluded that, although JWR did not provide all miners on-site simulated fire drills, JWR regularly instructed its miners in firefighting practices and techniques. *Id.* at 825 & n.73. Moreover, the judge credited the testimony of six of the supervisors who signed JWR's fire drill records stating that the drills the company considered compliant with section 75.1101-23(c) were conducted each quarter. *Id.* In light of the foregoing, the judge concluded that it was not reasonably likely that the lack of training specified in the

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[17] The Secretary does not explain why, if compliance with section 75.1101-23(c) were so critically important, MSHA's inspectors previously failed to check JWR's records to ensure simulations were conducted quarterly for all miners. JWR Ex. 203 at 59.

standard would result in an injury and therefore the violation was not S&S[18] Substantial evidence supports the judge.

We also find unavailing the Secretary's argument that JWR's failure to conduct simulations resulted in its miners not understanding the limitation of an SCSR. S. Br. at 40-41, 43-44. In particular, the Secretary contends that if two of the deceased miners, Wendell Johnson and Joseph Sorah, had participated in simulations, they would have been more likely to follow the lead of miner Robert Tarvin, and thus would not have volunteered in response to supervisor Blevins' request for three men who did not mind using an SCSR to accompany him into the No. 4 Section. *Id.* According to the Secretary, Johnson and Sorah would have recognized, as Tarvin did, that an SCSR is not designed to contain enough oxygen for the task at hand. *Id.* This account of events does not demonstrate that the judge's S&S determination should be overturned. There is no evidence that Tarvin knew the limitations of an SCSR better than Johnson or Sorah (or Blevins for that matter), or that the two miners were unaware of the limitations of the SCSR. Nor has it been shown that these limitations would have been taught as part of a hands-on firefighting simulation, given that SCSR training was separately being given to its miners by JWR.

Accordingly, we conclude that the judge's determination that the violation of section 75.1101-23(c) was not S&S and associated finding of moderate gravity are supported by substantial evidence and affirm both.

C. Section 75.360(b)(3)

Order No. 7328105 charges a violation of section 75.360(b)(3) and alleges that, during the September 23 day shift, miners were scheduled to work at a location within the No. 4 Section that was admittedly not included in the examination conducted prior to the shift. Gov't Ex. 7 at 1.[19] The pre-shift examination standard provides in pertinent part:

> (a)(1) . . . a certified person designated by the operator must make a preshift examination within 3 hours preceding the

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[18] Citing the decision in *Buck Creek*, 52 F.3d at 133, the Secretary argues that it was improper for the judge to consider in his S&S analysis that miners had received firefighting training under other standards. *See* S. Br. at 42. However, nothing in the court's decision precludes the judge from considering that JWR miners had much of the same training that they would have received if JWR had conducted quarterly fire drills. *See Buck Creek*, 52 F.3d at 136 (fact that operator had in place firefighting measures required by MSHA regulation simply indicates "the significant dangers associated with coal mine fires").

[19] Initially the order also alleged that during the pre-shift examination Albert Dye failed to identify that the section was inadequately rock dusted. The judge dismissed that portion of the order, and the Secretary did not appeal that ruling.

> beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.
>
> * * * *
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:
>
> * * * *
>
> (3) *Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift.* The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

30 C.F.R. § 75.360(a)(1) & (b)(3) (2001) (emphasis added).

The Commission has recognized that the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) ("The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.").

1. Violation

The judge found that, because maintenance foreman John Puckett's crew was "scheduled" to work on the No. 4 Section since the previous Thursday, Dye, the pre-shift examiner, should have conducted a preshift examination on the entire No. 4 Section. 27 FMSHRC at 808. The judge concluded that Dye's failure to do so constituted a violation of section 75.360(b)(3). *Id.*

JWR contends that there is not substantial evidence to support either the judge's finding that work had been scheduled on the No. 4 Section since the previous Thursday or that the location of the work for Puckett's crew had been assigned. JWR Br. at 8-10; JWR Reply Br. at 2-5. JWR further submits that the schedule for maintenance and roof bolting on the No. 4 Section was not operative when Dye conducted his preshift examination. JWR Br. at 10-11.

Section 75.360(b)(3) states that the preshift examination is to include "working sections," which are defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. Puckett's crew included roof bolters Terry and Sealy, and Puckett testified that their original assignment "was to bolt the faces up," as the faces had been "left unbolted until the weekend." Tr. IV 132-34. Puckett further explained that two other miners on his crew, scoop operator Jessee and laborer Phillips, would have serviced the faces once the faces had been bolted. Tr. IV 133-35. In short, there is substantial record evidence that prior to the power outage, maintenance work was scheduled inby the power center for the No. 4 Section, including the face, and thus within the working section.[20]

JWR does not dispute this evidence, but argues that the continuing power outage caused the work schedule for the mine, including the No. 4 Section, to change. JWR Br. at 11. JWR thus defends the incompleteness of Dye's preshift examination on the narrow ground that, during that 3-hour window Dye had to conduct his examination, Dye believed that no work at the face on the No. 4 Section would take place during the day shift because of the power outage. However, the only support for JWR's position is Dye's hearsay testimony that Hagood told him not to do a full preshift and Dye's "understanding" that he was told this because no one on the incoming shift was going to be "up there." Tr. III 382-84, 390-95, 447-49.[21] This testimony is insufficient to establish that miners were not scheduled to work on the No. 4 Section during the shift.

Moreover, as JWR recognizes in its brief, by the time the day shift began, Puckett learned that his crew would be assigned to bolt the unbolted faces. JWR Br. at 8. Puckett testified that he had miners Jessee and Phillips deliver roof bolts to Section 4. Tr. IV 134. The evidence further shows that miners were scheduled to work on the No. 4 Section, that JWR planned to resume roof bolting at the face once the power returned during the day shift, and that it took a number of steps in advance to be able to immediately do so. Puckett testified that power could return at anytime during the shift and that it was his "hope that power would be restored fairly early in the shift." Tr. IV 199, 152-53. The record also indicates that, at the outset of the shift, Puckett took part of his crew into Section 4 as far as Dye had preshifted, up to the power center,

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[20] We thus need not address whether the judge was correct in concluding that the work had been scheduled as early as the previous Thursday.

[21] Puckett also testified that when a preshift examiner did not know where miners would be assigned to work, the examiner would frequently limit the preshift to "the power center areas, any place that power is going to be restored." 27 FMSHRC at 807 (quoting Tr. IV 131).

and he then proceeded alone inby to complete the examination started by Dye, including at the face. 27 FMSHRC at 807; Tr. IV 199-206.

Given the weight of the evidence, we cannot agree that evidence shows that JWR changed the existing work schedule, including the expectation that work would occur at the face sometime during the shift.[22] Thus, we find that substantial evidence supports the judge's finding of a violation.

We reject JWR's argument that Puckett's examination of the area inby the power center qualified as a supplemental preshift examination made under section 75.361(a).[23] JWR Br. at 8, 11-12. Supplemental examinations are limited to those circumstances in which miners already underground are dispatched during the shift to an idle or abandoned area of the mine, which had not been subject to preshift examination because no miners were originally scheduled to work there. The violation of section 75.360(b)(3) occurred when Dye failed to conduct a complete preshift examination of a section where work was scheduled prior to miners entering the mine on the oncoming shift. Puckett could not undo the violation once the shift had begun.

The 1992 preamble to section 75.361 stated that "MSHA anticipates that under this rule, supplemental examinations will be conducted during working shifts just before persons are sent to perform *unscheduled tasks in remote areas* that have not been preshifted." 57 Fed. Reg. 20,868, 20,895 (May 15, 1992) (emphasis added). Because the record here shows that work was scheduled inby the power center in the No. 4 Section when Dye performed his preshift examination, section 75.361 is inapplicable. *Accord Buck Creek*, 17 FMSHRC at 12 (emphasis

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[22] JWR faults the Secretary for not calling Hagood to testify. JWR Reply Br. at 3-4. However, because all of the other evidence tends to show work was "scheduled" in the working section of the No. 4 Section, it was incumbent upon JWR to better explain, through Hagood, why, at the time Dye conducted the incomplete preshift, Hagood believed such work would *not* take place during the oncoming shift. The record establishes that the Secretary met her burden of proof with respect to the scheduling issue, and JWR failed to present sufficient evidence rebutting the Secretary's case.

[23] Section 75.361(a) states that:

> (a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters *an area in which a preshift examination has not been made for that shift*, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

30 C.F.R. § 75.361(a) (emphasis added).

added) (section 75.361 only provides "for a supplemental examination of *idle and abandoned areas* whenever miners who are underground are dispatched to an area of the mine that was not *required* to be examined as part of the preshift examination.").[24] Thus, we affirm the judge's finding that JWR violated section 75.360(b)(3).

2. S&S and Gravity of the Violation[25]

The judge found the violation of section 75.360(b)(3) to be S&S. He based this determination on his findings that: (1) had normal mining operations continued, power would have been restored and miners would have been sent forward to the face to roof bolt or to other areas of the section to perform maintenance work; and (2) miners already had advanced well into the section before the Puckett examination began. 27 FMSHRC at 809-10. Taking into account the gassy nature of the mine, the presence of electric and diesel power equipment, and the fact that JWR was working to restore power, the judge determined that the hazard was reasonably likely to result in an injury-causing event, and that the type of injuries suffered would be reasonably serious if not fatal. *Id.* at 810. The judge also concluded that the same evidence established that the level of gravity of the violation would be serious for purposes of assessing a penalty. *Id.* at 810-11.

JWR contends that the judge erred in basing his S&S determination on the assumption that normal mining operations would have resumed without a complete preshift examination, and that he misunderstood exactly where on the No. 4 Section Puckett's crew traveled and waited while Puckett completed his examination. JWR Br. at 15-20. The Secretary points to evidence regarding the nature of the mine and the violation that she believes supports the conclusion that the violation was S&S. S. Resp. Br. at 27-31. The Secretary also requests that the Commission use the opportunity this case presents to adopt a presumption that a violation of the preshift examination standard is S&S and to shift the burden of production to operators on the issue in such cases. *Id.* at 25-27.

We find that substantial evidence supports the judge's determination that JWR's violation of the preshift standard was S&S.[26] In so doing, we once again apply the *Mathies* test, slip op. at

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[24] Contrary to JWR's assertion (JWR Reply Br. at 7-8), our holding in *Buck Creek* has not been voided by the subsequent amendment to certain subsections of section 75.360(b), as only sections 75.360(b)(1) and 75.360(b)(10), and not section 75.360(b)(3), were amended. 61 Fed. Reg. at 9793, 9796.

[25] Commissioner Suboleski dissents from his colleagues' decision in this part. *See* slip op. at 38-45.

[26] In general, we agree with JWR that the judge misunderstood exactly where on the No. 4 Section the four members of Puckett's crew traveled to and waited during Puckett's examination of the area inby the power center. While the judge was correct in describing the

17-18. To determine whether the second *Mathies* criterion was met[27] — a discrete safety hazard contributed to by the violation — it is important to understand the duration of the violation. As concluded above, the violation began when Dye failed to complete the preshift examination he was charged with conducting by excluding the working section of the No. 4 Section from the scope of his examination. Furthermore, according to the terms of the preshift standard, section 75.360, "[n]o person other than certified examiners may *enter or remain in any underground area* unless a preshift examination has been *completed*" for the upcoming shift. 30 C.F.R. § 360(a)(1) (emphasis added).[28]

JWR's contention that any hazard to miners was ameliorated by the fact that miners waited outside the working section of the No. 4 Section while Puckett examined it provides no basis for reversing the judge's S&S determination. JWR ignores the fact that miners, both those who accompanied Puckett and those who did not, were working in and traveling through a section that should have been entirely preshifted before they entered it but was not. Moreover,

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power center to have been located "well inby the mouth of the section" (it was over five crosscuts inby), it appears the judge did not realize that the power center was nevertheless *not* located within the working section of the mine. The power center was slightly outby the loading point for the section at that time, given that the belt had been recently extended inby the second crosscut outby the face. 27 FMSHRC at 760; Gov't Exs. 16, 83C, 83D. Thus, contrary to the judge's finding, Puckett's testimony did not establish that the four miners had accompanied Puckett to the unexamined working section. *See* 27 FMSHRC at 810. The power center and the area outby had been preshifted by Dye during his earlier examination. Nonetheless, the judge's misunderstanding on this point does not invalidate his S&S analysis. *See U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 n.7 (Oct. 1984) (finding error judge made in considering evidence to be harmless where S&S finding is supported on alternative grounds).

[27] Of the four *Mathies* factors, only the second and third are at issue here.

[28] Section 75.360(a)(1) imposes the general preshift examination requirement while section 75.360(b) sets forth the scope of the examination in different circumstances. *See Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84-85 (D.C. Cir. 2005); *see also Enlow Fork Mining Co.*, 19 FMSHRC 5, 12 (Jan. 1997). Consequently, unlike our dissenting colleague, we do not rigidly read section 75.360(b)(3) in isolation from the rest of the preshift standard. *See* slip op. at 41-42. That the Secretary specifically referred to section 75.360(b)(3) in the order charging the violation does not prevent us from reading "these interconnected provisions" of the preshift standard together. *See Spartan*, 415 F.3d at 83-85 (operator cited for violating section 75.360(a)(1) when it failed to examine areas containing energized trolley wires, as required by section 75.360(b)(7)). Section 75.360(b) simply defines what constitutes a complete preshift examination under section 75.360(a)(1). Indeed, the order states that JWR's failure to comply with section 75.360(b)(3) rendered the preshift examination "incomplete" (Gov't Ex. 7 at 1), which also directly violates section 75.360(a)(1)'s requirement that preshift examinations are to be "completed."

Puckett's examination did not occur immediately at the start of the shift, or even before miners entered the No. 4 Section, but rather only after Puckett traveled to the face area of the section. Thus, miners were on the section for a significant amount of time before it had been entirely preshifted.

During that time, miners were in a section of the mine that had not been fully preshifted prior to their entering it, so it was proper for the judge to consider the nature of the hazards to miners that a complete preshift would have disclosed. As the judge took into account, the men were in a gassy mine, which prior to the shift lacked ventilation due to the fan check. 27 FMSHRC at 810. Given that the detection of methane buildups is one of the reasons a preshift examination is required, the mine's history as a gassy mine and the recent ventilation disruption in the mine constitute substantial evidence to support the conclusion that the Secretary has established the second *Mathies* criterion.

As for ignition sources, the judge provided extensive record citations regarding the mine's history of fires and ignitions, including on the No. 4 Section. Some had occurred as recently as two weeks before the explosion. *See* 27 FMSHRC at 824-25 n.72. There is also record evidence of roof falls that very week on the No. 4 Section, both at the face which was unbolted and remained so during the shift (Tr. V 65-66), and immediately outby the working section.[29] Roof falls pose another hazard that a preshift examination is intended to detect, and the potential for them to occur in a gassy mine supports our finding that the second *Mathies* criterion has been met. *See Buck Creek*, 17 FMSHRC at 13.

In terms of the third *Mathies* factor — whether there was a reasonable likelihood that the hazard would result in an injury causing event — the fact that the area outby the power center had been examined by Dye is not inconsistent with the conclusion that the violation in this instance was S&S. In *Buck Creek*, the Commission concluded that the third *Mathies* element had been proven when miners were allowed to work in a preshifted area even though another area of the mine that should have been examined was not. There, the Commission found that "hazards in an unexamined portion of the mine could affect" the area in which miners were working. *Id.* at 14.[30] Moreover, here there was the risk that one or more of the miners waiting by the power center could enter the unexamined area before Puckett completed his examination. Indeed, the testimony of one member of Puckett's crew, roofbolter Terry, can be read to indicate that he may have done so. Tr. V 24.

Furthermore, the fact that Puckett discovered no hazards in his supplemental examination of the working section during the next shift does not establish that the violation was not S&S.

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[29] We thus cannot agree with our dissenting colleague's characterization of these conditions as simply "general conditions" at the mine. Slip op. at 41 n.5.

[30] Commissioner Young would hold the instant case to be materially indistinguishable from *Buck Creek*.

The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector. *U.S. Steel*, 7 FMSHRC at 1130. The dissent maintains that we should take the results of Puckett's examination into account, because here the assumption does not apply in that there was no inspector's intervention, and thus there is record evidence of what actually transpired after the violation. Slip op. at 40. We reject that argument for the following reasons: first, because the violation occurred before Puckett completed his examination of the working section, it is improper to rely only upon later circumstances to find that the violation was not S&S. *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998). Second, because preshift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined. *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (opinion of Commissioners Holen and Riley), 1396 (opinion of Chairman Jordan and Commissioner Marks) (Aug. 1996).

In summary, we agree with the judge's conclusion that the Secretary has met her burden of proving that it is reasonably likely that the hazards posed by the failure to conduct a complete preshift in this instance would result in an injury-causing event. We therefore affirm the judge's S&S determination and related finding that the section 75.360(b)(3) violation was of serious gravity.[31]

3. Unwarrantable Failure and Negligence

The judge concluded that JWR's failure to ensure that the No. 4 Section was completely examined before miners were sent to work on the section was indicative of a serious lack of reasonable care. *Id.* at 811. The judge found that two supervisors, Puckett and Hagood, were responsible for miners being knowingly sent down into the mine before it had been completely preshifted, placing the miners in harm's way. *Id.* Relying on that same evidence, the judge found JWR to be highly negligent. *Id.*

JWR contends that the conduct of neither Puckett nor Hagood justifies the judge's conclusion that the violation in this instance resulted from JWR's unwarrantable failure. JWR Br. at 12-13, 14-15; JWR Reply Br. at 16-18. JWR also argues that the judge failed to consider all the factors germane to this case in reaching his conclusion. JWR Br. at 13-14.

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[31] We decline to address in this case the Secretary's request that we adopt the presumption that preshift violations are S&S. Before the judge, the Secretary specifically disavowed the need for the adoption of such a presumption in this case. *See* S. Post-Trial Br. at 67-68 (discussing previous cases raising issue of whether there should be a presumption that preshift violations are S&S but stating that the judge "does not need to find such a presumption in this case").

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. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. These factors include the length of time that the violation existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Id.*

The Commission is evenly divided regarding whether the judge correctly determined that the violation of section 75.360(b)(3) was attributable to JWR's unwarrantable failure. Commissioners Jordan and Young would affirm the determination while Chairman Duffy and Commissioner Suboleski would reverse. The effect of the split decision is to allow the judge's decision to stand as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992). The separate opinions of the Commissioners on this issue are included in Part III below.

D. The Penalty Assessments

The Secretary proposed penalties of $55,000 for each of JWR's violations at issue here.[32] 27 FMSHRC at 812, 826. After finding violations, the judge assessed a penalty of $2,500 for the section 75.360(b) violation and assessed a penalty of $500 for the section 75.1101-23(c) violation. *Id.* The Secretary petitioned for review of both penalty assessments.

The Secretary maintains that the judge erred in drastically reducing the proposed penalties and failed adequately to explain his reasons for doing so. S. Br. at 33-34, 46. With regard to the penalty for the violation of section 75.360(b)(3), the Secretary argues that the judge's finding that the violation did not contribute to the fatalities was not a proper explanation for reducing the

[32] Shortly after MSHA proposed penalties in this case, the maximum penalty for a violation was increased from $55,000 to $60,000. 68 Fed. Reg. 6609, 6611 (Feb. 10, 2003).

penalty because even if true, it does not detract from the seriousness of the violation. *Id.* at 36. The Secretary further alleges that with respect to both assessments, the judge erred by taking into account a document purporting to show previous penalties that had been assessed against JWR. *Id.* at 36-38, 46. In response, JWR contends that the reductions were justified by the judge's decision to vacate the section 75.360(b)(3) violation in part and his conclusion that the section 75.1101-23(c) violation was neither S&S nor unwarrantable. JWR Resp. Br. at 36, 46-47.

While Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[33] *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the Commission determines whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000). While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). Furthermore, as the Commission stated in *Sellersburg*:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase

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[33] Section 110(i) states in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

> or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293; *see also Unique Electric*, 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998) (concluding that judge failed to explain the wide divergence between the penalty of $400 assessed and the Secretary's proposed penalties of $8,500); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1504 (Sept. 1997) (concluding that judge failed to provide adequate explanation for 95% reduction in penalty assessed); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (finding that the judge was required to explain a 60% increase in his civil penalty assessment).

Clearly, the penalties assessed by the judge in this case "substantially diverge" from those originally proposed by the Secretary. In setting the penalties, the judge relied upon the parties' stipulations with respect to four of the six criteria, and incorporated his earlier findings with respect to the other two criteria, gravity and negligence. *See* 27 FMSHRC at 812, 826. The judge also noted that his penalties were consistent with the amounts included on a printout of JWR's history of violations submitted with the stipulations. *Id.* at 812 n.58, 826 n.74. He also noted that the violation of section 75.360(b)(3) did not contribute to the fatalities in this case. *Id.* at 812 n.58.

Such a terse analysis is not sufficient to explain the judge's substantial penalty reductions. Therefore, we vacate and remand the penalty assessments in this case. A more detailed analysis is particularly needed with respect to the section 75.360(b)(3) violation, in light of the judge's findings that it was serious and due to high negligence. 27 FMSHRC at 812.[34] While it may not have necessarily been improper for the judge to have considered the lack of causation between the preshift violation and the fatalities to be a mitigating factor in assessing the penalty, such a determination must be made within the context of the gravity of the violation. Moreover, other factors that potentially lead to a finding of high gravity must be considered; but it appears that the judge may have permitted the lack of causation to negate his other findings regarding the seriousness of the violation. Therefore, on remand, the judge should clarify how he views the lack of causation within the context of the other factors relevant to his finding of high gravity.

On remand, the judge should also clarify the extent to which, in setting both penalties, he relied upon the dollar amounts appearing as penalties in the stipulated printout of JWR's

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[34] The order was only partially upheld in that the judge vacated the part alleging that Dye should have detected inadequate rock dusting. *See* 27 FMSHRC at 805-06. Consequently, the judge may have considered the violation to have simply become another of the many violations cited as a result of the MSHA investigation that were not viewed as contributing to the explosions, most of which were settled prior to the hearing. *See id.* at 758 n.2. However, the judge did not indicate in his penalty discussion whether this was a factor in his decision to reduce the penalty for that violation. Similarly, he did not indicate in setting the penalty for the section 75.1101-23(c) violation whether he substantially reduced it from the amount proposed by the Secretary because, while affirming the violation, he vacated the special findings.

previous history of violations. While it was not error for the judge to "note" the equivalency between the penalties he assessed and those figures, it is impermissible to use those figures to arrive at the penalties to be assessed in this case. Penalty assessment figures in other cases are not a factor recognized as relevant by section 110(i) of the Mine Act, 30 U.S.C. § 820(i). The Commission has consistently ruled that, in assessing penalties, a judge may take into account only the six criteria listed in section 110(i). *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished).

III.

Separate Opinions of the Commissioners

Commissioner Young, in favor of affirming the judge's determination that JWR's violation of section 75.360(b)(3) was attributable to its unwarrantable failure:

JWR asserts that Puckett's subsequent examination prevents a finding that JWR's violation of section 75.360(b)(3) was attributable to its unwarrantable failure. I cannot agree. The examination occurred well after Puckett's crew began working in or traveling to the area just outby the unexamined working section of the No. 4 Section. JWR would credit Puckett for acting with requisite care (JWR Br. at 12-13), but it fails to recognize that it was well within Puckett's power to examine the working section before the men entered the No. 4 Section, where they were exposed to the hazards, discussed above, of a work area that had not been completely examined.

JWR's argument that Hagood was blameless in this instance is similarly unavailing. JWR Br. at 14; JWR Reply Br. at 16-17. It was Hagood who, as Dye's supervisor, instructed him to cut short his examination, apparently on the conviction that at that point in time no one would be working during any part of the next shift on the working section of Section 4 due to the power outage. As shown earlier, however, the evidence demonstrates that JWR planned for that work to eventually occur, despite the power outage, and JWR chose not to call Hagood as a witness to explain the discrepancy.

Section 75.360 requires "mine operators to design preshift examinations around the best information available at the time the preshift begins" (61 Fed. Reg. at 9793), and it can be reasonably concluded that Hagood was not using the best information available in supervising Dye. As discussed, Puckett testified that sometime prior to his arrival at the mine for the upcoming shift, part of his crew was assigned to work at the face of the No. 4 Section, so he immediately completed Dye's examination. The Commission has stated that section 75.360(a) does not authorize such piecemeal examinations of a mine. *Buck Creek Coal Co.*, 17 FMSHRC 8, 12 n.7 (Jan. 1995). The involvement of supervisors Hagood and Puckett in the violation support the judge's determination that the violation was attributable to JWR's unwarrantable failure. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987).

While the judge did not address all of the factors the Commission considers in determining whether a violation is unwarrantable, this deficiency does not lead to the conclusion that it is not supported by substantial evidence. To the contrary, other circumstances surrounding the violation, when considered in light of the requirements of section 75.360, provide additional substantial evidence in support of the judge's determination that the violation was unwarrantable.[1]

As the Commission discussed with respect to upholding the judge's S&S determination, the violation posed a high degree of danger in this particular instance. Undisputed evidence established that this is one of the gassiest mines in the nation. Tr. IX 16. There is also ample record evidence of ignitions and roof falls occurring in and around the unexamined area contemporaneous to the time in question. In short, this mine was plagued with the sorts of *per se* deadly hazards which the pre-shift examination is intended to combat. This degree of danger significantly reduces the threshold for finding, in this context, a serious lack of reasonable care on JWR's part. *See Midwest Material Co.*, 19 FMSRHRC 30, 34 (Jan. 1997).

The extent of the violation was also significant. The entire working section of the No. 4 Section was not inspected as part of Dye's preshift examination, so Puckett had to complete it upon arriving at the No. 4 Section. Tr. IV 200-05. The violation can also be considered extensive because at least eight miners (Puckett's entire crew) entered the No. 4 Section before it was completely preshifted. Moreover, as discussed, the exposure of the miners was not momentary, but continued until Puckett completed his examination of the area inby the power center. In addition, any claim by JWR that the violation was not obvious or that it did not know of the existence of the violation runs counter to *Buck Creek*, where the Commission warned operators they could not rely upon the supplemental examination provisions of section 75.361 to complete preshift examinations that should have been previously completed.

Accordingly, I would find that substantial evidence supports the judge's determination that the violation of section 75.360(b)(3) was attributable to JWR's unwarrantable failure, as well as his conclusion for penalty assessment purposes that JWR was highly negligent, and affirm both findings.

Michael G. Young, Commissioner

[1] The operator has global responsibility for actions or omissions of its agents, and for the supervision, coordination, and control of all operations. *See, e.g., Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989) (holding that under the Mine Act an operator can be held liable without fault for its employee's violative conduct). This responsibility includes liability for the inadequate communications and coordination here.

Commissioner Jordan, concurring in part and dissenting in part:

I agree with the Commission opinion in this matter, except with regard to the violation of 30 C.F.R. § 75.1101-23(a).[1] In its discussion of that violation, the majority correctly affirms the judge's ruling that the regulation governing JWR's Fire Fighting and Evacuation Plan (the "FFEP"), 30 C.F.R. § 75.1101-23(a) (2001), applied to explosion-related emergencies. Slip op. at 8-11. However, unlike my colleagues, I would also hold that the FFEP itself applied to all emergencies, and was not limited to evacuations due to fires. Consequently, I would reverse the judge's determination on this question, and remand the issue to him for further proceedings.

The threshold issue in this matter is to identify the method we will use to interpret the plan provision in question. As we recently noted, "[i]t is well established that plan provisions are enforceable as mandatory standards." *Martin County Coal Corp.*, 28 FMSHRC 247, 254-55 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989)); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) ("*JWR*"). Consequently, as discussed in greater detail below, we should apply the same tools of regulatory construction when interpreting plan provisions as we do when construing regulations promulgated by MSHA. Because we are treating both as mandatory standards, we should discern their meaning in a consistent manner.

Commission precedent providing guidance on regulatory interpretation is clear; where the language of a regulatory provision is plain, 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 a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

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[1] I also concur in the separate decision of Commissioner Young affirming the judge's finding that the violation of 30 C.F.R. § 75.360(b)(3) was attributable to the operator's unwarrantable failure.

Because the plan provision at issue is ambiguous (as it does not clearly state whether it applies to explosions), I would apply the standard set forth above and determine whether the Secretary's interpretation of the plan — i.e., that it applies to explosions — is reasonable and should be accorded deference. In contrast, my colleagues, holding that JWR's plan was limited to fire-related events, decline to apply our longstanding rules of regulatory interpretation to plan provisions. Relying on the 1987 *JWR* opinion, they require the Secretary to "'dispel the ambiguity'" in the plan "by establishing the intent of the parties on the issue." Slip op. at 11 (citation omitted).[2] They hold that the citation cannot stand because the Secretary failed to present evidence regarding the parties' understanding as to what the operator's obligations to initiate an evacuation were under the FFEP. *Id.* at 11-12. They reach this conclusion despite agreeing with the judge that the parties did not appear to have considered how the plan applied in the event of an explosion. *Id.* at 12. Thus, they fault the Secretary for failing to produce evidence on the parties' intent when they acknowledge that the parties did not even consider the question.

Given the fact that underground mine operators are required to adopt many plans containing numerous provisions,[3] it is unlikely that extensive negotiations will take place regarding all aspects of every plan approved by MSHA. Accordingly, in many instances it would be impossible for the Secretary to produce the evidence the majority insists it offer here: "establish[ ] through testimony of those involved in drafting and approving the FFEP, the intent of the Secretary or *JWR* with respect to *JWR's* evacuation obligations under the plan after an explosion." Slip op. at 11-12. This would be especially true for plans approved on a routine basis, without discussion or debate.

My colleagues' approach has the effect of limiting the agency's ability to enforce plan provisions to only those situations where the agency can demonstrate that both negotiation and a meeting of the minds occurred. This view, however, is contrary to *C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996), which recognized the Secretary has the ultimate say in

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[2] The language in *JWR* relied on by the majority is technically dicta, as the Commission declined to reach the question of whether the provision at issue was part of the approved plan, because it found that, even if it was, the Secretary did not prove that it was violated. 9 FMSHRC at 907. The majority's reliance on *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), slip op. at 11 n.8, is also misplaced. In that case, we were guided by the fact that "the Secretary's argument in this case is actually at odds with the broad purpose of the plan to protect miners from dangerous roof conditions," 20 FMSHRC at 1281, and that "[t]he procedure suggested by the inspector who filed the citation, considering that he was a roof control specialist, astonishes us. . . . [T]he logical outgrowth of [his] interpretation of the plan, would have required miners to enter an unpredictable and highly unstable area to commence mining, and would have been extremely dangerous." *Id.* at 1282.

[3] *See e.g.*, 30 C.F.R. § 48.3 (training plans); 30 C.F.R. § 75.220 (roof control plans); 30 C.F.R. § 75.370 (mine ventilation plans).

whether a plan provision is included. In that case, we stated that although "[t]he plan approval process involves good faith discussions between MSHA and the mine operator," we did not mean to suggest:

> that the Secretary is in the same position as a private party conducting arm's length negotiations in a free market. Ultimately, absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval.

Id. at 1746 (citing *UMWA v. Dole*, 870 F.2d at 667). Quoting the decision of the D.C. Circuit in *UMWA v. Dole*, the Commission in *C.W. Mining* recognized that:

> [W]hile the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise [her] judgment with respect to the content of such plans in connection with his final approval of the plan."

18 FMSHRC at 1746 (quoting *UMWA v. Dole*, 870 F.2d at 669 n.10, quoting S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)).

When a mandatory standard is promulgated under the Mine Act, the Secretary notifies the mining community of a proposed requirement, considers the comments filed in response, and then exercises her judgement as to what the final content of the regulation should be. Similarly, while the operator can propose plan provisions and may be entitled to further consultation over revisions, the Secretary must "'independently exercise [her] judgment with respect to the content of such plans'" and "always retain[s] final responsibility for deciding what [has] to be included in the plan.'" *UMWA v. Dole*, 870 F.2d at 669 n.10 (citation omitted). Therefore, I fail to see how the Secretary can be held to a more difficult standard of proof when attempting to enforce a plan provision than the standard she must meet to enforce a regulation that is the result of notice and comment rulemaking.

In fact, the Commission has stated recently that the Secretary is not held to two different standards of proof. In *Martin County Coal,* we explained:

> It is well established that plan provisions are enforceable as mandatory standards. As such, the law governing the interpretations of regulatory standards is applicable to plan provisions. *Energy West*, 17 FMSHRC at 1317.

28 FMSHRC at 254–55 (other citations omitted). *Martin County* relied on *Energy West*, which had applied controlling Commission case law on regulatory interpretation to the interpretation of a ventilation plan. 28 FMSHRC at 255 n.11 (citing *Energy West*, 17 FMSHRC at 1317). In *Energy West* we concluded that the disputed plan provision was unclear, and that accordingly a remand was necessary to determine whether the Secretary's interpretation of the provision was reasonable, noting that "[a]n agency's reasonable interpretation of its regulations is entitled to deference." 17 FMSHRC at 1317 & n.6 (citation omitted).

Applying the legal standard we traditionally use to interpret mandatory standards, I find that the Secretary's interpretation — that JWR's Firefighting and Evacuation Plan applied to evacuations prompted by explosions — is reasonable. The relevant plan provision stated that "[a] supervisor or designated person will assemble all men promptly and lead the way during the evacuation." FFEP at 3. That provision appeared under a general heading in the FFEP that stated "Program of Instruction - Underground Emergencies." *Id.* Section II of the plan, where this requirement was located, was entitled "Location of Escapeways, Exits and Routes of Travel to the Surface and Evacuation Procedures." *Id.*[4] Significantly, the language of the FFEP is not expressly limited to fire-related incidents.

The Secretary's interpretation of the plan provision — that it applies to explosions — is clearly consistent with the purpose of section 75.1101-23(a), which governed emergency plans. This regulation required in pertinent part that an operator was to adopt a program to instruct all miners:

> in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency.

30 C.F.R. § 75.1101-23(a) (2001). I find it notable that the governing regulation required plans for evacuations due to an "emergency," and was not limited to a fire-related emergency.[5] I also

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[4] The Secretary correctly notes that none of the provisions in Section II, which concerned escapeways and evacuations, used the word "fire." S. Br. at 18-20 (citing Gov't Ex. 34 at 3-4).

[5] I do not believe that subsequent revisions to the plan, covering "general evacuation procedures," JWR Ex. 266, undermines the reasonableness of the Secretary's interpretation here.

note that, prior to the explosion, MSHA had announced that it required "each operator of an underground coal mine to adopt a program for mine evacuation in the event of an emergency, such as fire *or explosion*." 60 Fed. Reg. 23567 (May 8, 1995) (MSHA Semi-Annual Unified Agenda) (emphasis added).[6]

Moreover, safety issues involving fires and explosions are often interrelated. Although the judge ultimately concluded that the plan did not apply to this evacuation, in his order denying JWR's motion for summary decision he stated:

> I find JWR's attempt to differentiate between a fire and an explosion to be a distinction without difference. I concur with the Secretary's statement that "explosions and fires are similar in nature and present similar hazards to miners underground." I agree with the Secretary that "it is reasonable to anticipate that a fire could create an explosion risk and an explosion could create a fire risk." This is because fires and explosions are fundamentally interrelated. . . . These two events are so intertwined, I conclude it is eminently reasonable to view the "emergency" referred to in the standard as inclusive of an explosion. In other words, it is reasonable to apply the standard to both occurrences.

26 FMSHRC 623, 627-28 (July 2004) (ALJ) (citations omitted).[7] Consistent with this view, I note that section 311 of the Mine Act, 30 U.S.C. § 871, entitled "Fire Protections," also contains a requirement pertaining to explosions, as it restricts the amount of methane that may be present during welding activities. 30 U.S.C. § 871(d); *see also* 30 C.F.R. § 75.1106.

The final inquiry regarding this citation is whether the operator violated the provision of the plan requiring that a supervisor or other designated person "assemble and lead" miners during an evacuation. The judge's decision barely touched upon this issue (*see* 27 FMSHRC 757, 817 n.66 (Nov. 2005) (ALJ)), and JWR has argued that the actions of the miners who did not vacate the mine but instead traveled towards the area of the first explosion did not necessarily do so in contravention of the FFEP. *See* JWR Resp. Br. at 31-34. Resolution of such issues are best left to the judge in the first instance, and, accordingly, I would remand this question to him.

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[6] Because this announcement alerted operators that the regulation required plan provisions to cover explosion-related evacuations, I reject JWR's claim, JWR Resp. Br. at 30-31, that it lacked notice that the plan provision covered emergencies caused by explosion.

[7] The judge also noted that the similarity between a fire and an explosion was acknowledged in a report created by JWR's expert, who stated that "[i]t is probable that [the] second ignition of methane resulted in the propagation of flaming" and "[t]he flame would then accelerate into a gas explosion." 26 FMSHRC at 628 n.6 (citing Pet'r's Br. Ex. J. at 46).

For the foregoing reasons, I would vacate and remand the judge's determination that JWR did not violate section 75.1101-23(a).

Mary Lu Jordan, Commissioner

Commissioner Suboleski, concurring and dissenting:

I concur with my colleagues that JWR violated section 75.360(b) when it failed to adequately preshift the Number 4 section for the September 23 day shift. However, I depart with them in affirming the judge that the violation was significant and substantial ("S&S") and occurred because of JWR's unwarrantable failure to comply with the regulation.

1. Significant and Substantial

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Here, as in many cases where the S&S determination is challenged, it is the application of the third *Mathies* element that is at issue. "[T]he question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission added that the operator's response in abating the citation does not obviate the need to determine "whether an injury would have been reasonably likely to occur *if mining operations had continued without the inspector's intervention*." *Id.* (citation omitted) (emphasis added); *see also Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). In the present proceeding, the violation stands in contrast to the S&S cases that have generally come before the Commission because the order was issued "after the fact," over one year after an accident investigation that was triggered by the tragic, but unrelated, explosions. Gov't Ex. 7.

Section 75.360(b)(3) requires that a preshift examination be conducted in "[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift[,]" and further states that "[t]he scope of the examination shall include the working places." 30 C.F.R. § 75.360(b)(3). Section 75.2 defines "working section" as, "All areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. "Working place" is further defined as, "The area of a coal mine inby the last open crosscut." *Id.*

The definitions in section 75.2, when read in conjunction with section 75.360(b)(3), make clear that the preshift examination requirement applies to specific areas of the mine, depending on their location and miner presence. Any remaining doubt about the carefully circumscribed nature of section 75.360(b)(3) can be resolved by the Federal Register preamble to this rule. There, the Secretary explained, in rejecting a commenter's suggestion that all areas of the mine, including idle areas, be examined during a preshift examination, "There is no need to require areas of the mine where persons are not scheduled to work or travel to be examined." 57 Fed. Reg. 20868, 20893 (May 15, 1992); *see also* 61 Fed. Reg. 9764, 9793 (Mar. 11, 1996) ("The preshift examination requirements in the final rule are intended to focus the attention of the examiner in critical areas."). As more fully explained below, the violation here turns on whether work was scheduled in the working section of the No. 4 Section when Dye was instructed to conduct the preshift examination on September 28.

The order charges JWR with a violation of section 75.360(b)(3) because:

> an adequate preshift examination was not conducted in 4 Section where persons were scheduled to perform maintenance work and install roof bolts during the oncoming day shift on September 23, 2001. The examination was incomplete in that an examination of the working places was not conducted where miners were scheduled to roof bolt the unsupported face areas.

Gov't Ex. 7 at 1.[1] The theory of violation of section 75.360(b)(3) is that miners were scheduled to work at a particular location within the No. 4 Section that was not examined when Dye conducted his preshift examination. 27 FMSHRC at 807, citing S. Br. at 63-64. As the judge stated, "[I]f anyone was 'scheduled to work on the section' prior to Dye's examination, the standard was violated." 27 FMSHRC at 808. In short, the essence of the violation is the inadequacy of the preshift examination. *See* S. Resp. Br. at 11.

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[1] The remainder of the order, alleging Dye's failure to recognize inadequate rockdusting, was not upheld by the judge. A close examination of the order indicates that the hazard recognition training required by MSHA for abatement appears to pertain only to the alleged failure to recognize deficient rockdusting, and not to examining all scheduled work places.

Were it not for the scheduling of maintenance in the No. 4 working section, prior to Dye's examination, there would be no violation. Thus, a bookkeeping entry that occurred prior to the Sunday day-shift determined whether JWR is found to have violated the regulation. Due to the strict liability nature of the Mine Act, once Dye performed an examination of the No. 4 Section that did not include the areas where miners were scheduled to roof bolt and do other maintenance work, the violation of section 75.360(b)(3) was complete. Once the day shift had begun, neither Dye nor Puckett could undo the violation

In analyzing the S&S designation, the judge reasoned:

> Given the propensity of the mine to liberate methane, and the fact that electric and diesel equipment was in place and that the power would have been restored *had normal operations continued*, I find that it was reasonably likely the failure to conduct a complete preshift examination significantly and substantially contributed to the danger of the miners being involved in a methane-related ignition or explosion.

27 FMSHRC at 810 (emphasis added). However, contrary to the judge's analysis, we do not have to guess as to what occurred after the violation. There was no intervening action by an inspector that requires the application of the legal fiction, "assuming continued normal mining operations." Rather, the record clearly shows that, when Puckett took his crew into the mine, he proceeded no further than the power center and other outby areas that had been preshifted. He then performed a supplemental examination in unexamined areas of the No. 4 Section before miners proceeded further.[2] 27 FMSHRC at 807. The judge's analysis cannot be sustained in light of the undisputed testimony as to what actually occurred after Dye inadequately preshifted the area in violation of section 75.360(b)(3).[3]

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[2] In agreement with the majority, I also conclude that the judge was incorrect when he found that the power center, where Puckett's crew went in the No. 4 Section, was in the working section. Slip op. at 23-24 n.26. Accordingly, when the miners were at the power center and other areas outby that had been preshifted, there was no violation and no hazard as a result of their presence in the those areas of the No. 4 Section.

[3] The majority rejects the position that there is no need to apply the legal fiction, "continued normal mining conditions," but cannot cite any case to support the analysis when it is known exactly what happened in the hours after Dye's failure to preshift the entire No. 4 Section. That is especially so here because the order issued months after the violation. In this regard, in addition to relying on general conditions in the mine to support its S&S determination, the majority also speculates that miners on Pucketts's crew "could enter the unexamined area before Puckett completed his examination." Slip op. at 25. Even under the majority's approach to the violation, such an assumption of miner disobedience, in the absence of record support, is unwarranted. *See Cougar Coal Co.*, 25 FMSHRC 513, 519 (Sept. 2003) (conduct of rank-and-

The only "hazard" that the miners were exposed to by their presence in areas of the mine that had been preshifted was the same conditions that miners would have been exposed to if no work had been scheduled in the working areas of the No. 4 Section.[4] Thus, I cannot conclude, based on the particular facts surrounding the violation (*Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988)), that there was a reasonable likelihood that the hazard contributed by the violation would result in an injury.[5]

In an effort to sustain the S&S designation, the majority transforms the order MSHA issued from one charging a violation of section 75.360(b)(3) to one charging a violation of section 75.360(a)(1), which provides, in part, "No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval." 30 C.F.R. § 75.360(a)(1). *See* slip op. at 24-25. However, the majority's effort to explain "the duration of the violation," slip op. at 24, is simply contrary to the language of the order, which is set out on page 39, supra, and the Secretary's theory of violation

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file miner in disobeying instructions of supervisor cannot support unwarrantability designation where there no evidence to suggest miner had disregarded instruction of a supervisor).

[4] If no work had been scheduled, there would be no violation. As a comparison consider that Puckett, after leaving the No. 4 Section, took two men to the No. 6 Section, which had been preshifted in the same manner as the No. 4 Section. There is no allegation that a violation was committed and no assertion that Puckett and his crew, by their presence in the No. 6 Section, were exposed to hazards from the unexamined areas of that section.

[5] While I have focused my attention to the third *Mathies* element, the judge's determination with regard to the second element — a discrete safety hazard contributed to by the violation — is suspect. In this regard, the judge erred when he analyzed this element assuming "continued normal mining operations." 27 FMSHRC at 809. The Commission has generally applied that assumption only to analyzing the third element of *Mathies*. *See, e.g., Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Further, the judge erred when he found, in analyzing the second element, that Puckett and his crew had traveled in unexamined areas of the No. 4 Section before he performed the supplemental examination. 27 FMSHRC at 810. The majority acknowledges this factual error and indicates that it is deciding the case on grounds different than those considered by the judge. Slip op. at 23-24 n.26. However, the majority subsequently indicates that it is affirming the judge's findings on the second *Mathies* element on substantial evidence grounds, *id.* at 24-25 — a position I find difficult to reconcile with its alternative approach. Finally, general conditions at the mine cannot suffice to establish a hazard without a connection to the violation. *See Texasgulf, Inc.*, 10 FMSHRC at 500. In this regard, the majority cites to general conditions at the mine, which even the judge did not rely on in his S&S analysis of the section 75.360(b)(3) violation, to bolster his hazard analysis. Slip op. at 25, citing 27 FMSHRC at 824-25 n.72. However, as *Mathies* requires, the hazard must be *contributed to* by the violation. *Sec'y of Labor v. FMSHR*C, 111 F.3d 913, 917-18 (D.C. Cir. 1997).

before the Commission. S. Resp. Br. at 11-24. It is also evident from the majority's analysis of the violation of section 75.360(b)(3), in which I concur, that Puckett and the miners who accompanied him *were not* in a "working section" or a "working place" and *were* in an area of the No. 4 Section that had been properly examined. Thus, the majority's attempt to expansively apply the narrowly drafted section 75.360(b)(3) to prohibit miners from going into *any* area of the No. 5 mine until the entire No. 4 Section had been examined, slip op. at 24-25, is contrary to the plain language of the regulation and its regulatory history.[6]

Finally, the majority relies on *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8 (Jan. 1995), to support its S&S determination. However, that case is readily distinguishable in several key aspects. First, at Buck Creek the mine had been idle for the weekend and the examiners had begun the required preshift examination prior to the first working shift. *Id.* at 9. The violation occurred when miners entered the mine while the preshift examination was ongoing, that is, before the examiners had completed their inspection. *Id.* Here, there is no allegation that the miners entered an unexamined mine; the charge is that the preshift examination, which had been completed, was, on one section only, inadequate.

Second, in *Buck Creek* the Commission concluded that the operator violated section 75.360(a) when it allowed, prior to an oncoming shift, miners into an area of the mine before a preshift examination had been completed. *Id.* at 9-11. In contrast, the violation in this case stems from the inadequacy of the preshift examination, not from the presence of the Puckett's crew at the electrical center in the No. 4 Section. MSHA does not allege that a violation of section 75.360(a) occurred.[7] Most significantly, in *Buck Creek* the operator had shut down the mine over a weekend, thus giving rise to the dangers attendant to an idle mine. *Id.* at 14. Here, JWR scheduled a maintenance crew to work on the day shift following an owl shift in ongoing operations. Thus, I cannot agree that *Buck Creek* is applicable to the facts of this case.

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[6] The majority's suggestion that an allegation of a violation of section 75.360(b)(3) cannot stand by itself, but must be read to include a general violation of section 75.360(a)(1), slip op. at 24 n.28, is at odds with Commission cases. *See, e.g., Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-16 (Jan. 1997). In reading and interpreting regulations, the Commission has examined the context in which a regulation appears. *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 (Feb. 2004); *see also Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84-85 (D.C. Cir. 2005). However, here the majority seeks to read into its S&S analysis a general violation of the pre-shift examination requirement in section 75.360(a)(1), and I can find no basis for doing that.

[7] Unlike my colleagues, I believe that the Secretary is quite capable of distinguishing between a violation of section 75.360(a)(1) and a violation of section 75.360(b)(3), *see Eagle Energy, Inc.* and *Enlow Fork Mining*, supra, and I am confident that, if she believed a violation of section 75.360(a)(1) had occurred, she would have alleged it as she did in the *Spartan Mining* case that my colleagues cite.

In summary, in the absence of any allegation that JWR's action was an effort to subvert the preshifting requirements, and given that the only difference between the occurrence of a violation or not is whether, midway through the midnight shift, the work continued to be scheduled, I am unable to find the violation to be S&S. If work was not scheduled in the No. 4 Section at that time, there is no violation; if it was scheduled, there is a violation. When the only difference between what is or is not a violation is a "yes" or "no" on a written schedule or in the thoughts of a foreman, then a discrete safety hazard reasonably likely to contribute to a reasonably serious injury simply cannot be found.

2. Unwarrantable Failure

I would also reverse the judge with regard to his unwarrantability determination. 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. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The judge's unwarrantability determination is brief but premised on the incorrect finding made in the judge's S&S determination that the power center was in an uninspected area of the No. 4 Section. 27 FMSHRC at 810-11. The judge's unwarrantable failure analysis turns on Puckett's conduct and having "plac[ed] miners on the section and thus in harm's way before the preshift examination was completed." *Id.* at 811. Thus, the judge erred as a matter of law when he relied on this crucial erroneous factual finding. I further conclude that largely uncontroverted record testimony supports only one conclusion on this issue — that the violation of section 75.360(b)(3) was not due to JWR's unwarrantable failure.

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's 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); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

The violation occurred here when Dye failed to examine all areas in the No. 4 Section. Based on the record testimony, it is apparent that Dye's failure to examine all areas of the No. 4 Section, including those areas where maintenance work was scheduled but had no power, was of short duration. There are no allegations that any similar violations had occurred elsewhere in the mine.[8] Thus, there is no charge that JWR was on notice that greater efforts were necessary to avoid violations of the preshift examination requirement.[9] Further, Puckett quickly remedied Dye's failure to completely preshift the No. 4 Section by performing a supplemental examination prior to permitting his crew to go beyond the electrical center. *Compare Enlow Fork Mining Co.*, 19 FMSHRC at 17 (Commission rejected assertion that prompt post-citation efforts to abate violation should be considered in an unwarrantable failure determination, noting that focus is on compliance efforts prior to the issuance of citation).

Most significantly, the violation did not pose a high degree of danger to miners. As noted above, JWR violated section 75.360(b)(3) when Dye failed to preshift the No. 4 Section in its entirety when work was scheduled to be performed there on the next shift. The violation did not turn on the presence of miners at the electrical center. Instead, the focus of consideration is Dye's conduct and the conditions at the time of the violation. *See Quinland Coals, Inc.*, 10 FMSHRC at 708-09. Given that the violation stemmed from the advanced planning of work in the No. 4 Section, I cannot conclude that the dangers arising from Dye's inadequate preshift examination were materially different, indeed not at all different, from those conditions that would have been present if no work had been scheduled.[10]

Finally, I cannot conclude that JWR's actions can be characterized as caused by "reckless disregard" or "intentional misconduct." In this regard, Dye conducted his preshift examination at a time when power was down in the No. 4 Section, and he assumed that, if power was not

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[8] My colleague's statement that the violation was "extensive," slip op. at 31, is based on the erroneous assumption that no miner could go in the No. 5 mine as long as any area of the No. 4 Section was unexamined. That assumption, however, ignores the carefully drafted words of the citation, alleging an inadequate preshift examination in some areas of the No. 4 Section – under section 75.360(b)(3), not under section 75.360(a).

[9] Dye's testimony that he had been performing preshift examinations since 1996 and never been cited for an inadequate preshift exam, Tr. III 409-10, was uncontradicted.

[10] My colleague's plenary review of the record to glean facts relating to general conditions at the mine does not resolve whether the Dye's inadequate examination was due to JWR's unwarrantable failure because these conditions, even if characterized as "*per se* deadly hazards," slip op. at 31, must somehow relate to the operator's violative conduct. *See* cases cited, slip op. at 42 n.5.

restored, no maintenance work would be performed in the section. Tr. III 447-48. The preamble to section 75.360(b)(3) contemplates this sort of exigent circumstance to relieve operators of the obligation to preshift areas where miners would otherwise be scheduled to work:

> Preshift examinations, by their nature, must be completed before the start of the shift. Changes in conditions, however, such as a breakdown of equipment, can alter planned work schedules. To accommodate these circumstances, the final rule requires mine operators to design preshift examinations around the best information available at the time the preshift begins. If changes must be made, § 75.361 specifies that areas not preshift examined be covered by a supplemental examination . . . before miners enter the area.

61 Fed. Reg. at 9793. While I have affirmed a violation of the regulation, because substantial, though circumstantial, evidence supports the judge's conclusion that JWR had not rescheduled when the preshift was conducted, 27 FMSHRC at 808, nevertheless I cannot conclude that JWR's conduct was indicative of reckless disregard in light of the lack of danger and the mitigating circumstance of the power outage. *See Cougar Coal Co*, 25 FMSHRC at 518-19

In sum, I cannot conclude that JWR's violation of section 75.360(b)(3) was due its unwarrantable failure.

Stanley C. Suboleski, Commissioner

Chairman Duffy, concurring and dissenting:

While I find that JWR violated the preshift examination requirement in section 75.360(b) and that the violation was significant and substantial in nature, I join with Commissioner Suboleski in finding that the violation was not caused by JWR's unwarrantable failure to comply with the standard.

The key to the degree of culpability attributable to JWR with respect to this violation is the motivation of Hagood in directing Dye not to preshift beyond the power center in the No. 4 section. The problem is that Hagood did not testify, so we can only speculate as to that motivation.

> Preshift examinations, by their nature, must be completed before the start of the shift. Changes in conditions, however, such as a breakdown in equipment, can alter planned work schedules. To accommodate these circumstances, the final rule requires mine operators to design preshift examinations around the best information available *at the time the preshift begins.*

Preamble to section 75.360, 61 Fed. Reg. at 9793 (emphasis added).

It may well be that Hagood believed at the time he spoke to Dye that the power outage would preclude any work being performed inby the power center during the day shift, thus making a preshift of that area unnecessary. On the other hand, he may have decided to take a chance on avoiding a full preshift on the premise that the unexamined areas could be picked up on a supplemental examination. Without his testimony, we simply do not know his state of mind at the time the preshift began. The lack of this crucial evidence precludes, in my view, a finding of unwarrantable failure.

Likewise, I agree with Commissioner Suboleski that the judge's finding may have been colored by his erroneous view that the miners were permitted to enter an area of Section No. 4 that had not been preshifted. If that were the case, the violation might well be characterized as unwarrantable. Since that was not the case, however, I do not believe that JWR's conduct rises to the level of "reckless disregard," intentional misconduct," indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2000-04 (Dec. 1987).

Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2006-33-M
ADMINISTRATION (MSHA)	:	A.C. No. 44-06600-26884 A
	:	
v.	:	Docket No. VA 2006-34-M
	:	A.C. No. 44-06600-26885 A
PAUL J. BENNETT,	:	
GLORIA W. HOLMES, and	:	Docket No. VA 2006-35-M
STEVEN K. HANKS, employed by	:	A.C. No. 44-06600-26886 A
BENNETT MINERAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On July 13, 2006, the Commission received a letter from Bennett Mineral Company sent on behalf of Paul J. Bennett, Jr., Gloria W. Holmes, and Steven K. Hanks, all employees of the company, requesting that the Commission reopen penalty assessments against the employees under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Numbers VA 2006-33-M, VA 2006-34-M, and VA 2006-35-M, in which all the respondents are employees of Bennett Mineral Company, and which all involve similar procedural issues. 29 C.F.R. § 2700.12.

The Mine Safety and Health Administration ("MSHA") sent proposed penalty assessments to the respondents in May 2004.[2] Although the respondents contend that they filed appeals in June 2004 (Letter from Donna M. Rutkowski, HR/Safety Administrator, dated July 12, 2006), these penalties became final orders in June 2004. *See* letters from MSHA to respondents dated June 14, 2006. However, the related penalty proceeding against the operator was dismissed pursuant to an unpublished order issued by Chief Administrative Law Judge Robert J. Lesnick on December 16, 2004. Order of Dismissal, *Bennett Mineral Co.*, Docket No. VA 2004-46-M. The respondents' letter states that until they received delinquency notices dated mid-June 2006, they believed that all related cases had also been dismissed.

On August 2, 2006, the Secretary filed a response to the employees' request for relief stating that "[a]fter reviewing the circumstances pertaining to the case[s], the Secretary states that she will not prosecute the case[s] further." S. Resp. at 1.

Based on the Secretary's response, it appears that she has in effect terminated the citations against Bennett, Holmes, and Hanks, and we therefore find their motions to reopen moot. *See Black Gold Trucking Co.*, 23 FMSHRC 797 (Aug. 2001).

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[2] The Proposed Penalty Assessments for Holmes and Hanks are dated May 12, 2004. Bennett has stated that he received "a personal citation" from MSHA on May 17, 2004. Bennett Letter to MSHA (June 17, 2004).

Accordingly, the motions to reopen are denied, and these proceedings are dismissed.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, D.C. 20001-2021

July 19, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-48-M
Petitioner	:	A.C. No. 01-01138-44059
	:	
v.	:	
	:	Docket No. SE 2005-55-M
	:	A.C. No. 01-01138-46301
ELMORE SAND & GRAVEL, INC.,	:	
Respondent	:	Scott Pitt

DECISION

Appearances: Leslie John Rodriquez, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner
George W. Walker III, Esq., and J. David Martin, Esq., Copeland, Franco, Screws & Gill, P.A., Montgomery, Alabama, on behalf of the Respondent

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Elmore Sand & Gravel, Inc. ("Elmore") of 30 C.F.R. § 56.14100(c) and 56.14211(c). On November 3, 2005, the parties filed a Joint Statement of Agreed and Disputed Facts ("Jt. Statement"). On November 8 and 9, 2005, a hearing was held in Montgomery, Alabama.[1] At the hearing, the parties filed Joint Stipulations. On November 30, 2005, pursuant to their stipulations, the parties filed four joint exhibits (JX 1, JX 2, JX 3, and JX 4). Subsequent to the hearing, the parties each filed Proposed Findings of Fact and either a Legal Argument or Memorandum of Law. On April 24, 2006, the parties each filed objections to the other parties' findings of fact and legal arguments.

[1]At the hearing evidence was adduced only regarding Citation No. 6093107 (violation of Section 56.14100(c)).

Joint Statement of Agreed Facts

The parties, in a Joint Statement of Agreed and Disputed Facts agreed to the following facts:

1. Donnie Zeigler had been a haul truck operator at Elmore Sand & Gravel, Inc. ("ESG") since March of 2003.

2. Prior to the date of the accident, Zeigler had been trained by ESG in compliance with 30 C.F.R. Part 46.

3. Prior to the date of the accident, Zeigler had been trained by ESG to never get under the raised dump bed on the Terex Haul Truck he operated without first employing the safety prop.

4. It was ESG's company policy to require the operators of its haul trucks to perform a daily vehicle inspection both before and after completing their shift and to record their findings on an Operator's Daily Vehicle Inspection Report.

5. From December 15 to December 17, 2003, Zeigler was suspended from work due to his failure to show up for work or call in, on December 13, 2003.

6. During the time that Zeigler was suspended, the Terex Haul Truck which he normally operated was being run by Jonas Lee Hall. During the time that Hall operated the Terex Haul Truck, it overturned.

7. The only problem with the Terex Haul Truck experienced by Hall was that the dump bed was slow coming down.

8. When Zeigler returned to work on December 18th, he immediately took the Terex Haul to the maintenance shop for them to repair wires from the wiring harness that were disconnected.

9. Jack Barnes and Eric Hilyer in the maintenance shop repaired the wiring harness.

10. Zeigler turned in Operator's Vehicle Inspection Reports dated December 18 and December 19, 2003.

11. Between December 18, 2003 and the time Zeigler told Derrell Saunders that he was going to check his brakes on the morning of December 20, 2003, Zeigler did not report any problems with the Terex Haul Truck. At the conclusion of his shift on December 19, 2003, Zeigler specifically told Mark Montgomery that the Terex Haul Truck was running fine.

12. After dumping his second load of the day on the morning of December 20, 2003, Zeigler called fellow operator Saunders on their two-way radio and told him that the brake light on the dashboard of his truck kept coming on and that he was going to check his brakes.

13. Zeigler then pulled his truck forward approximately twenty feet, with the bed fully raised.

14. The dump bed on Zeigler's truck was then seen slowly lowering.

15. While driving around Zeigler's truck, Saunders saw Zeigler pinned under the dump bed and immediately jumped out of his truck and got into the cab of Zeigler's truck to raise the dump bed.

16. Saunders moved the joystick to the raise position and raised the dumb bed off Zeigler.

17. Saunders is the only witness who can testify as to the position of the joystick at the time of the accident.

18. Zeigler was found positioned near the brake cylinder and was facing towards the cab of the truck.

19. The Terex Haul Truck was on level ground at the time of the accident.

20. Winds were light and variable on the day of the accident.

21. The emergency workers who responded to the 911 call regarding the accident had to undo some hoses in the process of removing Zeigler from the Terex Haul Truck.

22. Zeigler later died of injuries sustained as a result of the dump bed lowering on him.

23. The dump bed control joystick on the Terex Haul Truck on which Zeigler was killed has four positions, in descending order from the top: Float, Lower, Hold and Raise. The joystick will not remain in either the Raise or Lower positions unless the operator physically holds it there. The joystick will spring back to, and remain in the Hold position when released from the Lower and Raised positions. The Float is a detented position and the joystick will remain in that position if released. In the Float position, the weight of the dump bed causes it to lower. In the Raise and Lower positions, hydraulic pressure powers the dump bed up and down.

24. The dump bed control joystick operated the dump bed irrespective of whether the wiring harness was disconnected from the truck tractor to the truck trailer.

25. During the investigation, the Mine Safety and Health Administration ("MSHA") tested the safety prop on the Terex Haul Truck and found that it was functional in that it prevented the free and uncontrolled descent of the dump bed by stopping it from coming down. The MSHA investigators concluded that the safety prop on the Terex Haul Truck would have protected Zeigler from injury and prevented his death had it been used by him.

26. On December 22, 2003, MSHA investigators Eugene Hennen, Walter Turner and Harold Wilkes performed two sets of tests on the Terex Haul Truck before the wiring harness was replaced on the Terex Haul Truck.

27. On December 23, 2003, MSHA investigator Hennen performed a set of tests on the Terex Haul Truck before and after the wiring harness was replaced on the Terex Haul Truck.

28. During the course of the MSHA investigation, on December 23, 2003, MSHA investigator Hennen conducted tests to determine if the repair of the wiring harness before the accident resulted in shortened wires that pulled loose when the truck articulated. These tests were inconclusive.

29. On December 23, 2003, during the course of the investigation and after the wiring harness was repaired, MSHA investigator Hennen took connectors plus wires that were left over from the tractor side of the wiring harness to his hotel. With no representatives from ESG present, Hennen performed destructive testing on the connectors and wires. On December 24, 2003, Hennen returned the connectors to ESG.

30. In the course of its investigation, MSHA investigator Hennen sent requests for information to the manufacturer of the haul truck, Terex, on January 14, 15 and 16, 2004. Terex responded to these requests on January 22, 2004.

31. The final MSHA Report of Investigation indicated that MSHA could not determine when the wires on the tractor side of the Terex Haul Truck were cut.

I. Citation No. 6093107 (Violation of Section 56.14100(c), supra)

A. The Secretary's Case

1. Derrell Sanders

Derrell Sanders worked on the same shift as Donnie Zeigler, and operated the same model Terex dump truck as the one in issue operated by Zeigler. According to Sanders, he drove the truck one day during the period that Zeigler had been suspended from December 15, through December 17. Sanders indicated that when he operated the lever[2] in the truck which controls the position of the bed, " . . . you tried to power it down. It would never go down. You got to keep clicking it back and forth in order for it to go down. [sic] (Tr. 27). According to Sanders, on December 20, once he saw that the truck bed on Zeigler's truck was down and Ziegler was pinned under it, he jumped in the cab of the truck. Sanders testified that ". . . [t]he lever was in the hold position. And I pulled it back to get it off." (Tr. 33).

2. Eric Hilyer and Jack Barnes

Eric Hilyer, a maintenance mechanic employed by Elmore, was responsible for repairing the wire harness that electronically connects the cab unit (cab) and the dump bed. According to Hilyer, if the harness is damaged, it is his normal procedure to strip the outer layer of installation and each individual wire that has been broken, and then reconnect the ends of any exposed wires. The reconnected wires are each placed in a separate butt splicer, and crimped to make a secure connection.

On December 13, the dump bed had overturned. According to Hilyer, the wires were "mashe" (Tr. 84). He repaired all eleven wires within the harness by way of butt splicing.

According to Hilyer, he worked on the truck on December 15, because the body was not going up, and a fuse had blown. He indicated that when he put in a second fuse, "it blew". (Tr. 149). He then started to look for electrical problems " . . . and found the wiring harness pinched" *Id.*

Jack Barnes, a mechanic to whom Hilyer reports, testified that on December 18, "first thing" in the morning after Ziegler inspected the truck (Tr. 210), the latter brought him (Barnes) the harness and " . . . about three or four wires . . . had mashed." [sic] (Tr. 212). Although not all of the wires were damaged, Barnes repaired six of the wires, and the remainder was repaired by Hilyer. All damaged wires were repaired with butt connectors.

According to Hilyer, after the accident at issue, the harness that ran from the cab to the dump bed was examined. The end that was connected to the cab appeared to have been severed, and the end attached to the dump bed ended in butt connectors. A piece of the harness, of indeterminate length, was missing between the severed portion of the harness connected to the cab, and the butt connectors at the end of the harness connected to the dump bed.

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[2]Control joystick (joystick)

According to Hilyer, he performed various tests relating to the operation of the joystick and the dump bed. On December 22 and 23, tests were conducted while the harness was unconnected. In addition, on December 23, tests were performed after the harness had been repaired and reconnected. On one test when he raised the dump bed to the fully upright position and released the joystick, the dump bed held. On another test "it drifted down." (Tr. 114). When he was directed to lower the dump bed, it did not "come down." (Tr. 115). He then placed the joystick in the float position, and the dump bed did not come down. Hilyer raised the dump bed again, and the dump bed "didn't go up or didn't come down." (Tr. 115). He testified further as follows: "We went back to the hold position and it held again. Had to go back and forth between down and hold, down and hold, to make the body move. [sic] And then it started coming down. At one time it held; the next time it didn't hold." *Id.*

3. Mark Montgomery

Mark Montgomery testified that in his capacity as Elmore's Safety Director, every day at the end of the shift, he reviews all vehicle inspection reports. According to Montgomery, Elmore requires its employees to complete pre-shift vehicle reports at the start of the workday, and post-shift reports at the end of the workday. On December 20, the pre-shift vehicle inspection report for December 20, was not located. A blank vehicle inspection report was found in Zeigler's truck.

4. Eugene Hennen

According to Hennen, he inspected the severed harness subsequent to the accident, but prior to its replacement. He indicated that he could not determine how the harness had been severed. He agreed that he did not believe this condition " . . . existed at the time of the accident." (Tr. 443).

On December 22, before the severed harness had been replaced, Hennen asked Hilyer, who was then in the cab, to perform various tests with the joystick. He indicated that when the truck bed was raised and he told Hilyer to " . . . let loose of the joystick" . . . and the latter complied, " . . . the bed would come down." (Tr. 249). Hennen was asked to describe what occurred when he requested Hilyer to ". . . raise the bed up points in between the frame of the dump bed unit and its maximum height." He answered as follows: "Well, when he would take it all the way up, it would stay there. And he would have to power it to start it down before it would come down. When he would start powering it down and let loose of the control, it would come all the way to the frame." *Id.*

Later on that day, Hennen asked Hilyer to raise the bed all the way and put the joystick in the hold position. According to Hennen, the bed appeared to go all of the way up. He indicated that the bed came down and ". . . that was the first time that the bed had came down from the totally up position."[sic] (Tr. 253). Hennen said he repeated the test, "... we waited at least a minute", and the bed stayed up. *Id.* He further testified that he then tested ". . . to start the bed

down. And it came all the way to the frame." (Tr. 253). Hennen indicated that on December 22, when he tested the joystick in the hold position the bed came down "... one out of three times... ." (Tr. 429). According to his testimony the bed " . . . came down twice ... [f]rom all the way up" (emphasis added) (Tr. 464), and it came down two other times when the bed was not in a fully raised position.

Hennen testified that on December 23, in the presence of the representative of the manufacturer of the Terex truck at issue, he repeated the same tests that had been performed the previous day. He indicated that, in the hold position, " . . . the bed would not hold when you would let loose the control when you are raising or lowering the bed." (Tr. 257). He also indicated that in testing on December 23, the bed came down when the joystick was in the float position. When he repeated the test the bed initially stayed up, but it started to come down after thirty-five seconds. Hennen repeated the test again, and the bed stayed up. He asked the Terex representative to explain why that happened "[a]nd he told me that it was because . . . the wire to the warning light was broke because all the wires were severed. And that would cause it to do that." [sic] (Tr. 259).

On December 23, after Hilyer repaired and reconnected the wiring harness, Hennen had him then repeat the same tests, with the exception of putting the joystick in the float position. According to Hennen, the bed was raised and put in the hold position. He indicated that this test was performed "several times" and "... it would hold every time." (Tr. 266).

According to Hennen, in essence, the operation of the hydraulic system that raises and lowers the truck bed is controlled by a joystick, located in the cab. When the joystick is placed in the up or down position, respectively, an electrical connection is made between the control stick and a hydraulic valve located in the cab, which in turn, hydraulically raises or lowers the dump bed. When the truck bed is in a raised position, electricity is transmitted through a wire in the harness that extends from the dump bed to the cab and activates a warning light located in the cab. If the bed is lowered, it makes contact with a proximity switch located on the frame of the bed. As a result, the electrical circuit to the warning light is broken, and the light is turned off.

Hennen opined that when the bed is raised and the joystick is released, if there is a break in either of the wires that electrically connect the warning light in the cab and the proximity switch on the dump bed, then the system will remain in the float position, even if the joystick is in the hold position. Hennen opined that this is what caused the bed to come down at the time of the accident.

On January 12, 2004, the Secretary issued a citation to Elmore alleging a violation of 30 C.F.R. § 56.14100(c). Section 8 of the citation alleges in the "condition or practice" the following:

> A fatal accident occurred at this operation on December 20, 2003, when a truck driver was pinned between the frame of the truck and

the dump bed of a Terex TA25 haul truck. The wiring harness from the tractor to the dump bed trailer was damaged causing a short in the electrical system that prevented the dump bed control switch from working properly. Due to the electrical short when the control lever was released after raising the bed, the hydraulic control valve would not return to the hold position allowing the bed to come down.

B. Discussion

Section 56.14100(c), supra, provides as follows:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

Thus, to establish a violation herein, the Secretary must establish (1) the existence of a defect, that (2) makes a continued operation hazardous to persons, and (3) that the defective items be taken out of service.

1. The existence of a defect

The Secretary asserts that the truck was defective " . . . in that before the accident, the wiring harness came loose thereby creating an open circuit that disabled the joystick, the body-up switch and the warning light." (emphasis added) (Proposed Finding of Fact and Memorandum of Law, at 32).

a. Whether the wiring harness "came loose" before the accident

i. evidence relied on by the Secretary

In support of its position that the harness had come loose prior to the accident, the Secretary relies on the testimony of Hilyer and Barnes, that on December 13, and December 18, they repaired damaged wires within the harness. They indicated that on each occasion the wires were reconnected by placing them in butt connectors, which were then crimped. The Secretary also relies on an MSHA taped interview of Jonas Hall on December 23, 2003,[3] wherein the latter indicated that he operated the truck in question during Ziegler's absence on December 13, 15, 16

[3] This taped interview was transcribed by the parties after the hearing and offered as a Joint Exhibit (JX 4), and is admitted into the record.

and 17, and the bed turned over. Hall stated that he noticed that the wires running from the bed to the cab " . . . had came loose."[sic] (JX 4, at 2). On another occasion when the truck had turned over, he noticed that these wires had come loose, and they were subsequently repaired.

According to Hall, when he operated the truck, he noted that the wires were loose and that the " . . . little light wouldn't come on the truck." (JX 4, at 9). Hall also indicated that the truck bed was slow coming down.

In addition, the Secretary refers to an MSHA taped interview of Tommy Finley on December 23, 2003, in which the latter indicated that on December 20, he was working on the same site as Zeigler and that "[h]e had said something that morning about the wiring on the truck. He had said the wiring was messed up and (inaudible) fix it." [sic] (JX 3, at 1)[4]. In the same fashion, MSHA Inspector, Harold Wilkes' general field notes, dated December 23, 2003, relating to an interview of Ennatt Anthony Findley, state as follows: "Zeigler told me something was wrong with the wiring and someone was due today to make repairs." (R-10, at 6)[5]

ii. discussion

The record is clear that, after the accident, the harness was not intact; the end that was connected to the cab appeared to have been severed; the end attached to the dump bed ended in butt connectors; and a piece of the harness of indeterminate length was missing between the severed end, and the butt connectors. Also, on two occasions within a week prior to the accident, the harness wires had become damaged, and had to be stripped and reconnected. However, the record does not contain any evidence that these repairs were not done according to accepted standards, that the butt connectors were not properly crimped, or that the reconnected ends were not secure.[6] Further, there was not any evidence adduced that, on December 18, when the last repairs were performed, any of the previous connections had come loose. The only evidence of damage to the harness subsequent to the repairs on December 18, consists of an unsworn statement by Findley that on December 20, Zeigler told him the wiring was "messed up". (JX 3, at 1). Not much weight is placed upon the statement inasmuch as it is not clear as to what

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[4]Subsequent to the hearing, the tape of the interview was transcribed and offered by the parties as a Joint Exhibit (JX 3) and is admitted into the record.

[5]In the Secretary's Memoranda of Law, the Secretary cites this statement as exhibit P-5, at 6. However, exhibit P-5, which is the same as exhibit R-10, was not admitted at the trial.

[6]I take cognizance of Hall's recorded statement that, when he operated the truck on December 13, 15, 16, and 17, wires running from the bed to the cab "had came loose" [sic] (JX 4, at 2). and that "wires were loose... and the little light wouldn't come on in the truck." (JX 4, at 9). However, he was not called to testify, and he did not specify the wires he was referring to. Further, there is not any evidence that all the loose wires in the harness that had existed on December 18, were not repaired, reconnected, and secured on that date.

specific wiring Zeigler was referring to. Also, it is significant to note that the Secretary did not call Findley as a witness, which would have allowed also for cross-examination. Further, I note that Sanders was the only miner to testify who had a conversation with Zeigler on December 20. Sanders did not indicate either in his testimony or in statements that he gave to the police, and MSHA Investigators that Zeigler had said anything to him about the wiring in the harness being "messed up." Also, it is significant to note that Ziegler did not report any problems with the truck on his inspection reports for December 18 and 19. In this connection, it was stipulated to by the parties that "[a]t the conclusion of his shift on December 19, 2003, Zeigler specifically told Mark Montgomery that the Terex Hall Truck was running fine." (Jt. Statement, para. 11). Importantly, it also was agreed to by the parties that "[b]etween December 18, 2003 and the time Ziegler told Sanders that he was going to check his brakes on the morning of December 20, 2003, Ziegler did not report any problems with the Terex Haul Truck". *Id.*

Moreover, although the condition of the harness was noticed to have been not intact after the accident on December 20, it is significant to note that Sanders, who was the first person to arrive at the truck immediately after the accident was asked as follows in a MSHA taped interview only three days after the accident: "Whenever you all were at the accident scene, . . . did you notice though, there's a set of wires that runs from the back to the front, . . . that . . . had been either ripped or torn into or . . . ." (JX 2, at 9)[7]. He answered as follows "Everything was connected good." *Id.* This statement was not contradicted by any other witness. Indeed, no other witness testified based on personal observation as to the condition of the harness wires immediately after the accident. In this connection, the parties stipulated that MSHA could not determine when the wires on the tractor side of the Terex Haul Truck were cut. Similarly, as stipulated by the parties, test results were "inconclusive" regarding whether " ... repair of the wiring harness before the accident resulted in shortened wires that pulled loose when the truck articulated ... ." (Jt. Statement, para. 28).

For all the above reasons, I conclude that the Secretary failed to establish, by a preponderance of the evidence that the harness wires had come loose prior to the accident on December, 20.

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[7]The taped interview was transcribed by the parties after the hearing and offered as a joint exhibit (JX 2). and is admitted into the record.

b. Whether loose wiring disabled the joystick, the body- up switch, and the warning light prior to the accident.

In this connection, it appears to be the Secretary's argument that, in essence, the harness had become loose prior to the accident, which resulted in the disabling of the joystick, the body-up switch, and the warning light. In support of her argument, the Secretary relies on the testimony of Hennen regarding the relationship between a severed harness wire, and the failure of the dump bed to operate properly in the hold position.

i. Heenen's testimony

In order to evaluate the weight to be accorded Hennen's analysis, his testimony in this regard relating to the truck's electrical system is set forth in its entirety as follows:

Q You said it's an electrical -- the joystick is an electrical component of some kind.

A Yes, the joystick is an electrical component. It sends a signal to the solenoid valves on the hydraulic control valves to control it through the power pressure it lets into it.
So to make it simple, to simplify, the body hydraulic joystick sends an electrical signal into the hydraulic system to control the hydraulic control valve.
ADMIN. JUDGE WEISBERGER: The signal that's sent to the hydraulic system, is that what makes the bed, dump bed, go up and down?
THE WITNESS: Yes.
ADMIN. JUDGE WEISBERGER: That signal is sent through a wire?
THE WITNESS: Yes.
ADMIN. JUDGE WEISBERGER: Is that wire in the harness in question?
THE WITNESS: No, Your Honor.
ADMIN. JUDGE WEISBERGER: Mr. Rodriguez.
BY MR. RODRIGUEZ:

Q In response to the Judge's question, the Judge said if that signal in the harness -- how do you explain the electrical signal that we're discussing for this body down circuit and the electrical signal you just discussed about the hydraulic joystick? Is there a difference?

A Could you repeat the question, please?

Q You described that there's a different electrical signal that goes through the hydraulics.

A Yes. One of the signals comes from pushing the joystick and the other comes from this circuit that we're talking about. So this

particular circuit, the one is related to our -- what we say was the cause of the bed coming down.

Q Are we moving to 12 and 13? Or where are we moving?

A We're going to go back to the other page here in just a little bit. But there's one other thing that I wanted to point out. Also, H-2 --

Q Is this on Page 1?

A One. Which is Item 14, which is the light inside of the cab of the cab unit. This is the light that warns the operator that the bed -- when the bed is up.

But now we're talking when the bed is down so this light is out. It's actually totally isolated from the electrical circuit in that both the ground side of the light between B-12 and B-15 is disconnected. So it doesn't have a ground.

And also up on K-35, Item 7, it's disconnected there also so that it doesn't have power or ground. So it's totally isolated from the circuit and it goes out when the body's down, indicating that the body is down, so the operator knows this.

Q Are we finished then with Page 1?

A Yeah. We can go to Page 2. On Page 2, I made an X. This is to indicate what happens when there is a broken wire.

ADMIN. JUDGE WEISBERGER: Is that X --

THE WITNESS: It's on Item 3, on Page 2, wire R0.

ADMIN. JUDGE WEISBERGER: Okay.

THE WITNESS: The broken wire might be there, or it could be in 6. It would be the same thing as what I'm referring to. I'm not saying that it was in this exact place, but we're alleging that it was someplace in the wiring harness where it was damaged at, was the broken wire. So with this wire broken --

ADMIN. JUDGE WEISBERGER: With "this," you mean either 3 or 6?

THE WITNESS: Yeah, either 3 or 6. If either one wires is broken -- normally when you raise the bed, this circuit closes. So when you raise the bed -- now the circuit I'm talking about S-22, which is called the -- in the -- as it's called on this exhibit, it's called the body up switch. It would normally close. And it does even if the wire's broken.

But with the wire broken, it is the same as the switch being closed. It acts the same as a switch. So normally when the body goes up, this switch closes, and then it reverses everything that we just went through.

I don't think we need to go through a step-by-step again, but we can just go over to Page 1 and summarize what that means.

Everything's reversed, so we go down to K-36. So at that point, K-

36, everything reverses there.
This is a double-pole relay. And now B-12 is connected to B-15. Since everything's reversed, there's now power coming to H-2, which is Item 15. It's grounded at K-36, and it has power coming through at K-35. So the light comes on. This is normally when you raise the bed.
And then the B-12 -- as I said, B-12 is connected to B-15, which has a ground for the light. But B-12, US-13 are disconnected. Then the float -- at that point, the float no longer works. The float that this part of the signal that sends, that goes into the electrical circuit and causes the float to operate is no longer grounded. So it's not sending any signal. So now the float is no longer operational.
But if we go back to Page 2. If the wire is broken --
ADMIN. JUDGE WEISBERGER: That's either 3 or 6?
THE WITNESS: Yeah, either 3 or 6. If that wire's broken, it's the same as when the circuit was open because the body was down. So as you raise the bed, the float is still open.
When you let loose of the joystick and it goes into the hold position, this float is still energized because of the broken wire, and that causes the bed to come down. When you let loose of the joystick and let it go back into the hold position, it doesn't read the hold position because this circuit has kept the control, the hydraulic control, in the float position.
So that's what we allege was the reason that the bed came down at the time of the accident.
ADMIN. JUDGE WEISBERGER: Thank you.
BY MR. RODRIGUEZ:

Q So connect this then, this body down circuit that we discussed to the mended Citation. We're now talking about an open circuit.

A Yes. The open circuit is the broken wire, either RO, Item-3, or PG, Item 6. That is the open circuit. Which because of that open circuit, it would remain into the float position even when you released the control and let it go back to the hold position.

Q Reading from the Citation, it says, "As a result of the amended, the result of the open circuit, it concludes the hydraulic control valve would not return to the hold position, allowing the bed to come down."
How do you explain that in light of P-18?

A Well, the Citation says that when the control went into the hold position --

Q It says, "The hydraulic control valve would not return to the hold position, allowing the bed to come down."

A Yes, well, it wouldn't allow the hydraulic control itself to go into

the hold position. The joystick was in the hold position, but the hydraulic control valve itself would not go into the hold position.

Q I want you to look at Exhibit P-13, Page 7.

A Okay.

Q Look at the second note from the bottom of that page. It starts with, "If the body warning light..." See that?

A Yeah.

Q Take a moment to look at it, and then I'll ask you a question.

A Okay.

Q How do you connect the representation made in that note with this body down -- note in P-13, Page 7. With the body down circuit and the Citation, the body down circuit in P-18.
How do you connect all of that?

A This says that if the light goes out to -- if the light goes out, then the body control valve will automatically float to -- or will default to the D-10 float. Which is what we said happens, when the wire breaks, the light goes out. (Tr. 318-326)

I find Hennen's testimony to be confusing and lacking in clarity. I thus find it lacking in probative value.

ii. Heenen's theory, assumptions, and tests

Hennen agreed on cross-examination that his theory of this case is as follows: "... the wiring harness, and specifically the proximity switch wire, was severed, was disconnected, causing the dump bed to not operate properly when the joystick was in the hold position." (Tr. 361). He indicated that his theory is based upon the following assumptions: 1) that the harness was disconnected at the time of the accident, and 2) that the joystick was in the hold position. Hennen also relied on results of tests relating to the operation of the control stick and the dump bed.[8]

The harness was disconnected at the time of the accident

As discussed above, (I(B)(1)(a) infra), the record fails to establish that the harness wires had come loose prior to the accident. Accordingly, I find that there is not any evidentiary support for one of the two assumptions made by Hennen.

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[8] Hennen testified that another assumption that he made supporting his theory was that the blinking headlights on Ziegler's truck a day or two before the accident indicate the harness wiring was damaged before the accident. This assumption is not addressed in the decision since the Secretary abandoned this theory during the trial.

The joystick in the hold position at the time of the accident

In support of Hennen's assumption that the stick was in the hold position at the time of the accident, the Secretary relies on the testimony of Sanders, the first person to enter the cab immediately after the accident. According to Sanders, when he entered the cab he used the joystick to raise the bed and it was in the "hold" position. (Tr. 33, 51). However, the weight to be accorded Sanders' testimony with regard to his observation of the joystick immediately after the accident, is diluted by his admission on cross-examination that when he saw Zeigler or some part of his body under the truck bed, it was "a very traumatic moment" for him. (Tr. 48). Also Sanders agreed that when he jumped in Ziegler's cab "the only thing that was on [his] mind . . . was just get the bed started up."[sic] (Tr. 48-49). Importantly, when asked " . . . you weren't really paying attention what position . . . the joystick was in; were you?" He answered, "Right". (Tr. 49).

Further, I note that Sanders' testimony at the trial was adduced almost two years after the accident. In contrast, on the day of the accident he signed a statement that when he got into the cab and "... let up his bed the dump lever was not all the way down I pulled it down . . . ." [sic] (Ex. P-28, at 2) Additionally, in a taped interview with a MSHA Investigator the day after the accident, Sanders indicated that when he got in the cab the dump switch was not in the float position " . . . It was in the neutral position. It wasn't up, it wasn't back but it was right there in the middle." (JX 2, at 3). To further obfuscate matters, Sanders responded in the affirmative in response to a leading question from the Secretary's attorney as to whether he ever used the term the "hold" position as being the same as the "neutral" position.

Further, Sanders testified as follows with regard to the various positions of the joystick, as indicated on Exhibit P-9, and their function: "... on the very top, that's showing to raise the bed, the middle one is suppose to be float–no, power down. And the third one is suppose to be float. And the last one is suppose to be powered down." (Tr. 37). In contrast the uncontested facts indicate, as stipulated to by the parties, that the joystick "... has four positions, in descending order from the top: Float, Lower, Hold and Raise." (Ex. P-9, Ex. P-13, at 7, and Jt. Statement, para. 23). In the same fashion, Sanders testified that in either powering up or powering down, if he would let go of the joystick it would go into the float position. (Tr. 41). In contrast, the parties stipulated that if the joystick is released from the "lower" and "raise" positions it will "spring back to, and remain in, the Hold position ... . " (Jt. Statement, para. 23).

Therefore, for all of the above reasons, I assign very little probative weight to the testimony of Sanders regarding the position of the joystick immediately after the accident. Thus, I find that the evidence adduced by the Secretary, consisting solely of the testimony of Sanders, is not sufficiently clear to establish, by a preponderance of evidence, that immediately prior to the accident, the joystick was in the hold position. Thus, it is concluded that the record does not establish the existence of one of the two assumptions made by Heenen.[9]

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[9]The significance of this assumption to Hennen's theory is indicated by his testimony that he considered it as "conclusive" support for his theory, in connection with the fact that the bed did

Hennen's tests

In general, the Secretary asserts that in the testing performed on December 23, when the harness was still disconnected, the bed came down in the following situations: when the joystick was released to the hold position, when the bed was powered down, when the bed was powered up, but before it was fully raised, and when the bed was fully raised. The Secretary alleges that in the latter test, the bed came down twice. However, for the reasons set forth below, I find that the weight of the evidences regarding the particulars of the testing does not support these assertions.

Hilyer's testimony

According to Heenen, in testing on December 22 and 23, he instructed Hilyer to operate the truck and place the joystick in various positions.[10] Hilyer indicated that he recalled that when the bed was raised and the joystick was let go to spring back to the hold position, "On one test it held right where it was at." [sic] (emphasis added) (Tr. 114). On another test when he let go of the joystick and it sprang back to the hold position, the bed came down.

However, further testimony regarding Hilyer's recollection diminishes the weight to be accorded his testimony. He was asked whether " . . . the dump bed it went up and it went down" [sic] on December 22, when only Hennen was present. He answered "I . . . Yes." (Tr. 108). However, Hilyer was next asked what he remembered, and he answered as follows: "Well, I don't remember exactly what the dump body done at that time." [sic] (emphasis added) (Tr. 108-109). Further, when he was asked whether he raised the dump bed after the harness had been repaired and reconnected, he indicated as follows: "... we did a lot of tests on that thing at that time. And I don't remember every test we done or exactly when I done it or how I done it. But I don't remember that part. I don't remember if we did it then or not." [sic] (Tr. 102).

Additionally, Hilyer's following testimony further evidences a lack of reliability regarding his memory of various tests:

> Q Did you raise the body all the way up, part way up?
> A I don't remember exactly at what time. I done exactly what the inspectors told me to do. If they told me to stop it halfway, I did. If they told me to raise it all the way up, I did. So I don't exactly remember that particular test at that particular time where we stopped the body at, if it was all the way up, in the middle, or where.
> Q But when you raised the dump bed -- and the inspector told you to raise the

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not come down when the joystick was put in the hold position on December 23, after the harness was reconnected.

[10]Two sets of tests were conducted on December 22, before the harness was replaced. On December 23, a set of tests was performed before and after the harness was replaced.

dump bed, I just heard you say -- did the dump bed hold after this splice was -- the truck and the trailer were reconnected? Did it stay up?

A I can't remember.

Q Let me ask you this. Is your habit to, when you raise the dump bed, to release the joystick?

A When you raise it?

Q Uh-huh (affirmative).

A If you release it, it stops.

Q Okay.

A It goes back to the hold mode automatically.

Q Okay. So before the repair was made and you raised the dump bed and you released it, did the dump bed hold?

A Raising it up?

Q Uh-huh (affirmative).

A I can't -- if I answer these -- if I answer that yes, I can't be a hundred percent sure. This has been two years ago. And we done a lot of tests in those three days, and I don't remember exactly what we done on each test during those three days." (Tr. 103-105)

inconsistencies in the record

Moreover, the balance of the record contains a number of significant inconsistencies which further diminish the weight to be accorded the tests. According to Hennen, the first series of tests on December 22, indicated a defect that he described as follows: "... when you let loose of the joystick control while the bed was in the raised position the bed would not hold as it should. The joystick would remain in the hold position, but the bed would come down." (emphasis added) (Tr. 248). However, on cross-examination he agreed that on December 22, in the testing in the hold position before the inspectors arrived the dump bed "had never came down." [sic] (Tr. 432).

Hennen testified, in essence, that he repeated the first tests to show MSHA Inspectors, Walter Turner, and Harold Wilkes, the defect that he observed when the joystick was in the hold position. He said the bed "appeared to go all the way up . . . [and then] came down without me giving any other directions." (Tr. 252). In contrast, in a draft of a report prepared by Hennen, entitled EQUIPMENT RELATED PHYSICAL FACTORS FOR A FATAL ACCIDENT AT SCOTT PITT AT ELMORE SAND & GRAVEL, INC., he indicated as follows: "The truck manufacturer was contacted to determine why the bed did not stay in the fully upright position when the control was in the float position during the first test conducted after the accident, but stayed in place in all of the subsequent identical tests." (emphasis added) (Ex. P-12, at 4)

Moreover, contemporaneous notes taken by Turner and Wilkes, do not appear to be consistent with Heenen's testimony regarding the position of the joystick in tests conducted in their presence. Turner's notes contain the following entry: "ON ONE ATTEMT THE BED LOWERED ON ITS ON-FLOAT POSITION THE SECOND AND THIRD ATTEMT IT STAYED." [sic] (emphasis added) (Ex. P-4, at 4) To add to the confusion, Turner did not observe the tests, but wrote what Heenen told him. On direct-examination, he was asked to state Hennen's exact words to him and he testified as follows: "To the best of my recollection, he said, 'It bypassed the hold position and went into the float position'." (Tr. 479). He was then asked to what he meant in his notes, and he testified as follows: "That's whenever Eric had raised the bed and the bed come down, [sic] and he said it's bypassing the hold position going into the float position... ." (Tr. 478). In contrast, contemporaneous notes taken by Wilkes, who wrote what Turner told him, contain the following entry: "When truck bed was lowered in the float position it took 55 seconds to lower." [sic] (emphasis added) (Ex. P-5, at 4). Turner's notes contain the following statement relating to the second attempt to lower the bed: "In the float position it did not lower its self," [sic] (emphasis added) *Id.* Lastly, Wilkes wrote as follows relating to the third attempt to lower the bed: "It did not lower its self [sic], the lever was then placed in the lower position for a moment then placed in the float position. It did not lower its self." [sic] (emphasis added) *Id.*

Hennen supervised a third series of tests on December 23. According to Hilyer's direct testimony, "... the bed would not hold when you would let loose the control when you were raising or lowering the bed." (Tr. 257). Hennen's contemporaneous notes for December 23, state as follows: "[h]old position on machine bed lift would not hold."(Ex. P-6, at 5) However, on cross-examination he indicated that on December 23, in testing before the harness was repaired, the bed did not come down when the control stick was in the hold position; it came down when it was in the float position. (Tr. 428-429).

discussion

Due to the various inconsistencies in the record, I place considerable weight on Heenen's clear admissions on cross-examination, that in the approximate 12 tests that he conducted, the bed came down only once when the joystick was in the hold position. (Tr. 411-412, 425-426). It's significant to note that subsequent re-direct-examination did not elicit any further testimony from Heenen concerning the number of times the bed came down with the joystick in the hold position. I thus find that the preponderance of the evidence fails to establish that the bed came down more than once when the joystick was in the hold position. I thus find that the tests are insufficient to support Heenen's opinion that a break in the harness causes the bed to come down when the joystick is in the hold position.

Moreover, it is critical to Hennen's theory that in testing on December 23, after the harness had been repaired and replaced, the bed did not come down in the three times it was tested when the bed was fully raised and the joystick was put into the hold position. However, conflicting testimony adduced by Elmore diminishes the probative value of these results. I note that Billy Stanley, Elmore's President testified that, approximately four to five months after the

accident, he unplugged the harness wiring and instructed Hilyer to raise the bed " ... all the way up." (Tr. 570). According to Stanley, he observed Hilyer take his hand off the joystick, which put it in the hold position, and the bed did not come down. He indicated that he did this test "... 10, 15 times over a period of time... ." (Tr. 572). In addition, he had Hilyer raise the bed all the way, release the joystick, and "slam" on the brakes. *Id.* Stanley indicated that the bed did not come down.

In addition, Stanley instructed Hilyer to put the joystick in the float position and raise the bed all the way up, and it did not come down. He then had Hilyer drive forward approximately fifty feet and the bed came down. It is significant to note that Stanley's testimony was not impeached or contradicted. I thus find that Elmore's evidence diminishes the weight to be accorded Heenen's tests on December 23, after the harness had been reconnected.

Accordingly, for all of the above reasons, I find that the Secretary has failed to meet its burden of proof of establishing that, prior to the accident, the harness wire running between the dump bed and the truck had become loose, and would have caused the truck bed to come down after it was raised and the joystick placed in the hold position. I thus find that the Secretary has failed to establish, that prior to the accident, a defect existed that made continued operation of the truck at issue, hazardous to persons. Accordingly, I find that the Secretary has not established a violation under Section 56.14100(c), supra. Therefore it is **Ordered** that Citation No. 6093107 be **DISMISSED.**

II. Citation No. 6093106 (Violation of 30 C.F.R. § 56.14211(c))

On January 12, 2004, the Secretary issued a citation to Elmore alleging the following condition constituted a violation of Section 56.14211(c), supra: "A fatal accident occurred at this operation on December 20, 2003, when a truck driver was pinned between the frame of the truck and the dump bed of a Terex TA-25 Haul Truck. The truck driver was on the frame of the truck with the bed in a raised position when the bed of the truck unexpectedly lowered. The safety bar had not been utilized to prevent the bed from lowering."

Section 56.14211(c), supra, requires, as pertinent, that "[a] raised component ... be secured to prevent accidental lowering when persons are working on or around mobile equipment an are exposed to the hazard of accidental lowering of the component."

The record clearly establishes that the Terex truck at issue was mobile equipment with a raised component i.e. the dump bed. Also, the record indicates that, just prior to the accident at issue, Ziegler told Sanders that he was going to check his brakes. Ziegler than pulled his truck forward and Sanders observed him getting out of the cab. The dump bed started to come down and Ziegler was found pinned under the dump bed, positioned near the brake cylinder. Within the above framework, and given the absence of any evidence to the contrary, it may reasonably be inferred that Ziegler exited the truck intending to check the brakes, and became exposed to the hazard of the dump bed lowering. I thus find that it has been established that Ziegler was working on or around the truck, and was exposed to the hazard of accidental lowering.

The sole issue remaining for resolution is whether the raised truck bed was "secured" as provided in Section 56.14211(c), supra. The parties stipulated that the safety prop on the truck was tested and it "... prevented the free and uncontrolled descent of the dump bed by stopping it from coming down, [and] MSHA investigators concluded that ... [it] ... would have protected Ziegler from injury and prevented his death had it been used by him." (emphasis added) (Jt. Statement, para. 25). Based on these stipulations and the fact that the truck bed did come down, I find that the prop was not used by Ziegler when the bed was in a raised position. Accordingly, I conclude that the bed was not "secured", as use of the prop would have stopped the bed from coming down.

It is Elmore's position, as a defense, that Section 56.14211(c), supra, alone, is not controlling, but that it must be read "conjunctively" with subsection (d) (30 C.F.R. § 14211(d)), which provides that "[u]nder this section a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." Elmore asserts that subsection(d), supra, only requires that mobile equipment be provided with a device which prevents free and uncontrolled descent. As such, it is argued by Elmore that subsection(d), supra, does not require the actual use of the device.

I find that the limited construction urged by Elmore fails to achieve the protection explicitly required by the clear language of Section 56.14211(c) i.e., the securing of a raised component to prevent accidental lowering. Further, I note that the regulatory history of Section 56.14211(d), supra, clearly evidences an intent that any device preventing free descent must be used to comply with the requirement of Section 56.14211(c), supra. In this connection, I note the Discussion and Summary of the Final Rule, set forth in the preamble to Subpart M, 30 C.F.R., states as follows with regard to a discussion of Section 56.14211(d), supra,: ". . . [t]he final standard also permits use of any other device that prevents free and uncontrolled descent, should there be a sudden failure of the system that is holding up the raised component." (emphasis added) 53 Fed. Reg. 32,516 (1988). I thus find that to achieve the explicit protection required in Section 56.14211(c), supra, a safety prop must be used; it is insufficient if a truck is merely provided with a device.

Therefore, for all of the above reasons, I find that the Secretary has established that Elmore violated Section 56.14211(c).

Penalty

The parties stipulated that the imposition of a penalty will not effect Elmore's ability to remain in business. The parties also stipulated as follows "MSHA appropriately considered the statutory factors regarding history, operator size, gravity and good faith abatement regarding the proposed penalty and ESG does not contest the size of the proposed penalties assessed against ESG." (Jt. Stip. para. 10) In this connection, the record established that the gravity of the violation was relatively high inasmuch as a fatality resulted. However, I find that a significant

mitigating factor regarding the level of the company's negligence is the stipulation by the parties that "... Ziegler had been trained by ESG to never get under the raised dump bed on the Terex Haul Truck he operated without first employing the safety prop." (Jt. Statement, para. 3). Although Ziegler's negligence in failing to use the safety prop may be imputed to the company, there is not any evidence that Elmore knew or reasonably should have known that Ziegler was not going to use the safety prop, or that Ziegler's failure to use the safety prop should reasonably have been anticipated or expected by Elmore. Nor is there any evidence that Elmore was negligent in failing to have properly trained or supervised Ziegler. For all the above reasons, I conclude that the level of Elmore's negligence was low.

Taking into account all of the above factors set forth in Section 110(i) of the Act, I find that a penalty of $350.00 is appropriate for this violation.

ORDER

It is **Ordered** that Citation No. 6093107 be **DISMISSED**. It is further **Ordered** that, within thirty days of this decision, Elmore pay a total civil penalty of **$350.00** for the violation of Section 56.14211(c), found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 28, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2005-111-M A.C. No. 07-00093-54165
v.	:	
PENNSY SUPPLY, INC., Respondent	:	Tarburton Pit

DECISION

Appearances: Keith E. Bell, Esq., U.S. Department of Labor, Arlington, Virginia; Brian Y. Yesko, Conference and Litigation Representative, Warrendale, Pennsylvania, on behalf of the Petitioner;
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me upon Petition for Assessment of Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration ("MSHA"), against Pennsy Supply, Incorporated ("Pennsy"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). The Secretary seeks civil penalties in the amount of $406.00 for two alleged violations of her safety regulation found at 30 C.F.R. § 56.11001.

A hearing was held in Dover, Delaware. The parties' Post-hearing Briefs and Reply Briefs are of record. For the reasons that follow, the citations shall be vacated.

I. Stipulations

The parties stipulated as follows:

1. Pennsy Supply is owned and operated by Pennsy Supply, Incorporated;

2. Pennsy Supply, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

3. The presiding Administrative Law Judge has jurisdiction over these proceedings;

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date , time, and place stated thereon, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein;

5. The parties stipulate to the authenticity of their exhibits, but not to their relevance or the truth of the matters asserted therein;

6. The total annual hours worked at Pennsy Supply, Incorporated, is approximately 24,437 hours per year;

7. The computer printout reflecting the Respondent's history of violations is an authentic copy, and may be admitted as a business record of the Mine Safety and Health Administration; and

8. The imposition of the proposed civil penalties will not affect the Respondent Pennsy Supply's ability to remain in business.

II. Factual Background

Pennsy is a division of Old Castle Materials Group. Tr. 89. On January 11, 2005, MSHA Inspector Reecle Horn conducted his first inspection of Pennsy's Tarburton Pit, a seasonal sand and gravel operation in Dover, Delaware, employing 15 to 18 employees. Tr. 42, 110-11. The plant was shut down for winter maintenance on the day of the inspection, and Tarburton's plant manager, Richard Hickman, and its safety director, Dorothy Lehmann, were on site. Tr. 12, 36, 157-58. When Horn commenced his inspection, he observed that the C2 stacker conveyor and the C1 conveyor, situated above and feeding the stacker, did not have walkways or extended fittings.[1] Tr. 10, 16, 24-26. No work was being performed on the equipment at the time of Horn's inspection. Tr. 36. Based on his observations, Horn asked plant operator Thomas Avery, who was performing maintenance duties nearby, how he greased the head pulleys of both conveyors. Tr. 12, 26, 161-62. Avery told Horn that he greased them on average of every two weeks. Tr. 10, 17, 29. He further stated that he climbed up the lattice-work on the side of the C2 stacker conveyor and walked the belt to the head pulley. Tr. 10, 12, 17. As for the C1 conveyor, Avery told Horn that he used a ladder to access it, then walked down the belt to grease the head pulley. Tr. 24-29. Lehmann and Hickman were nearby during this discussion, but only Lehman heard Horn question Avery. Tr. 22, 163-64, 201. Horn then discussed Avery's statement with Hickman, and was told that Hickman had no knowledge of Avery walking the belt to service the head pulleys. Tr. 22-23. Horn estimated the distance down the C2 stacker belt, from the alleged

[1]Extended fittings are used to grease machine parts, like head pulleys, from remote locations.

point of access to the head pulley, to be 150 feet. Tr. 17-18. The point of access on the C1 belt to the head pulley, as indicated to Horn by Avery, is approximately 20 feet. Tr. 26-27, 29-31. Both belt structures are curved surfaces. Tr. 18, 20, 30. Horn and Avery estimated that the C2 stacker conveyor, in its lowered position, is ten feet above ground. Tr. 17; ex G-2. Horn approximated the distance from the C1 head pulley to the ground at 15 to 20 feet. Tr. 29, 62-63. As a result of his observations and discussions with Avery and management, Horn issued two citations alleging significant and substantial violations of 30 C.F.R. § 56.11001. Citation No. 6020987 describes the hazardous condition as follows:

> Safe access was not provided to the C2 stacker conveyor belt's head pulley to grease the bearings. A person was climbing the belt structure 67 inches onto the belt and walking the belt approximately 150 feet to the head pulley. From the head pulley to the ground [is] estimated to be 10 feet when the conveyor was lowered. The head pulley bearings are greased once every two weeks. A slip and fall hazard existed to the person greasing these bearings.

Ex. G-1. Citation No. 6020988 alleges the following:

> Safe access was not provided to grease the head pulley bearings for the C1 conveyor. A person was climbing a ladder getting onto the belt and walking the belt approximately 20 feet to the head pulley, the left side of the head pulley to the metal guard for the C2 conveyor belt [sic] tail pulley measures 9 feet, from the tail pulley guard to the ground measured 4 feet. The right side of the head pulley [is] estimated to be 9 feet to the C2 conveyor. The head pulley bearings are greased every two weeks. A slip and fall hazard existed to person greasing these head pulley bearings.

Ex. G-3.[2] Pennsy timely abated the citations by installing extended grease fittings. Tr. 113; ex. G-4. No additional citations were issued to Pennsy as a result of this inspection and, of the five or six other conveyors that were inspected, all had walkways or accessible fittings. Tr. 16, 20-21.

Pennsy conducted its own investigation of the procedures being utilized by the entire crew to service the head pulleys on the C1 and C2 conveyors and, having uncovered no evidence of unsafe practices other than Avery's statement to Horn, issued Avery a letter of warning. Tr. 165-66, 194-95, 211-13; ex. R-9.

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[2]Pennsy's protest that the violations were based on Avery's statement, rather than Horn's observation, resulted in MSHA modifying the Condition or Practice section of both citations by adding the following language: " Information for this violation was obtain [sic] from employees [sic] at the plant. The company stated they were not aware of this practice." Ex. G-1, G-3.

III. Findings of Fact and Conclusions of Law

A. Applicable Case Law

30 C.F.R. § 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places. The Commission has held that section 56.11001 embodies the dual requirement of providing and maintaining safe access to working places. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002). A violation may be found when either or both prongs of the standard are not met. An operator's duty to "provide" a safe means of access incorporates the responsibility to instruct its employees on the procedure for safe access. *Id.* at 681. By interpreting "maintain" according to its plain meaning, the Commission has concluded that the term "requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001); *Western Industrial, Inc.*, 25 FMSHRC 449, 452 (August 2003). The Commission has further explained that the duty to maintain safe access requires constant vigilance because it "incorporates an on-going responsibility on the part of the operator to ensure that a means of safe access is utilized, as opposed to a purely passive approach in which the operator initially provides safe access and then has absolutely no further obligation." 24 FMSHRC at 680 (quoting *Lopke*, 23 FMSHRC at 708). More is required than simply making a safe means of access "available," since the Commission has held that, "at a minimum, the standard's requirement that operators 'maintain' safe access to working places mandates that management officials utilize that access, and require other miners to do so." 23 FMSHRC at 709.

B. The Testimony

1. The Secretary's Witness

MSHA Inspector Reecle Horn testified that he questioned plant operator Thomas Avery about his method of greasing because "he couldn't get to the head pulley [safely]" without a walkway or extended fitting. Tr. 10, 12-13. Horn elaborated on his concerns about accessing both conveyors, by explaining that the belts are curved, wet when the plant is operating, have no safe place to tie off, and would require bending over them to service the head pulleys. Tr. 18-19, 30. These conditions, he asserted, caused a slip and fall hazard that could result in serious injuries ranging from cuts and bruises, broken bones and head injuries, to a fatality. Tr. 30-31. Horn testified that when he discussed Avery's statements with plant manager Hickman, he stated that he "had no idea that the employee was climbing the belt and walking the belt line, that there was a man lift provided at the other site, but not that was there that day." Tr. 32-34; see 23, 47-48, 51. Horn acknowledged, in fact, that no one in mine management had seen or had knowledge of any employee walking the belt to grease the head pulleys. Tr. 66, 68-69. In his opinion, in order to prevent this hazardous condition, a reasonable, prudent operator would "[keep] a walkway, ladders, and fall protection, make sure his people were using it, check on his people to make sure they were using the access that was provided, the fall protection and stuff they were supposed to be using, that they thought they were using." Tr. 34-35; see 23, 67. He also acknowledged, through somewhat inconsistent testimony, that multiple ladders, safety harnesses, belts and lines were on site, accessible, and in good condition. Tr. 31, 49-51, 55, 66; see 14;

ex. R-1. Finally, according to Horn, his review of Pennsy's training records indicated that the company had been providing training to its employees on fall protection, and that Avery had received his annual refresher training. Tr. 52.

2. Pennsy's Witnesses

Robert Dailey, vice-president of occupational health, safety and environment, has been with Pennsy since February 2004 and has responsibility for Pennsylvania, New Jersey and Delaware operations. Tr. 89. Dailey testified that he is responsible for implementing safe work practices, as set forth in Pennsy's Employee Safety Manual, for all of its mining operations, as well as revising the company's policies. Tr. 91-92; ex. R-3. He summarized Pennsy's Fall Protection Program as "designed as a safeguard in the event alternate means of safe access cannot be provided. It outlines the requirements and responsibilities of employees to make a safe assessment. It also requires that whenever an employee has to work at a height we've chosen greater than six feet or greater, that they would be required to utilize some form of fall protection means." Tr. 92-93; ex. R-3, sec. 3.1. Dailey pointed out that employees are required to immediately report to their supervisors all questionable or dangerous conditions. Tr. 93-94. He asserted that the company strictly enforces its safety rules, and that employees have faced discipline as severe as termination for failure to follow safe work practices. Tr. 94, 101. In Dailey's opinion, the C1 and C2 conveyors, at the time of inspection, provided adequate means of tying off with use of short lanyards. Tr. 95. He noted that, as part of Pennsy's ladder safety program, the company had recently converted to fiberglass ladders only, and that use of secured ladders to grease pulleys is an acceptable means of safe access used worldwide. Tr. 96-97. He noted that Pennsy's annual refresher training specifically includes use of ladders, safe access, conveyor safety, and fall protection. Tr. 97. Respecting avoidance of injury during plant maintenance, he asserted, the safety manual clearly prohibits climbing on conveyors in a quarry, with the exception that "conveyors may be used as access during maintenance only when proper lockout, tag out and fallout procedures have been implemented. . . . And in addition, that fall protection or harness and lanyard is required where there is a danger of falling during maintenance." Tr. 97-98, 127. He explained that at lower heights, a smaller work platform or ladder would be preferable. Tr. 99. Dailey identified hazard recognition and selection of appropriate equipment as topics covered in Avery's Part 46 annual refresher training, which encompassed safe access and maintenance issues. Tr. 102-107; ex. R-5. According to Dailey, he visits Tarburton Pit every few months, and has not found the plant to be deficient in supplying fall protection, in good condition, on site. Tr. 108. He noted that Tarburton shares equipment with two nearby mining operations and rents equipment when sharing is not a viable option. Tr. 110. According to Dailey, he has observed employees appropriately accessing equipment, and he maintained that he has not seen anyone walk on the belt. Tr. 113. In order to grease the head pulleys at issue, Dailey explained, Pennsy's employees are required to "lower that conveyor down to its maintenance position, which is as low as it'll go to the ground, lock that piece of equipment out of service, secure a ladder, whether it's a step ladder that you don't need assistance or an extension ladder where you would, access the ladder up to the head pulley position, secure it if need be, do the greasing of the two pieces inspected, and then put everything

back in service." Tr. 113. Because many ladders were available throughout the property, he asserted, it was not expected that anyone would walk the belt. Tr. 114. Dailey was adamant that the company was maintaining safe means of access by having safety policies in place and enforcing them and that, based on Pennsy's investigation, there is no evidence to support Avery's statement or the Secretary's charges. Tr. 115-17. He made it clear through his testimony, that, because Avery refused to elaborate on when and how he had walked the belt, and because Pennsy could find no corroboration of his statement, Pennsy disciplined Avery for simply telling the inspector that he had accessed the equipment in the prohibited manner. Tr. 123-24, 128, 136-39, 143, 146. Dailey noted that Avery was not called by Pennsy to testify because he was on pre-approved vacation. Tr. 139; ex. R-10. Finally, Dailey testified that, because several means of fall protection were available at the time of the inspection, he "would have thought that there would have been more inquiries into what is the practice, what is the policy, what equipment is available, let's look at the equipment and talk to other miners. And none of that was done." Tr. 141-42.

Dorothy Lehmann, safety director for Tilcon, Delaware, testified that she conducts training at the company's facilities, including Tarburton. Tr. 150-51. She established that Thomas Avery's annual refresher training was current, and had included fall protection and safe access dating back, at least, to 2002. Tr. 152-57; ex. R-8. According to Lehmann, during Horn's pre-inspection paperwork review, he had mentioned safe access in a brief, general discussion with her. Tr. 158-59. She stated that Tarburton has safe access equipment on site and that she had no reason to believe that any employee had been violating Pennsy's written safety policies. Tr. 160. She asserted that she had never seen a worker walk the belt, and that Avery had never brought any safe access concerns to her attention. Tr. 160-61. As to the inspector's conversation with Avery, Lehmann testified that she heard Horn ask "Tom how he had greased that head pulley," but that she could not recall precisely what Avery had answered. Tr. 163, 167, 168-69. When Horn issued the citations, Lehmann stated, she and Hickman complained to him that the narratives misstated that he had observed the alleged violations, but Horn refused to change the wording. Tr. 164. She participated in the investigation by asking other miners and Hickman what procedure they used for greasing the head pulley, and was told "that the conveyor was lowered and locked, and that a ladder was used to access the head pulley, for other servicing that the forklift was used with the man basket." Tr. 165-66. According to Lehmann, she did not find anyone who had observed Avery walk the belt, and she doubted that he could have done so without being seen. Tr. 176. Lehmann acknowledged that she did not talk to Avery, since it had already been established that he had made the statement to the inspector. Tr. 168. She voiced her objection to the citations on the bases that there was no evidence of the alleged conduct at the site, the inspector had not eye-witnessed prohibited conduct, and the company had been providing a variety of safety equipment. Tr. 173-75.

Richard Hickman, Tarburton's plant manager, testified that, pursuant to his investigation of Avery's statement to Horn, Avery "said, yes, but he couldn't give me a time when he did it." Tr. 194, 212-14, 216-17. According to Hickman, Avery had worked at Tarburton ten to twelve years and, despite Dailey's recommendation that Pennsy suspend him for two days, Hickman

issued Avery a written warning for his statement of unsafe conduct, taking into account Avery's lack of a disciplinary record. Tr. 195. Hickman maintained that he had been unaware of the scheduled hearing date at the time that he had pre-approved vacation leave for Avery and that, ultimately, he advised Avery that he would have to appear if MSHA subpoenaed him. Tr. 197-98. Regarding the inspection, Hickman explained that he had not heard the discourse between Horn and Avery. He testified that he had explained to Horn that, to grease the head pulley he would "go get a ladder, put it down on the head pulley, secure it with a rope, come down, get a grease gun and go up there and grease it, and vice versa do the other side." Tr. 201-02. This was the customary manner in which the employees performed the function, he asserted, and miners are task trained on maintenance activities in weekly tailgate meetings. Tr. 202-03, 207-09; ex. R-12. As for the safety equipment maintained at the mine, Hickman explained that extension ladders were being used on the day of the inspection, and that Tarburton had access to a fork lift with a basket housed at the Bay Road facility five miles away. Tr. 204. Hickman further testified that he had never seen Avery walk the belt and that, of the entire crew, no one had ever reported having seen him do so. Tr 206, 211-12. He corroborated Lehmann's testimony that they had objected to Horn's misleading narrative on the citations, but that Horn would not change his wording. Tr. 211. Like Lehmann, Hickman expressed disbelief that it was possible to walk a distance of 150 feet on the belt. Tr. 216-18, 220. He also opined that accessing the belt makes no sense, when the ladder provides direct access to the head pulley. Tr. 226-27.

C. Fact of Violation

The Secretary concedes that Pennsy *provided* safe means of access to its working places by referencing Inspector Horn's acknowledgment that ladders and safety belts were on site during his inspection; it is the company's failure to *maintain* a safe means of access, she argues, that is the foundation of the violations. Sec. Br. at 5. In essence, the Secretary is charging Pennsy with failure to *ensure* that Avery used proper safety equipment when he serviced the head pulleys on the C1 and C2 conveyors. Sec. Br. at 7. Penny's own decision to discipline Avery, the Secretary maintains, is evidence that the company, itself, believed that Avery had walked the beltways.

Pennsy contends that it is a safety conscious operation that *provides* and *maintains* safe means of access. The company points to several types of safety equipment that were in view of Inspector Horn, its Employee Safety Manual and Fall Protection Program, and its extensive training of all employees in safe access procedures and use of fall protection. Pennsy asserts that its customary procedure for accessing the C1 and C2 head pulleys is by use of secured ladders, and that there is no evidence of unsafe conduct that would corroborate Avery's statement that he walked the belt. Avery received a written warning for having made the statement to Horn, Pennsy argues, because of the company's overriding responsibility for deterring its miners at all facilities from engaging in unsafe work practices. Tr. 143.

Pennsy, essentially, concedes that Avery walked the beltways by testifying that Avery admitted telling Horn that he had done so. It is clear that Horn was inquiring about current practice, and I fully credit his testimony that Avery was describing recent conduct. While it is

curious that Avery would use a ladder to access the belt, rather than the head pulley directly, I find that he walked the belts to the head pulleys, as reported to Horn. What is lacking, however, is the Secretary's evidence of the circumstances under which he engaged in the prohibited conduct. Horn testified that he asked no follow-up questions of Avery. There are several questions that he could have posed that would have demystified Avery's conduct. For example, Horn could have asked Avery to specify when the activity took place and whether it was frequent or isolated. He could have asked Avery whether he used fall protection, and where he tied off. He could have asked Avery whether he had received training on performing maintenance and accessing equipment safely. Likewise, Horn could have interviewed other employees to ascertain whether they also performed maintenance on the head pulleys, what procedures were used, and whether they had ever seen Avery walking the belts. According to Horn, he did not make inquiries of management about the company's policies and training program on safe means of access.

The evidence establishes that Pennsy enjoys an exemplary safety record, provides several types of equipment for safe access to its machinery, has written policy requiring safe conduct in work performance, and devotes significant time and resources to training its employees on safe work habits. It is also established that Tarburton miners customarily access the head pulleys by use of secured ladders, and that no one has been observed walking the belts to grease them. The Secretary's position suggests that Pennsy is required to constantly monitor its employees in the performance of their duties. I disagree, primarily because its employees are highly trained in the use of safety equipment that is readily available and, among other safeguards, they are required to report unsafe conduct to management. The aberrant behavior of one employee, without evidence indicating that it was frequent, flagrant or condoned by management, falls short of establishing that the company was less vigilant than the standard requires. Interestingly, the Secretary urges me to draw an adverse inference against Pennsy for its failure to call Avery as its witness. I decline to do so, especially in light of the fact that the Secretary made no effort to subpoena Avery or otherwise preserve his testimony. The Secretary also argues that MSHA investigations are routinely conducted in instances where inspectors have not eye-witnessed alleged violative conduct. I agree. That argument fails, however, because it simply does not resurrect the evidence lacking in the Secretary's case. Therefore, I conclude that the Secretary's evidence, which consists of Avery's statement to Horn, fails to support the conclusion that Pennsy did not maintain a safe means of access to the head pulleys on the C1 and C2 conveyors, as alleged.

Because I find that the Secretary has failed to prove, by a preponderance of the evidence, that Pennsy violated 30 C.F.R. § 56.11001, Citation Nos. 6020987 and 6020988 must be vacated.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 6020987 and 6020988 are **VACATED**, and this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge
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August 18, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2006-251-M A.C. No. 35-03624-77741 01 Portable #2
v.	:	Docket No. WEST 2006-252-M A.C. No. 35-03624-77741 02 Portable #2
WESTERN ROCK REDUCTION CO. Respondent	:	Docket No. WEST 2006-255-M A.C. No. 35-03280-77570 Portable

DECISION

Appearances: Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Robin Weathers, President, Western Rock Reduction Co., Shady Cove, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Western Rock Reduction Company ("Western Rock"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve 35 citations issued at the Portable and Portable #2 Plants operated by Western Rock in Jackson County, Oregon. The Secretary proposes a total penalty of $7,155.00 in these cases. The parties introduced testimony and documentary evidence at a hearing held in Medford, Oregon.

At the hearing, the parties requested that I first take evidence on whether Western Rock's mines were operating on the dates of MSHA's inspection. They also requested that, if I ruled in the Secretary's favor on that issue, the parties be given time to try to settle the citations. I granted the parties' request. (Tr. 4-6).

The parties stipulated that MSHA has jurisdiction over the Portable and Portable #2 Plants. (Ex. J-1). They also stipulated that the Commission has jurisdiction to hear the cases. *Id.* MSHA Inspector Denis Karst testified that on September 14, 2005, he traveled to Western Rock's Portable Plant to conduct an inspection. He met with the foreman, Russ Clark. (Tr. 13).

He also discussed the inspection with Robin Weathers, President and General Manager of Western Rock, and Tracy Packebush, Western Rock's office manager. Karst testified that when he asked them if there were any problems at the plant, or if they had any concerns about the inspection, they did not indicate that they had any concerns. (Tr. 14). When Inspector Karst first entered the plant area, it was operating. He could see that the conveyor belts were moving and rock was coming off the ends of the belts. (Tr. 15, 19). He also observed either a loader or an excavator operating. As the inspection began, Mr. Clark shut down the plant. Karst issued nine citations during the inspection that are at issue in these cases. The inspector testified that no employee of Western Rock indicated that the plant was not operating that day. (Tr. 16-17).

Inspector Karst also testified that a form filed by Western Rock with the MSHA field office in Albany, Oregon, notified MSHA that the portable plant was operating, but no form was filed by Western Rock to notify MSHA that the plant would be closed on or before September 14, 2005. (Tr. 18).

MSHA Inspector David Small testified that he inspected the Portable #2 Plant on September 13-14, 2005. (Tr. 26). When he arrived at the plant on September 13, he talked to a man named Greg who told him that the plant belonged to Western Rock. (Tr. 27). The inspector was not aware of the existence of this plant. (Tr. 40). Inspector Small told Greg that he was there to conduct an inspection of the plant. Small determined that the plant was operating. As he approached the facility, he saw dust coming off the crushing operation. (Tr. 28). When he pulled into the site, the belts and the loader were operating. *Id.* He could see rock on the moving belts. Western Rock shut down the plant when he began his inspection. (Tr. 33). He inspected the plant and issued 23 citations that are at issue in these cases.

Inspector Small returned to the Portable #2 Plant on September 14, 2005, to complete his inspection. The plant was shut down on September 14 because Western Rock's employees were doing repairs on the equipment which Inspector Small cited the previous day. (Tr. 29). A front-end loader was loading trucks with rock from the stockpile. (Tr. 33). On September 14, he issued three citations that are at issue in these cases. Inspector Small testified that he returned to the plant on September 14 because he could not complete his inspection on September 13. (Tr. 36).

Sometime on September 13, 2005, Inspector Small called Ms. Packebush to find out more about the plant he was inspecting because it was not in MSHA's records. (Tr. 42). He was advised that the plant he was inspecting was simply a part of Western Rock's single rock crushing plant. *Id.* Ms. Packebush told the inspector that Western Rock has always operated under a single MSHA identification number although part of the plant may sometimes be in a different location. Inspector Small told her that because the plant was split up, they were actually two separate operations which require separate identification numbers. *Id.* MSHA established the identification number for this plant on September 13, 2005. Small testified that, during this phone conversation, Packebush did not indicate that either plant was closed in September 2005.

Ms. Packebush testified that when Inspector Karst arrived at the Portable Plant, she advised him that the plant had not been running for several days because of electrical problems. (Tr. 46, 49-50). She stated that when the inspector arrived, the generator had just been started and the men were running a little material through the plant to make sure that the electrical repairs, which had been performed by a contractor, were acceptable. *Id.* Ms. Packebush also testified that the plant was not "truly in operation producing materials, because we were under almost a week of maintenance." *Id.* Packebush testified that a previous MSHA inspector would not issue citations if the plant were being repaired at the time of the inspection. Instead, this inspector pointed out any safety problems needing correction. (Tr. 50).

Ms. Packebush testified that Western Rock owns one complete portable crushing plant. (Tr. 48). On the day that Inspector Small inspected what MSHA now calls the Portable #2 Plant, Western Rock only had a little finishing crusher at that location. *Id.* At one point in time the entire plant was there, but most of it had been moved back to the location inspected by Inspector Karst. This finishing crusher was only present to complete a job that was just about done. Western Rock did not consider the finishing crusher to be a separate plant which required a separate identification number. Mine identification number 35-03624 was assigned to this operation by MSHA as a result of this inspection.

Ms. Packebush testified that Western Rock's quarries never close because there is always a loader operator loading material at its quarries. (Tr. 49). As a consequence, she never sends MSHA a notice that a plant is closing. She testified that she has always notified MSHA when the company is going to start operating at a new location. (Tr. 45, 49). Western Rock, through Ms. Weathers, also advised me that it received a Certificate of Honor from MSHA's Joseph A. Holmes Safety Association for "working 54,783 work hours from 07/01/2000 to 12/31/2004 without incurring a lost time injury." (Tr. 61-63; Ex. A2).

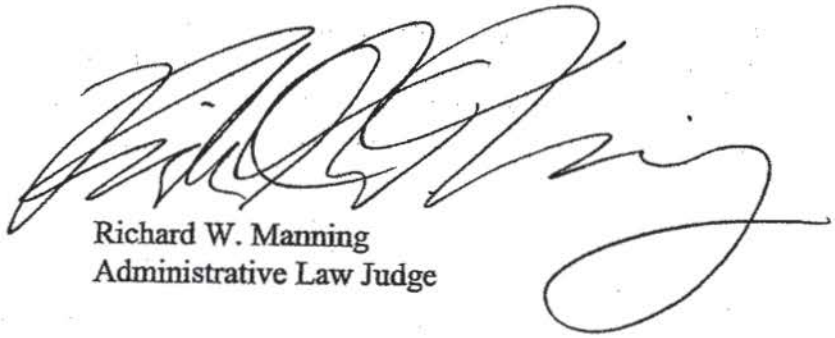
After the parties presented their evidence on this issue, as summarized above, I entered a bench decision. I ruled that both the Portable Plant and the Portable #2 Plant were subject to inspection by MSHA on the dates in question. (Tr. 51-52). A mine is not required to be crushing rock for commercial purposes in order to be subject to an MSHA inspection. The Portable Plant was operating even though it had just been restarted following extensive electrical repairs. In addition, a loader or excavator was operating. The Portable #2 Plant was crushing rock with a finishing crusher. On the second day of the inspection, Western Rock was not crushing rock but its employees were repairing equipment. A front-end loader was also loading product from the stockpile. When an operator is repairing equipment, the mine is still subject to an MSHA inspection. The inspection may, as a practical matter, be more limited if the entire plant is being repaired. For example, citations for unguarded pinch points on moving machine parts may not be appropriate on a piece of equipment which has been torn down for repairs. On the other hand, a citation issued for having an untrained miner working on the property would be entirely appropriate, for example. If a mine will be shut down for a period of time, the operator should notify MSHA of the closure. I confirm my ruling in this written decision and hold that both

plants were subject to MSHA inspections on the dates that they were inspected by Inspectors Karst and Small. Consequently, the citations were validly issued.

After I entered my bench decision, the parties requested that they be given time to try to settle the cases. After the break, the parties announced that they had settled all of the citations. The Secretary agreed to reduce the total penalty for the citations to $6,469.00, as set out in detail at the hearing. (Tr. 53-61). Western Rock agreed to pay this penalty.

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. I conclude that the proposed settlement is appropriate under these criteria. The Portable Plant has a history of 26 violations in the 24 months preceding September 14, 2005. (S. Exhibit). The Portable #2 Plant did not have a separate identity until this inspection. The operator is small. The citations were abated in good faith. The penalty proposed by the parties will not have an adverse effect on Western Rock's ability to continue in business. The gravity and negligence determinations are set forth in the citations.

Based on the evidence presented at the hearing, the parties' oral motion to approve settlement is **GRANTED** and Western Rock Reduction Company is **ORDERED TO PAY** the Secretary of Labor the sum of $6,469.00 within 40 days of the date of this decision. Payment should be made to the Mine Safety and Health Administration at: Office of Assessments, Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. The "A.C." numbers shown in the caption for these cases should be written on the check(s).



Richard W. Manning
Administrative Law Judge

Distribution:

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Robin Weathers, President, Western Rock Reduction Co., P.O. Box 1269, Shady Cove, OR 97539 (Certified Mail)

RWM

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

August 22, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2006-191 A. C. No. 36-09274-84278
v.	:	
SUMMIT ANTHRACITE, INC., Respondent	:	Brockton Slope

DECISION

Appearances: Kenneth G. Hare, Conference & Litigation Representative, U.S. Department of Labor, Wilkes-Barre, Pennsylvania, and Susan Jordan, Esq., Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Mike Rothermel, President, Summit Anthracite, Inc., Klingerstown, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Summit Anthracite, Inc. (Summit) with three violations of mandatory standards and proposing civil penalties for the alleged violations.[1] The general issue before me is whether Summit violated the cited standards, and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

Summit initially challenged the Secretary's jurisdiction, arguing that the Brockton Slope at issue was not a "mine" as defined in the Act. Section 3(h)(1) of the Act, provides in relevant part as follows:

> "Coal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form... and (C)... shafts, slopes... or other property... on the surface or underground... to be used in... the work of extracting such minerals from their natural deposits in non-liquid form.

[1] At hearing, the Secretary vacated Citation No. 7008146 and accordingly only two citations remain for disposition.

At hearing, Mr. Rothermel, Summit's president, acknowledged that the Brockton Slope was being driven for the purpose of aiding in future coal production.[2] I find, accordingly, that the Brockton Slope was, at the time the citations at bar were issued, intended "to be used in... the work of extracting such minerals [coal] from their natural deposits in non-liquid form". Accordingly, the Brockton Slope at issue was a "mine" as defined in the Act.

Citation No. 7008150

Citation No. 7008150 alleges a "significant and substantial" violation of the standard at 30 C.F.R.§ 77.1900 and charges as follows:

> The operator was not complying with the approved shaft/slope sinking plan dated July 06, 2005, in that steel tubing was only installed 20 feet in by the slope portal and the slope is down approximately 200 feet. Miners were observed working in the slope.

The cited standard, 30 C.F.R. § 77.1900, provides only for the submission and approval of plans for the sinking of slopes and shafts.[3] In its answer to the petition for assessment of civil penalty at bar, Summit stated, in relevant part, as follows:

> This citation was written in error. 77.1900 pertains to the submission of a slope and shaft sinking plan. Summit Anthracite has submitted a slope and shaft sinking plan with all of the required information included.

While thereby placed on notice of the operator's defense that the wrong standard had been cited, the Secretary nevertheless failed to modify or amend her citation to allege a violation of the appropriate standard. Moreover, at hearing, the Secretary offered Summit's approved plan into evidence (Government Exh. No. 4). Under the circumstances then, it is clear that Summit was in compliance with the cited standard and Citation No. 7008150 must accordingly be vacated.

Citation No. 7008152

Citation No. 7008152, as amended, alleges a violation of the standard at 30 C.F.R. § 77.1911(d), and charges as follows:

> The main mine fan was not being operated while persons were working in the underground slope. The foreman Mike Rothermel was directing mining operations and working in the

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[2] Rothermel further acknowledged that during the slope excavation process, materials removed were transported through their coal processing plant in anticipation that some coal was included therewith. While no coal was actually produced as a result of this processing, this evidence clearly supports a finding that there was an intent to produce coal.

[3] 30 C.F.R. § 77.1900-1 requires compliance with such plans.

slope along with two other miners. Foreman Rothermel engaged in aggravated conduct by performing and having two miners perform work in the slope without the main mine fan operating.

The cited standard, 30 C.F.R. § 77.1911(d) provides as follows:

> The fan shall be operated continuously when men are below the surface. Any accidental stoppage or reduction in airflow shall be corrected promptly; however, where repairs cannot be make immediately, development work below the surface shall be stopped and all the men not needed to make necessary repairs shall be removed to the surface.

While acknowledging that the mine fan was in fact not operating while three miners where below the surface in the Brockton Slope, Mr. Rothermel argues that the stoppage or reduction in air flow was the result of an accident i.e. the flexible tubing had been damaged when the continuous miner was brought into the slope, and that, therefore, the exception to the requirement that the fan be operated continuously applies hereto.

The Secretary argues, on the other hand, that even if there is an accidental stoppage or reduction in airflow the standard requires that "all the men not needed to make necessary repairs shall be removed to the surface". The Secretary notes that since Mr. Rothermel was not needed to make necessary repairs, he should have been removed to the surface and not have remained underground. Rothermel himself testified that he was in the mine merely removing the previously installed damaged flexible tubing (Tr. 42-43). It may reasonably be inferred, therefore, that he was not needed to make necessary repairs and should have been removed. The violation is accordingly proven as charged.

I also find that there was a violation of the cited standard because I conclude that there was no "accidental" stoppage or reduction in airflow. Rothermel claims that the flexible tubing that had previously been installed in the slope had been damaged by the continuous miner and that, therefore, its replacement was necessitated by an accident. Under the Respondent's slope and shaft sinking plan (Plan), however, only the last 50 feet of tubing was permitted to be of flexible material and the remaining tubing must be made of steel. Inspector McGann testified that steel tubing as required by the Plan was not installed as required and his testimony is undisputed. Since the use of flexible tubing (except for the last 50 feet), was in violation of the Plan, I cannot consider any damage to it caused by the continuous miner to have been "accidental". The requirements of the Plan are clear and unambiguous and Respondent's failure to have utilized the steel tubing was obviously intentional.

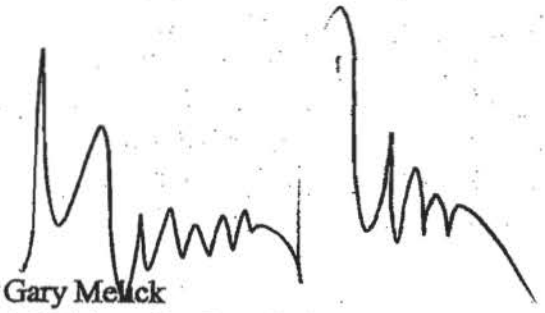
As amended, the citation alleges that "injury or illness" is "unlikely" and would involve "no lost workdays". No evidence was elicited by the Secretary at hearings regarding gravity. Under the circumstances, I must find the absence of gravity. Inspector McGann found the operator in this case chargeable with moderate negligence "based on Mr. Rothermel being a certified mine foreman for a number of years and knowing he should have had the mine fan on while men were underground" (Tr. 25). I find no sound reason for modifying the inspector's negligence findings.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its Judges must consider the following factors in assessing a civil penalty; the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would effect the operator's ability to continue in business. The record shows that the operator is small in size with no history of "final" violations at the facility cited. There is no dispute that the violations were abated in a timely and good faith manner and no evidence has been presented as to the effect the penalties would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision.

ORDER

Citations No. 7008146 and 7008150 are hereby vacated. Citation No. 7008152 is hereby affirmed and Summit Anthracite Inc. is directed to pay civil penalties of $75.00 for the violation charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204-3582
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August 28, 2006

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-489-DM
on behalf of DIANE PALMER,	:	RM-MD-05-04
Complainant	:	
	:	
v.	:	Ray Complex
	:	Mine I.D. 02-00150
ASARCO INC.,	:	
Respondent	:	

DECISION

Appearances: Satoshi Yanai, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Complainant;
Mark N. Savit, Esq., Donna M. Vetrano, Esq., Patton Boggs, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Diane Palmer against Asarco Inc. ("Asarco") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). The Secretary and Ms. Palmer contend that Palmer was discriminated against because she was a safety representative for the local Steelworkers union. Asarco contends that it did not discriminate against Palmer and that her discipline did not violate the Mine Act. A hearing was held in Phoenix, Arizona. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Asarco is the operator of the Ray Complex, a large open-pit copper mine in Gila County, Arizona. At all pertinent times, Palmer drove a large 240-ton haul truck for Asarco. As described in more detail below, haul truck drivers transport waste rock and ore-bearing rock from shovels in the pit to either a dump or a crusher. The mine uses a computer program to direct and monitor the activities of the truck drivers. A salaried supervisor, called the "dispatcher," sits in a control tower at the mine and uses this computer program as an aid to move rock as efficiently as possible. He uses three computer screens to monitor the activities in the pit and he can communicate with haul truck drivers through the computer system or on the mine radio.

At all pertinent times, the dispatcher on Palmer's crew was Bruce Miller. Miller has worked for Asarco for 16 years and he has been a dispatcher for 8 years. Prior to becoming a dispatcher he was a truck driver and heavy equipment operator. The objective of the computerized dispatch system is to increase production. The system tracks each haul truck as it moves about the pit and calculates how long each trip should take based on a running average it calculates. Each haul truck is equipped with a global positioning system ("GPS") device and a dispatch panel that communicates with the central computer. The shovels, the dumping locations, and other positions within the pit are equipped with devices that can sense and record when a truck has arrived at each location and when it leaves. Throughout each shift, the haul truck drivers receive their instructions on the dispatch panel's computer screen in the cab of the truck. The computer sends the drivers text messages and the dispatcher also sends text messages. Drivers can also send text messages to the dispatcher. Some of these messages are pre-programmed so that the driver need only touch a few keys to send the message. As stated above, the dispatcher and the drivers can also communicate via the mine radio.

The dispute in this case concerns the discipline Palmer received when she parked her haul truck near the end of her shift on October 27, 2004, and again on November 5, 2004. Palmer shut down her truck because she did not believe that she had time to take her loaded truck to the dumping location and return to the shovel before the end of the shift. Miller denied Palmer's request to shut down via text messages and the radio. Palmer contends that other haul truck drivers received counseling when they parked their trucks before the end of the shift. She contends that she was singled out for discipline because she had just become an alternate safety representative on her crew for Local 5252 of the United Steelworkers of America ("union"). The discipline on October 27 was a verbal warning and the discipline on November 5 was a written warning. (Ex. S-1 & S-2). Contestant is seeking an order directing that all references to this discipline be expunged from Palmer's employment file and directing that Asarco cease and desist from further harassment of or retaliation against Palmer or other employees for exercising their Mine Act rights.

A brief and simplified description of the work day of haul truck drivers is necessary to understand the dispute between the parties. When haul truck drivers arrive at the beginning of a shift, a bus delivers them to their haul trucks. The trucks may be parked at several different locations at the mine. When a driver arrives at her assigned haul truck, she performs a pre-shift examination. If the truck bed is empty, a text message on the dispatch panel will tell the driver which shovel she should drive to for her first load of the shift. If the truck contains rock, the dispatch panel in the truck will display a text message that tells the driver where to dump the load. Once a shovel loads a truck, the operator of the shovel will punch a button in his cab instructing the driver where to dump the load. This instruction will appear on the dispatch panel's screen. For example, the screen may say, "Truck HT446 assigned from Shovel ES02 to Dump Diversion Dam, Truck HT446 should arrive at Dump Diversion Dam in 13.4 mins." One of the screens monitored by the dispatcher also displays this information along with the exact time that each message was sent. The monitoring devices located throughout the pit track the progress of the truck using the GPS system and record the time. The dispatcher can see this

information in text form and in picture form. The sensing device at the dump also records the time the haul truck arrives at the dump. Once the driver dumps the rock, she will receive another text message that will say, for example, "Truck HT446 assigned from Dump Diversion Dam to shovel ES02, Truck HT446 should arrive at shovel ES02 in 9.6 mins." Very detailed monitoring information is kept in the computer at the mine. Printouts of this detailed information were introduced into evidence in this case.

Every time a truck leaves a shovel or a dumping location, a new assignment appears on the dispatch panel's screen in the cab of the truck. Near the end of the shift, one of two things can occur. A driver can punch in the delay code on the dispatch panel, which is "444." This code tells the dispatcher via a text message that she wants to shut down her truck for the shift change. The dispatcher can accept the delay code and tell the driver via text message where to park her truck. The dispatcher can also deny the request and tell the driver to keep hauling her load to the dump and await further instructions as to where to park ("tie down") at the end of the shift. Under the collective bargaining agreement, if the haul truck operator is directed to keep driving and she ends up working a few minutes beyond the end of the shift, she must be paid for at least 15 minutes of overtime. A driver cannot refuse a request to keep operating. In the alternative, the dispatcher can send a text message to a driver telling her to tie down at a particular location without the driver first punching in the delay code. Using the computer system, the dispatcher knows how long it should take a haul truck operator to get to the specified tie-down location. The bus that transports the incoming haul truck drivers takes the outgoing haul truck drivers back to the mine office.

As of October 2004, Ms. Palmer had been driving a haul truck at the pit for seven years. She was a member of the union. It appears that the alternate union safety representative for her shift transferred to another department at the mine sometime in July 2004. (Tr. 125). Palmer agreed to replace the departing alternate safety representative. In addition, she became the chief safety representative on the crew, replacing Charles Berry, soon after he went on medical leave on November 3, 2004. (Tr. 199). The record does not make clear when she became the alternate safety representative, when the union notified management that she had taken this position, or when Mr. Miller became aware of this change. In an interview with MSHA Special Investigator David B. Funkhouser in February 2005, Palmer said that she became the safety representative for the crew on or about November 3, 2004, and that she became the alternate safety representative about a week prior to that date. (Ex. R-38; Tr. 48). At her deposition, also taken in February 2005, Palmer testified that she became the alternate safety representative in "November – October 2004." (Ex. R-39 pp 20-21; Tr. 51-55). At the hearing in this case, Palmer testified that she became the alternate safety representative in mid-September 2004. (Tr. 16-17). George Hunt, a heavy equipment operator at the pit and the safety chairman for the union, testified that Palmer became the alternate safety representative for her crew in late August or early September 2004. (Tr. 125). Robert Manriquez, a heavy equipment operator and president of the union, testified that Palmer became an alternate safety representative sometime between July and October 2004. (Tr. 144).

It is important to understand that Complainant contends that Palmer's protected activity was her selection as the alternate safety representative for her crew and her subsequent selection as the safety representative. Complainant did not offer any evidence about specific safety complaints that Palmer made on behalf of herself or anyone on her crew prior to October 27 or November 5, 2004. Hunt testified that she must have been involved in safety complaints as an alternate safety representative. (Tr. 130). He bases his opinion on nothing more than the fact that he believed that she had been an alternate safety representative for at least a month. Manriquez testified that he believes that Palmer was involved in at least one safety complaint sometime in early October 2004. (Tr. 145-46). As the alternate safety representative, Palmer was a backup for Hunt and became involved in safety issues primarily when he was not available. (Tr. 17). I find that Complainant did not establish that Miller was aware of any specific safety complaints that Palmer made prior to October 27, 2004.

Conflicting evidence was presented at the hearing on when Asarco management was notified by the union that Ms. Palmer had become an alternate safety representative. There is no dispute that the union regularly posts a list of the safety representatives as changes are made. The union does not date these lists as they are updated, however. It is Mr. Hunt's responsibility as the union safety chairman to keep the list of safety representatives up to date. He testified that he first posted the list, which included Ms. Palmer as an alternate safety representative, at various locations at the mine some time before October 27, 2004. (Tr. 127-280; Ex. S-10). Hunt admitted that he is not sure when the updated list was posted or who had a copy of the list. (Tr. 137-38). One of the places that he regularly posted the list is in the dispatcher's area. After the discipline was issued to Palmer for stopping early on her October 27 shift, Hunt, Manriquez, and Palmer were in Miller's work area and Hunt pointed to the list showing that Palmer was an alternate safety representative. Miller said that he had not looked at the updated list and that he did not know that Palmer had been designated as an alternate safety representative.

On October 27, 2004, Palmer was working on the shift that starts at midnight and ends at 8:00 a.m. Palmer was driving her normal truck, which was number 447. Palmer testified that, near the end of her shift, she was loaded with rock from the No. 2 shovel. The dispatch panel in her truck directed her to dump the load at the No. 9 dump. She pulled away from the shovel and parked the vehicle in the tie-down location at the shovel pit. She determined that she did not have time to drive to the dump, empty the bed of her truck, and return to the shovel to tie down. She punched in the delay code and began performing her routine duties. She cleaned out the cab of the truck, cleaned the outside of the windshield, and put chocks under the wheels. As she waited for the bus to pick her up, she believed that she had parked her truck in accordance with company procedures.

Miller testified that, when he received the delay code from Palmer, he looked at the computer screens before him and determined that Palmer had time to dump her load. He pressed the code that rejects the delay code. He could tell from the information on the computer screens that the truck was not moving. The picture of a truck turns a pink color on the screen when it is not moving. He testified that he rejected Palmer's delay code and also called her on the radio

several times but he did not get a response. Palmer testified that she either did not receive the rejection of her delay code or she did not see it. She also testified that Miller did not call her on the radio.

The printout of the text messages provides the following information, in part:

ES02 loaded HT446 with LG SulCure	7:36:40
HT446 assigned from Shovel ES02 to Dump 9D	7:36:40
HT446 should arrive at Dump 9D in 12.7 min.	7:36:40
HT446 Delay rejected by dispatcher	7:44:13
Message "should be dumping load" sent to Truck HT446	7:45:34

(Ex. R-14 p. 2) (programming codes and other irrelevant information omitted). The only message that was generated by Miller is the "delay-rejected" message; the others were generated by the computer system.

Asarco's witnesses testified that, because a delay code appears on a separate screen, it does not show up on the printout. Miller testified that, because he must approve or deny a delay code quickly, he estimates that Palmer punched the delay code within a few minutes before 7:44. Miller testified that the purpose of the computer monitoring program is to increase efficiency. The objective is to keep the haul trucks moving until a few minutes before the end of the shift. It did not matter to Miller whether Palmer had time to return to the shovel before the end of her shift. Once she dumped her load, he would determine where she should tie down. He testified that he could have told her to tie down at the dump or continue driving until she reached a tie down location known as "Bluebird." Bluebird is located about halfway between the dump and the shovel. Complainant's witnesses testified, however, that Bluebird was not a recognized tie down location in 2004. Palmer testified that everyone tied down at the shovels in October 2004. (Tr. 26). Haul trucks cannot tie down on the haulage road. There are established areas in the pit where these large trucks are permitted to tie down. These areas must be large and relatively flat so that trucks can be safely parked and chocked and a bus can safely enter the area.

The next day, October 28, 2004, as the haul truck drivers were gathering on the patio outside the mine office to get on their busses, Miller approached Palmer and told her that she parked too early on her previous shift. What happened next is the subject of great dispute in this case. Palmer testified that, in reply, she said that she "didn't feel" that she had parked too early. (Tr. 25). Miller replied, "well, you did," and he became angry, walked into the office and, when he came out, handed her a written copy of a verbal warning. (Tr. 25-26). Palmer testified that she did nothing and said nothing to provoke Miller's anger. *Id.* Daryl Neely, another haul truck driver on Palmer's shift, was on the patio with Palmer and Miller on October 28. He corroborated Palmer's version of the events. He said that Palmer was neither aggressive nor sarcastic toward Miller and that she did not raise her voice. (Tr. 90-91).

Miller testified that, when he told Palmer she had parked too early on her previous shift, she denied that she had parked early. (Tr. 304). Miller testified that he then said, "Diane, I am not here to debate whether you had time to get to the dump or not, because I already know that you had time . . . . I pulled up the times [on the computer]." *Id.* He further testified that he said, "I'm not here to write you up. I'm just here to counsel you and let you know that you had time to go to the dump." *Id.* Miller testified that Palmer continued to argue with him and that she eventually said, "If you don't like it, put it on paper." (Tr. 305). Miller said that he responded, "Okay, Diane, if that's the way you want it, that's the way we'll do it." *Id.* Palmer then asked for a shop steward. Miller testified that he wrote up a verbal warning only after this exchange. Jimmy Powell, another haul truck driver on Palmer's shift, corroborated Miller's testimony. He testified that after Palmer denied that she had time to go to the dump, Miller responded "Diane we talked about this before. You had time to go to the dump. I have it in dispatch." (Tr. 391). When Palmer continued to deny that she had enough time, Miller responded "Well, next time I'm going to have to write you up." *Id.* Palmer then responded, "Go ahead and write me up. I don't care." (Tr. 392). Asarco also relies on the fact that Palmer later apologized to Miller for the way she talked to him on October 28. (Tr. 56, 74, 78, 308, 374).

Under the collective bargaining agreement, a system of progressive discipline is used. The first step is a verbal warning, which is memorialized in a written document. The second step is a written warning. The same form is used for this discipline, but a different box is checked on the form. Managers also use counseling as a way to correct behavior. When counseled, an employee is advised that she made some sort of mistake but a written record is not kept and such counseling is not considered to be discipline. The verbal warning given Palmer states, as follows:

> Diane delayed too early at the end of the shift instead of going to the dump. I called her and got no answer. She had 21 minutes to dump and her loads were taking 12 to 13 min. In the future, she needs to work until the end of the shift not past the end of the shift.

(Ex. S-1).

The linchpin of Complainant's case is that other employees who tied down about the same time as Palmer were merely counseled rather than disciplined. The Secretary contends that this evidence of disparate treatment, along with other evidence of Miller's hostility toward Palmer, establish that she was disciplined because she had become the alternate safety representative for the union. Asarco contends that she was disciplined because she parked too early and, when Miller tried to counsel her the following day, she refused to acknowledge that she parked early or say that she would park later in the shift in the future.

Several of Complainant's witnesses testified that they had parked early and had merely been counseled by Miller. Most of these events occurred on other days. Mr. Neely testified that he was accused of parking early on two occasions. (Tr. 91). Miller told him "not to do it again"

but he took no further action. Neely testified that he and two other drivers who had parked early were called into a meeting with Miller and another supervisor and were merely told to "try not to do it [any] more." (Tr. 93). Lonny McNavage, another haul truck driver, testified that on about six occasions Miller contacted him by radio or dispatch panel to tell him to proceed to the dump. (Tr. 115). Although McNavage testified that he did not proceed to the dump as instructed, he was never disciplined for his actions. (Tr. 116). On October 27, 2004, Sal Hernandez also parked early, yet he was not disciplined. When Miller rejected his delay code, he called Miller on the radio to tell him that he was too tired to drive any further. Miller then gave him permission to tie down at the shovel. Manriquez testified that, based on his review of the records, no other employee at the mine has ever been disciplined for parking early unless that employee had already been counseled about the same problem earlier. (Tr. 158-59).

On November 5, 2004, Palmer was again driving haul truck 446 and was working the shift that starts at 4:00 p.m. and ends at midnight. After being loaded with rock at the No. 2 shovel near the end of her shift, her dispatch panel directed her to dump the load at the dump at the Diversion Dam. Palmer determined that she did not have enough time to dump the load and return to the shovel so she parked her truck at the shovel pit. She testified that it was 11:45 p.m. when she decided to park. (Tr. 30). The computer records provide the following information:

ES02 loaded HT446 with Sulfide Waste	23:39:54
HT446 assigned from ES02 to Dump Diversion Dam	23:39:54
HT446 should arrive at Dump Diversion Dam in 12.9 mins.	23:39:54
HT446 assigned to Dump Diversion Dam by dispatcher	23:46:28
Message "R U at Dump" sent to Truck HT446	23:50:01
Crew 2 worker D Palmer logged off Truck HT466	23:52:09

(Ex. R-17, p. 6) (programming codes and other irrelevant information omitted). The only messages that were generated by Miller are the "assigned to Dump Diversion Dam by dispatcher" and the "R U at Dump" messages; the others were generated by the computer system.

Palmer testified that drivers were parking their haulage trucks at the shovel pits and that she did not believe she had time to dump her load at the Diversion Dam and return to the shovel before the end of the shift. (Tr. 29). Miller testified that Palmer was operating the last truck to be loaded by the shovel that shift and she "had a little bit more time left to go to the dump this time, and she also chose to sit in the pit for a number of minutes and do nothing." (Tr. 309). Her truck turned pink on his computer screen so he knew that she was just sitting in the pit and not moving. Miller stated that he sent her a text message again assigning her to the Diversion Dam to let her know that he knew that she was not moving. (Tr. 310). Miller testified that he tried without success to reach her on the radio. He then typed the message "R U at Dump" and received no response.

Senior Mine Supervisor Gary Torres held a meeting with Palmer and Miller to discuss this incident. Torres told Palmer that when the dispatcher gives a direct order to go to the dump, the driver must proceed to the dump. (Tr. 383). The discipline that Palmer received for parking at the shovel states:

> D. Palmer had 21 min to go to the dump again and chose not to go. Her loads were taking her 11 min. That gave her 10 min to get back to the shovel. Last week she was also given discipline for not going to the dump at the end of the shift.

(Ex. S-2). The union filed grievances for both disciplinary notices, which have not yet been resolved. (Exs. R-12 & 13). In both grievances the union asks that the discipline be removed from Palmer's record. In the second grievance, the union also asks that Miller be placed in a non-supervisory position.

Asarco previously issued a memo concerning procedures to follow at shift change. The memo was issued because a haul truck driver "barreled" into a tie-down area too fast when a bus was present. This memo, dated April 2, 2004, states, in part:

> Our policy remains that all mine equipment operate right up to the end of each shift. However, extenuating circumstances do occur. If you happen to be running late, refrain from entering your designated tie-down until the busses have left the area. Get in touch with control and request a ride. . . . If you don't think you can make the last haul and still be back at a tie-down or shovel pit, request a tie-down assignment. Remember that the dispatcher makes the call, however, it is up to you to communicate your concerns. The control room supervisor knows exactly how long it takes for a particular truck to make any given round-trip to a dump or crusher. If you are having trouble with your truck, you need to inform your supervisor so that allowances can be made. We need to maximize productivity during the first and last hours of any given shift, however, we must do this in a safe manner.

(Ex. R-10).

The Complainant offered other evidence of Miller's hostility toward Palmer's protected activities. Palmer testified that Miller's attitude toward her changed considerably in October 2004. She testified that Miller had previously been friendly with her and jokingly referred to her as his "daughter" before she became an alternate safety representative. (Tr. 40). After she became a safety representative, Miller stopped all friendly interactions with her. Miller also stopped responding to her radio calls. (Tr. 41, 152-53).

On January 3, 2005, Ms. Palmer reported that her truck was overfilled with oil and should not be operated. When she was assigned to another truck, she discovered that it did not have an operable back-up alarm. As a consequence she was assigned a third truck. Palmer testified that, as a result of these reassignments, she had to perform three pre-shift examinations in the pouring rain. She subsequently asked to go to the office because she was soaking wet and did not feel well. She was sent home at her request. Palmer argues that she should have been reassigned to her own truck after the excess oil was removed. Miller testified that she was assigned to the third truck because it was parked on a ramp so it needed to be moved. Complainant contends that there were other qualified haul truck drivers who were not operating haul trucks that night, who could have moved the haul truck that was parked on the road. Complainant cites these events as evidence that Asarco continued to treat her differently than her fellow drivers. Miller testified that these other drivers were being trained on other equipment and were not available for other work.

Sometime in February 2005, Palmer and two other haul truck drivers forgot to chock their truck tires at the end of the shift. Only Palmer was counseled by Gary Torres following the incident. Palmer believes that she was singled out because of her position as a safety representative for the union. Torres testified that he could not recall whether other miners had failed to chock their tires that night and that he would have counseled them as well had he known. (Tr. 384-85).

Finally, Complainant alleges that Miller's discriminatory attitude toward Palmer's protected status can also be inferred from his treatment of Mr. Berry. Berry was the chief safety representative on her crew until he went out on medical leave. Miller admitted that he had told Berry that he should not be assigned to drive water trucks because he was always "complaining of different things." (Tr. 321). Dennis Chroninger, the shift supervisor for Palmer and Miller's crew, testified that he heard that Miller did not want Berry driving water trucks because he was always complaining about the need for more water trucks on the roads. (Tr. 375). When he heard about this controversy, Chroninger told Miller that Berry "will take his turn on the water truck." *Id.* Manriquez testified that he understands that Miller did not want Berry driving water trucks because "he makes too many safety complaints." (Tr. 155). He also testified that Berry had a preference for driving water trucks. Complainant contends that water trucks perform an important function at the mine by controlling dust and fighting fires. (Tr. 377). Consequently, Complainant argues that Miller's refusal to assign Berry to operate water trucks demonstrates Miller's animus toward those who make safety complaints and those who engage in safety related activities. (S. Br. 8-9).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising protected rights under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be

encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978)

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

The only credible evidence of Palmer's protected activities as of October 27 and November 5, 2004, is her position as the alternate safety representative and then the safety representative for her crew. In that position, she would become involved in helping resolve safety disputes at the mine for her crew. There is no credible evidence that Miller was aware that she had actually been involved in any significant safety dispute as of October 27 or November 5. Nevertheless, as a newly appointed alternate safety representative she would soon be involved in safety activities on behalf of the union. I find that, although the date of her appointment as alternate safety representative is uncertain, she was the alternate safety representative on or before October 27, 2004. I hold that the Mine Act prohibited Asarco from taking an adverse action against her as a result of her status as a newly appointed alternate safety representative. *See generally, Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1533 (Sept. 1997) (miners' representatives are members of a protected class); *Sec'y of Labor on behalf of Sullivan v. 3M Co.*, 24 FMSHRC 1006, 1011 (Nov. 2002) (ALJ) (activity on a union safety committee constitutes substantial evidence of protected activity). Consequently, I find that Diane Palmer engaged in protected activity.

B. Adverse Action

Complainant contends that Diane Palmer suffered adverse action as a result of her protected activities. The adverse action is (1) her verbal warning issued for parking early on October 27, 2004, (2) her written warning issued for parking early on November 5, 2004, and (3)

Asarco's continued harassment of her through the actions of Bruce Miller. Asarco maintains that Miller did not know that Palmer was an alternate safety representative on October 27, that Palmer's discipline was entirely unrelated to her protected activities, and that Miller did not harass her. As it is difficult to discern what a person is thinking, the Commission has set out some guidelines for determining motivation.

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

Sec'y of Labor on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

The first issue is whether Miller was even aware on October 27 that Palmer was a safety official with the union. Knowledge of the protected activity is a critical element in a discrimination case. As discussed above, Complainant's witnesses could not agree on when Palmer became an alternate safety representative or when the company was notified of her appointment. Palmer told the MSHA special investigator that she became the alternate safety represented about a week prior to November 3, 2004. (Ex. R-38; Tr. 48). That would be on or about October 27. At her deposition she said that she became the alternate in November or October 2004. (Ex. R-39 pp 20-21; Tr. 51-55). At the hearing in this case, she said that it was in mid-September 2004. (Tr. 16-17). Her deposition and MSHA interview were in February 2005, which was more than a year before the hearing in this case. As summarized above, Hunt and Manriquez were also unsure when Palmer became the alternate and when the amended list was posted. Miller testified that he did not know on October 27 that Palmer was an alternate safety representative for his crew. (Tr. 302-03, 307). Miller testified that he first learned that she was the alternate safety representative when the union shop steward advised him of that fact shortly after he handed Palmer the verbal warning notice. (Tr. 303). Later when Hunt, Manriquez, and Palmer came into Miller's work area and pointed to the amended list on the board above his desk, he replied that he had not looked at it. (Tr. 151, 303).

I find that a preponderance of the evidence does not establish that on October 27 Miller knew that Palmer was an alternate safety representative. The undated list does not highlight any

changes made. (Ex. S-10). It is simply a list of 11 names and union positions. It is easy to understand why Miller would not notice the changes in the list, even if it had been recently posted. I also find that the Complainant did not establish that Miller knew of Palmer's status when he issued the verbal warning to her the next day. As a consequence, Complainant did not establish a violation of section 105(c) of the Mine Act with respect to Palmer's verbal warning.

Asarco and Miller clearly knew that Palmer was an alternate safety representative or the chief safety representative on November 5. There was also a coincidence in time between the protected activity, *i.e.*, her appointment as an alternate safety representative and the adverse action. The key is whether there is evidence of hostility or animus toward the protected activity and whether there is evidence of disparate treatment of Palmer.

The record makes clear that Miller pushes truck drivers more than the dispatchers for other crews at the pit. Witnesses for both parties testified that Miller requires drivers to operate their trucks up until a few minutes before shift change. For example, McNavage testified that Miller has a reputation for pushing drivers to go to the end of the shift. (Tr. 120). Powell testified that Miller works drivers until the end of the shift. (Tr. 390). Muetchler, the mine manager, testified that Miller is well respected by upper management because he "pushes his drivers, he pushes his trucks, but he doesn't do so at the expense of safety." (Tr. 203). As a consequence, Miller is "controversial" with some drivers because "he pushes harder than some of our other supervisors and some of our employees don't like that." *Id.* Miller testified that he requires his drivers to run up until the end of the shift. (Tr. 299). Some members of the union, including the current president, believe that Miller is not acting in the best interest of Asarco when he pushes the drivers and the union has asked in grievances filed against Miller that he be moved into a non-supervisory position. (Tr. 168-69).

It is also clear that Miller and Asarco believe that drivers may be required to operate their vehicles to the end of the shift. The drivers who testified stated that, if the dispatch panel in their truck tells them to go to a particular dump or crusher to dump rock, they must do so. Complainant did not argue at the hearing that, by requiring haul truck drivers to operate their vehicles to within a few minutes of the end of the shift, Asarco created a safety or health hazard.[1] The case is based solely on Asarco's treatment of Palmer.

Complainant contends that the evidence establishes that Asarco, acting through Miller, demonstrated hostility toward Palmer's protected activity. Although I have held that Miller did

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[1] In the complaint of discrimination, the Complainant alleges that, on October 27 and November 5, Palmer "parked her truck before the end of the shift because she believed that there was insufficient time left in the shift to *safely* perform any further work." (Complaint ¶¶ 7 & 9) (emphasis added). Complainant did not present any evidence at the hearing that it would have been unsafe for her to continue driving to the dump on either date. Palmer testified that she did not believe that she could make it to the dump and back to the shovel in a safe manner. (Tr. 78). She did not explain what her safety concerns were.

not know that Palmer was an alternate safety representative when he disciplined Palmer on October 27, 2004, I analyze both incidents when considering the animus and disparate treatment issues because the evidence and legal arguments are intertwined. Complainant contends that Asarco's reasons for disciplining Palmer are pretext because "Miller could not have believed in good faith that Palmer had sufficient time to complete another run before the end of her shift on either occasion." (S. Br. 14-15). Complainant makes this claim based on a review of the steps Miller used to calculate the time it would take Palmer to travel to the dump and back to the shovel. (S. Br. 14-22). I hold that these arguments are largely irrelevant to this case. Miller credibly testified that he looks primarily at the time it will take a particular truck to get to the dump when reviewing whether that truck should be allowed to tie down at the shovel at the request of the driver. (Tr. 300-01, 319, 323, 334-37, 348-49, 352, 363-64, 366). Miller testified that, at the end of the shift, he is not trying to get the truck back to the shovel; instead he is "trying to get that last load dumped because that's what we do is try to get that last load dumped . . . because that's how we make the money on these loads." (Tr. 366-67). After the driver dumps the rock, Miller determines where she should park. Although it is not a normal tie down location, Miller testified that he can have a truck park at the dump if necessary. (Tr. 363, 367). I find that the evidence does not support Complainant's position that Miller did not have a good faith belief that Palmer could have continued driving her truck until a few minutes before the end of the shift.[2]

Mine Manager Muetchler put Miller's testimony on this issue into perspective. He testified that the haul trucks are the most important part of the mining process. (Tr. 182). Asarco has calculated that total revenues generated by the pit over a period of time divided by the number of truck loads dumped during the same period of time to be about $20,000 at current copper prices. Thus, the company views each truck load to be worth $20,000. About 30 haul trucks are operated on each shift. (Tr. 183). He testified that if the pit loses one load per truck for all three shifts, a significant amount of production is lost. As a consequence, it is company policy to run each haul truck "right up until the end of the shift on the hour." (Tr. 184). At the end of each shift, Asarco strives for a "hot seat change" whereby the driver on the oncoming shift starts her preshift examination of the truck just as the driver from the previous shift is getting off

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[2] Complainant contends that the issue in this case is not whether Palmer had time to go to the dump on either date, but whether she could have parked at the Bluebird tie-down. (S. Reply Br. 14, Tr. 349). Complainant believes that Miller had made an irrevocable decision to have Palmer park at Bluebird if she did not have time to return to the shovel. *Id.* Consequently, Complainant believes that if the evidence shows that the Bluebird tie-down was not available and if the company records show that she did not have time to return to the shovel, then Palmer's decision to park early is vindicated and Miller's discipline was both unwarranted and was given in bad faith. I disagree. Although Miller testified that he was thinking that he would have Palmer park at Bluebird when the dispatch system ordered her to continue toward the dump, it is quite clear that Miller's objective was to get her and the other drivers as far along as possible before the end of the shift. The issue in this case is not whether Palmer could have made it back to the shovel before the end of the shift or whether Bluebird was available as a tie-down location.

the truck. *Id.* Miller's conduct in determining whether Palmer had time to get to the dump rather than time to make a round trip is entirely consistent with Asarco's policy.

The dispatch records show that on October 27, 2004, Palmer was instructed to proceed to the dump at 7:36 a.m. and that it would take a little less than 13 minutes for her to get to the dump. (Ex. R-14 p. 2). That would place her at the dump at about 7:49. Instead, Palmer parked her truck at the shovel. Miller testified that it takes about two minutes for a truck to dump rock. (Tr. 342). After Palmer dumped the rock at the dump, Miller could have ordered Palmer to tie down at the dump or proceed to another location. If he ordered her to proceed to a tie down location and there was not enough time to get there, Palmer would have been entitled to overtime pay. Once a driver requests to tie down, the responsibility is on Miller to direct how that should be accomplished. The dispatch records show that on November 5, 2004, Palmer was instructed to go to the dump at 11:39 p.m. and that it would take her about 13 minutes to get there. Instead, Palmer parked her truck at the shovel. It was reasonable, given Asarco's policy, for Miller to expect Palmer to keep driving. Thus, I find that it was reasonable for Miller to have concluded that Palmer parked too early on each of these dates.

The overriding issue in this case is whether Palmer was treated differently than other drivers who have parked early and, if so, whether this disparate treatment was related to her protected activity. Complainant contends that all other drivers who have parked their trucks early have been given counseling rather than discipline. Manriquez, the union president, testified that it is very unusual for a manager to give a miner a verbal warning without first having counseled her. (Tr. 160). He stated that he was not aware of any counseling given to Palmer on this subject prior to her verbal warning. Palmer testified that prior to October 27, she has never been given any counseling for parking too early. (Tr. 26-27).

As stated above, Daryl Neely testified that Miller has accused him of parking about 25 minutes early. Miller simply told him not to do it again. (Tr. 91). Neely testified that on another occasion, he and two other drivers were told that they parked too early. These drivers were called to a disciplinary meeting with Chroninger and Miller, but they were not issued any formal discipline. (Tr. 92). Lonny McNavage testified that Miller has told him that he parked too early on about six occasions. (Tr. 115). In none of those instances did Miller discipline him. Finally, Complainant points to Sal Hernandez, who parked early on October 27, 2004, without being disciplined or counseled. (Tr. 27-28).

Asarco contends that these instances do not establish disparate treatment. For example, it states that McNavage often discussed whether he had time to dump with Miller over the radio. (Tr. 119-20). When Miller called him on the radio, McNavage always responded and stated his case for parking where he was. McNavage testified that sometimes Miller let him park and other times he did not. *Id.* McNavage acknowledged that Miller, as the supervisor, makes the ultimate decision. (Tr. 120). Miller gave permission for Hernandez to park early on October 27. When Miller rejected his delay code, Hernandez called Miller over the radio and told Miller he was too

tired to continue to operate his rig. Miller then gave Hernandez permission to tie down at the shovel. Palmer, on the other hand, failed to respond to Miller's radio calls and text messages.

Asarco also maintains that there are other important differences in the incidents involving other drivers. The other drivers responded to Miller's order to continue driving by calling him over the radio to ask permission to park early. These drivers also acknowledged that it is Miller, not the drivers, who make the decision as to when and where to park at the end of the shift. In those instances when a driver parked early without permission, the drivers were counseled because they admitted that they were not allowed to park if they were ordered to keep operating. Asarco contends that Palmer was disciplined rather than counseled because of her attitude. First, on October 27, she did not respond to Miller's radio calls or the text messages he sent to her dispatch panel ordering her to keep driving. She simply parked her truck and did not attempt to communicate with Miller about it. Second, the day after the first occasion, she argued with Miller about the incident. She told him that she did not park early. Asarco contends that she received the verbal warning because she continued to argue about the incident.

Complaint maintains that if Miller were concerned about Palmer's attitude and her argumentative behavior, she should have been disciplined for her failure to follow orders or for insubordination. Complainant notes that neither the verbal warning nor the written warning state that the discipline was given because of Palmer's recalcitrance or because she challenged Miller's authority to dispatch trucks. Consequently, Palmer contends that the discipline she actually received is inconsistent with Asarco's claim that she was disciplined because she argued with Miller about parking early.

As stated above, I hold that Miller was not aware of Palmer's status as an alternate safety representative when she was given the verbal warning on October 27, 2004. Thus, if Miller treated Palmer differently than other drivers, it was not because of her protected status. The focus, therefore, is on events of November 5, 2004. Palmer testified at the hearing that she never received any radio or text messages from Miller on this occasion ordering her to proceed to the Diversion Dam dump. (Tr. 47). Palmer's contemporaneous handwritten notes, however, state that she had radio conversations with Miller that night about whether she had time to take her final truckload to the dump and return to the shovel. (Tr. 60-61). The notes reflect that Miller ordered her to proceed to the dump. *Id.* Palmer stated that these notes are likely to be more accurate than her testimony. *Id.* McNavage testified that he heard Palmer and Miller on the radio "having a dispute about whether she had time to take the load to the dump or not." (Tr. 112). Palmer's recollection of important events was quite hazy at the hearing.

Miller testified that he gave Palmer a direct order to proceed to the dump on November 5 and that she refused to do so. (Tr. 310). He gave her the written warning for her conduct because she had already received the verbal warning. *Id.* Miller testified that if Palmer had not received a verbal warning on October 27, he would not have issued a written warning for November 5. (Tr. 310-11). Miller further testified that he chose not to include allegations of insubordination in the written warning because the sanctions for insubordination are more severe,

up to and including termination. (Tr. 311). He stated that he wanted to "just use the progressive discipline route." *Id.* He testified that Palmer's position as a safety representative played no part in his decision to issue the written warning. *Id.*

I find that the Complainant did not establish disparate treatment. The evidence establishes that Palmer was ordered to proceed to the Diversion Dam dump on November 5, 2005, and that she refused to follow this direct order. Although other drivers have received counseling rather than formal discipline, these other drivers were contrite about their failure to follow company procedures. These drivers acknowledged that they can be required to operate their equipment until the end of the shift. It is important to recognize that the end of the shift is a busy time for the dispatcher. As a consequence, drivers have sometimes parked their trucks earlier than Miller wanted them to and, as a consequence, he counseled them that they must keep operating until they are given a tie-down designation. I credit Miller's testimony that he was only going to counsel Palmer on October 27 for parking early until she argued with him in front of the crew on October 28 that she did not park early. Although McNavage and other drivers may have discussed whether there was sufficient time to proceed to the dump over the radio, there has been no showing that other drivers have directly challenged Miller's judgment and authority. It is significant that Palmer later apologized for the way she talked to Miller. (Tr. 56, 74, 78, 308, 374). This indicates that she was hostile to his oral admonition not to park so early. The written warning issued for parking early on November 5 flowed directly from the previous verbal warning. I also credit Miller's explanation that he did not include allegations of insubordination in Palmer's discipline because he did not want to escalate the situation. The written warning was issued in accordance with the system of progressive discipline set forth in the collective bargaining agreement.

In addition to the verbal and written discipline, discussed above, Complainant relies on other evidence of harassment. First, Palmer contends that after she become a safety representative, Miller frequently failed to respond to her radio calls. (Tr. 40). Manriquez testified that he also noticed this trend. (Tr. 152-53). In response, Asarco contends that the evidence shows that Miller continued to answer Palmer's radio calls, contrary to Palmer's assertions. (Tr. 35-37).

I find that Complainant did not establish that Miller deliberately stopped answering Palmer's radio calls. He obviously continued to communicate with her with respect to her job duties. The evidence reveals that about 30 haul trucks operate in the pit on any given shift. (Tr. 178, 183). The dispatcher must keep in contact with these trucks as well as other equipment operating in the pit. Complainant did not introduce any evidence of specific instances where Palmer attempted to contact Miller and he never responded.

Complainant also avers that Palmer was harassed by Miller on January 3, 2005, when she was assigned three different trucks during a single shift. She contends that she should have been reassigned back to her truck once it was repaired because there were other qualified haul truck drivers available to drive the other trucks that shift. Specifically, Palmer testified that at least

four other drivers had not been assigned trucks that night because of mechanical problems. (Tr. 39). Miller testified that the other drivers were training each other to operate busses and water trucks. (Tr. 312). Palmer and Hunt believed that rainy days are not good days to provide training. Complainant argues that "Miller failed to explain what sense it made to have the bus take the time to pick up Ms. Palmer from one downed truck and transport her by bus to truck No. 438, when the bus or water truck could have proceeded directly to truck No. 438 with a spare driver [to operate that truck]." (S. Br. 13). Complainant also points out that after Palmer went home, it does not appear that Miller had any other driver proceed directly to truck 438 to move it out of harm's way.

Asarco argues that the events of January 3, 2005, do not indicate animus toward Palmer's protected activities. It contends that drivers sometimes have to operate multiple trucks during a single shift. (Tr. 393). It is also common knowledge that when it rains, electrical problems develop on the trucks. (Tr. 315). When Palmer first reported a problem with her truck, she was allowed to sit in her truck for about an hour and a half while she was waiting for her truck to be worked on. (Tr. 314). When truck 406 became available, Palmer was assigned to that truck. *Id.* Her preshift examination revealed that the backup alarm was not operational on truck 406. She was told that she could sit in that truck until mechanics arrived to fix the backup alarm. When the mechanics never arrived, Palmer was assigned to truck 438 because it was parked in a bad location. In addition, Palmer's truck was not available at the time she was assigned to truck 438. (Tr. 316). The driver of the bus who was taking Palmer to that truck told Miller via the radio that Palmer was tired and wet and that she wanted to go home sick. Miller gave Palmer permission to go home. (Tr. 315). Miller testified that another driver moved truck 438 after Palmer left to go home. (Tr. 316).

I agree with the Complainant that the scope of an adverse action is not limited to terminations, demotions, and formal discipline, but rather extends to "more subtle forms of discrimination." (S. Br. 5 *quoting, Sec'y on behalf of Long v. Island Creek Coal Co.*, 2 FMSHRC 1529, 1543 (June 1980) (ALJ)). I hold that it would violate section 105(c) to assign a miner onerous tasks or subject a miner to other harassment in retaliation for protected activities. Complainant contends that "Miller's assignment of Ms. Palmer alone to conduct the pre-operational inspections on three separate trucks in the pouring rain clearly constitutes adverse action." (S. Br. 5). I find that complaint's reconstruction of the events is speculative and illogical. Because it was raining, many trucks were down. Four drivers were assigned to train or be trained on other equipment at the start of the shift. I cannot draw an inference that Miller kept assigning Palmer new trucks for the purpose of harassing her by getting her wet. Miller could not have known that her truck would have a problem or that truck No. 406 would have an inoperable backup alarm. He had already scheduled the other four drivers to specific training tasks so having Palmer get started hauling rock by assigning her to truck 438 is not illogical. The truck was parked on a ramp. I find that Asarco's proffered business justification for keeping Palmer operating a truck is not plainly incredible or implausible. *See, Chacon*, 3 FMSHRC 2508, 2520 (Nov. 1981). I find that the evidence does not establish any nexus between the events of January 5, 2005, and Palmer's protected activities.

Complainant also relies on the counseling Palmer received when she forgot to chock the wheels on her truck after she parked it at the end of shift sometime in February 2005. Palmer believes that she was singled out for counseling because she was a safety representative. Asarco argues that, because the supervisor who counseled Palmer was not aware that other drivers had likewise neglected to chock their truck wheels, this incident does not establish disparate treatment. In addition, Palmer was not disciplined in any way for this event. I find that the Secretary did not establish that Palmer was singled out in this instance. Asarco requires drivers to chock the weeks of haul trucks for safety reasons. Torres, the senior mine supervisor, credibly testified that if he had noticed that other drivers did not chock their trucks, he would have counseled them as well. (Tr. 384-85).

Complainant also argues that Miller demonstrated hostility toward protected activity when he refused to allow another union safety representative, Charles Berry, to operate water trucks. As stated above, Complainant asserts that Miller would not assign Berry to a water truck because Berry complained to much. Asarco argues that it is not uncommon for an employee to be utilized on a particular piece of equipment more than others. It also contends that the Secretary did not establish any nexus between Miller's preference to assign Berry to haul trucks and Berry's protected actions as a safety representative. It is not necessary for me to resolve this issue because Berry did not file a discrimination complaint. Berry did not testify at the hearing. Complainant's point is not that Miller refused to assign Barry to water trucks because he was a safety representative; rather, the issue is whether he would not assign Berry to water trucks because Berry complained that the roads were not kept wet enough to keep down the dust. There is no question that dusty roads can create a safety and health hazard. Nevertheless, the evidence is too vague and the events are too far removed from the issues in this case for me to draw any substantive conclusions.[3]

To summarize, I find that Diane Palmer engaged in protected activity as a result of her status as a alternate safety representative and then as a safety representative for her crew. I find that the dispatcher on her crew, Bruce Miller, did not know that she was an alternate safety representative until after he issued her a verbal warning on October 28, 2004. I find that Miller

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[3] Palmer also testified that about a week before the hearing in this case she was hauling rock to a crusher. She was in line to dump at the crusher when Miller reassigned her to dump the rock at another crusher. She testified that there was a truck in line in front of her and two trucks behind her, so it would have been difficult to get out of line. When she called Miller on the radio to tell him, he told her to stay where she was. (Tr. 36-37). Palmer testified that Miller originally ordered her to pull out of line just to harass her. He knew where she was in the line and he should have asked the truck at the back of the line to go to the other crusher. She believes that Miller can see the crusher area from his control tower. (Tr. 36). Miller testified that he can tell when a truck is at a crusher by looking at the computer screen but he cannot always determine the order of the trucks in the line waiting to dump. (Tr. 317). He believed that Palmer was last in line, but when she called him to tell him that she was in the middle of the line, he immediately told her to stay there. I find that this event does not demonstrate any animus or hostility toward Palmer's safety activities.

had a reasonable good faith belief that Palmer had time to dump the rock from her truck one last time before the end of her shift on October 27 and November 5, 2004, and that she could have tied down at an appropriate location before shift change. I also find that Miller issued Palmer the verbal warning on October 28 because she shut down her truck about 21 minutes before the end of her shift in violation of the directive on her dispatch panel, in violation of his text and radio messages, and in violation of company policy and because she continued to maintain, in an argumentative fashion, that she did not shut down early. I find that Miller issued Palmer the written warning on November 5 because she shut down her truck about 21 minutes before the end of her shift in violation of the directive on her dispatch panel, in violation of his text and radio messages, and in violation of company policy and because she had already received a verbal warning. In addition, I find that Complainant did not establish disparate treatment of Palmer by Miller or Asarco. Consequently, I conclude that a preponderance of the evidence establishes that Asarco disciplined Palmer for reasons unrelated to her protected status or her protected activities. Finally, I find that the other examples of alleged harassment or animus presented by Complainant do not help to establish that Asarco discriminated against her in violation of section 105(c) of the Mine Act. Of course, my findings in this case do not relieve Asarco from its obligation to comply with the provisions of section 105(c) of the Mine Act. Asarco may not retaliate or discriminate against Palmer or any miner for exercising any of their statutory rights.[4]

III. ORDER

For the reasons set forth above, the discrimination complaint filed the Secretary of Labor on behalf of Diane Palmer against Asarco, Inc., under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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[4] According to Muetchler, the discipline Palmer received in 2004 can no longer be considered in any future discipline against her under the terms of the collective bargaining agreement because it was issued more that a year ago. (Tr. 237).

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 13, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-301-M
Petitioner	:	A. C. No. 01-02936-63063
	:	
	:	Docket No. SE 2006-131-M
v.	:	A.C. No. 02-02936-78967
	:	
	:	Docket No. SE 2006-167-M
HOSEA O. WEAVER & SONS, INC.,	:	A.C. No. 01-02936-83942
Respondent	:	
	:	Plant #1

ORDER CONSOLIDATING PROCEEDINGS
ORDER DIRECTING RESPONDENT TO ANSWER
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION
AND
ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DECISION

In these civil penalty proceedings the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitions to assess Hosea O. Weaver & Sons (Weaver) civil penalties for three alleged violations of the Secretary's mandatory training standards found in Part 46, Title 30, Code of Federal Regulations (C.F.R.), and for ten alleged violations of various mandatory safety and health standards for metal and nonmetal mines found in Part 56, Title 30, C.F.R.

ORDER OF CONSOLIDATION

The parties have moved for consolidation of the cases. The motion is **GRANTED**. The three dockets are **CONSOLIDATED** for hearing and decision.

ORDER DIRECTING RESPONDENT TO ANSWER

A review of the record in Docket No. SE 2006-167-M indicates Weaver has yet to file an answer. Weaver is **ORDERED** to do so within 30 days of the date of these orders.

THE SUMMARY DECISION MOTIONS

Cross motions for summary decision have been filed in Docket No. SE 2005-301-M. In moving for the consolidation of Docket No. SE 2005-301-M with Docket Nos. SE 2006-131-M and SE 2006-161-M, the parties have made clear the motions apply to the latter two dockets. Accordingly, I will treat the motions as having been filed in all three dockets.

In its motion, Weaver challenges the Secretary's jurisdiction over its plant. The company denies it owns or operates a "mine" as that word is defined in section 3(h)(1) of the Mine Safety and Health Act of 1977 (Mine Act or Act).[1] 30 U.S.C. § 802(h)(1). Therefore, in Weaver's view, MSHA is without authority over its operation.

Rather than a "mine," Weaver contends it operates an OSHA-regulated manufacturing facility, that it complies with OSHA standards and that it trains its workers pursuant to OSHA requirements.[2] Weaver asserts that the subject facility, Plant No.1, is one of three hot mix asphalt plants it owns and operates. At the plant, Weaver produces asphalt for commercial sale. The asphalt is used in highway and road construction. Resp. Mot. 2. In manufacturing asphalt,

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[1] Section 3(h) (1) states:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and working structures, facilities, equipment, machines, tools, or other property, including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this [Act], the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

[2] While Weaver acknowledges it has been inspected by MSHA four times since 1993, it maintains that it "never has acquiesced to MSHA jurisdiction." Resp. Mot. 2.

Weaver utilizes gravel, which it purchases on the open market, primarily from one gravel company.

After delivery to Plant No. 1, the gravel is stockpiled. The gravel is used as delivered in the asphalt manufacturing process, or, depending on the hot mix formulation, the gravel is crushed into smaller sizes before it is added to the hot asphalt mixture. Less than 4.5% of the plant's total hot mix asphalt production involves the use of crushed gravel. Resp. Mot. 3. None of the company's 165 workers are involved in the extraction or production of minerals and none are required to enter any mines or other work sites where minerals are extracted or produced. *Id.* In sum, Weaver argues that "because it does not engage in mineral extraction, production or milling at Plant [No.] 1 . . . and because [Weaver] does not utilize raw, unprocessed minerals in its manufacturing process . . . [Weaver] is entitled to judgement [on the jurisdictional issue] as a matter of law". Resp. Mem. of Law 2.

The Secretary counters that undisputed material facts establish MSHA has jurisdiction over a part of Weaver's operation. The Secretary acknowledges that Weaver buys raw 9/16-inch to 2-inch gravel from an outside company. She agrees that Weaver uses the gravel for asphalt production. She emphasizes that although the gravel is mined, screened and washed by the gravel company, after it is delivered to a stockpile on Weaver's property, Weaver at times moves the gravel approximately 100 feet by front end loader to the hopper of a crushing and screening plant [[3]] where Weaver crushes and sizes the gravel. Sec. Mot. 2-3. The crushed and sized gravel is then moved approximately 300 feet by front end loader to Weaver's hot mix plant. Sec. Mot. 3. The Secretary is not asserting jurisdiction over the delivery of gravel to Weaver's facility or over its use in the asphalt hot mix plant. Rather, she is asserting Mine Act authority over Weaver's crushing and screening operations, including the front end loader used to transport the unprocessed gravel to the hopper and the processed gravel to the hot mix plant

RESOLUTION OF THE JURISDICTIONAL ISSUE

The parties agree if MSHA has jurisdiction over the crushing and screening plant and the front end loader it is by virtue of the fact that the transportation, crushing and sizing of the gravel is "milling" within the meaning of section 3(h)(1) of the Act. Section 3(h)(1) includes within the definition of "'coal or other mine' equipment, machines, tools, or other property . . . used in . . . the work of extracting . . . minerals . . .or used in, or to be used in, the work of milling . . . such minerals." The section gives the Secretary the duty of determining "what constitutes mineral milling." *See* Sec. Mot. 6. The Secretary points out she has exercised that duty in an Interagency Agreement (Agreement) between MSHA and the Occupational Safety and Health Administration ("OSHA"). 44 Fed. Reg. 22, 827 (April 17, 1979), *amended by* 48 Fed. Reg. 7, 521 (Feb. 22, 1983). The Agreement states that "milling consists of one of more of the following processes: crushing, grinding, pulverizing, sizing". . . ." 44 Fed. Reg. at 22829. "Crushing" is defined as

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[3] The "crushing and screening plant" is also referred to by the Secretary as the "crushing and sizing plant". Resp. Mot. 3.

"the process used to reduce the size of mined materials into smaller relatively coarse particles." *Id.* "Sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." *Id.* 22829-30.

I conclude that application of the Agreement and the exercise of deference resolve the issue. The parties are in accord that, depending upon customer specifications, some of the gravel must be crushed and sized before it is used in the asphalt manufacturing process and that Weaver does this crushing and sizing. As noted, the term "milling" is defined in the Agreement as including crushing and sizing. *Id.* at 22829. "Crushing" is further defined as "the process used to reduce the size of mined materials into smaller, relatively coarser particles." *Id.* "Sizing" is defined as "the process of separating particles of mixed sizes into . . . particles of all the same size, or into . . . particles [which] range between maximum and minimum sizes." *Id.* The parties agree that at the plant the gravel is "reduced in size," that is to say, it is "crushed." They also agree it is "separat[ed]" into ½- inch size particles, that is to say, it is "sized." These processes correspond exactly to the activities the Agreement brings within the perimeters of the Act.

Not surprisingly, Weaver takes issue with this simple analysis. The company points to Appendix A of the Agreement, which states milling requires "separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." 44 Fed. Reg. at 22828. Weaver emphasizes that its crushing and sizing of gravel does not involve the "separation of one or more valuable desired constituents . . . from . . . undesired contaminants". *Id.* Weaver describes its work as "simply custom sizing to meet a manufacturing specification for asphalt products." Resp. Mem. of Law 7.

Despite the fact that no separation on constituents takes place at Weaver's facilities, I believe that Weaver's crushing and sizing comes within the Agreement. The Commission has noted the statement in Appendix A regarding "separation of one or more valuable desired constituents from crude" is "not the only relevant definitional provision" and that the "general definitions" in the Agreement -- in this case, the references to "crushing" and "sizing" -- may be determinative when resolving a jurisdictional issue. ***Watkins Engineers & Constructors***, 24 FMSHRC 669, 673-674, 675 (July 2002). Thus, I return to the main point, which is that Weaver engages in activities that clearly come within the definition of "milling" and, therefore, which bring it within MSHA's jurisdiction.

I further find that additional factors buttress MSHA's assertion of jurisdiction. First, when resolving jurisdictional questions of this sort, the benefit of the doubt goes to the Secretary. As the Commission stated in *Watkins*, "Congress clearly intended that . . . jurisdictional doubts be resolved in favor of coverage by the Mine Act. 24 FMSHRC at 675-676 (*citing* S. Rep. No. 95-181, at 14 (1977) *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978)).

A second, and related factor is that, as the Secretary correctly points out, the courts and, by implication, the Commission and its judges, have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage. She is the one whose duty it is to administer the acts and when, in the course of her administration, she makes informed and reasoned jurisdictional determinations, judicial decision makers have been wary of overruling her. *See* Sec. Mot. 7.

In this instance, the Secretary has made an informed and reasoned determination. She states that MSHA's expertise with the inspection and regulation of crushing and sizing equipment at rock quarries extracting gravel – equipment identical to the subject equipment – gives MSHA the best background for the effective inspection and regulation at the subject facilities. Sec. Mot. 12-13. She further states the fact that Weaver's crushing and sizing operation is separate from the asphalt hot-mix plant provides a clear line of demarcation between MSHA and OSHA jurisdiction. These are informed and reasonable administrative considerations to which Weaver has no effective rejoinder.

Third, Weaver's assertion that if its re-sizing of gravel is "milling," the milling is minimal and is not subject to MSHA's jurisdiction, is not persuasive. Weaver Mem. of Law 6-7. Although the Secretary counters that the Act does not contain an exception for "so called '*de minimis*' milling operations," I need not reach that issue. Sec. Resp. 2. Rather, I hold the subject activities are not *de minimis* in the context of Weaver's overall operation. *See* Sec.'s Response to Resp.'s Mot. 1-3. The subject crushed and screened gravel is used in making the plant's reason d'etre, hot-batch asphalt. Of the six employees working at Plant No. 1, two are involved in the gravel crushing process, and one works around the crusher. Resp. Mot. 4, 11. Further, crushed gravel must be incorporated into the hot mix asphalt to meet certain customers' specifications, and the crushed gravel comprises up to 18% of the total amount of gravel incorporated. *Id.* 5, 10. These are not trifling or insignificant considerations. Even if, as Weaver maintains, only 4.5 % of the plant's total asphalt output involves the use of crushed gravel, active involvement of three of six employees of Plant No. 1 in crushing and sizing entitles those employees to the regulation the Secretary deems most effective for their safety.

For these reasons, I conclude MSHA properly exercised its jurisdiction over the crushing and screening operation at Weaver's Plant No. 1. Weaver's motion for summary decision is **DENIED**. The Secretary's motion is **GRANTED**, but only to the extent it involves the jurisdictional issue. The Secretary's allegations regarding the existence of the alleged violations and the penalty aspects of the cases remain to be resolved.

David F. Barbour
Administrative Law Judge
(202) 434-9980

28 FMSHRC 692

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20001

July 18, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-209
Petitioner	:	A.C. No. 46-08939-63450
v.	:	
	:	
ARCH OF WEST VIRGINIA,	:	Guyan
Respondent	:	

ORDER DENYING MOTIONS FOR SUMMARY DECISION

BACKGROUND

This civil penalty proceeding involves the application of mandatory safety standard 30 C.F.R. § 77.404(a) to off-the-road (OTR) tires on haulage trucks. The standard states that "mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." On May 9, 2005, Jerry Robertson, an inspector from the Secretary of Labor's Mine Safety and Health Administration (MSHA), issued three citations to Arch of West Virginia (Arch) asserting that the company violated section 77.404(a) by failing to maintain haulage truck tires in safe operating condition. The citations charge that one tire on each of three cited trucks was "worn to the 4th steel belt". Subsequently, the Secretary petitioned for the assessment of civil penalties for the alleged violations. Arch denied it violated the standard, and the matter was assigned to me for hearing and decision.

THE MOTIONS

The parties have filed cross motions for summary decision. Arch argues that in issuing the citations, MSHA has imposed a new enforcement policy for section 77.404(a), one about which Arch did not have fair notice. According to Arch, under that policy an MSHA inspector who examines tires on OTR heavy equipment, must cite a violation of section 77.404(a), "[i]f the first two protective plies of [OTR] tires . . . are worn through". Resp. Mot. 3 (*citing* Exh. 4 (Robertson Deposition 18)). In Arch's view, because "the enforcement standard MSHA applied has never been expressed by the agency", the three citations must be vacated. *Id.*

The Secretary argues that she is the one entitled to summary decision. She asserts Arch was aware of the requirements for compliance with section 77.404(a), but none the less clearly violated the standard. Because the three tires were unsafe, they should have been removed from service, and they were not.

ARCH'S MOTION IN MORE DETAIL

In the motion Arch gives its version of what happened at its mine during the May 9 inspection and its view of the background against which the inspection took place. According to Arch, on May 9, Robertson inspected 25 to 30 pieces of heavy equipment. Each piece of equipment had four to six tires. Of the 100 to 180 tires inspected, Robertson found three in violation of section 77.404(a). Resp. Mot. 8. At the time of the inspection Arch had in place an OTC tire maintenance/inspection program that involved four levels of inspection and maintenance. *Id.* 5-7. According to Dennis Stilley, Arch's Maintenance Planner, under the program a tire was taken out of service when "a tire [was] worn into the steel belts" and/or when a tire "exhibit[ed] sidewall cuts [or] smooth tread". *Id.* 7 (*citing* Stilley Deposition 48-51). Arch states when its Manager of Maintenance, John Metzger, had doubts about whether a tire was safe, he would "contact the representative of the tire's manufacturer, and ask him to come to the mine and examine the tire to made recommendations as to whether the tire [could] be safely used." *Id.* 8 (*citing* Metzger Dep. 19-20). During his contacts with manufacturers' representatives, Metzger never was told about an out-of-service criteria as it related to the wear on OTR tires, nor had he ever heard any of the representatives express knowledge of a "two belts and out" standard for tire removal and replacement. *Id.*8. In addition, when Robertson wrote the citations he did not mention of the "two belts and out" standard, nor did he ask Metzger about Arch's tire inspection/maintenance program. Resp. Mot. 9-10.

Arch also notes that Robertson stated that he did not measure the tread depth of the cited tires. Rather, he visually inspected the tires and counted the number of belts that were worn on each tire. Resp. Mot. 11 (*citing* Robertson Dep. 70-71). His only concern was whether belts one and two are worn through, and he did not think about anything else when considering whether the tires should be removed from service. *Id.* (*citing* Robertson Dep. 95).

Arch argues that MSHA is required to "publish standards that are ascertainable to the regulated community and give 'fair notice' of the agency's interpretation of those regulations." Resp. Mot. 12 (*citing Alan Lee Good, an ind. d.b.a. Good Constr.*, 23 FMSHRC 995 (September 2001)). Arch asserts that the standard itself provides no notice of the "two belts and out" removal criteria, that Robertson provided no notice, and that MSHA's Program Policy Memorandum (PPM) and other MSHA publications do not mention the criteria. It also asserts there were no prior citations issued at the mine for violations of the criteria. *Id.* 13-14. Indeed, according to Arch, the first time it learned of the criteria was when Robertson referred to it during his deposition. *Id.* 14.

Arch states that the question of fair notice must be decided on the basis of application of a "reasonably prudent person test", to whit, whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Resp. Br. 16 (*citing Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (July 1990)); *BPH Materials Int'l Inc.*, 18 FMSHRC 1342, 1345 (October 1996)).

Arch argues it had a "reasonable and safe tire program in place" and that it "reasonably relied upon [its] criteria for OTR tires, *i.e.*, when the first steel belt is visible, the maintenance personnel schedule for tire replacement and continue to watch and inspect the tire until replacement." Id. 17, 19.

Finally, Arch asserts it reasonably relied on "established safety standards for OTR tires" and mine specific safety factors such as the fact that its roads were graded daily to reduce tire wear. *Id.* 20-23. Arch also cites the report of its expert, James K. Sprague, a vice president of Packer Engineering, Inc., in which Sprague expresses his opinion that the tires were safe. *Id.* 26-28.

THE SECRETARY'S MOTION IN MORE DETAIL

The Secretary asserts that Robertson cited the subject tires because he was concerned about blowouts and their potential to cause injury to drivers and nearby miners. Pet. Resp. 5. The Secretary references the opinion of her expert, James Angel, a mechanical engineer with MSHA's Approval and Certification Center, that OTR tires with worn steel belts are more likely to fail by rupture than by slow leak. *Id.* 13 *citing* Angel Dep. 42-43, 54).

Two of the tires were made by Michelin and one was made by Bridgestone. "To ensure that the construction and safety features of [OTR] tires were consistent with his understanding", Robertson called the Michelin representative "and explained that four belts had been breached and [Robertson] wanted to know when the tires should be taken out of service." *Id.* 4 (*citing* Robertson Dep. 34). According to the Secretary, the representative told Robertson "that a tire should be removed from service when the top two belts were worn through." *Id.* Although Arch had notice of the unsafe condition of the tires through reports made to mine management by miners, mine management, as represented by Metzger, did not think that tires worn to the fourth of the six belts were unsafe. *Id.* 6-7 (*Citing* Metzger Dep. 52, 80).

In the Secretary's view, Arch either knew or should have known better. The Secretary points to the deposition of Jack Warnock, an employee of Bridgestone, who stated that once the structure belts of OTR tires are exposed, the tires should be removed from service. Pet. Resp. 9 (*citing* Warnock Tr. 28). According to Warnock, this is the tire removal criteria of the Rubber Manufacturers Association, and it is a criteria that it is recognized by "all of the tire industry". *Id.* Further, the Secretary notes Warnock's assertion that in 2004 and 2005 he conducted courses on tire safety at which the removal criteria for tires was discussed and that Arch representatives attended the courses. *Id.*

RULING ON THE MOTIONS

The controlling question is whether or not Arch violated section 77.404(a). Resolution of the question is fact driven and, as the parties recognize, must be determined within a framework of legal principles that have long been known and applied. These principles establish that section

77.404(a) imposes upon an operator two duties: (1) to maintain equipment (in this case, the cited tires) in safe operation condition; and (2) to remove unsafe equipment from service immediately. *Peabody Coal Company*, 1 FMSHRC 1494, 1495 (October 1979). As the parties also recognize, "[d]erogation of either duty violates the regulation". *Id.* The question of whether the cited equipment was in unsafe operating condition is resolved on the basis of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including facts peculiar to the mining industry and the mine, would have recognized a hazard warranting corrective action. *see Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982).

Applying these principles, the specific issue before me is whether, on May 9, 2006, the cited tires were not "maintained in safe operating condition" (30 C.F.R. 77.404(a)) because, as stated on each citation, they were "worn to the 4th steel belt." The parties have gone to great lengths to present conflicting arguments on the issue. However, they have not stipulated to a single fact, and the issue cannot be resolved without factual findings. While I take it as a given that the tires are "equipment" within the meaning of the standard, it is not clear the parties agree the subject tires were in the condition described by the inspector on the citations. Nor is it clear they agree regarding the conditions under which the subject tires were used and/or reasonably could have been expected to be used. Because there is a component of tire safety that is relative to their conditions of use, such factual matters may be relevant when determining whether the tries were unsafe.

Moreover, the Secretary bears the burden of proof, and it will be important for me to hear the testimony of Inspector Robertson as to why he believed the particular tires were not in safe operating condition. It also will be important to hear the testimony of the parties' witnesses as to whether, given the condition of the tires as found by the inspector, the tires were in fact in unsafe condition and whether a reasonably prudent operator would have known this. All such testimony will, of course, be subject to cross examination, which means there will be a complete record upon which to determine the ultimate issue.

Counsels should note in this regard that even if the testimony reveals Robertson issued the citations as the result of his rote application of the "two belts and out" rule and even if Arch did not have notice of MSHA's adoption and application of the rule, this will not resolve the issue. An inspector may issue a citation for an invalid or wrong reason, and the citation still may be sustained if the facts establish a violation. Here the citations may be sustained if the testimony establishes the tires were in fact in unsafe operating condition and Arch either knew or should have known it. In other words, the validity of the citations rests not on Robertson's motives, but on the facts and whether they show that a reasonably prudent operator familiar with the circumstances under which the particular citations were issued, including facts peculiar to the mine involved, would have concluded the cited tires were unsafe and would have removed them from service.

A conclusion on this issue is best based on testimony that has been refined and sharpened through cross examination and that has been subjected to credibility determinations. For these reasons, the motions are **DENIED**. The hearing scheduled to begin at 8:30 a.m. on August 17, 2006, will go forward as planned.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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July 21, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-157
Petitioner	:	A. C. No. 36-08746-26476
v.	:	
	:	Quecreek No. 1 Mine
BLACK WOLF COAL COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-158
Petitioner	:	A. C. No. 36-08746-26477 LVY
v.	:	
	:	Quecreek No. 1 Mine
PBS COALS, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-152
Petitioner	:	A. C. No. 36-08746-26478 KQN
v.	:	
	:	Quecreek No. 1 Mine
MUSSER ENGINEERING, INC.,	:	
Respondent	:	

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY OF LABOR'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION

These consolidated civil penalty proceedings are brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 801 *et seq.* (2000) (hereinafter the "Mine Act" or "the Act"), as a result of a nonfatal entrapment accident at the Quecreek No. 1 Mine, located in Somerset, Pennsylvania. They involve three alleged violations of mandatory safety standards for underground coal mines with aggregate civil penalties of $14,100.00. Unless otherwise noted, the summaries of

the facts throughout this Order are derived from the parties' joint stipulations of fact.

Background and Procedural History

On July 24, 2002, at approximately 8:45 p.m., water broke through the working face of the No. 6 entry of the Quecreek No. 1 Mine after a cut was made in the entry during mining operations. The deluge came from a long-abandoned and flooded underground coal mine known as the Harrison No. 2 Mine. The Harrison No. 2 Mine was located immediately updip (at a higher elevation) of the Quecreek No. 1 Mine permit boundary. As a result of the inundation, nine miners narrowly escaped and nine others were trapped in the mine. While the world anxiously watched, the nine trapped miners were rescued one by one approximately 76 hours later, on July 28, 2002.

Under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), a mine operator is required to have an accurate map of the mine pursuant to 30 C.F.R. § 75.1200. Among other requirements, section 75.1200 requires a mine operator to show "adjacent mine workings within 1000 feet." 30 C.F.R. §75.1200(h). Part of the investigation's purpose was to determine why the workings in the Harrison No. 2 Mine were not shown on the Quecreek No. 1 map. As a result of the investigation, the Secretary determined that the Quecreek No. 1 Mine's section 75.1200 map was not completely accurate because the intersected workings of the adjacent Harrison No. 2 Mine were not shown on Quecreek No. 1 Mine's section 75.1200 map. Consequently, MSHA issued single citations to the three Respondents in this proceeding; specifically, Musser Engineering, Inc. ("Musser"), PBS Coals, Inc. ("PBS"), and Black Wolf Coal Company ("Black Wolf"), which was the production operator of the mine (collectively "the Respondents").

On November 21, 2005, both Musser and PBS filed Motions for Summary Decision in this matter. The Secretary of Labor filed her response to the Respondents' motions and her own Motion for Summary Decision on December 21, 2005. In support of their cross-motions for summary decision, the parties submitted extensive stipulations and certain joint exhibits.[1] Black Wolf did not file or join in the cross-motions for summary decision but did sign the joint stipulation of facts.

The Secretary contends that PBS and Musser are liable as independent contractor operators of the mine. Musser responds that it is not an operator within the meaning of the Mine Act and, therefore, should not be held liable. PBS does not dispute the Secretary's jurisdiction; however, it does dispute the validity of the citation.

Statement of Facts

Black Wolf's Quecreek No. 1 Mine is located in Somerset County, Pennsylvania. At the time of the inundation, 61 people were employed at the mine, 6 on the surface, and 55 in the mine itself.

[1] The following abbreviation is used herein as a citation to the administrative record: Stip. = the parties' joint stipulations.

Stip. 24. On Wednesday, July 24, 2002, at 8:45 PM, miners working on the No. 1 entry on the 1-left section during mining operations broke through the working face and caused a serious inundation. Stip. 29. The water came from the abandoned Quecreek No. 2 mine. Stip. 28, 29. Of the 18 miners underground that evening, 9 were trapped. Stip. 29. Within hours the local and national media had joined in the vigil for the trapped miners. Soon the watch spread worldwide. Not since the Carmichaels disaster of 1962 at the Robena Frosty Run Mine had Western Pennsylvania's coal fields faced a crises of this magnitude. By the next morning, after approximately 16 hours of rising water, the nine miners estimated they had about an hour left to live. The entrapped miners did what miners do: accepted their fate and prepared for the worst. Goodbye notes were written to their families and sealed in a bucket for recovery. But over the next few hours, the rising water slowed and reached the highest elevation.[2] Hope returned as the rescue efforts continued. After 3 days, in a dramatic rescue led by Federal Mine Safety and Health Administration workers, the nine trapped miners were brought to the surface using MSHA's mine rescue capsule. MSHA Report at 30.

Quecreek No. 1 Mine

Prior to opening a new mine, mining permits and plan approvals are required from state and federal authorities, respectively. MSHA Report at 54; Stip. 50. In 1994, the Double C Coal Company ("Double C") initiated an application to obtain a permit for the Quecreek No. 1 Mine from the Pennsylvania Department of Environmental Protection ("PA DEP"). *Id.* MSHA Report at 54; Stip. 50. Double C contracted with Musser to prepare a permit application for its submission under the Pennsylvania Small Operator Assistance Program. MSHA report at 54. PBS acquired the project from Double C in 1995 and the project was transferred to Quecreek Mining, Inc. ("Quecreek Mining"), a subsidiary of PBS. MSHA report at 54; Stip. 10, 21, 50. PBS hired Musser to prepare the original permit application for the Quecreek No. 1 Mine. Stip. 12. This work included researching and showing the location of old mine works adjacent to the planned mine. *Id.*

The initial permit application was submitted to the PA DEP on February 28, 1998. The permit, number 56981301, was issued to Quecreek Mining, Inc., on March 13, 1999. MSHA Report at 54; Stip. 51, 73. Black Wolf Coal Company conducted the underground mining operations at Quecreek No. 1 and contracted with Mincorp, Inc. ("Mincorp") to perform the mining. Stip. 23. PBS is a subsidiary of Mincorp. Stip. 9, 10, 23. Mining was conducted by the use of remote controlled mining machines. Stip. 19. The Quecreek No. 1 Mine opened into the Upper Kittaning coal seam, and Quecreek Mining developed the surface area, the portals, and the mains, which were driven downdip from the portals. Stip. 18, 22, 32.

Harrison No. 2 Mine

In 1913, the Quemahoning Creek Coal Company opened what is now known as the Harrison No. 2 Mine and the Saxman Coal and Coke Company ("Saxman") subsequently

[2] Some miners believed it to be about noon, Thursday, July 25th, while others estimated it to be noon on Friday, July 26th.

purchased the mine in 1925. Stip. 28. Saxman operated the mine until 1963, although the mine was idle from 1934 through 1941. *Id.* Prior to the mine's 1963 closure, Consol Energy, Inc. ("Consol") owned the coal reserves and leased the reserves to Saxman in exchange for monthly royalty payments. Stip. 48, 65. Saxman also provided Consol with updated mine maps on a biannual basis. *Id.* After the mine stopped producing coal in 1963, it was abandoned, sealed, and became flooded. Stip. 54. The Harrison No. 2 Mine was located in the same seam and immediately updip of the Quecreek No. 1 Mine permit boundary. Stip. 28, 32. In general, the Harrison No. 2 Mine is located east of the Quecreek No. 1 Mine. Stip. 32.

Pennsylvania Bituminous Coal Mine Act of July 17, 1961 ("PA Mine Act")[3]

The PA Mine Act requirements regulate bituminous coal mining in Pennsylvania. Stip. 33. The PA Mine Act requires operators or superintendents of mines to survey the workings of their mines and to create an accurate map of the mine that shows, among other items, "an accurate delineation of the boundary lines" between the mine and "all adjoining mines or coal lands and the relation and proximity of the workings of said mine to all adjoining mines or coal lands." PA Mine Act, 52 P.S. §701-235; Stip. 34. In addition, a professional engineer or registered professional surveyor must certify the mine maps. *Id.* Sections 238 and 239 of the PA Mine Act require that the mine map be updated every six months and a copy of the updated mine map must also be provided to the Pennsylvania Mine Inspector. PA Mine Act, 52 P.S. §§701-238,239; Stip. 35, 36. The Pennsylvania Mine Inspector is required to take custody of the mine maps as "official records pertaining strictly to the office of mine inspector in the district," and to transfer all of the maps to his successor as district mine inspector. PA Mine Act, 52 P.S. §701-239; Stip. 37. Within 60 days of abandonment of a mine, the operator or superintendent must update the mine inspector's map and must also send the PA DEP a "complete original tracing or print of the complete original map, which shall be kept in the department as a public document." PA Mine Act, 52 P.S. §701-2240; Stip. 38. Moreover, a registered professional engineer or registered surveyor must certify that the map is a true and correct copy and a "true, complete and correct map and survey of all the excavations made in such mine." PA Mine Act, 52 P.S. §701-240; Stip. 39. Substantially similar provisions have existed in Pennsylvania Mine Safety Law since 1911 and in 1963, when the Harrison No. 2 Mine was abandoned, mine operators were required to supply mine closure information to the Commonwealth including a final mine map. PA Mine Act, P.S. § 701-240; Stip. 40, 43.

Endeavors and Process in Locating Maps of Harrison No. 2 Mine

During the permitting process, it was not practical or feasible for the Harrison No. 2 Mine to be surveyed because it was abandoned, sealed, flooded, and inaccessible. Stip. 54. Prior to submitting the permit application to the PA DEP, both Musser and PBS conducted searches for maps of the abandoned Saxman Mine. Stip. 55. In the summer of 1995, every known mine map repository in central and western Pennsylvania was searched and five maps of the Saxman Mine were located. *Id.* These included the Federal Office of Surface Mining map repository in

[3] P.L. 659, 52 P.S. 701-101 through 701-706.

Greentree, Pennsylvania ("OSM"), the Pennsylvania Department of Environmental Protection in McMurry, Pennsylvania, the MSHA District 2 Office in Hunker, Pennsylvania, and Consol Energy, Inc., which was the owner of the coal mined at Harrison No. 2, and the DEP Bureau of Deep Mine Safety (BDMS") Uniontown Office. Stip. 55, 58, 59. Musser also consulted Carlton Barron of Boswell, Pennsylvania, who was an owner of Saxman Coal and Coke Company. Musser Mot. at 4. The search was conducted for mines with the names "Saxman" and "Harrison," since the adjacent mine was frequently referenced by either name. Stip. 55.

Most of the maps discovered during the searches were older and of no practical use. Stip. 62. Two maps located during the search, however, were used for permitting the Quecreek No. 1 Mine. *Id.* PBS and Musser located a map of the Harrison No. 2 Mine at the OSM repository in Greentree, Pennsylvania. Stip. 63. This map was not dated, marked final, or certified by a professional engineer or professional surveyor. *Id.* It depicts the general mine workings of the Harrison No. 2 Mine. *Id.* Unknown to Musser and PBS, a frame of the legend portion of this map is dated 1957. *Id.* This map was not indexed properly in the OSM archives and was not located in the searches performed at Musser's and PBS's request. *Id.* The Greentree map was the most current map of the Harrison No. 2 Mine available at either the state or federal mine map repositories. Stip. 64.

Musser also contacted Consol Energy Inc., in Library, Pennsylvania and requested a copy of any maps of the Harrison No. 2 Mine that Consol had available. Stip. 65. Because Consol previously owned the coal reserves at the Harrison No. 2 Mine and was entitled to royalties on all coal removed from the mine, Musser expected that Consol would have had accurate maps of the Harrison No. 2 Mine. *Id.* A Consol employee located a copy of the Harrison No. 2 Mine and provided a copy to Musser. *Id.* PBS also received a copy of this map. *Id.* The Consol map is not dated or marked final, and the map is not certified by a professional engineer or professional surveyor. *Id.*

The Consol map showed the most extensive mining in the Harrison No. 2 Mine that was located, and Musser believed it to be the final map. Stip 66. Musser, with the concurrence of PBS, used the Consol map to plot the boundary of the Harrison No. 2 Mine on the Quecreek Mine permit maps. *Id.* The plot of the boundary led to the extent of the development limits for the Quecreek No. 1 Mine, leaving a 200-foot barrier with the Harrison No. 2 Mine based on the Consol Map. *Id.* Edwin Secor, a Musser employee, certified the permit map with a seal. *Id.*

Records indicate that John E. Kimmel, the superintendent and engineer at the Harrison No. 2 Mine, supplied mine closure information and final maps to the Commonwealth prior to 1961 and that he also gave a final map for the Harrison No. 2 Mine to C.H. Maize, the Pennsylvania Mine Inspector, in 1964. Stip. 44 and 45. The MSHA investigation team found no evidence that Mr. Kimmel failed to comply with the Pennsylvania mine closure requirements. Stip. 46. Nonetheless, the PA DEP did not have the final mine map of the Harrison No. 2 Mine available in its archives when the Quecreek No. 1 Mine was planned and permitted, and a final mine map was not found until after the accident at the Windber Coal Heritage Center ("Windber

Center"). Stip. 47.[4] This map, however, is not certified by a professional engineer or surveyor. Stip. 83. A certified final map for the Harrison No. 2 mine has not been found. Stip. 85. The room that the Black Wolf miners broke into is not on any map yet found. Stip. 94. However, using the Windber map, the 200 foot buffer zone enforced by law would have included the abandoned workings, and likely prevented the inundation.

As a result of its investigation, MSHA issued a Significant and Substantial ("S&S") Section 104(a) Citation, No. 7322481, to Black Wolf, alleging a violation of 30 C.F.R. § 75.1200 with "low" negligence. MHSA issued a Section 104(a) S&S Citation, No. 7322487, to Musser alleging a violation of 30 C.F.R. § 75.1200 with "moderate" negligence. PBS was also issued a Section 104(a) S&S Citation, No. 7322488, by MSHA, alleging a violation of 30 C.F.R. § 75.1200 with "moderate" negligence. The standard provides:

> The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:
>
> (a) The active workings;
> (b) All pillared, worked out, and abandoned areas, except as provided in this section;
> (c) Entries and aircourses with the direction of airflow indicated by arrows;
> (d) Contour lines of all elevations;
> (e) Elevations of all main and cross or side entries;
> (f) Dip of the coal bed;
> (g) Escapeways;
> (h) Adjacent mine workings within 1,000 feet;
> (i) Mines above or below;
> (j) Water pools above; and
> (k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and,
> (l) Such other information as the Secretary may require. Such map shall identify those areas of the mine which have been pillared, worked out, or abandoned, which are inaccessible or cannot be entered safely and on which no information is available.

30 C.F.R. § 75.1200.

The citations were properly served to all parties.

Discussion

[4] The Windber Center map was donated to the museum in June 2002 by Inspector Maize's granddaughter. Evidently, she found the map among his personal effects after he died. Stip. 84.

The Mine Act provides, in pertinent part, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - *the miner*" and "it is the purpose of this Act to direct . . . the Secretary of Labor to develop and promulgate improved mandatory and health or safety standards to protect the health and safety of the Nation's coal or other miners" and to require that each operator of a coal or other mine and every miner in such mine comply with such standards." 30 U.S.C. § 801(a)(g) (emphasis added).

The standard for granting summary decision is set forth in Commission Rule 67(b), which provides that, [a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R § 2700.67(b).

Regarding Black Wolf, if a non-moving party fails to establish sufficient evidence of an essential element to its claim, on which it bears the burden of proof, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court is required, in reviewing all of the evidence on the record, to draw all reasonable inferences from the underlying facts in the light most favorable to the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000); *Matsuchi Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The parties have stipulated to the material facts, and, therefore, the first prong of 29 C.F.R . § 2700.67(b) is met, provided those facts can provide a sufficient factual basis for a decision. Based on the stipulated facts and my reasons outlined below, I conclude that the Secretary is entitled to partial summary judgment as a matter of law.

PBS

A. Whether PBS Violated Section 75.1200

PBS presents a sub-issue as to whether the Secretary properly charged a violation of section 75.1200. First, it argues that the language "accurate and up to date" does not apply to "adjacent mine workings because under a plain reading of the regulation, the language "an accurate and up to date map of such mine" refers to the operator's mine, not adjacent mine workings within 1,000 feet, as it relates to the Harrison No. 2 Mine. PBS Memo of Law at 22. Also, within this sub-issue, PBS argues that the Secretary's interpretation is contrary to the plain meaning of the text; the Secretary's interpretation is inconsistent with her overall regulatory scheme, averring, in particular, that section 75.1200-2(b) requires an operator to use an accurate method of survey to produce a map, while section 75.1200 presents an operator with the impossible task of accurately surveying an inaccessible and abandoned mine; and the Secretary's interpretation would lead to the absurd result of requiring an operator to accurately depict inaccessible, abandoned mine workings. *Id.* at 21-23. Thus, an adjacent mine, according to PBS, is not subject to the section 75.1200 map

requirement because a mine operator cannot accurately map the mine workings of another mine, particularly one that has been closed for years. *Id.* PBS further argues that the Secretary's interpretation of the standard is not reasonable as she requires an operator to depict with survey accuracy the location of abandoned mine workings for which such maps are not available. *Id.* at 27-28. PBS argues in the alternative that, even if the Secretary argues the language is ambiguous, she should not be afforded deference because her interpretation is unreasonable. *Id.* at 26-27. Finally, PBS avers it was not on notice that "accurate and up to date" applied to its mapping of the Harrison No. 2 Mine. I note that PBS does not contest its status as an "operator" under the Act. *Id.* at 28.

When the breakthrough accident occurred, the operator's mine map showed that the Harrison No. 2 Mine was located approximately 450 feet away. PBS's Section 104(a) S & S Citation. In reality, given that the workings of the Harrison No. 2 Mine were actually intersected, it logically follows that the mine was much closer. To say that the operator's map was inaccurate would be an understatement. If the operator's map were accurate, the Harrison No. 2 Mine workings would not have been intersected because the Harrison No. 2 Mine really would have been approximately 450 feet away, as indicated on the operator's map.

The Secretary argues that she properly issued the citation because, under a plain reading of the regulatory text, PBS was required to show a complete and accurate map of adjacent mine workings within 1,000 feet, which PBS did not do. Thus, a violation occurred, resulting in the issuance of the subject citation. Sec'y Br. at 7-8. The Secretary concedes that the "level of accuracy" for an inactive, abandoned mine would be different from that of an active mine. *Id.* at 11. However, she notes that a duty to depict inactive, abandoned mine workings still exists, and should be depicted with "the most recent and reliable evidence of what existed," and wherever there is doubt, such doubt should be indicated on the map. *Id.* Such indication could be made by using a dotted line or simply stating "unknown" on the map. *Id.* Regarding "notice," the Secretary avers PBS's argument is without merit because the plain language of the regulatory text was notice enough, and a "reasonably prudent person" would know the provision applies to the situation. *Id.* at 13.

First, as a general matter, the Mine Act is a strict liability statute. As such, the Mine Act assesses liability without regard to the individual operator's fault. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988). However, fault may be considered in setting the level of the civil penalties by considering whether the operator was negligent. 30 C.F.R. § 100.3.

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 a meaning would lead to absurd results. *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998). In addition, ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. *Norman J. Singer Statutory Construction*, § 45.02 (5th ed. 1992).

I conclude, as have both parties, that the language of section 75.1200 is clear and unambiguous and warrants a plain meaning interpretation. Accordingly, no discussion of *Chevron*,

467 U.S. 837 (1984) deference to the Secretary is necessary.[5]

Section 75.1200 states in pertinent part, "the operator of a coal mine shall have . . . an accurate and up-to-date map of such mine . . . [s]uch map shall show . . . [a]djacent mine workings within 1,000 feet." PBS, in its reading of the regulation, disjoints the "adjacent mine workings" clause. The Secretary is correct in stating that this phrase should be read as one of "12 classes of information" required to be included on the map. Sec'y Br. at 7. The language "such a mine" *does* refer to the operator's mine, as proffered by PBS. PBS Memo of Law at 22. However, the 12 items following the clause stipulate what additional information is to be included on that map, such as a bordering abandoned mine. There can only be one meaning for "[s]uch map shall show . . . [a]djacent mine workings within 1,000 feet." The map of the mine operator's mine must do just that: show the location of applicable adjacent mine workings.

PBS asserts that the Secretary is requiring it to have accurate and up-to-date mapping of the adjacent mine (in this case, the Harrison No. 2 Mine) and cites the language of the citation, not the regulation, to emphasize this point. PBS Memo of Law at p. 22. Consequently, the only ambiguity is in the wording of the citation itself, as PBS is misinterpreting it to mean that the Secretary "is requiring 'accurate and up-to-date' information regarding the workings of the abandoned Harrison No. 2 Mine on the section 1200 map." PBS Memo of Law at p. 22. This is incorrect. The Secretary maintains that the Quecreek No. 1 Mine Map was inaccurate because it failed to show the existence of adjacent mine workings within 1,000 feet. Sec'y Response at 5, 7. While the citation itself may be awkwardly worded, the issue here is the language of the standard, which is designed to put operators on notice as to a requirement before an accident occurs, as opposed to a citation, which penalizes after the fact. There is no ambiguity here.

The Secretary's interpretation is not contrary to her overall regulatory scheme. As the Secretary correctly states, the map could have been drafted in such a way as to show uncertainty and still be considered "accurate." If there had been some indication on the map that the location of mine workings in the Harrison No. 2 mine were unknown, the miners would most certainly have proceeded with more caution. The map would have "accurately" shown that adjacent mine workings existed, and would have "accurately" shown that the exact location of those workings was not known. This reading of the text does not lead to the absurd result of requiring operators to produce exact depictions of inaccessible mine workings. This reading leads to the result of the operator considering the safety of its miners by providing all the relevant and important information it possesses, and where pertinent and life saving information is not available, so indicating. This interpretation is in keeping with a plain reading of the text and is in line with the purpose of the Act - to protect the safety of any miners from accidents such as the one that brought about these proceedings.

The breakthrough accident occurred because the miners were working from the operator's

[5] PBS evidently agrees with this interpretation, as its brief emphasizes that "such mine" and "such map" as used in the standard are, in fact, referring to the operator's mine and map. PBS Memo of Law at p. 22

inaccurate map that did not show the adjacent mine workings within 1,000 feet. If the location of the adjacent Harrison workings were accurately depicted—within 1,000 feet—on the map, the miners would not have intersected those workings that evening and the accident would not have occurred.

Similarly, PBS's argument that it was not "on notice" that the phrase "accurate and up-to-date" applied to its depiction of the workings of the Harrison No. 2 Mine on the section 75.1200 map is also erroneous. PBS argues it was not on notice because the Secretary's application of "accurate and up-to-date" to the depiction of the Harrison No. 2 Mine workings is contrary to the plain language of the regulation. PBS Memo of Law at 29-30.

The Commission has held that a safety standard must provide adequate notice of the conduct it...requires, so that the mine operator...may act accordingly. *Freeman United Coal Mining*, 18 FMSHRC 438, 448 (Mar. 1996). The standard is objective and the appropriate test is not whether the operator had explicit prior notice of a specific...requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific...requirement of the standard. *Id.*

PBS agrees that the standard requires a mine operator be "accurate and up-to-date" with respect to the working of its own mine. PBS Memo of Law at p. 29. Basic common sense dictates that a map is not accurate if it contains incorrect information. As an illustration, a 2006 map of the continental United States would not be accurate if its western border stopped at Colorado. The Quecreek No. 1 Mine's section 75.1200 map incorrectly depicted the location (read: border) of the Harrison No. 2 Mine workings. A reasonably prudent person would not only recognize that the plain meaning of the statute requires an operator to have an accurate and up-to-date map of its own mine workings (as PBS agrees that it does), but that its own map cannot possibly be accurate if the information contained therein is wrong. Moreover, a reasonably prudent person familiar with the coal mining industry (and likely many reasonably prudent people who are unfamiliar with coal mining), would understand that an accurate map is an important part of mine safety and can help prevent unintentional breaches of flooded, abandoned mines and other potential dangers like oil and gas wells.

An operator's map (or any map, for that matter) cannot be accurate if its boundaries are wrong. The boundaries on the Quecreek No. 1 Mine's section 75.1200 map were wrong because PBS incorrectly depicted them on the Quecreek No. 1 section 75.1200 map. PBS argues there is no accepted practice for annotating maps to show uncertainty. *Id.* at 31. However, I find it incomprehensible that a skilled map maker would have no means of notating uncertainty or inconclusiveness on a map. Because the boundary information contained in the Quecreek No.1 Mine's section 75.1200 map was wrong, the map itself was not accurate and consequently, the standard was violated. The reasons behind the incorrect boundary depiction are not relevant to the question of whether a violation did in fact occur, which is the only inquiry in the face of a strict liability statute. The reasons for the incorrect depiction are a question of negligence and that issue is addressed below.

Accordingly, I find that the language of section 75.1200 is clear, PBS had notice of the regulation's requirements, a violation of 30 C.F.R. § 75.1200 did occur, and the Secretary's citation was properly predicated on the violation.

Therefore, the Secretary's Motion for Summary Judgment on this issue is granted.

B. Whether PBS Was Negligent

PBS argues that even if it is determined that a violation occurred, it was not negligent in any fashion because it exercised diligence in searching for a final map and it reasonably believed the Consol map, though uncertified, was the final map. Moreover, it is not common for miners to annotate their maps with dashed lines, and PBS, in fact, was not aware of such a requirement. PBS Memo of Law at 31-34.

The Secretary asserts that where information is uncertain, there exists a duty to disclose to MSHA the basis for the use of a map such as the Consol map, and, when in doubt, any uncertainty. She states PBS's failure to acknowledge any level of doubt about the location of the adjacent mine workings constituted negligence. Sec'y Br. at 27.

The citation states that PBS's violation of section 75.1200 was the result of "moderate" negligence. Stip. 97. Moderate negligence means, "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d)(Table VIII). This section further provides that "[m]itigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. 30 C.F.R. § 100.3(d).

The parties stipulated to the extensive searches performed by PBS. Stip. 55. Indeed, Edwin P. Brady, MSHA's lead investigator, testified in his deposition that the engineers performed a diligent search and that he is not questioning their integrity or diligence. Brady Deposition at p. 51-52. Moreover, it is not PBS' fault that the Windber map was hidden in the personal effects of the former Pennsylvania Mine Inspector during the time of its search. Stip. 84. It is also not PBS's fault that the OSM map was not indexed properly. Stip. 63. Additionally, the parties agree that the Consol map used by PBS showed the most extensive mining in the Harrison No. 2 Mine that was located before the accident. Stip 66. These circumstances, however, are mitigating factors.

The key inquiry as set forth in section 100.3 is: Should PBS have known of the violative condition - in this case that the operator's map was not accurate - because it failed to show the existence of adjacent mine workings within 1,000 feet? As previously discussed, a reasonably prudent person familiar with the mining industry would know that a map with incorrect boundaries is not an accurate map. In addition, the same reasonably prudent person would know that relying on an inaccurate map in the mining industry could lead to disastrous results, as happened here. Consequently, unless PBS reasonably believed that the map it relied on to depict

the boundaries and workings of the Quecreek No. 1 Mine was valid itself, it should have known that the Quecreek No. 1 Mine's section 75.1200 map would not be accurate and therefore would violate the standard.

PBS submits that it reasonably believed the Consol Map was a final map of the Harrison No. 2 Mine because Consol, as lessor of the coal reserves mined at the Harrison No. 2 Mine, would be expected to possess a final map. PBS Memo of Law at 32. In support of this statement, PBS references the deposition testimony of Kelvin Wu, a member of the MSHA accident investigation team, in this matter. However, the testimony needs to be taken in context. Mr. Wu stated that he would expect the lessor of coal reserves to have a reliable map because they have a financial incentive to do so. Wu Deposition at 43. However, he states that his confidence level would be higher with a certified map, and he would take extra steps to validate an uncertified map. *Id.* I also note that the full transcripts of the deposition testimony are not a part of the stipulated facts.

The question of whether PBS's reliance on the Consol map was reasonable is a question of fact. I am inclined to think it is not reasonable, since the map was not dated or certified, despite Consol's incentive to have a final map. As the parties acknowledge, the PA Mine Act requires that within 60 days of abandonment of a mine, the operator or superintendent must update the mine inspector's map and must also send the PA DEP a "complete original tracing or print of the complete original map, which shall be kept in the department as a public document." PA Mine Act, 52 P.S. §701-2240; Stip. 38. Moreover, a registered professional engineer or registered surveyor must certify that the map is a true and correct copy and a "true, complete and correct map and survey of all the excavations made in such mine." PA Mine Act, 52 P.S. §701-240; Stip. 39. Consequently, a reasonably prudent person could also assume that the reason Consol's "final" map was uncertified and undated was because it was not the final map and that the final map was lost or misplaced.

PBS submits "nothing in the plain language of § 75.1200 or in the Secretary's Program Information Bulletins, Program Policy Letters, Procedure Instruction Letters, or Program Policy Manual indicated to the regulated community that there was a requirement to do more than PBS did to depict the workings of an adjacent, inaccessible mine." PBS Memo of Law at 33. This misses the point. There are many prophylactic actions taken by reasonably prudent people that are not set forth in the statutes.

PBS next maintains that it was not a common practice for mine operators to annotate their section 75.1200 maps with disclaimers, or to use dashed lines to signify uncertainty, or that under the reasonably prudent person standard, PBS was not "on notice" that section 75.1200 required it to notify MSHA or any other party, that it relied on a map of the Harrison No. 2 Mine that was not dated, "final" or certified. PBS Memo of Law at 34. PBS provides a consultative report from CME Engineering, to demonstrate that Pennsylvania is covered with uncharted and abandoned mines and that the steps it took to locate a valid map of the Harrison No. 2 Mine not only complied with the standards of the engineering and mining community but actually

exceeded the standards. PBS Exhibit 11.

While custom and practice evidence may be useful in determining that PBS's actions were within the standards of the mining community, given the gravity of the accident, I cannot dismiss basic common sense. First, I note that Pennsylvania's mining laws at the time of the actions giving rise to this accident were woefully inadequate in terms of mine safety. Because of the inadequacy of the laws, accurate mine maps of closed and abandoned mines appear to be the exception, rather than the rule. As a result, engineers and surveyors are at a disadvantage when putting together section 75.1200 maps. However, just because most mine engineers and surveyors do not put disclaimers on maps, or use dashed lines to signal uncertainty, does not mean that it cannot or should not be done. Mine disasters such as those that occurred at Hana, Wyoming, Marianna, Pennsylvania, and Farmington, West Virginia, stand as grim reminders of a time when miners died by the hundreds. Time and again, our attention has been captured by the tragedy of those who risk their lives each day toiling in the bowels of the earth to make our lives more comfortable. But since the passage of the Federal Mine Safety and Health Act, the culture of our mining industry has changed from one of risk to a culture of safety. What was once considered acceptable risk is no longer.

The crux of the matter, however, is whether PBS's reliance on the Consol map was reasonable. This is a material factual question. I do not have enough information in the record before me in order to fairly determine whether PBS was moderately negligent pursuant to section 100.3(d)(Table VIII). At a minimum, without the full deposition testimony subject to stipulation, I cannot make a final determination of what a reasonable engineer would do in the same situation. Additionally, there is no evidence in the record before me as to whether PBS ever indicated to the production operator, Black Wolf, that the map it relied on was uncertified and undated. If Black Wolf had concerns about the boundaries of its mine before the accident, which is also a material question of fact, it might indicate that PBS conveyed any uncertainties it might have had about the map to Black Wolf. As previously discussed, my personal inclination is that an uncertified map from a lessor company like Consol would more likely indicate that the final map was lost or misplaced. Accordingly, because there remain outstanding questions of material fact, I am prohibited from a full review of the Secretary's determination of the level of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act. Summary judgment, as to the issue of PBS's degree of negligence and the appropriateness of the penalty assessed, is therefore denied.

Musser

A. Jurisdiction

As a threshold issue, Musser avers it is not an operator of the Quecreek No. 1 Mine and, therefore, is not subject to Mine Act jurisdiction. Musser submits that pursuant to the Commission's ruling in *Berwind Natural Resources Corp*, 21 FMSHRC 1284, 1393 (Dec. 1999), the test for determining "operator" status is whether there was "substantial involvement with the mine." Musser

Mot. at 8. Musser also argues that operator status is determined on a case-by-case basis, pursuant to the Commission's ruling. *Id.* Applying the *Berwind* decision, Musser claims it did not have substantial involvement with the mine, but rather had the limited role of preparing a permit application. It could not make engineering decisions at the mine; it never represented the Quecreek No. 1 Mine in health and safety matters; it had no authority in mine financial matters; and it had no control over supervision, production, or personnel matters at the mine. Thus, Musser asserts it does not meet the "substantial involvement" test and is not an "operator" within the meaning of the Act. *Id.* at 10.

The Secretary rejects Musser's argument, stating that Musser is an independent contractor subject to Mine Act jurisdiction that performed "essential engineering services for the mine," including "assisting PBS and Blackwolf [sic] at the mine in the form of assisting PBS with surveying the mine in 2001 and then. . . [conducting] a check survey of the mine's mains in February 2002." Sec'y Br. at 20-21. The Sec'y Response of January 6, 2006, further asserts that MSHA's independent contractor records confirm that Musser's last change for its contractor I.D. of KQN was January 23, 1992, prior to the activity in question here and that Musser was clearly engaged in the business of providing mining engineering services to the mining community in their area of operation, including at the Quecreek No. 1 Mine. Sec. Br. at 20. Moreover, the mine map that Musser created played an integral role in the mining of Quecreek No. 1 Mine. *Id.* The Secretary asserts that the Commission and Courts of Appeals have addressed independent contractors as mine operators, citing, in particular, a Tenth Circuit ruling that "independent contractor status is to be based not on the existence of a service contract or control . . . but on the performance of significant services at the mine." *Id.* at 23, *citing Joy Technologies*, 99 F.3rd 991, 998 (10th Cir. 1996). Musser's work, the Secretary submits, "constituted the performance of services" at the mine. *Id.* at 22. In addition, the Secretary distinguishes the instant case from *Berwind*, stating that, while in *Berwind*, the Secretary sought to hold Respondent Jessie Branch jointly liable for violations committed by the production operator, in this case the Secretary is seeking to hold Musser responsible for its own unique actions with respect to mapping the mine. *Id.*

Musser's reliance on Berwind is misplaced. In *Berwind* the Commission considered the status of Jesse Branch, an engineering firm which performed mapping operations very similar to the actions of Musser, and three of the four Commissioners, constituting the majority found that Jesse Branch *could* have been cited as an independent contractor. (Commissioner Jordan stated: "The evidence unquestionably reveals that Jesse Branch was an independent contractor performing ... the engineering services of surveying, spad setting and preparation of mine maps." Commissioner Marks: "[T]he record compels the conclusion that [Jesse Branch] was an independent contractor performing services at the mine." Commissioner Riley: "Jesse Branch could simply have been cited as a contractor performing services at a mine....").[6]

For the following reasons, I conclude that Musser is an independent contractor operator within the meaning of section 3(d) of the Mine Act, and, therefore, is subject to Mine Act jurisdiction.

[6] Commissioner Beatty, writing for the majority, and Commissioner Verhaggen, the lone dissenter, did consider Jesse Branch an independent contractor.

The Mine Act defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or *any independent contractor performing services or construction at such mine*." 30 U.S.C. § 802(d) (emphasis added). Although undefined in the Act, "independent contractor" is defined in MSHA's regulations as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to *perform services or construction at a mine*." 30 C.F.R. § 45.2(c) (emphasis added).

Prior to the 1977 amendments to the Mine Act, the term "independent contractor" was not included in the definition of "operator," although "courts interpreted this provision to include independent contractors whenever the contractors, in performing services at the coal mine, controlled or supervised all or part of the mine." *Joy Technologies*., 99 F.3d at 993-94. Explaining its rationale for inclusion of "independent contractor" in the definition of "operator," Congress noted in the legislative history its "intent to thereby include individuals or firms who are engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of [the Mine Act]." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414. While Musser was not engaged in the extraction process, it is apparent that Congress intended to expand the Mine Act's reach to include entities one would not consider to be an "operator" in the traditional sense.

Circuits are split on the proper test for determining when an independent contractor's activities and services constitute sufficient ties to a mining operation as to bring the contractor under the jurisdiction of the Mine Act. The District of Columbia, Ninth, and Tenth Circuits have relied on the plain language of section 3(d) to conclude that "any independent contractor performing services" at a mine could come under jurisdiction of the Mine Act. *D.H. Blattner & Sons, Inc.*, 152, 1102 (9th Cir. 1998); *Joy Technologies*, 99 F.3d 991 (10th Cir.1996) *Otis Elevator Co.*, 921 F.2d 1285 (D.C. Cir. 1990).[7] Accepting the broad statutory reading adopted in *Otis Elevator*, the court in *Joy Technologies* recognized that Congress chose the phrase "independent contractors performing services or construction at [a] mine" to broaden the reach of the Mine Act "to include all those whose presence at a mine affected the health and safety of miners." *Joy Technologies,* 99 F.3d at 997-98. While the Seventh Circuit followed the *Otis Elevator* and *Joy Technologies* test, it concluded that Northern Illinois Steel Company - whose only connections to a mine were delivering steel orders, loosening restraints on the loads, and occasionally assisting with rigging the load - had such *de minimis* ties to mining operations as to prevent it from falling under Mine Act jurisdiction. *Northern Illinois Steel Supply Co.*, 294 F.3d 844, 848-49 (7th Cir. 2002). The court took a slightly more narrow approach in its reading of the statute, requiring an entity to perform more than minimal activity at a mine before it can be determined that "services" were performed.

Musser argues that it is not an operator under the Mine Act because, pursuant to *Berwind*, it does not have "substantial involvement" with the mine, and the Commission did not consider an operator's supervision or control of a mining operation to be a deciding factor in determining whether

[7] I have found no recent or applicable Third Circuit case law dealing with the issue of independent contractor status under the Mine Act.

an entity is an operator. Instead, the Commission focused on the entity's "participation and involvement in the operation of the mine."

Under District of Columbia, and Tenth Circuit precedent, Musser is subject to the Mine Act if it performed significant services rendering more than *de minimis* ties to mining operations. Musser was contracted to provide "certain engineering services" for the Quecreek No. 1 Mine, which included researching and preparing the original permit application for the mine. Stip. at 12. This work included creating and certifying a map of the mine, which served as a baseline map and boundary line for updating changes and current mining operations. Stip. at 87. A Musser employee certified the boundary line that served as a foundation for mining operations and contributed to the events of July 24, 2002.

I conclude that under either the "plain language," "substantial involvement," or "*de minimis*" tests, Musser falls within the definition of independent contractor, and, thus, is an operator for Mine Act purposes. Mining operations require engineering support, mapping, and surveying services. The Mine Act makes no distinction between activities done to meet operational requirements of the mine and those done in a direct effort to meet specific criteria of the Mine Act. Although Musser was not hired to create a map for submission to MSHA, it was hired to perform necessary services required in the overall extraction process. Survey operations, mapping, and advising on required barrier distance between active mining and an abandoned mine all have sufficient ties to mining operations to overcome the *de minimis* standard set forth in *Joy Technologies* and *Otis Elevator*.

Additionally, even considering the somewhat narrower interpretation of "operator" that the Commission discussed in *Berwind*, under the totality of the circumstances, Musser's activities rise to the level of "substantial involvement" with the mine. A "substantial involvement" test based on the totality of the circumstances must be applied in light of Congress' intention that the Mine Act be liberally construed to protect the health and safety of the miners. See, e.g., *Cannelton Indus.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). Here, Musser was substantially involved in the operation of the mine when it developed the boundary line for the Quecreek No. 1 Mine, conducted surveys, and performed other engineering services within the mine itself. Considering Congress's intent and under the totality of the circumstances, I conclude that Musser is an independent contractor operator subject to Mine Act jurisdiction.

B. Whether Musser Violated Section 75.1200

Musser argues that, even if the court determines it is subject to Mine Act jurisdiction, the map it prepared was a permit application map that was not intended to be submitted to MSHA. Musser Mot. at 11. The Secretary contends, however, that as an independent contractor, Musser is subject to the standards set forth in the Mine Act. The Secretary charged Musser with violating Section 75.1200 because Musser's inaccurate mapping of the abandoned Harrison No. 2 Mine in relation to the Quecreek No. 1 Mine contributed to the breakthrough and inundation. Musser argues that it could not have violated 30 C.F.R. § 75.1200 because it was never hired to create the specific maps submitted to meet MSHA requirements.

PBS hired Musser to prepare the original PA DEP permit application for the Quecreek No. 1 Mine, which included researching and identifying the location of old, abandoned mine workings adjacent to the planned mine. It is undisputed that Musser and PBS searched every known mine map repository in central and western Pennsylvania. Stip. at 55. They sought information on the potential location of adjacent mines from all the expected sources, both public and private. Stip. at 55-65, 68. Through this research, Musser located two maps, the "Greentree Map" and the "Consol Map," which were considered the most extensive representations of mining that had occurred at the Harrison No. 2 Mine. Stip. at 62.

Musser used the Consol Map to plot the boundary of the Harrison No. 2 Mine on the Quecreek No. 1 Mine permit map. Stip. at 66. After plotting the outline of the Harrison No. 2 Mine on the permit map, Musser drew a line between the outline of the Harrison No. 2 Mine and the planned workings for the Quecreek No. 1 Mine. Stip. 71. This line represented a 200-foot-wide hydraulic barrier between the Harrison No. 2 Mine and the Quecreek No. 1 Mine. Stip. 71, JE 11. This hydraulic barrier line on the permit map indicated the limit of planned mining for the Quecreek No. 1 Mine. Musser employee, Edwin S. Secor, P.E., certified the permit map with the presumed outline of the Harrison No. 2 Mine and the established 200-foot-wide hydraulic barrier. Stip. 66. This sealed map was submitted in conjunction with the DEP permit application. Stip. 66. The Musser permit map, including the placement of the Harrison No. 2 Mine and the barrier distance between active workings planned for the Quecreek No. 2 Mine, was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200. Stip. 87.

As the Mine Act is a strict liability statute, the inundation on July 24, 2002, provides sufficient evidence to prove that Musser's depiction of the Harrison No. 2 Mine workings within 1,000 feet of the Quecreek No. 1 Mine was not accurate.

The Secretary has wide enforcement discretion to proceed against "either an owner-operator, his contractor, or both." *W.P. Coal Co.*, 16 FMSHRC 1354, 1360 (Sept. 1991); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989). Indeed, simultaneous to the writing of this decision, the District of Columbia issued a decision in *Twentymile Coal Co.*, 2006 WL 1867249, at *5 (Jul. 7, 2006) and unequivocally holding "that the Secretary of Labor has authority to cite an owner-operator for safety violations committed by its contractor." In this case, the Secretary did not abuse her discretion by citing Musser because a violation of section 75.1200 existed and Musser, as an independent contractor under section 3(d), is subject to the jurisdiction of the Mine Act.

The Commission recently determined that due process requires an operator to be in a position to prevent the violation before it can be charged with the violation under the strict liability of the Mine Act. *National Cement Co. Of Ca., Inc.*, 27 FMSHRC 721, 733 (Nov. 2005); *Cf. Miller Mining Co.*, 713 F.2d 487, 491 (9th Cir. 1983) (operator held liable for violation that occurred when unknown party entered operator's underground mine and altered ventilation system); *Cyprus Indus. Minerals Co.*, 664 F.2d 1116, 1119 (9th Cir. 1981) (holding that mine owner can be held liable for violation by its independent contractor because the owner is generally in continuous control of

conditions at mine). Here, Musser was in a position to prevent the errors on the section 75.1200 map submitted to MSHA because Musser created, certified, and sealed the permit map, on which the section 75.1200 map was based. Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy. PBS relied on Musser's permit map without conducting additional surveys and research of the area. The inaccurate placement of the Harrison No. 2 Mine on the permit map transferred to the section 75.1200 map. Musser would likely have prevented the violation of the Mine Act had it preserved the uncertainty of the Consol Map on the permit map. Its failure to do so led to the Secretary properly citing Musser for violating the Mine Act.

C. Whether Musser Was Negligent

Although I find the "significant services" test of *Joy Technologies* and *Otis Elevator* instructive, and I find the Secretary's arguments pertaining to the importance of certain engineering services and their consequent effects on safety, regardless of the location at which they are actually performed, to be particularly compelling, I note that all of these cases are very fact-specific. Despite the numerous stipulations of fact, there is at least one factual area in contention that precludes my granting summary decision on the degree of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act. Part of Musser's main argument is that its work was incident to preparation of the permit application, was ***not*** prepared in accordance with 30 C.F.R. § 75.1200 and ***was never intended*** to be used as a submittal to MSHA. Musser Mot. at 4. Indeed, at one point, Musser argues that the map it certified for the permit application was prepared for environmental purposes, not for health and safety purposes. Musser Reply Br. at 2. Musser also averred that:

> In fact, the physical area encompassed by the permit application that Musser was initially hired to prepare was ***much smaller*** than the physical area encompassed by the final mine plan for the Quecreek No. 1 Mine. The Saxman/Harrison No. 2 Mine workings were not even within the physical area of the initial permit application that Musser prepared.[8]

However, elsewhere in the record, the parties stipulated that all future engineers certified only their new work and accepted the prior sealed work as being complete. The parties further stipulated that the original permit map was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200. Stip. 87. While the record before me consisting of the stipulated facts and the Joint Exhibits suggests that Musser knew or should have been reasonably aware that its permit map would serve as the basis for the section 75.1200 map, the parties have only stipulated to the admission but not the validity of the Joint Exhibits. Stip. 116. I also note that even though Musser emphasizes that the difficulties in locating the final, certified map were not

[8] All boldface and italics are taken directly from Musser's Motion.

"secret" because PBS was also engaged in the same search process,[9] again it appears from the record before me that Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map.

A determination of whether Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map is of paramount importance to me in making a final determination on Musser's potential moderate negligence citation. Accordingly, as the facts underlying Musser's role in the preparation of the section 75.1200 map exists, summary judgment on the degree of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act is improper and must be denied and my final decision must await a full hearing on the facts.

Black Wolf

Section 110 of the Mine Act, states:

> The operator of a coal or other mine *in which a violation occurs* of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary . . . .

30 U.S.C. § 820(a) (emphasis added).

Black Wolf Coal Company is the operator of Que Creek Mine No. 1. Stip. 1. Black Wolf has stipulated to the facts which support my findings above that violations of the Mine Act have been committed by both PBS and Musser as independent contractors for Black Wolf. As previously discussed, in *Twentymile Coal*, the District of Columbia Circuit Court, strongly agreed with established precedent that the Secretary may cite an owner-operator for violations committed by its contractors. The Court cited the District of Columbia's seminal decision in *Brock v. Cathedral Bluffs Shale Oil Co.*, observing:

> "To determine the meaning of the term "operator," the court reviewed the legislative history of the Mine Act, first noting that the Federal Coal Mine Health and Safety Act of 1969-the Mine Act's precursor-defined " 'operator" ' as " 'any owner, lessee or other person who operates, controls, or supervises a coal mine." ' *Id.* (quoting 30 U.S.C. § 802(d)(1976)). The court next pointed out that, in *Bituminous Coal Operators Ass'n v. Secretary of Interior* ("*BCOA*"), 547 F.2d 240 (4th Cir.1977), the Fourth Circuit "interpreted that definition of 'operator' to include independent contractors performing services at the production-operator's mine, and held that the Secretary had the power to cite the independent contractor, the operator, or both for independent contractor violations." 796 F.2d at 535.

Twentymile Coal Co., 2006 WL 1867249, at *4 (Jul. 7, 2006) *citing Brock v.*

[9] Musser Motion at p. 8.

Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986) (Scalia, J.).

Reaffirming its decision in *International Union, United Mine Workers of America v. FMSHRC ("UMWA")*, the District of Columbia Circuit Court further observed that "the owner of a mine is liable without regard to its own fault for violations committed or dangers created by its independent contractor." *International Union, United Mine Workers of America v. FMSHRC ("UMWA")* 840 F.F2d 77, 83 (D.C. Cir. 1988) (Citing *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 n.2 (4th Cir. 1981); *BCOA*, 547 F.2d at 246 (4th Cir. 1977).

The court further found the holding to be consistent with the legislative history and the statutory language explaining:

> "Without exemption or exclusion, section 819 makes the operator of a coal mine in which a violation occurs subject to a civil penalty .... Th[is] section[], when read with the definition of operator, impose[s] liability on the owner or lessee of a mine regardless of who violated the Act ...."

Twentymile Coal Co., 2006 WL 1867249, at *4 (Jul. 7, 2006) *citing UMWA* at 83 (quoting BCOA, 547 F.2d at 246).

The court in *Twentymile* concluded:

> [T]he Commission is generally without authority to review the Secretary's discretionary decisions regarding whether to cite owner-operators, their independent contractors, or both for safety violations committed by the independent contractors.

Id. at 10

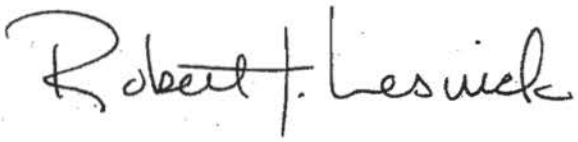
As I have found that independent contractors PBS and Musser both violated section 75.1200, I accordingly find that operator Black Wolf is jointly liable and was properly cited by the Secretary.

Penalties

Although the joint stipulations of fact to an extent address some of the section 110(i) criteria, I have insufficient information to make a determination as to the validity of the proposed penalty assessments for any of the parties. To make this determination, an evidentiary hearing must be held.

ORDER

In light of the foregoing, the Secretary's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART** and the Respondents' Motion for Summary Decision is **DENIED**. The violations of mandatory safety standards for underground mines issued by the Secretary of Labor against Musser, PBS, and Black Wolf are affirmed. The parties are **ORDERED** to confer and inform this court within 30 days of their availability for a hearing in the matter to be held in Somerset County Court House, Somerset, Pennsylvania, solely for the purpose of presenting testimony and argument regarding the appropriateness of the penalties proposed by the Secretary



Robert J. Lesnick
Chief Administrative Law Judge

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July 30, 2006

DICAPERL MINERALS CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2004-511-RM
	:	Citation No. 6300457; 09/03/2004
	:	
	:	Docket No. WEST 2004-512-RM
v.	:	Citation No. 6300458; 09/03/2004
	:	
	:	Docket No. WEST 2004-513-RM
	:	Citation No. 6300459; 09/03/2004
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 2004-514-RM
	:	Citation No. 6300460; 09/04/2004
	:	
	:	Docket No. WEST 2004-515-RM
	:	Citation No. 6300470; 09/23/2004
	:	
	:	El Grande Plant
	:	Id. No. 05-00438
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2005-030-M
	:	A.C. No. 05-00438-33522
	:	
	:	Docket No. WEST 2005-173-M
	:	A.C. No. 05-00438-45808
v.	:	
	:	Docket No. WEST 2005-216-M
	:	A.C. No. 05-00438-47837
	:	
	:	Docket No. WEST 2005-357-M
DICAPERL MINERALS CORPORATION, Respondent	:	A.C. No. 05-00438-55242
	:	
	:	Docket No. WEST 2005-504-M
	:	A.C. No. 05-00438-64811
	:	
	:	El Grande Plant

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2005-104-M A.C. No. 05-00438-37368A
v.	:	Docket No. WEST 2005-358-M A.C. No. 05-00438-55240A
TERRY J. VANCE, employed by DICAPERL MINERALS CORPORATION Respondent	:	El Grande Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2005-111-M A.C. No. 05-00438-37367A
v.	:	Docket No. WEST 2005-359-M A.C. No. 05-00438-552410A
CLAUDE S. RADFORD, employed by DICAPERL MINERALS CORPORATION Respondent	:	El Grande Plant

ORDER FINDING THAT THE MINE SAFETY AND HEALTH ADMINISTRATION HAS JURISDICTION TO INSPECT THE EL GRANDE PLANT

These cases are before me on five notices of contest brought by Dicaperl Minerals Corporation ("Dicaperl") and nine petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Dicaperl, Terry J. Vance, and Claude S. Radford pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve citations and orders issued by MSHA at Dicaperl's El Grande Plant in Conejos County, Colorado. This plant, which Dicaperl calls the Antonito Processing Facility, is about five miles north of the New Mexico border in the town of Antonito, Colorado. Throughout this order, I refer to this facility as the "El Grande Plant" or the "plant."

Dicaperl contends that the plant is not subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Mine Act"). I granted the parties' request that a hearing be held on this jurisdictional issue. An evidentiary hearing limited to the issue of MSHA's jurisdiction over the plant was held in the Commission's courtroom in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs. I also granted the motion of the Perlite Institute to file a brief as *amicus curiae*.

I. BACKGROUND

The El Grande Plant can best be described as a perlite expansion facility. This plant is a free-standing facility that is not located at or adjacent to the quarries where the feedstock for the plant originates. Perlite is a volcanic glass that is used in a wide variety of horticultural, consumer and industrial products. Most of the expanded perlite that is produced at the plant is sold to U.S. Gypsum and Hamilton Materials to make joint compound used in drywall installation. To understand the workings of the plant, it is necessary to start at the beginning, which is the mining of the ore. Dicaperl operates two perlite mines in New Mexico: the No Agua Mine & Mill and the Socorro Mine & Mill. Once the ore is removed from the ground at these mines, it goes through a milling process. The mined material is dumped through a grizzly to remove large rocks and it falls into a jaw crusher. The crushed ore then drops through a scalping screen to remove material larger than one inch. The larger material is sent back through a secondary crusher. Once the material is small enough, it is sent through a dryer. The dried material is dropped onto a two-deck screen where further sizing takes place. This screen deck separates coarse, intermediate, and fine grades of perlite ore. As before, material that is too large is sent back through the secondary crusher and back through the screen deck.

The three finer grades of material from the No Agua and Socorro mills are shipped by pneumatic tractor trailers to the El Grande Plant. These three grades of perlite ore have the consistency of white flour. The No Agua Mine & Mill is about 23 miles from the plant and the Socorro Mine & Mill is about 250 miles from the plant. About 70% of the material processed at the plant is from the Socorro Mine & Mill.

Dicaperl expands and screens the perlite received from No Agua and Socorro at the El Grande Plant. The plant is subdivided into four different plants but, for purposes of these proceedings, the processes are the same in each plant. Each plant consists of storage bins, a furnace, a cyclone, a baghouse, a screen, and product bagging systems. In this order, I discuss the processes used at the plant as if there were but one plant so I use the singular rather than the plural. Exhibit S-2 is a schematic of the plant and Exhibits S-5 through S-15, S-20, and S-21 are photographs of the plant.

The milled perlite ore is transported from the storage bin at the plant into the furnace. The furnace is vertical and contains a vertical "firing tube" in the center. When the perlite passes through the burner flame and mixes with the hot gasses in the firing tube at temperatures of about 1,600°F, the particles start to melt and become plastic. At this point, the chemically combined water in the particles vaporizes and is quickly released. As the water is released, the particles expand or "pop." This process can be analogized to the popping of popcorn kernels in hot air. This process takes but a few milliseconds as the perlite shoots up the firing tube in the furnace. The popped perlite is between 4 and 20 times its original volume and is significantly lighter in weight. Dicaperl tries to keep the density of the expanded perlite in the range of 6.5 to 7.5 pounds per cubic foot. Dicaperl calls these popped perlite particles "microspheres."

As the microspheres exit the top of the vertical furnace, they are captured by a collector cyclone or a baghouse dust collector. The microspheres move along the airline through an airlock where they are dropped onto a single deck Rotex screen. About 95-97% of the microspheres drop onto the screen, while the remaining 3-5% are pulled into the baghouse filters. The Rotex screen is normally a 60-mesh screen, but a 74-mesh screen is used for some products. The Rotex screen is on a slight incline and rotates in a circular back and forth motion. The material that is too large to pass through the screen falls over the top of the screen into a "tramp" bag. The material that is smaller than the mesh openings falls into product bags. The microspheres in product bags are fine enough to be used in joint compound and are sold to U.S. Gypsum and Hamilton Materials. Microspheres can be too large to pass through the screen because they expanded too much in the furnace or because the size of the perlite particles that entered the vertical furnace was too large. In addition, microspheres sometimes attach to the metal walls of the firing tube and fuse together. Most of these fused microspheres eventually drop to the bottom of the furnace, but some are shot up the firing tube, travel over the screen, and fall into the tramp bag. Finally, foreign objects such as sand, small rocks, mining debris, and small bits of metal from the plant fall into the tramp bag. The material in the tramp bags is shipped to other perlite processing facilities in Indiana and Tennessee.

There are quite a few perlite expansion facilities in the United States. A significant number of these facilities process perlite ore to make microspheres in a manner that is similar to the processes used at the El Grande Plant. As discussed in more detailed below, Dicaperl introduced evidence to show that many of these other perlite expansion facilities are inspected by the Department of Labor's Occupational Safety and Health Administration ("OSHA") rather than MSHA whenever such facilities are geographically and operationally separate from mining operations.

MSHA has been inspecting the El Grande Plant since the passage of the Mine Act. The El Grande Plant was assigned the same mine identification number as the No Agua Mine. At that time, the No Agua Mine and the El Grande Plant were owned and operated by another company. The plant was included under the same mine identification number as the perlite mine at the request of the operator. Because the operator moved employees between the mine and the plant, it wanted both facilities under the jurisdiction of a single agency and it wanted the same MSHA inspectors to inspect both facilities. Since the plant was only about five miles north of the New Mexico - Colorado border, both facilities were inspected by MSHA's Albuquerque Field Office which is part of its South Central District. Ordinarily, facilities in Colorado are inspected out of the Denver Field Office of MSHA's Rocky Mountain District. Apparently, when the amount of mining activity at the No Agua mine slowed down, MSHA inspectors from Albuquerque were traveling into Colorado for the sole purpose of inspecting the plant. The No Agua Mine is an intermittent operation. Sometime around November 2003, MSHA assigned a Rocky Mountain District identification number to the plant and MSHA inspectors out of the Denver Field Office began inspecting the plant separately from inspections of the No Agua Mine.

II. BRIEF SUMMARY OF ARGUMENTS PRESENTED

The only issue presented at the hearing is whether MSHA has jurisdiction over Dicaperl's El Grande Plant. The Secretary contends that the plant engages in mineral milling and is therefore a mine as that term is used in section 3(h)(1) of the Mine Act. She states that section 3(h)(1) delegates to her the authority to determine what constitutes mineral milling. She points out that Congress expressed its intention that doubts be resolved in favor of inclusion of a facility under the Mine Act. She provided clarification of the term mineral milling in her interagency agreement between the MSHA and OSHA. ("Interagency Agreement" or "Agreement") (Ex. S-17). The Secretary argues that the dividing line is delineated in the Interagency Agreement in two ways. First, section B(6) of the Interagency Agreement assigns certain types of facilities either to OSHA or MSHA. Second, in instances where the type of facility in question is not specifically assigned to either OSHA or MSHA under the Interagency Agreement, as is the case with perlite expansion facilities, the agreement provides a series of definitions to be used to make this determination. The Secretary contends that the El Grande Plant fits within one or more of the definitions of mineral milling in the Interagency Agreement.

The Secretary also argues that her position is consistent with her longstanding interpretation of mineral milling. She states that Dicaperl's evidence concerning MSHA's lack of inspection activities at other perlite facilities is too weak to be given much weight. The perlite industry "contains plants of varied design and function that require a case-by-case jurisdictional determination to be made by MSHA and OSHA taking into consideration the factors set forth in sections B(3) - B(5) of the Interagency Agreement." (Sec. Br. 28). The evidence shows that MSHA has inspected the El Grande plant since the agency was created and that MSHA's predecessor in the Department of the Interior inspected the plant since at least 1972. This history of MSHA inspections at the El Grande Plant establishes a clear pattern of consistent enforcement.

Dicaperl argues that it engages in mineral milling at the Socorro Mine & Mill and No Agua Mine & Mill. It contends that the El Grande Plant manufactures microspheres through the perlite expansion process. The processes used at the El Grande Plant are not mineral milling as that term is used in the Mine Act and defined in the Interagency Agreement. Because the express language of the Interagency Agreement is clear and unambiguous, consideration of the Secretary's interpretation of the language is not warranted. The Secretary's evidence on this issue was provided by MSHA employees who only briefly visited the plant. Claude Radford, who has been the plant manager for the past 15 years, testified as to the processes used at the plant. His testimony should be given considerably more weight than the testimony of MSHA employees. Indeed, the Secretary's own counsel agreed at the hearing than Mr. Radford is the "world's greatest authority on what happens at the El Grande Plant." (Tr. 76). Radford's description of the plant operations makes clear that it is a manufacturing facility, not a milling operation.

Dicaperl also introduced evidence that eight similar perlite expansion plants are inspected by OSHA rather than MSHA. In addition, in response to discovery, the Secretary provided a list of 21 other perlite expansion facilities that are not currently inspected by MSHA. Dicaperl also

submitted an MSHA memo from MSHA's Southeast District which states that Chemrock's Jacksonville, Florida, perlite expansion plant should be inspected by OSHA rather than MSHA. The memo states that "[t]his determination is consistent with past jurisdictional determinations that perlite and vermiculite operations which are geographically and operationally separate from mining operations shall be subject to OSHA's jurisdiction." (Ex. C-7). Thus, Dicaperl concludes that the El Grande Plant is the only MSHA-regulated perlite expansion facility in the United States not located at or near a the mine where perlite is extracted from the earth. The Secretary did not introduce evidence of a single other perlite facility that is inspected by MSHA.

Dicaperl further argues that because the Secretary has interpreted the term mineral milling differently at other perlite expansion facilities, her interpretation of that term should not be accorded deference in this case. An agency's interpretation should not be given much weight when it has not been consistently stated or applied. Perlite expansion facilities like Dicaperl's operate in much the same way today as they did when the Interagency Agreement was drafted. The failure to include the processes used at these facilities in any of the definitions of mineral milling demonstrates that the Secretary intended perlite expansion facilities to be inspected by OSHA.

In its *amicus* brief, the Perlite Institute states that there are about 25 perlite manufacturing plants throughout the United States. A few of these plants are "co-located" with mining operations where the extraction of perlite ore takes place. It states that, in the past few decades, virtually all perlite manufacturing plants, which are not located at a perlite mine, have been under the jurisdiction of OSHA. These plants do not engage in mineral milling as that term is used in the Mine Act and the Interagency Agreement. All mineral milling of perlite ore is performed at the mines where perlite is extracted from the earth. The work performed at perlite plants is part of the final manufacturing process of the product. In some cases, expanded perlite is added to other materials. For example, perlite is added to gypsum and fiber at some perlite plants to manufacture ceiling tiles. In other cases, perlite may be sold in separate grades, sizes or mixtures, depending on intended uses. Many types of non-metallic minerals are routinely subject to further processing to render them suitable for the intended end uses. Under the Secretary's excessively broad reading of the Interagency agreement, all of these processes would be considered mineral milling. The Perlite Institute contends that perlite plants manufacture a product and they bear no genuine resemblance to milling operations that are part of the mining of ore. Perlite plants manufacture a product in accordance with their customers' needs rather than the needs of the mine operator.

III. ANALYSIS OF THE ISSUES WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Mine Act states, in relevant part, that "[e]ach coal or other mine . . . shall be subject to provisions of this [Act]." 30 U.S.C. § 803. The Mine Act defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, *used in, or to be used in . . . the work of extracting minerals from their natural deposits . . . or used in . . . the milling of such minerals . . . .*

30 U.S.C. § 802(h)(1) (emphasis added). The Mine Act does not define "milling," but states that in making a "determination of what constitutes mineral milling . . . , the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authorities with respect to health and safety of miners employed at one physical establishment." *Id.* When Congress passed the Mine Act, the report of the Senate Committee on Human Resources stated that "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

In reviewing MSHA's interpretation of a statute, the reviewing court must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984); *Watkins Eng'rs & Constructors* 24 FMSHRC 669, 672-73 (July 2002). If the statute is clear and unambiguous, effect must be give to its language. *Id.* When a statute is ambiguous or silent on the point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. *Id.* Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). "The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins* 24 FMSHRC at 673 (citations omitted).

In *Watkins*, the Commission reached the following conclusion:

> The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. *See In re: Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 591 (5th Cir. 2000) ("Congress

> expressly delegated to the Secretary . . . authority to determine what constitutes mineral milling") (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13.

24 FMSHRC at 673.

Dicaperl and the Perlite Institute do not dispute that the Secretary has broad authority to interpret the term "milling," but they contend that her authority is not without limits. As the D.C. Circuit observed, "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h) [of the Mine Act]." *Donovan v. Carolina Stalite Co.* 734 F.2d 1547, 1551 (D.C. Cir. 1984). They contend that the Secretary's interpretation is unreasonable and is not entitled to deference.

A. **Definition of Milling in the Interagency Agreement**.

An analysis of the Interagency Agreement is necessary to resolve the dispute raised in these cases. In the Agreement, the Secretary first states that the Mine Act authorizes the Secretary to promulgate safety and health standards regarding the working conditions of employees engaged in the "preparation and milling of the minerals extracted" from underground and surface mines. (Ex. S-17 at 1). The Interagency Agreement also states that the Occupational Safety and Health Act of 1970 ("OSHAct") gives the Secretary, acting through OSHA, authority over working conditions of employees "except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health." *Id.* Thus, if the Secretary has jurisdiction over a facility under the Mine Act because it is a mill, safety standards developed under the OSHAct do not apply.

The Agreement states that it was written to "set forth the general principle and specific procedures which will guide MSHA and OSHA." *Id.* It states that the Agreement will "serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved." *Id.* "The general principle is that as to unsafe and unhealthful working conditions on mine sites and milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions." *Id.*

The Agreement goes on to state that:

> [W]here the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (*e.g.* hospitals on mine sites) or where there is

> statutory coverage under the Mine Act but there exist no MSHA standards applicable working conditions on such sites, then the OSHAct will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSHAct may be applied to such an employer where application of the OSHAct would, in such a case, provide a more effective remedy that citing a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The Agreement sets forth guidelines that the Secretary will use in determining whether a facility is engaged in mineral milling. It is clear that the Secretary anticipated that she needed to be flexible in her approach because of the myriad circumstances which may exist. Appendix A to the Agreement provides a rather detailed description of the "kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority." (Ex. S-17 at 2). It is important to understand, however, that the Secretary realized that "[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle." *Id.* The Agreement states that the "scope of the term milling may be expanded to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling." *Id.* Conversely, the term "milling" may be narrowed to exclude from its scope "processes listed in Appendix A where such processes are unrelated, technologically or geographically, to mineral milling." *Id.*

The Interagency Agreement further provides:

> The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

Id.

In addition, the Interagency Agreement provides that certain specific processes are automatically deemed to be mineral milling, such as the processes at alumina plants and cement plants. *Id.* The Agreement states that other processes are automatically subject to the jurisdiction of OSHA, such as the processes at smelters, refineries, and concrete and asphalt batch plants. *Id.* These processes do not require a case-by-case analysis. Perlite expansion facilities are not specifically listed in the Interagency Agreement. As a consequence, the determination of whether the El Grande Plant is engaged in mineral milling must be determined by examining the specific processes that are conducted at the plant.

The Agreement defines the term "milling" in Appendix A, as follows:

> Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated. A CRUDE is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute promise of possible profit in extraction, treatment, and sale.

(Ex. S-17 at 5).

As the Commission stated in *Watkins*, Congress "explicitly left a gap for the Secretary to fill with respect to the definition of milling." (24 FMSHRC at 673). The issue is whether it was reasonable for the Secretary to conclude that the term "milling" covers one or more of the processes that take place at the El Grande Plant. In conducting this analysis, the question becomes whether the Secretary's interpretation of milling, as applied to the facts of this case, is based on a "permissible construction of the statute." *Chevron*, 467 U.S. at 842.

At the hearing, Senior Mine Safety and Health Specialist L. Harvey Kirk testified for the Secretary. He testified that during the perlite expansion process at the El Grande Plant, Dicaperl separates from the crude ore "the combined water that [is] chemically bound up in it." (Tr. 141). Through this process, Dicaperl is making a "more valuable, more desired, [and] certainly more versatile product." *Id.* In his report, Kirk stated:

> The Antonito facility is a mill because it subjects pulverized perlite ore ("a solid crude") to high temperatures in order to vaporize combined water in the ore and thereby create (and, in effect, separate) a desired, expanded constituent of the ore. This process produces (after the expanded perlite is sized in collector cyclones and screens) a primary consumer derivative which is used by

> downstream manufacturers to make joint compound and other products for the public.

(Ex. S-18 at 2). The sudden heating of the perlite causes water to be liberated from the perlite ore. Kirk contends that this water is "an undesired contaminate" which is separated from the "desired constituents" in the crude ore. As a consequence, the Secretary argues that the heat expansion process qualifies as mineral milling.

Claude Radford, a 25-year veteran of the perlite industry, testified that no "contaminants" are removed during the expansion process. (Tr. 219). Instead, the process only "changes the shape of the particle" while allowing the water to evaporate. *Id.* Thus, Dicaperl contends that the El Grande Plant does not fit into the Interagency Agreement's definition of a mill.

The El Grande Plant is not associated with an area where material is extracted from the ground. The plant receives perlite from two different mines. The first question is whether the El Grande treats "the crude crust of the earth to produce therefrom the primary consumer derivatives." Can previously crushed and sized perlite be considered to be "the crude crust of the earth?" The Interagency Agreement defines "crude" as "any mixture of minerals in the form in which it occurs in the earth's crust." The perlite received at the plant from the No Agua and Socorro Mines is a mineral, but it is not in the same "form" in which it occurs in the earth's crust because it was milled before it left the two mines. Nevertheless, the perlite was not chemically changed, it was simply crushed or pulverized into a fine powder. Clearly once a mineral enters the milling process it is no longer in the form in which it occurs in the earth's crust. Nevertheless, the downstream processes used to mill a mineral cannot be said to be something other than milling just because the material entering that particular process is not in the "form" in which it occurs in the earth. The mineral can only be in that form in the first step of the milling process. Thus, secondary crushing is still milling even though the material entering the secondary crusher is not in the form in which it naturally occurs. I find that the Secretary established that Dicaperl treats the crude crust of the earth to produce primary consumer derivatives at the El Grande Plant.

Another issue raised by the Secretary's definition of milling is whether the removal of water from the perlite through the heat expansion process can be considered to be the "separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." The Secretary contends that because the removal of water is key to the expansion process, the water should be considered to be an undesired contaminant which is removed at the plant. Because an undesired contaminant is removed, she contends that mineral milling is taking place.

I find the Secretary's interpretation to be reasonable based on the evidence presented. When the perlite is expanded (popped), all moisture is removed. The heating process at the plant is designed to expand the perlite to make it less dense. This process upgrades the product for use in the construction industry. The product would not be the same if the moisture remained in the

perlite. Thus, the "undesirable contaminant" in the crude (water) is separated from the "valuable desired constituents of the crude," in order to upgrade the product.

In the mining industry, the first stage of milling generally consists of crushing and grinding the ore using crushers, ball mills, rod mills and other similar equipment. The milling process does not stop there, however. The separation of the desired mineral from the unwanted contaminants is typically performed by subjecting the crushed ore to a series of processes which removes contaminants. In the crushed stone industry, for example, the crushed material is sized for customer use and unwanted material is removed. In the metal mining industry, finely crushed ore may be placed in large flotation vats which contain chemical reagents that help separate the desired metallic minerals from the host rock. All of these processes are part of the milling operation. The term "milling" is not limited to the processes that crush and grind the crude ore. In this case, Dicaperl uses high heat to remove the undesirable water from the ore.[1]

I find that the Secretary's contention that the removal of water from the perlite at the plant constitutes mineral milling is a permissible and reasonable construction of the term milling in section 3(h)(1) of the Mine Act. The water which is removed is not water on the surface of the perlite but is water that is embedded in the perlite itself and is removed to create a lighter product. The water is not incidentally evaporated from the perlite as it passes through the vertical furnace; the removal of the water is a key component of the expansion process.

Another operation that the Secretary contends that Dicaperl performs at the plant is sizing. In Appendix A of the Interagency Agreement, the Secretary sets forth examples of processes which she interprets as milling under the Mine Act. These examples are: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting." (Ex. S-17 at 7.) The Secretary defines these processes in the Interagency Agreement. Kirk testified that Dicaperl performs milling at the plant because it sizes the perlite after it is expanded. The Interagency Agreement defines "sizing" as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." (Ex. S-17 at 7). There is no dispute that all of the expanded perlite is screened through one of two screens. Material that does not fit through the screen is bagged separately.

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[1] I note that the Secretary is not bound by any particular technical definition of milling. As the Commission stated, "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that such separation was critical to the determination that 'milling' took place." *Watkins*, 24 FMSHRC at 675. In this case, however, the Secretary contends that the removal of water from the perlite powder fits within her definition of milling in Appendix A of the Agreement.

Kirk testified that the El Grande Plant uses screens to remove oversized particles which form in the furnace and to remove "tramp" material from the final product. He testified that the screening is necessary to produce a "uniform particle size" for its two main customers. (Ex. S-18 at 5). The product sold to US Gypsum is passed through a 74 mesh screen, while the product sold to Hamilton Materials is passed through a 60 mesh screen. Kirk believes that sizing occurs because the processes at the plant separate perlite particles of mixed sizes into groups of particles of the same size or within a similar range of sizes. (Ex. S-18 at 5).

Radford testified that the perlite received at the El Grande Plant has already been screened at the mine to very specific sizes. He states that the "ore [from the mines] has to be within a certain specification or when it is placed into the Antonito processing facility it would make an out-of-spec product . . . . [T]he size of the product produced at Antonito is directly dependent on the ore that is received from the two mines." (Tr. 210). Thus, the El Grande Plant uses different feed stock from the mines when it makes its two product lines. (Tr. 210-11). Radford further testified that the screening system at the plant is not essential and that the purpose of the screen is "quality control." (Tr. 213-14). The "tramp bag" actually contains a large amount of material that would fall through the screens if further screening were performed. There is no separating of small and large microspheres into two separate bags. The tramp bag contains material that meets product specifications, out-of-spec material, and foreign matter. He stated that the material in the tramp bag is one percent or less of the total volume of material produced at the plant. (Tr. 173). Dicaperl contends that all sizing occurs at the mills at the two mines and that the screens at the plant are only used to keep foreign materials and over-sized perlite out of the product bags. The screens at the plant do not separate particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

I find that the Secretary established that sizing takes place at the El Grande Plant. The screens are used to make sure that similar sized particles are placed into the product bags for its two major customers. Calling the screening process "quality control" does not change this fact. The definition of sizing does not contemplate that a certain percentage of material must be separated out to qualify under the definition. In addition, I am not persuaded by Dicaperl's argument that sizing does not occur because "a significant amount of material that is smaller than the mesh size also ends up in the tramp material bag." (D. Br. 20-21). The Secretary does not dispute that sizing also occurs at the No Agua and Socorro Mines. Although different feedstock is used to make different products at the plant, the screening process at the plant still separates perlite particles of mixed sizes into products that meet a specific product's size specifications by eliminating oversized particles and foreign material. The Perlite Institute equates "sizing" with sorting and argues that since no sorting of product occurs at the plant, sizing is not performed. (PI Br. 11). This argument too narrowly interprets the definition of sizing. The screens sort material into two groups: (1) perlite that meets size and other product specifications, and (2) foreign material, oversized perlite, and perlite that failed to fall through the screen. The Secretary's position is reasonable and is a "permissible construction" of the term milling.

Based on the above, I find that the Secretary's conclusion that the El Grande Plant is subject to Mine Act jurisdiction because it is a mill is reasonable and is entitled to deference. Several other factors set forth in the Interagency Agreement also weigh in favor of MSHA jurisdiction. First, the Secretary has promulgated safety and health standards which are applicable to the plant. The citations and orders at issue involve alleged violations of MSHA's safety standards dealing with such subjects as safe access, falling hazards, guarding of moving machine parts, and good housekeeping. MSHA's inspectors have expertise with respect to hazard prevention in these areas. The hazards alleged to be present at the El Grande Plant, as set forth in the subject citations and orders, do not present issues which are outside of MSHA's expertise. MSHA has been inspecting the plant since the Mine Act was passed and its inspectors are familiar with the working conditions at the plant. The hazards at issue in these cases are not different from the hazards presented at other facilities that perform milling. In addition, because Dicaperl has been subject to the jurisdiction of MSHA at the plant and its mines, it has been an "operator" for a considerable length of time with the result that it is familiar with the requirements of MSHA's safety and health standards. Although I limited my discussion to the heat expansion process and the sizing operations at the plant, all of the processes at the plant are geographically and technologically related to each other. Finally, Dicaperl was provided with fair notice of Mine Act jurisdiction because MSHA has been inspecting the plant for many years.[2]

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[2] The Secretary also argued that the plant is a mill because it engages in "heat expansion." That term is defined in Appendix A of the Agreement. "Heat expansion" is defined as "a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume." (Ex. S-17 at 8). Kirk admitted that the El Grande Plant does not use a rotary kiln or sinter hearth, but he argues that the vertical furnace used at the plant is simply an advancement over more traditional equipment. Radford convincingly testified that vertical furnaces have been used in the perlite industry since the 1950s, long before the Interagency Agreement was drafted, and that no perlite expansion facilities use rotary kilns or sinter hearths. The Secretary provides no reasonable argument to explain why the drafters of the Interagency Agreement mentioned industry-specific heating vessels if they wanted to include a wider range of furnaces. She asks the Commission to ignore those words in the definition. Ignoring key words or phrases in the Secretary's own interpretation of the term "heat expansion" is not reasonable and is not a "permissible construction" of the definition. A vertical furnace is not a type of rotary kiln or sinter hearth. Consequently, I did not rely on the definition of "heat expansion" in reaching my conclusion.

The Secretary also asks the Commission to find that Dicaperl engages in "kiln treatment" at the plant. The Interagency Agreement defines "kiln treatment" as "the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat." (Ex. S-17 at 8). Kirk believes that the "kiln treatment" provision can "fairly be called a 'mineral heating catchall.' " (Ex. S-18 at 6). He calls it a "catch-all" application because the definition contains the phrase "otherwise upgrading mineral products through the application of heat." I find that it defies logic to believe that the vertical furnace at the plant performs a function that is

B. **Consistency in the Secretary's Interpretation**.

Although the Secretary has consistently enforced the Mine Act at the El Grande Plant, Dicaperl contends that the Secretary's interpretation of the Interagency Agreement offered in these cases is inconsistent with her longstanding position with respect to other perlite expansion facilities. (D. Br. 27). I find that Dicaperl's arguments in this regard are in the nature of an affirmative defense.

Dicaperl argues that as early as 1984, MSHA determined that perlite expansion facilities not located on mine property, *i.e.*, property where extraction takes place, would not be subject to MSHA jurisdiction. In a memorandum authored by Roy L. Bernard, Administrator for Metal/Nonmetal, MSHA determined that vermiculite expansion facilities "which are geographically and operationally separate from mining operations shall be subject to [OSHA] jurisdiction." (Ex. C-6). Based on that memo, the MSHA southeast district manager determined that a perlite expansion facility in Jacksonville, Florida, should also be inspected by OSHA. (Ex. C-7). In the memo, the district manager states that the Florida plant receives "previously crushed perlite by rail from a mine in Oklahoma," it "heat expand[s]" the perlite, and then bags the product for shipment by "truck or rail to be used in potting soil or concrete block." *Id.* As grounds for the decision to place the plant under OSHA jurisdiction, the memo states that the "determination is consistent with past jurisdictional determinations that perlite and vermiculite operations which are geographically and operationally separate from mining operations shall be subject to OSHA's jurisdiction." *Id.* Dicaperl maintains that Chemrock's Jacksonville plant is substantially similar to its El Grande Plant.

Dicaperl presented other evidence to support its position that the Secretary is inconsistent in her exercise of jurisdiction over facilities that are substantially similar to the El Grande Plant. Dicaperl's witnesses testified that various other perlite facilities use processes that are

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related to kiln treatment. A "kiln" can be defined as: "(a) A large furnace used for baking, drying, or burning firebrick or refractories, or for calcining ores or other substances. (b) A furnace or oven, which is usually made from refractory brick, used to dry and fire various types of ceramic ware." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 297 (2d ed. 1997). The Secretary's interpretation of her Interagency Agreement to conclude that Dicaperl performs kiln treatment at the plant is unreasonable and is not a permissible interpretation of the Agreement.

My findings in this regard do not affect my holding that the Secretary reasonably interpreted the term "milling" to include the El Grande Plant under Mine Act jurisdiction. The Interagency Agreement lists certain processes in Appendix A, such as "kiln treatment" and "heat expansion," under the heading "Specific Examples of MSHA Authority." (Ex. S-17 at 5). These examples do not limit or restrict the general definition of "milling" provided in the Agreement. I have relied on the Secretary's definitions of "milling" and "sizing" in reaching my conclusion that MSHA's enforcement of safety standards at the plant is reasonable.

"substantially similar" to that used at the El Grande Plant. (D. Br. 6-8). In response to discovery, the Secretary identified 26 similar perlite facilities that are not being inspected by MSHA. (Ex. C-10). Dicaperl points out that the Secretary is required by law to exercise enforcement jurisdiction over all mines and milling operations pursuant to section 103(a) of the Mine Act. She does not have discretion "to exercise selective enforcement over facilities of her choosing." (D. Br. 30). Dicaperl also states that the evidence establishes that MSHA exercised jurisdiction over a number of perlite expansion facilities in the past, but subsequently abandoned such jurisdiction. (Exs. C-2, C-3). This fact further illustrates the Secretary's failure to consistently enforce the Mine Act at perlite expansion facilities. In sum, the Secretary's interpretation of the term "milling" in these cases is inconsistent with the Secretary's past enforcement at other perlite expansion facilities. "The continued inclusion of the El Grande Plant under MSHA's jurisdiction, while other perlite expansion facilities are not under the agency's jurisdiction, defies common sense and leads to the bizarre result of a single facility in the industry being under MSHA's jurisdiction while its competitors in the same industry are under OSHA's jurisdiction." (D. Br. 32) (*citing Nat'l Cement Co. Of Cal. Inc.*, 27 FMSHRC 721, 728-29 (Nov. 2005).

The Secretary contends that Dicaperl's arguments are irrelevant and that the only issue is whether her application of the Interagency Agreement to the El Grande Plant is reasonable. Second, she argues that, although MSHA has determined that it should not exercise jurisdiction over vermiculite facilities not otherwise located at a mine, it has not issued a similar policy for perlite facilities. The Secretary points out that MSHA has been inspecting the El Grande Plant since 1979 and that she is currently inspecting 10 other perlite mines or mills. (Tr. 244-45; Ex. C-3). The decision by the local office of MSHA to stop inspecting the perlite facility in Florida "appears to have been a local resource-driven determination [that is] permitted under section B(5) of the Interagency Agreement." (S. Br. 26, footnote omitted).

The Secretary contends that, although other perlite facilities may be similar to the El Grande Plant, there may be important differences. Jason Guzek, Vice President of Operations at Belmont Holdings Corporation,[3] and Mr. Radford testified about several perlite facilities which they alleged were not being inspected by MSHA. (Tr. 225-31, 281, 289-302; D. Br. 6-9). The Secretary contends that local MSHA officials often make these jurisdictional determinations based on unique factual circumstances. For example, some of these other perlite facilities actually make finished products such as ceiling tiles, fire doors, potting soil and filter media at the same location. (Tr. 240-42, 306-07). Other facilities do not screen perlite. (Tr. 229, 240). Other facilities process perlite that has already been expanded at the El Grande Plant. (Tr. 106, Ex. S-22). The Secretary also contends that Respondent did not offer any technical details about the processes that occur at these other facilities. The evidence shows that the perlite industry consists of "plants of varied design and function that require a case-by-base jurisdictional determination to be made by MSHA and OSHA taking into consideration the factors set forth in sections B(3)-(5) of the Interagency Agreement." (S. Br. 28).

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[3] Dicaperl is a subsidiary of Belmont Holdings Corporation. Mr. Guzek oversees production, efficiency and personnel matters for Belmont.

I find that the arguments presented by Dicaperl and the Perlite Institute are not very persuasive. At the hearing, the Secretary objected to the introduction of Dicaperl's evidence on MSHA's lack of enforcement at other perlite facilities on the grounds that such evidence was irrelevant to the issue whether the El Grande Plant is a mill. Although I overruled the Secretary's objections, I agree that MSHA's failure to inspect other perlite facilities is not relevant to the issue whether the Secretary has the authority to enforce MSHA's standards at the El Grande Plant. Moreover, I hold that Dicaperl did not establish that the Secretary's enforcement policies are fatally inconsistent. Although perlite expansion facilities may be similar, they are not exactly alike. For example, the memo in which local MSHA officials announced that MSHA would stop inspecting the Jacksonville, Florida, plant noted that potting soil had been manufactured at the plant and that "this finished product may again be manufactured in the future." (Ex. C-7). This type of case-by-case factual determination is committed to agency discretion under the Interagency Agreement. The Agreement specifically gives the agency flexibility when evaluating what constitutes mineral milling for purposes of MSHA enforcement. The Secretary is given the authority to expand or narrow the scope of the term "milling" depending on geographic and technologic factors. This flexibility is especially important "in operations near the termination of the milling cycle and the beginning of the manufacturing cycle." (Ex. S-17 at 2). It would be quite cumbersome and impractical for Commission judges, when evaluating whether a facility is a mill subject to MSHA jurisdiction, to evaluate whether MSHA should be exercising jurisdiction at other similar facilities. There are too may factors that come into play and the Secretary has been granted broad authority to exercise her discretion when determining what is a mill under the Mine Act.

Dicaperl's argument that MSHA does not have the authority to "exercise selective enforcement over facilities of its choosing, while not exercising jurisdiction over other facilities that fit within the definition of mining or milling," is not well taken because it misstates the issue. (D. Br. 30). The Secretary is not arguing that she has the authority to waive Mine Act jurisdiction at mineral milling facilities, she is arguing that she has the authority to determine what is mineral milling for purposes of the Mine Act. As long as her determination is reasonable, that decision is within her discretion. As stated above, the Secretary is not required to apply a technical definition of milling when determining whether the safety of employees at a facility is best served by MSHA or OSHA inspections. Practical considerations, including the "convenience of administration," can be factored into her analysis. The "convenience of administration" clause of section 3(h)(1) [of the Mine Act] is a broader concept than the need to eliminate overlapping jurisdiction." *Watkins*, 24 FMSHRC at 674 n. 8 (citation omitted). MSHA has been inspecting the El Grande Plant for about 27 years. The Interagency Agreement contemplates that, when determining what "constitutes mineral milling," the Secretary can consider the "expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility." (Ex. S-17 at 2). In this case, I find that her decision to assign MSHA the authority to inspect all the processes at the El Grande Plant to be reasonable and is entitled to deference.

The U.S. Court of Appeals for the District of Columbia Circuit, recently held that the "Commission is generally without authority to review the Secretary's discretionary decisions regarding whether to cite owner-operators, their independent contractors, or both for safety violations committed by the independent contractors." *Sec'y of Labor v. Twentymile Coal Co.*, No. 05-1124, 2006 WL 1867249, at *10 (DC Cir. July 7, 2006). The court based its decision, in part, on the fact that the Mine Act does not provide a "meaningful standard" against which to judge MSHA's exercise of discretion on that issue. *Id.* at *6. It found that the Mine Act is "utterly silent on the manner in which [MSHA] is to proceed against a particular transgressor." *Id.* at *6 (citation omitted). I note that the Mine Act provides a very loose standard against which to judge MSHA's exercise of discretion when determining whether a facility performs milling. I have not relied on *Twentymile* but have determined that the Secretary's exercise of discretion in this case to be reasonable based on the language of the Mine Act and the guidelines and definitions set forth in her Interagency Agreement.

IV. ORDER

For the reasons set forth above, I find that the Mine Safety and Health Administration has jurisdiction to inspect the El Grande Plant. Consequently, Dicaperl Mineral Corporation's motion to dismiss these cases is **DENIED**.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 8, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-707-R
	:	Citation No. 7239942; 05/22/2006
v.	:	Docket No. WEVA 2006-708-R
	:	Citation No. 7239943; 05/22/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-709-R
	:	Citation No. 7239946; 05/23/2006
	:	White Queen
	:	Mine ID 46-8297
	:	Docket No. WEVA 2006-710-R
	:	Citation No. 7253955; 05/22/2006
	:	Brushy Eagle
	:	Mine ID 46-8315
	:	Docket No. WEVA 2006-711-R
	:	Citation No. 7254891; 05/23/2006
	:	River Fork Powellton #1
	:	Mine ID 46-08914
	:	Docket No. WEVA 2006-760-R
	:	Citation No. 7257562;06/26/2006
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID 46-09048
	:	Docket No. WEVA 2006-752-R
	:	Citation No. 7254904;06/07/2006
	:	Docket No. WEVA 2006-753-R
	:	Citation No. 7254905;06/07/2006

: Docket No. WEVA 2006-754-R
: Citation No. 7254907;06/07/2006
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: Docket No. WEVA 2006-755-R
: Citation No. 7254911;06/12/2006
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: Docket No. WEVA 2006-756-R
: Citation No. 7254912;06/12/2006
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: Docket No. WEVA 2006-757-R
: Citation No. 7254915;06/12/2006
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: Docket No. WEVA 2006-758-R
: Citation No. 7254917;06/14/2006
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: River Fork Powellton #1
: Mine ID 46-08914
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: Docket No. WEVA 2006-770-R
: Citation No. 7254922;06/26/2006
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: Docket No. WEVA 2006-771-R
: Citation No. 7254928;06/26/2006
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: Docket No. WEVA 2006-772-R
: Citation No. 7254939;06/26/2006
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: Docket No. WEVA 2006-773-R
: Citation No. 7254930;06/26/2006
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: Docket No. WEVA 2006-774-R
: Citation No. 7254931;06/26/2006
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: Docket No. WEVA 2006-776-R
: Citation No. 7254933;06/26/2006
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: Docket No. WEVA 2006-777-R
: Citation No. 7254935;06/26/2006

:	Docket No. WEVA 2006-778-R
:	Citation No. 7254937;06/26/2006
:	
:	Marsh Fork Eagle Mine
:	Mine ID 46-08913
:	
:	Docket No. WEVA 2006-791-R
:	Citation No. 7247599; 06/28/2006
:	
:	Docket No. WEVA 2006-792-R
:	Citation No. 7247600; 06/28/2006
:	
:	White Queen Mine
:	Mine ID 46-08297

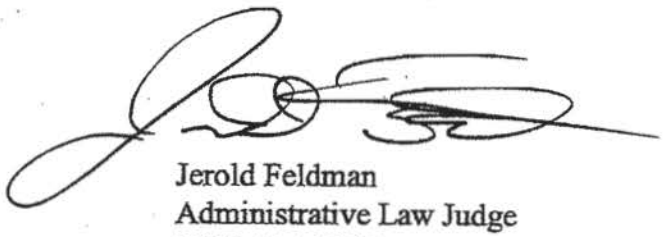
STAY ORDER
AND
ORDER LIMITING DISCOVERY

The Secretary has filed a motion to stay the above contest matters pending the docketing and assignment of the related civil penalty case. The Contestant does not oppose the Secretary's motion. Accordingly, in the interest of administrative efficiency, these proceedings **ARE STAYED**. **IT IS ORDERED** that the parties initiate a conference call with the undersigned within 21 days of the docketing and assignment of the pertinent civil penalty case to lift this stay and to schedule these matters for a consolidated hearing.

The Secretary, in her stay motion, requests that the operator should be ordered to provide periodic status reports concerning the progress of the related civil penalty matters. The Contestant opposes the Secretary's suggestion. This issue is moot as I have not ordered any status reports with respect to the progress of the Secretary's civil penalty proposal

There are 24 contested citations in these proceedings. In instances where contests are stayed to await the Secretary's proposal of civil penalties, postponing discovery until the Secretary's proposal is presented to the operator facilitates settlement discussions and may

obviate the need for discovery on some or all of the citations in issue. In order to avoid the undue burden or expense that may result from needless discovery, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), **IT IS ORDERED** that discovery shall be limited to periods when these matters are no longer on stay.[1]



Jerold Feldman
Administrative Law Judge
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/mh

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[1] An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty. Absent a reason to believe that an operator has a need for an early hearing, contests should not be filed solely for the initiation of discovery when, as in this case, the operator elects to forgo its right to an early hearing by acquiescing to a stay.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 8, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-666-R
	:	Citation No. 7253941; 05/17/2006
v.	:	Docket No. WEVA 2006-667-R
	:	Citation No. 9967710; 05/18/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-668-R
	:	Citation No. 9967723; 05/18/2006
	:	Brushy Eagle
	:	Mine ID 46-08315
	:	Docket No. WEVA 2006-669-R
	:	Citation No. 7239937; 05/16/2006
	:	Docket No. WEVA 2006-670-R
	:	Citation No. 7239939; 05/16/2006
	:	Docket No. WEVA 2006-671-R
	:	Citation No. 7239935; 05/16/2006
	:	White Queen
	:	Mine ID 46-08297

ORDER CONTINUING STAY
ORDER DISMISSING MOTION FOR PROTECTIVE ORDER
AND
ORDER RESCINDING DISCOVERY

The Secretary's Motion to Stay these contest matters was granted by Order on July 21, 2006, because the contestant did not oppose the Secretary's motion. The Order permitted the parties to engage in discovery during the pendency of the stay.

On July 27, 2006, Contestant's counsel served on the Secretary a Notice of Depositions, accompanied by subpoenas issued by Contestant's counsel, seeking to compel the attendance of MSHA inspectors Albert Clark, Gerald Cook and James Wilson at a deposition at 9:00 a.m on August 7, 2006. On August 3, 2006, the Secretary's counsel responded that he was not in agreement with the Contestant's unilateral deposition schedule. Upon learning of the Secretary's objections, in an August 3, 2006, facsimile, Contestant's counsel cautioned the Secretary's counsel that he "could be subjecting the Secretary to sanctions" if he disregarded the subpoenas and did not avail the MSHA inspectors for deposition on August 7, 2006. In the August 3, 2006, correspondence, the Contestant claimed its desire for expeditious depositions was motivated by a desire to complete discovery within 40 days of its initiation as specified in Commission Rule 56(e), 29 C.F.R. § 2700.56(e).[1]

On August 4, 2006, the Secretary filed a Motion for a Protective Order. Commission Rule 57(b) provides that the judge shall specify the time, place and manner of taking depositions if the parties are unable to agree. 29 C.F.R. § 2700.57(b). Thus, the unilateral deposition date is contrary to the Commission's Rules. It follows that the Secretary's disinclination to attend is not a sanctionable event. Consequently, the parties were advised during a August 4, 2006, telephone conference that the Secretary's Motion shall be dismissed as moot.

Although the July 21, 2006, Order permitted discovery despite the stay, I now believe that discovery while these matters are stayed for consolidation with the civil penalty proceedings is neither wise nor an efficient use of judicial resources. In instances where contests are stayed, postponing discovery until the civil penalties are proposed facilitates settlement discussions and may obviate the need for discovery. In order to avoid the undue burden or expense that may result from needless discovery, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), discovery shall be limited to periods when these matters are not on stay.[2]

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[1] The time constraint in Rule 56(e) is routinely extended by agreement of the parties or by order of the judge.

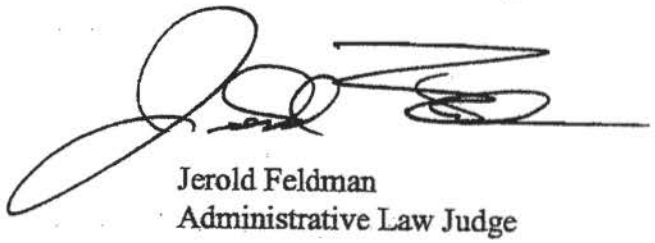
[2] An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty. A contest may not be used solely for the initiation of discovery when, as in the current case, the operator elects to forgo its right to an early hearing, instead opting to await the civil penalty proceeding.

In view of the above, **IT IS ORDERED** that the Secretary's Motion for a Protective Order **IS DISMISSED** as moot.

IT IS FURTHER ORDERED that the stay in these contest proceedings **IS CONTINUED**.

IT IS FURTHER ORDERED that the provision in the July 21 Stay Order permitting discovery **IS RESCINDED**.

This order supercedes the directive given to the parties during the August 4, 2006, telephone conference concerning their submission of stipulated satisfactory deposition dates on August 14, 2006, for the purpose of judicial establishment of discovery schedules in these matters.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 11, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-788-R
	:	Citation No. 7257574; 06/27/2006
v.	:	Docket No. WEVA 2006-789-R
	:	Citation No. 77257575;06/27/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-790-R
	:	Citation No. 7257568;06/27/2006
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID

ORDER TO SHOW CAUSE

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission on July 10, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). In its contests, Marfork Coal Company, Inc., (Marfork) denies each and every allegation contained in the contested citations. Marfork identifies the relief sought in its contest as "issuance of an Order directing that all the subject Citations be vacated and dismissed." (*Marfork Contest*, p.3). Such an Order can only be issued after a hearing on the merits of the contested citations.

The Secretary filed an answer to Marfork's contests on July 27, 2006, in which she moved to stay these matters pending the related civil penalty cases. The Secretary's answer noted that "counsel for the Contestant has indicated . . . that he has no objection to this motion." (*Sec'y Mot.*, p.2). The Secretary's answer was accompanied by a cover letter stating:

> [Marfork's] Counsel has also indicated that it is the operator's intention to file notices of contest of all significant and substantial citations and orders but will agree to continuances of those cases involving 104(a) citations. While it is the Contestant's prerogative to file duplicative contest and civil penalty proceedings pursuant to the Commission's rules, the Contestant's policy of always filing a notice of contest and then agreeing to a stay seems to be a needless use of the Commission's and Secretary's resources. This is especially true when the operator can contest both the civil penalty and the underlying citation when the civil penalty is proposed.

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

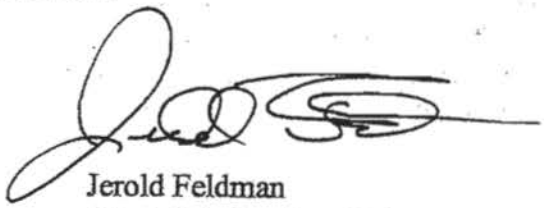
Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested. The relief requested by Marfork is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

By filing a contest on July 10, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, it appears that Marfork is, in substance, waiting for a disposition on the merits *after* the civil penalty is proposed. In other words, Marfork has not adequately articulated the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

The Commission's processing of Marfork's 105(d) contests requires the duplication of docket files with incidental copying and storage for both the contest dockets and the ultimate civil penalty docket. Moreover, Marfork's 105(d) Notice of Contest requires *pro forma* rulings on stay motions that are lacking in substance. I am also cognizant of the Secretary's burden of answering multitudes of 105(d) contests, only to await duplication of her answers in the ultimate civil penalty proceedings. Simply put, a stay order postpones the pre-civil penalty hearing requested by Marfork; a hearing that Marfork implicitly concedes it does not want. I miss the point. I look forward to Marfork's explanation.

In view of the above, Marfork **IS ORDERED TO SHOW CAUSE**, in writing, **within 21 days from the date of this Order**, why its 105(d) Notice of Contest of the subject citations should not be dismissed because of its apparent contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. The Secretary shall be afforded the opportunity to reply to Marfork's response to the Order to Show Cause within 10 days thereafter.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-451-M
Petitioner	:	A. C. No. 02-01691-05844
	:	
	:	Docket No. WEST 2004-76-M
	:	A. C. No. 02-01691-10445
v.	:	
	:	Docket No. WEST 2004-103-M
	:	A. C. No. 02-01691-12689
	:	
	:	Docket No. WEST 2004-196-M
QMAX COMPANY,	:	A. C. No. 02-01691-17038
Respondent	:	
	:	Portable Plant for Qmax Co.
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-61-M
Petitioner	:	A. C. No. 02-01691-27590A
v.	:	
	:	
JAMES L. FANN, Employed by	:	
QMAX COMPANY,	:	Portable Plant for Qmax Co.
Respondent	:	

ORDER ADDRESSING SURVIVABILITY OF CLAIM AGAINST INDIVIDUAL AGENT OF OPERATOR

Docket No. WEST 2005-61-M presents a claim for imposition of a civil penalty against James L. Fann under section 110(c) of the Act. 30 U.S.C. § 820(c). As noted in Respondents' post-hearing brief, James L. Fann died on May 28, 2006. By Order dated July 3, 2006, the Secretary was directed to submit a memorandum stating her position with respect to the viability of the section 110(c) claim in light of Mr. Fann's passing. The Secretary has taken the position that she will pursue the claim as it presently stands. While the Secretary has, at least tacitly, taken the position that the section 110(c) claim survived Mr. Fann's death, she did not cite any authority or present any legal argument on that issue.

In general, the survival of a federal cause of action is, in the absence of an expression of contrary intent, a question of federal common law. Actions that are remedial generally survive, and actions that are penal generally do not. *U.S. v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1993); *Smith v. Dept. of Human Services, State of Okl.*, 876 F.2d 832, 834 (10th Cir. 1989); *International Cablevision, Inc., v. Sykes,* 172 F.R.D. 63 (W.D.N.Y. 1997); *and see Sinito v. U.S. Dept. of Justice*, 176 F.3d 512 (D.C.Cir. 1999).

There is nothing in the Mine Act addressing the survivability of claims arising thereunder, or suggesting that established rules regarding the abatement of actions upon the death of a party should not apply to claims under the Act. While the determination of whether a particular claim is "penal" or "remedial" for purposes of survivability can present difficult issues,[1] it appears that a claim under section 110(c) of the Act seeking imposition of a civil penalty against an individual corporate director, officer or agent is penal in nature. Accordingly, under federal common law, the action would abate upon the death of the individual charged.

While there does not appear to be any dispute as to Mr. Fann's passing, his death has not been formally noted on the record. Nor has any potential successor entity, e.g., his estate, or a proper party representative been identified. Accordingly, Elaine P. Fann is directed to file a suggestion of death, including a copy of the death certificate, in the form referenced in Rule 25, Federal Rules of Civil Procedure.[2] Filing should be made within 20 days. If, within 14 days after the filing of the suggestion of death, the Secretary has not shown good cause why the claim should not be dismissed, the claim against James L. Fann under section 110(c) of the Act will be dismissed.

Michael E. Zielinski
Administrative Law Judge

---

[1] *See NEC, supra; Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 414 (7th Cir. 1980) (overruled, in part, on other grounds, *Pridegon v. Gates Credit Union*, 883 F.2d 182, 193-94 (7th. Cir. 1982)). In determining whether a particular claim is penal or remedial, courts typically consider three factors: (a) whether the purpose of the statutory claim was to redress individual wrongs or wrongs to the public; (b) whether the recovery goes to the individual or the public; and (c) whether the recovery is disproportionate to the harm suffered. *NEC*, 11 F.3d at 137; *Smith*, 876 F.2d at 835; *Sykes*, 172 F.R.D. at 67.

[2] The suggestion should include the caption of this case, a copy of the death certificate, and a certificate of service on the Secretary. The body of the suggestion should state:

> Elaine P. Fann [or other appropriate person], as [executor, administrator, or other representative or successor] of James L. Fann, suggests upon the record the death of James L. Fann during the pendency of this action.

Distribution:

Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2937

Elaine P. Fann, c/o Qmax Company, P.O. Box 877, Williams, AZ 86046

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-301-M
Petitioner	:	A. C. No. 01-02936-63063
	:	
	:	Docket No. SE 2006-131-M
v.	:	A.C. No. 02-02936-78967
	:	
	:	Docket No. SE 2006-167-M
HOSEA O. WEAVER & SONS, INC.,	:	A.C. No. 01-02936-83942
Respondent	:	
	:	Plant #1

ORDER DENYING MOTION TO CERTIFY

In these civil penalty proceedings the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitions to assess Hosea O. Weaver & Sons (Weaver) civil penalties for three alleged violations of the Secretary's mandatory training standards found in Part 46, Title 30, Code of Federal Regulations (C.F.R.), and for ten alleged violations of various mandatory safety and health standards for metal and nonmetal mines found in Part 56, Title 30, C.F.R. The cases are scheduled to be heard on December 19, 2006, in Mobile, Alabama.

A major issue in the cases, perhaps *the* major issue, is whether MSHA has jurisdiction to issue the citations. Weaver contends it is not covered by the Act, that it is not a "mine" as the word is defined in section 3(h)(1). 30 U.S.C. § 802(h)(1). The Secretary takes the opposite view. The parties' arguments are set forth in cross motions for summary decision.

On July 13, 2006, I granted the Secretary's motion and denied Weaver's motion. In rejecting Weaver's contention that MSHA lacks jurisdiction, I noted that if MSHA has jurisdiction it is by virtue of the fact that the transportation, crushing and sizing of gravel at Weaver's plant is "milling" within the meaning of section 3(h)(1). I found the agency properly exercised its authority by applying the facts, as I understood them from the parties' pleadings, to the statute and the Interagency Agreement between MSHA and the Occupational Safety and Health Administration (OSHA). 44 Fed. Reg. 22, 827 (April 17, 1979), *amended by* 48 Fed. Reg. 7, 521 (Feb. 22, 1983). Order 4. I also noted that in resolving jurisdictional questions "the benefit of the doubt goes to the Secretary" and that this is especially true when the Secretary chooses, as she has here, between MSHA and OSHA coverage. *Id.* 3-4.

The parties have responded with a blizzard of paper. Weaver's counsel has filed a motion to certify the ruling for interlocutory review and, clairvoyantly as it turns out, a simultaneous petition for discretionary review and an alternative petition for interlocutory review. The Secretary has filed a motion to dismiss and an opposition to Weaver's petitions.

Under the Commission's rules, the sole matter before me is Weaver's motion to certify the July 13 order for interlocutory review. I can do so only if I find: (1) that interlocutory review involves a controlling question of law; and (2) that review will materially advance the final disposition of the case. 29 C.F.R. § 2700.76(a)(1).

The motion to certify states that "[i]t is in the interest of judicial efficiency for the Commission to determine whether or not the finding of MSHA jurisdiction was legally and/or factually erroneous before proceeding at the ALJ level." Mot. to Cert. Dec. 1-2. This is only partly true. It is accurate to state that the question of jurisdiction is a controlling question of law (indeed, as I have noted, it is probably *the* controlling question), but it is not correct that interlocutory review will materially advance the final disposition of the case. If it did, then, interlocutory review would be warranted for every order denying summary decision on jurisdictional grounds, and clearly the Commission's rules do not contemplate that result.

Jurisdictional issues such as this are inextricably tied to the factual circumstances of the facility and processes MSHA seeks to regulate. In the subject cases the parties have not stipulated to the pertinent facts regarding those circumstances and processes. Rather, I have interpreted the facts from the parties' pleadings. If, as Weaver argues to the Commission, I have made critical factual errors in reaching my conclusion regarding the appropriateness of MSHA's jurisdiction, I fail to see how it will materially advance a resolution of the case to have the Commission review the question based on a record devoid of stipulated and/or trial-based factual findings.

In my view, the best course for the parties is to proceed to hearing or to resubmit the question based on joint stipulations of fact. Accordingly, Weaver's motion to certify is **DENIED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
August 21, 2006

MARTIN COUNTY COAL CORP.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 2006-416-R
	:	Citation No. 7433765; 06/20/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	White Cabin #7
Respondent	:	Mine ID 15-18452

NOTICE OF HEARING
AND
PREHEARING ORDER

This contest proceeding is before me based on a Notice of Contest of the subject citation filed with the Commission on July 21, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). On August 14, 2006, the Secretary moved to stay this matter pending consolidation with the yet to be docketed civil penalty case. The contestant has not agreed to stay this matter. The Secretary's motion **IS DENIED**.

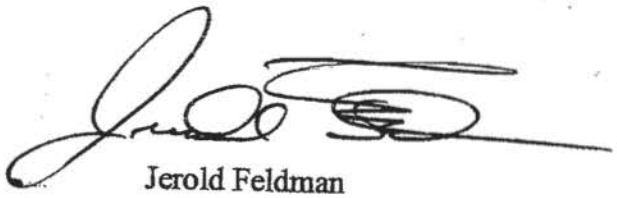
In accordance section 105(d) of the Mine Act, this proceeding is scheduled for hearing on the merits on **Wednesday, October 4, 2006**, at **9:00 a.m.**, in the vicinity of **Huntington, West Virginia**.[1] The specific courtroom in which the hearing will be held will be designated at a later date. The matters of fact and law asserted are as stated in the pleadings.

In preparation for the hearing, the parties are directed to complete the following on or before **September 26, 2006**: (a) confer on the possibility of settlement and endeavor to stipulate as to all relevant matters which are not in substantial dispute; (b) endeavor to stipulate to the issues of fact and law remaining for hearing, and, if unable to do so, exchange written agreements as to the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate to those exhibits which may be admitted into evidence without objection and as to others indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

---

[1]Any person planning on attending this hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those in advance [subject to the limitations set forth in 29 C.F.R. § 2706.150(a)(3) and § 2706.160(d)].

If the proceeding has not been settled, the parties are further directed to file with the undersigned Administrative Law Judge on or before **September 26, 2006,** a written prehearing report setting forth (a) lists of exhibits and witnesses together with the parties' synopsis of expected testimony (b) any stipulations entered into; (c) the parties' statement of the issues; and (d) a memorandum of law on any legal issue raised by a party with citation to the principal authorities relied upon. Failure to comply with any part of the prehearing order may result in sanctions against the defaulting party.



Jerold Feldman
Administrative Law Judge
202-434-9967

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Mark Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

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

August 23, 2006

SPARTAN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-532-R
	:	Citation No. 7460784; 05/13/2006
	:	
	:	Docket No. WEVA 2006-533-R
	:	Citation No. 7062294; 05/13/2006
v.	:	
	:	Docket No. WEVA 2006-534-R
	:	Citation No. 6601514; 05/13/2006
	:	
	:	Docket No. WEVA 2006-535-R
	:	Citation No. 6601512; 05/13/2006
	:	
	:	Docket No. WEVA 2006-536-R
	:	Citation No. 6601510; 05/13/2006
	:	
	:	Docket No. WEVA 2006-541-R
	:	Citation No. 7460790; 05/15/2006
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2006-542-R
MINE SAFETY AND HEALTH	:	Order No. 7460793; 05/15/2006
ADMINISTRATION, (MSHA),	:	
Respondent	:	Laurel Creek/Spirit Mine
	:	Mine ID 46-08387

ORDER DENYING
MOTION FOR RECONSIDERATION

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At the request of the Secretary, and without objection by the Contestant, proceedings in these matters were stayed on July 18, 2006. The Secretary has now filed a Motion for Reconsideration of the stay order. The Contestant objects to part of the Secretary's motion. For the reasons set forth below, the motion is denied.

The Secretary first requests that "a clarification be issued to make clear that only the scheduling of a hearing date . . . is being stayed and that the parties are permitted to engage in discovery and other prehearing matters." (Mot. at 2.) The Secretary asserts that this "is necessary to avoid any misunderstanding between the parties that may occur." (Mot. at 2.) The Respondent does not object to this part of the motion.

Section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20, permit an operator to contest an order or citation without waiting for a civil penalty to be assessed. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). In *Energy Fuels*, the Commission noted that the reason for this is that "the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable" when "related withdrawal orders may be issued before the Secretary has proposed a penalty." (*Id.*) However, the Commission went on to say that if "the operator . . . lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed." (*Id.*)

Clearly, the operator in these cases does not have an immediate need for a hearing as it has agreed to the stay. Nevertheless, rather than follow the advice of the Commission, the operator's counsel has expressed the intention, according to the Secretary, of filing notices of contest of all citations and orders that contain a finding of "significant and substantial." The Secretary states that its Arlington office has "received more than 290 notice of contest cases in the past two months." (Mot. At 3.) In its response, the Contestant does not deny this assertion, it merely asseverates its right to file a notice of contest.

Although not expressly stating so, it is apparent that the practice of filing a notice of contest for every citation or order containing special findings is placing a significant burden on the Secretary. More importantly, processing notices of contests requires the Commission's Docket Office to prepare duplicate files for the same violation, with the incidental copying associated therewith, and necessitates twice the storage space. It also requires the *pro forma* ruling on unopposed stay motions in cases that were never intended to be contested immediately.

Permitting discovery in these cases may well result in needless time and expense for the parties, who may conduct discovery on citations which would not even be contested once the civil penalty is assessed. Moreover, superfluous discovery could involve the Commission in mediating unnecessary discovery disputes. Therefore, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), discovery will be limited to periods when these matters are not stayed.

The Secretary also requests reconsideration of the requirement in the stay order that she periodically report on the status of the civil penalty cases corresponding to the contest cases and asks that this requirement be placed on the Contestant. Not surprisingly, the Contestant objects to this request.

This part of the motion is also denied. The Secretary requested the stay in these cases. Of greater significance, the Secretary assesses the penalty in these cases and, therefore, is in a much better position to know the status of the civil penalty cases than is the Contestant. Furthermore, since the Secretary is in control of penalty assessments, she can determine how long the cases are on stay by how quickly she assesses the penalty. For all of these reasons, I find that counsel for the Secretary is the appropriate party to report on the status of the civil penalty cases.

Order

The filing of notices of contest for no apparent purpose places unnecessary burdens on all areas of the system. There is no reason to add to those burdens by permitting discovery while the cases are on stay. Additionally, the Secretary is the appropriate party to file status reports on civil penalty cases being processed for orders and citations which are the subjects of notices of contest. Accordingly, the Motion for Reconsideration is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue N.w., Suite 9500
Washington, D.C. 20001
August 23, 2006

INDEPENDENCE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-537-R
	:	Order No. 6690161; 05/14/2006
	:	Docket No. WEVA 2006-538-R
	:	Citation No. 6690162; 05/14/2006
	:	Docket No. WEVA 2006-539-R
	:	Citation No. 6690163; 05/14/2006
	:	Docket No. WEVA 2006-543-R
	:	Citation No. 7583418; 05/13/2006
	:	Docket No. WEVA 2006-544-R
	:	Citation No. 7583422; 05/13/2006
	:	Docket No. WEVA 2006-545-R
	:	Citation No. 6690079; 05/13/2006
v.	:	
	:	Docket No. WEVA 2006-546-R
	:	Citation No. 6690080; 05/13/2006
	:	Docket No. WEVA 2006-547-R
	:	Citation No. 7427042; 05/13/2006
	:	Docket No. WEVA 2006-548-R
	:	Citation No. 6690076; 05/13/2006
	:	Docket No. WEVA 2006-549-R
	:	Citation No. 7583425; 05/13/2006
	:	Docket No. WEVA 2006-550-R
	:	Citation No. 7583426; 05/13/2006
	:	Docket No. WEVA 2006-551-R
	:	Citation No. 7583427; 05/13/2006
	:	Docket No. WEVA 2006-552-R
	:	Citation No. 7583420; 05/13/2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2006-553-R
ADMINISTRATION, (MSHA),	:	Citation No. 7583421; 05/13/2006
Respondent	:	
	:	Docket No. WEVA 2006-554-R
	:	Citation No. 7427036; 05/12/2006
	:	
	:	Docket No. WEVA 2006-555-R
	:	Citation No. 7583406; 05/12/2006
	:	
	:	Justice #1 Mine
	:	Mine ID 46-07273

ORDER DENYING
MOTION FOR RECONSIDERATION

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At the request of the Secretary, and without objection by the Contestant, proceedings in these matters were stayed on July 14, 2006. The Secretary has now filed a Motion for Reconsideration of the stay order. The Contestant objects to part of the Secretary's motion. For the reasons set forth below, the motion is denied.

The Secretary first requests that "a clarification be issued to make clear that only the scheduling of a hearing date . . . is being stayed and that the parties are permitted to engage in discovery and other prehearing matters." (Mot. at 2.) The Secretary asserts that this "is necessary to avoid any misunderstanding between the parties that may occur." (Mot. at 2-3.) The Respondent does not object to this part of the motion.

Section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20, permit an operator to contest an order or citation without waiting for a civil penalty to be assessed. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). In *Energy Fuels*, the Commission noted that the reason for this is that "the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable" when "related withdrawal orders may be issued before the Secretary has proposed a penalty." (*Id.*) However, the Commission went on to say that if "the operator . . . lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed." (*Id.*)

Clearly, the operator in these cases does not have an immediate need for a hearing as it has agreed to the stay. Nevertheless, rather than follow the advice of the Commission, the operator's counsel has expressed the intention, according to the Secretary, of filing notices of contest of all citations and orders that contain a finding of "significant and substantial." The Secretary states that it has "received more than 200 notice of contest cases from this law firm over the past month." (Mot. At 3.) In its response, the Contestant does not deny this assertion, it merely asseverates its right to file a notice of contest.

Although not expressly stating so, it is apparent that the practice of filing a notice of contest for every citation or order containing special findings is placing a significant burden on the Secretary. More importantly, processing notices of contests requires the Commission's Docket Office to prepare duplicate files for the same violation, with the incidental copying associated therewith, and necessitates twice the storage space. It also requires the *pro forma* ruling on unopposed stay motions in cases that were never intended to be contested immediately.

Permitting discovery in these cases may well result in needless time and expense for the parties, who may conduct discovery on citations which would not even be contested once the civil penalty is assessed. Moreover, superfluous discovery could involve the Commission in mediating unnecessary discovery disputes. Therefore, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), discovery will be limited to periods when these matters are not stayed.

The Secretary also requests reconsideration of the requirement in the stay order that she periodically report on the status of the civil penalty cases corresponding to the contest cases and asks that this requirement be placed on the Contestant. Not surprisingly, the Contestant objects to this request.

This part of the motion is also denied. The Secretary requested the stay in these cases. Of greater significance, the Secretary assesses the penalty in these cases and, therefore, is in a much better position to know the status of the civil penalty cases than is the Contestant. Furthermore, since the Secretary is in control of penalty assessments, she can determine how long the cases are on stay by how quickly she assesses the penalty. For all of these reasons, I find that counsel for the Secretary is the appropriate party to report on the status of the civil penalty cases.

Order

The filing of notices of contest for no apparent purpose places unnecessary burdens on all areas of the system. There is no reason to add to those burdens by permitting discovery while the cases are on stay. Additionally, the Secretary is the appropriate party to file status reports on civil penalty cases being processed for orders and citations which are the subjects of notices of contest. Accordingly, the Motion for Reconsideration is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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August 25, 2006

ARACOMA COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-824-R
	:	Citation No. 7253529; 07/13/2006
v.	:	Docket No. WEVA 2006-825-R
	:	Order No. 7253530; 07/14/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Aracoma Alma Mine #1
	:	Mine ID 46-08801

ORDER TO SHOW CAUSE

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission on July 28, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d). In its contests, Aracoma Coal Company, Inc., (Aracoma) denies each and every allegation contained in the contested citations. Aracoma identifies the relief sought in its contest as a Commission declaration, through Commission review, that the subject citation and order are invalid. (*Aracoma Contest*, p.2). Such a declaration can only be rendered after a hearing on the merits of the contested citation and order.

The Secretary filed an answer to Aracoma's contest on August 16, 2006, in which she moved to stay these matters pending the related civil penalty case. The Secretary's answer noted that she conferred with Contestant's counsel and he had no objection to her stay motion. (*Sec'y Mot.*, p.3).

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

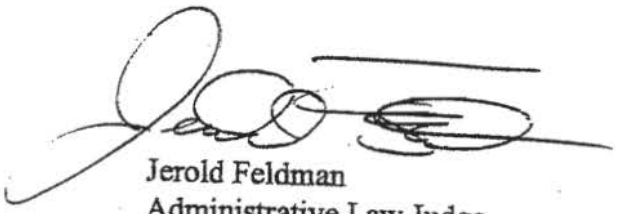
Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested. The relief requested by Aracoma is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

By filing a contest on July 28, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, it appears that Aracoma is, in substance, waiting for a disposition on the merits *after* the civil penalty is proposed. In other words, Aracoma has not adequately articulated the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

The Commission's processing of Aracoma's 105(d) contests requires the duplication of docket files with incidental copying and storage for both the contest dockets and the ultimate civil penalty docket. Moreover, Aracoma's 105(d) Notice of Contest requires *pro forma* rulings on stay motions that are lacking in substance. I am also cognizant of the Secretary's burden of answering multitudes of 105(d) contests, only to await duplication of her answers in the ultimate civil penalty proceedings. Simply put, a stay order postpones the pre-civil penalty hearing requested by Aracoma; a hearing that Aracoma implicitly concedes it does not want.

In view of the above,[1] Aracoma **IS ORDERED TO SHOW CAUSE**, in writing, **within 15 days from the date of this Order**, why its 105(d) Notice of Contest of the subject citations should not be dismissed because of its apparent contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. The Secretary shall be afforded the opportunity to reply to Aracoma's response to the Order to Show Cause within 10 days thereafter.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

August 28, 2006

HIGHLAND MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-712-R
v.	:	Citation No. 7244885; 05/25/2006
	:	Docket No. WEVA 2006-713-R
	:	Citation No. 7244889; 05/25/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	: : : :	Highland Coal Handling Mine ID: 46-06558

ORDER TO SHOW CAUSE

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Secretary, by counsel, has requested that the cases be continued pending the filing of the corresponding civil penalty cases. The motion states that the Contestant does not object to it. However, before ruling on the motion, additional information is needed.

It appears from the number of notices of contest before me that counsel for the Contestant is routinely filing notices of contest in all cases where, as in the instant cases, the violations are alleged to be "significant and substantial." While a literal reading of the law may permit such filings, there does not appear to be any exigent reason for them, nor do they foster cooperation among the parties or facilitate judicial economy.

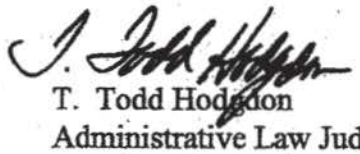
Section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20, permit an operator to contest an order or citation without waiting for a civil penalty to be assessed. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). In *Energy Fuels*, the Commission noted that the reason for this is that "the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable" when "related withdrawal orders may be issued before the Secretary has proposed a penalty." (*Id.*) However, the Commission went on to say that if "the operator . . . lacked a need for an immediate hearing, *we would expect him to postpone his contest of the entire citation until a penalty is proposed.*" (*Id.*) (emphasis added.)

Obviously, the operator in these cases does not have an immediate need for a hearing as it has agreed to the continuance. Nevertheless, rather than follow the advice of the Commission, the operator's counsel has filed the notices of contest. This despite the fact that the failure to file a notice of contest of a citation or order will not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in the citation or order,

including whether the violation was "significant and substantial" or the result of an "unwarrantable failure." 29 C.F.R. § 2700.21; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1621 (Sept. 1987).

It is apparent that the practice of filing a notice of contest for every citation or order containing special findings places a significant burden on the Secretary. More importantly, processing notices of contests results in the Commission's Docket Office having to prepare duplicate files for the same violation, with the incidental copying associated therewith. While up to 20 orders and citations are included in one civil penalty case when it is received by the Docket Office, each contest case involves a single order or citation. In turn, this necessitates more than twice the storage space. It also requires the *pro forma* ruling on unopposed continuance or stay motions in cases that were never intended to be contested immediately.

Accordingly, Highland Mining Company is **ORDERED TO SHOW CAUSE**, within **15 days** of the date of this order, why its notices of contests should not be dismissed as an abuse of the Commission's processes. The Secretary will have **10 days** from the date Highland's response is filed to file a reply.



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Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021
August 28, 2006

SPARTAN MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-629-R
	:	Citation No. 7062296; 05/15/2006
	:	Docket No. WEVA 2006-630-R
	:	Citation No. 7062297; 05/15/2006
	:	Docket No. WEVA 2006-631-R
	:	Citation No. 7062298; 05/15/2006
	:	Docket No. WEVA 2006-632-R
	:	Citation No. 7062299; 05/15/2006
	:	Docket No. WEVA 2006-633-R
	:	Citation No. 7062300; 05/15/2006
	:	Docket No. WEVA 2006-634-R
	:	Citation No. 6601519; 05/15/2006
v.	:	
	:	Docket No. WEVA 2006-635-R
	:	Citation No. 6601515; 05/15/2006
	:	Docket No. WEVA 2006-636-R
	:	Citation No. 6601518; 05/15/2006
	:	Docket No. WEVA 2006-637-R
	:	Citation No. 6601521; 05/15/2006
	:	Docket No. WEVA 2006-638-R
	:	Citation No. 6601523; 05/15/2006
	:	Docket No. WEVA 2006-639-R
	:	Citation No. 6601524; 05/15/2006
	:	Docket No. WEVA 2006-640-R
	:	Citation No. 6601526; 05/15/2006
	:	Docket No. WEVA 2006-681-R
	:	Citation No. 6601530; 05/16/2006

	:	Docket No. WEVA 2006-682-R
	:	Citation No. 6601532; 05/16/2006
	:	
	:	Docket No. WEVA 2006-683-R
SECRETARY OF LABOR,	:	Citation No. 6601533; 05/16/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2006-684-R
Respondent	:	Citation No. 6601534; 05/16/2006
	:	Docket No. WEVA 2006-685-R
	:	Citation No. 6601535; 05/16/2006
	:	
	:	Docket No. WEVA 2006-686-R
	:	Citation No. 7062302; 05/16/2006
	:	
	:	Docket No. WEVA 2006-687-R
	:	Citation No. 7458067; 05/16/2006
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	:	Docket No. WEVA 2006-688-R
	:	Citation No. 7458068; 05/16/2006
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	:	Docket No. WEVA 2006-689-R
	:	Citation No. 7458069; 05/16/2006
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	:	Docket No. WEVA 2006-690-R
	:	Citation No. 7458070; 05/16/2006
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	:	Docket No. WEVA 2006-691-R
	:	Citation No. 7458071; 05/16/2006
	:	
	:	Docket No. WEVA 2006-692-R
	:	Order No. 7458072; 05/16/2006
	:	
	:	Docket No. WEVA 2006-693-R
	:	Citation No. 7458073; 05/16/2006
	:	
	:	Docket No. WEVA 2006-694-R
	:	Citation No. 7458074; 05/16/2006
	:	
	:	Docket No. WEVA 2006-695-R
	:	Citation No. 7458075; 05/16/2006
	:	
	:	Docket No. WEVA 2006-696-R
	:	Citation No. 7460800; 05/16/2006

: Laurel Creek/Spirit Mine
: Mine ID 46-08387

ORDER TO SHOW CAUSE

These cases are before me on 28 Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Secretary, by counsel, has requested that the cases be continued pending the filing of the corresponding civil penalty cases. The motion states that the Contestant does not object to it. However, before ruling on the motion, additional information is needed.

It appears from the number of notices of contest before me that counsel for the Contestant is routinely filing notices of contest in all cases where, as in the instant cases, the violations are alleged to be "significant and substantial." While a literal reading of the law may permit such filings, there does not appear to be any exigent reason for them, nor do they foster cooperation among the parties or facilitate judicial economy.

Section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20, permit an operator to contest an order or citation without waiting for a civil penalty to be assessed. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). In *Energy Fuels*, the Commission noted that the reason for this is that "the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable" when "related withdrawal orders may be issued before the Secretary has proposed a penalty." (*Id.*) However, the Commission went on to say that if "the operator . . . lacked a need for an immediate hearing, *we would expect him to postpone his contest of the entire citation until a penalty is proposed.*" (*Id.*) (emphasis added.)

Obviously, the operator in these cases does not have an immediate need for a hearing as it has agreed to the continuance. Nevertheless, rather than follow the advice of the Commission, the operator's counsel has filed the notices of contest. This despite the fact that the failure to file a notice of contest of a citation or order will not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in the citation or order, including whether the violation was "significant and substantial" or the result of an "unwarrantable failure." 29 C.F.R. § 2700.21; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1621 (Sept. 1987).

It is apparent that the practice of filing a notice of contest for every citation or order containing special findings places a significant burden on the Secretary. More importantly, processing notices of contests results in the Commission's Docket Office having to prepare duplicate files for the same violation, with the incidental copying associated therewith. While up to 20 orders and citations are included in one civil penalty case when it is received by the Docket Office, each contest case involves a single order or citation. In turn, this necessitates more than twice the storage space. It also requires the *pro forma* ruling on unopposed continuance or stay motions in cases that were never intended to be contested immediately.

Accordingly, Spartan Mining Company is **ORDERED TO SHOW CAUSE**, within **15 days** of the date of this order, why its notices of contests should not be dismissed as an abuse of the Commission's processes. The Secretary will have **10 days** from the date Highland's response is filed to file a reply.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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