COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

NOVEMBER 2004

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

Secretary of Labor, MSHA v. Currituck Sand, Inc., Docket No. SE 2004-154-M.
(Unpublished Default decision by Chief Judge Lesnick, October 14, 2004)

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

Secretary of Labor, MSHA v. RAG Cumberland Resources, LP., Docket No. PENN 2000-181-R, et al. (Judge Feldman, October 18, 2004).

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 22, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2004-154-M
	:	A.C. No. 31-02188-22481
CURRITUCK SAND, INC.	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 9, 2004, Chief Administrative Law Judge Robert Lesnick issued to Currituck Sand, Inc. ("Currituck") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On October 14, 2004, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On November 10, 2004, the Commission received from Currituck a Motion to Reopen setting forth its reasons for failing to answer the Secretary's petition for assessment of penalty and to respond to the judge's show cause order. Mot. at 2-3. Currituck states that it was initially delayed in responding to the Secretary's petition because it confused this proceeding with another pending proceeding with a similar docket number and believed that it had already answered the petition. *Id.* at 2. Currituck also states that the judge's Order of Default was issued prematurely on October 14, 2004, prior to the expiration of the 30 day period during which it was permitted to file an answer in the judge's show cause order. *Id.* Currituck explains that it received the judge's Order to Show Cause on September 17, 2004, and believed it had 30 days from receipt of the order to respond and file an answer, making its answer due on October 18, 2004. *Id.* Currituck further states that it timely filed an answer on October 18. *Id.* Currituck asserts that it also filed a Motion to Vacate the judge's default order, but the judge concluded that he no longer had jurisdiction. *Id.* Currituck requests the Commission to reopen this proceeding pursuant to

Fed. R. Civ. Pro. 60(b) so it may continue its contest. *Id.* at 3. The Secretary does not oppose Currituck's request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on October 14, 2004. 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). We construe Currituck's motion to be a timely filed petition, which we grant.

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"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). 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).

The show cause order directed Currituck "to send an Answer to this Commission *within 30 days* or show good reason for [its] failure to do so." Order to Show Cause (emphasis added). The judge issued the show cause order on September 9, 2004. *Id.* Based on the language of the show cause order, it appears that the judge intended Currituck to respond to the show cause order within 30 days of the date of the order, making the 30th day October 12, 2004. Accordingly, the judge's default order was properly issued after the 30th day on October 14, 2004. *Id.*; Order of Default. However, it appears that Currituck mistakenly believed that the 30 day period began to run from its receipt of the judge's show cause order, and thus believed it timely filed its response.

Having reviewed Currituck's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Currituck's failure to timely respond to the judge's show cause order and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

Leslie Paul Brody, Esq.
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street, S.W., Room 7T10
Atlanta, GA 30303

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

ADMINISTRATIVE LAW JUDGE DECISIONS

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

November 1, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-136-M
Petitioner	:	A. C. No. 38-00016-21326
v.	:	
	:	Cayce Quarry
MARTIN MARIETTA AGGREGATES,	:	
Respondent	:	

DECISION

Appearances: Melody S. Wesson, Conference & Litigation Representative, U.S. Department of Labor, Birmingham, Alabama, on behalf of the Petitioner; Justin Patchan, Manager Safety and Employee Relations, Martin Marietta Aggregates, Augusta, Georgia, 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 (1994), *et. seq.*, the "Act", charging Martin Marietta Aggregates (Martin Marietta) with one violation of the mandatory standard at 30 C.F.R. § 56.3131 and proposing a civil penalty of $324.00 for the alleged violation. The general issue before me is whether Martin Marietta violated the cited standard, 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.

Citation No. 6112053 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3131 and charges as follows:

> The 992 Cat pit loader was partially engulfed by a fall of material from the #2 Bench where it was mucking shot rock loading out haul trucks. Other areas, in front of the loader and to the left, appeared to be loose or unconsolidated as well as a couple areas along the upper edge of the #1 Bench directly above where the loader was working. This condition created a fall of material hazard to persons working or traveling in these areas. The pit foreman stated that the work place examination was done at

0545, and that the loader started loading trucks at 0630.

The cited standard, 30 C.F.R. § 56.3131, provides as follows:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated materials shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

The Secretary alleges that the second sentence of the standard was violated herein. As with many standards, the language of section 56.3131 is simple and brief in order to be broadly adaptable to myriad circumstances. Such a broadly written standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Alabama By-Products Corp*, 4 FMSHRC 2128, 2130 (December 1992). The mine operator need not have actual notice of a specific requirement, but the standard must provide adequate notice of prohibited or required conduct. *Lanham Coal Company, 13* FMSHRC 1341, 1343 (September 1991). The Commission developed the "reasonably prudent person test" to be applied in such circumstances. The test is 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. *Id.*

Accordingly, the issue is whether such a reasonably prudent person would have recognized that the condition of the highwall before its failure created a fall-of-material hazard. In determining whether the mythical objective "reasonably prudent person" would have found that the conditions of the highwall were such as would have created such a hazard the testimony of experienced observers is relevant. *Ideal Cement Co.,* 12 FMSHRC 1409, 2416 (November 1990).

In this regard, Juan Ornelas, a loader operator with 15 years experience and who was operating the subject loader at the time of the collapse, testified that although he felt it was safe in the immediate area where he was then working, he considered the highwall to the right of him (the area that actually failed) to be unsafe (Tr. 27). In this regard, he recognized that he was working within range of a potential collapse from that area - - an area having known cracks and an area deemed too dangerous to work near (Tr. 22-23). Indeed Ornelas had told Pit Foreman Teddy Jackson that conditions in the area to the right of where he was working were "terrible" and that they "shouldn't be working under [those] conditions" (Tr. 27). According to Ornelas, "rocks and stuff always fell there," water was coming out of the highwall and they "always had problems with that section (Tr. 32-33). The dangerous area beneath the highwall had not been barricaded or blocked off to prevent persons from exposure to the hazard (Tr. 30,58-59). Indeed, Plant Manager David Risner testified that Ornelas had been working beneath that area earlier on the same shift and Risner considered that to be an active work area (Tr. 128).

In addition, sometime shortly before the highwall collapse (Ornelas could not provide "exact dates"), Ornelas and one of the truck drivers had seen cracks on the bench next to the highwall that were "getting real big" (Tr.17-18). According to Ornelas, he reported these cracks to his supervisor, Pit Foreman Jackson, who then directed Ornelas to block off the road on the bench above the cracked area. Ornelas then proceeded to block off the haul road as instructed and cut a new road 20 to 30 feet from the edge of the highwall (Tr. 19). Ornelas' testimony is not disputed in this regard and indeed is corroborated by admissions of the operator's agents (Tr. 58-60).

Ornelas also testified credibly that before the highwall collapsed, 100 ton haul trucks were operating on the haul road on the bench above the highwall some 20 to 30 feet from the edge (Tr. 24-25, 28). Ornelas thought that was an unsafe practice and testified credibly that he told Pit Foreman Jackson that "we needed to get off that bench, and that until we did something with it we shouldn't be hauling out of there" (Tr. 30-31). Ornelas was injured as a result of the highwall collapse, suffered neck and back pain and was taken to a hospital.

Inspector James Enochs of the Department of Labor's Mine Safety and Health Administration (MSHA), opined that the cracks in the highwall had been present for some time before the collapse on March 1, 2003. He based this testimony on the admissions to him from both pit foreman Teddy Jackson and plant manager David Risner (Tr. 58-60). They both told Enochs that, because of their concerns about these cracks, they had barricaded the corresponding area on the bench above the highwall. According to Enochs, Jackson also admitted that he had been aware of the cracks depicted in photograph Exhibit D-3. Enochs testified that the whole area to the right and left of the collapsed area had fissures and overhanging rock and that the upper bench near the edge had cracks showing separation.

I also note that Inspector Enochs credibly opined that the conditions depicted in the photographic evidence, showing significant fissures above the subject highwall and overhanging rock on the face of the highwall, were hazardous. I also find that the conditions depicted in the photographs in evidence of fissures and overhanging material would certainly lead the objective "reasonably prudent person" to conclude that a fall-of-material hazard existed in those locations. There is no dispute that the same conditions also existed before the highwall failure at issue and there is no evidence that adequate corrective action was taken to protect workers below the highwall.

In reaching my conclusions herein, I have not disregarded the testimony of Pit Foreman Teddy Jackson. Jackson had 37 years' of industry experience but had been pit foreman for only about six months before the accident. He acknowledged that he had noticed cracks in the highwall following blasting about a week or so before the collapse and identified those cracks in a photograph in evidence (Exhibit D-3) (Tr. 101-102). Jackson claimed the cracks that he observed on the morning of the accident did not show instability in the highwall. He visited that area several times before the collapse and claims that he saw nothing that was unsafe or dangerous. (Tr. 103-105). I find, however, that the more detailed testimony of Ornelas, who was in the best position as loader operator to have closely observed the highwall conditions, is the most credible. The observations of this experienced observer are clearly relevant and persuasive

in determining what the "reasonably prudent person" would have found, i.e. that the condition of the highwall created a fall-of-material hazard.

The violation was also designated as "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

I have no difficulty concluding that the existence of the conditions described by Ornelas made it reasonably likely for a fall-of-material to occur. There can be no dispute that such a fall of material could result in fatal injuries to persons either inspecting, working or passing in range of that part of the highwall.

In determining operator negligence I have considered the fact that pit foreman Jackson was admittedly aware of fissures and cracks in the highwall shortly before its failure(Tr. 101-102,58-60). Indeed in light of these dangerous conditions he had Ornelas block off the haul road on the bench above the cracks and had him create a new haul road 20 to 30 feet from the edge of the highwall (Tr. 19). Loader operator Ornelas testified that, as a result of his discussion with Jackson, he blocked off an area on the top, closed down the haul road near the cracks and created another haul road some 20 to 30 feet away from the highwall. This credible and essentially undisputed evidence demonstrates knowledge on the part of the pit foreman that the cracked areas constituted a hazard that needed remedial action. Accordingly, I find that the pit foreman was highly negligent in failing to take remedial action to protect workers in the area below the highwall. Since the pit foreman was an agent of the operator, his high negligence is imputable to

the operator for civil penalty purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194-197 (February 1991).

Civil Penalty Analysis

In assessing a civil penalty under section 110(i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve compliance after notification of the violation. According to the documents attached to the pleadings, Martin Marietta does not have a serious history of violations and is a medium size business. There is no dispute that it achieved appropriate compliance after notice of the violations herein. Gravity and negligence have been previously discussed. There is no evidence that the penalties herein would affect the operator's ability to continue in business. I have considered the above statutory factors and conclude that the civil penalties assessed herein are appropriate. This penalty reflects, *inter alia*, a much higher degree of negligence than initially alleged by the Secretary.

ORDER

Citation No. 6112053 is affirmed and Martin Marietta Aggregates is hereby directed to pay a civil penalty of $500.00 for the violation charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Melody S. Wesson, Conference & Litigation Representative, U.S. Department. of Labor, MSHA, 135 Gemini Circle, Suite 212, Birmingham, AL 35209

Justin Patchan, Mgr. Safety & Employee Relations, Martin Marietta Aggregates, 3019 River Watch Parkway, Augusta, GA 30907

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

November 2, 2004

MOUNTAIN COAL COMPANY, LLC, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 2004-10-R Order No. 7629370; 9/09/2003
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	West Elk Mine Mine Id. 05-03672
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-305 A.C. No. 05-03672-24602
v.	:	West Elk Mine
MOUNTAIN COAL COMPANY, LLC, Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Mountain Coal Company, LLC.

Before: Judge Manning

These cases are before me on a notice of contest filed by Mountain Coal Company, LLC, ("Mountain Coal") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* (the "Mine Act"). A hearing was held in Delta, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

These cases concern Order of Withdrawal No. 7629370, issued under section 104(d)(1) of the Mine Act on September 9, 2003. The order alleges a violation of 30 C.F.R. § 75.400, which requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The Secretary proposes a penalty of $11,500.00 for the alleged violation.

The body of the order, as corrected for spelling errors, states:

> Excessive/dangerous accumulations of loose coal, coal dust, dry coal float dust, and coal fines were allowed to accumulate on the 17 H.G. Longwall. The excessive dangerous accumulations began at shield #10 and extended to the last shield #165. The back walkway had excessive dry-damp loose coal chunks, coal dust, coal fines and float dust deposited on the walkway of the shields. There was dry black coal float dust deposited on the back of the walkway shield structure and on the metal floor walkway, on the shield control boxes, high pressure hose attachments, electrical cords and electrical control boxes. There was excessive dry-damp packed coal fines and coal dust observed in the control hoses behind the shield legs. The excessive dry-damp packed coal fines and coal dust was observed in the lemniscate back area. Also there was excessive coal fines and coal dust allowed to accumulate and packed in the front of the shield legs. These accumulations measured from approximately ½ inch to 12 inches in depth at different locations on the longwall. The shields were totally black in color. The longwall foreman stated to the writer they had mined between 6 and 7 passes prior. There was no one observed washing down the shields when the inspectors arrived on the longwall. This mine has been cited over 75 times for violations of 75.400 since March 28, 2001. Meetings have been held with management on numerous occasions addressing the recurring problems of violating 75.400. The writer discussed this cleaning on the shields 3 days ago. Management has been put on prior notice in the past that greater efforts need to be implemented to prevent accumulations from occurring at this mine. Spot samples were collected to substantiate the combustibility of the coal accumulations. Also, samples of the dry coal float dust were collected. This mine is on a 5-day methane spot inspection. This type of dangerous condition could result in a major mine explosion or fire.

I. SUMMARY OF THE EVIDENCE

A. Background

Mountain Coal operates the West Elk Mine, an underground coal mine near Somerset in Gunnison County, Colorado. At the time the order was issued, Mountain Coal was operating two continuous mining sections and one longwall section. The order was issued on the longwall section. Mountain Coal has used a longwall at its mine for about 10 years. The longwall uses 165 numbered shields for roof support starting with Shield No. 1 on the headgate side to Shield No. 165 on the tailgate side. The shearer consists of two 7-foot drums that cut coal by traveling back and forth along the working face. The face is 1000 feet long. During the mining cycle, the shearer cuts about seven feet of coal from the face when moving toward the headgate in what is called the main or headgate pass. On this pass, the shearer normally moves about 35 to 40 feet per minute. After this pass, about three or four feet of coal remains on the bottom which is cut on the tailgate pass. The shearer moves about 60 to 70 feet per minute on this pass.

The panline is pushed forward on the tailgate pass by the relay bars connected to each shield. The headgate shearer or a jack setter activates the relay bars to push the panline closer to the face. The shields are pulled forward about 40 inches on the headgate pass starting at Shield No. 165. The movement of each shield is controlled by a computer called the "PM-4," mounted on each shield. First, the hydraulic leg cylinders lower the shield's canopy from the mine roof about six to eight inches. Next, the base lift cylinder rises, allowing the shield's pontoons to lift up over material on the floor. After the shield has been pulled about 40 inches toward the face, the canopy is extended back against the roof with a force of about 600 tons. Side shields are extended from both sides of each canopy so the space between each shield is minimized.

Miners travel along the longwall by walking between the panline and the leg cylinders of the shields. At the hearing, this area was called the "front walkway." Miners can also access the area behind the leg cylinders for maintenance. Although this area was called the "back walkway" at the hearing, miners would not enter the area except to perform repairs or to replace a hydraulic hose. Even a small individual would have difficulty walking along this "back walkway."

The canopy on each shield supports the roof and protects miners from falling rock. A caving shield is behind each canopy. These caving shields are supported by two hinged beams, known as the "lemniscate," which are behind the back walkway. The configuration of the canopies is illustrated in Joint Exhibit 12-2.

A longwall crew usually consists of five miners and one supervisor. On this longwall there was a headgate operator, a headgate shearer operator, a tailgate shearer operator, two jack setters, and a production supervisor. In addition, there are two mechanics and a maintenance supervisor assigned to each longwall production shift. There were a total of four crews for the longwall, three production shifts and one maintenance shift.

The longwall is kept clean of coal dust, coal fines, loose coal and other combustible material through the use of water sprays. One water line is used for the shields and another water line is used for the shearer. About 200 gallons of water is used per minute. There are six water sprays on the body of the shearer that spray toward the face and there are also sprays on the cutting drums. (Joint Ex. 12-4). There is a wide-angle water spray mounted on the shearer near the tailgate drum that sprays toward the shields. This spray, known as the PM-4 spray, keeps the infrared light on each shield computer clean so that it can function properly and it helps keep the shields clean. As the shearer travels up and down the longwall face, the tailgate shearer operator washes the shields with either the hose on the shearer or with the high-pressure hoses on the shields. The tailgate operator would typically wash the front walkway, the toes of the hydraulic leg cylinders, the valve banks, and the PM-4s on the faster tailgate pass. On the slower headgate pass, the tailgate shearer operator spends more time washing the back walkways and the lemniscate. High-pressure hoses on the shields are located on every tenth shield. Washing must be performed continuously throughout the shift to keep the longwall free of accumulations. The jacksetters, as well as supervisors, may spot-clean areas with hoses as the need arises. Miners generally do not clean downwind of the shearer when it is cutting because of the potential increased exposure to respirable dust. These cleaning methods, which are in its cleanup plan under section 75.400-2, have been used at the West Elk Mine for years.

Loose coal and coal dust, including float coal dust, are produced during the mining process. Although coal dust is created by the cutting of coal, most of that dust is suppressed by the water sprays on the body of the shearer. Any remaining coal dust would be deposited along the front walkway, on the front of the leg cylinders, and on the PM-4s. Most of the loose coal and coal dust observed on September 9 was produced by the movement of the shields. When the shields are pulled forward on the headgate pass, the material above the canopy falls onto the shield components because the force of the canopy against the roof pulverizes the roof immediately above it. Loose coal, coal dust, and debris are deposited along the back walkway, on hoses, and other shield components each time the shields are pulled forward. The amount and nature of the material that falls depends on the composition of the mine roof above the shields. Mountain Coal's witnesses credibly testified that, on September 9, 2003, the roof above the shields was mostly comprised of coal. (Tr. 721-25, 940-41, 802, 1018-19). Because the shields are moved forward soon after the back walkway area is cleaned on the headgate pass, new material falls into that area coating the wet equipment with loose coal and coal dust. The tailgate shearer operator cannot hose down the back walkway area after the shields move because it would place him downwind of the shearer and increase his potential exposure to respirable dust.

B. <u>MSHA's Inspection Activities</u>

MSHA has inspected the longwall section of the West Elk Mine many times. On September 7, 2003, Inspector Kenneth Wilson was at the mine to conduct a 5-day methane spot inspection. During this inspection, Inspector Wilson observed accumulations of loose coal and coal dust on the back walkway and on several shield structures. In some places the material was three to four inches deep. (Tr. 44-45, 50-51, 240, 562, 1055). He believed that these

accumulations were more than what is typical on the longwall. Inspector Wilson testified that he discussed his concerns with Gaylon McDaniel, a longwall production supervisor, and Darrell Green, another longwall production supervisor. He pointed out areas of concern and advised them that Mountain Coal needs to do a better job of cleaning the longwall because material is accumulating faster than the company can clean it. McDaniel testified that he understood that Inspector Wilson's primary concern was the accumulations in the back walkway. (Tr. 1036-38, 1051, 1055). Inspector Wilson did not issue any citations for the accumulations because Mountain Coal employees were washing the shields at the time of his inspections. Wilson advised management that he would examine accumulations on the longwall on subsequent inspections.

On September 9, 2003, Inspector Wilson returned to the West Elk Mine accompanied by Supervisory Inspector Larry Ramey. After reviewing pre-shift and on-shift record books, they proceeded to the longwall section. When they arrived on the section, the longwall was not in operation. They were told that the shearer had completed about six or seven passes before it was shut down to repair a water spray boom on the shearer. Inspectors Wilson and Ramey spent about three hours inspecting the longwall face. They separately traveled from the headgate to the tailate stopping along the way to observe conditions and to take samples. The inspectors testified that they observed coal dust, float coal dust, coal fines, and loose coal at various places along the longwall shields, including on the back walkway, on the shield structures, on hydraulic hoses, on power boxes, on electrical cables, and in leg cylinder pockets. Inspector Ramey collected 18 samples of the material at random locations from shield 10 to shield 165.

Inspector Wilson testified that it appeared to him that no washing had occurred since his September 7th inspection or that washing had been totally ineffective. (Tr. 61-62, 75, 110, 117, 239, 241-42). He described the accumulations as obvious and extensive. Wilson testified that the accumulations were particularly extensive along the back walkway, where he measured the depth to be between ½ inch and 12 inches, with a few areas as deep as 18 inches. The depth and type of material varied greatly between shield 10 and shield 165. Inspector Wilson testified that the conditions he observed were "unbelievable" and "filthy" and that the accumulations were the "worst I've ever seen [on] that longwall." (Tr. 60, 72, 117, 818). Supervisory Inspector Ramey testified that the accumulations he observed were the most he had ever seen on any longwall. (Tr. 263). He testified that the accumulations were extensive and obvious. (Tr. 348).

Based on the conditions observed, Inspector Wilson issued the subject order at about 3:05 p.m. As discussed in more detail below, Mountain Coal maintains that the accumulations observed on September 9 were typical for the longwall section and that the accumulations were incidental to normal longwall operations. As a consequence, Mountain Coal management ceased all clean-up operations and called the MSHA District Office in Denver to request that a district official travel to the West Elk Mine to review the conditions observed by the inspectors. Bob Cornett, assistant district manager for technical operations, traveled to the mine to observe the conditions on the longwall. Mr. Cornett arrived at 1:00 a.m. the following morning and the entire inspection team returned to the longwall section with Cornett. They examined the

longwall from the headgate to the tailgate and back. Cornett spent more than two hours observing the conditions and checking them against the language in the order. He also spoke privately with Inspector Wilson about the conditions.

Cornett testified that he observed conditions that concerned Inspector Wilson. He stated that most of the shields had some type of float dust or coal dust on them. (Tr. 567). The accumulations appeared worse as he traveled from the headgate to the tailgate. (Tr. 568). Cornett was especially concerned about the surfaces along the back walkway. He stated that material was packed in and around the deck plates along the back walkway. In areas where these deck plates were missing, loose coal was wedged in between the hoses, electrical components, and the shield structure. Smaller material was packed around the hoses and the loose coal. Cornett believes that this material was so packed in at some locations along the back walkway that spraying the area with water would not remove the material. (Tr. 569). He observed the back walkway by leaning over and looking in. Cornett testified that the accumulations he observed were consistent with what Inspector Wilson described in the order. Following his tour of the longwall section, Cornett concluded that the accumulations were in violation of section 75.400. He testified that these accumulations were not incidental to normal longwall operations and that, "with prudent washdown and cleanup, it is not something that would have occurred over a shift." (Tr. 571). Mr. Cornett advised mine management that he was not going to modify the order of withdrawal following his examination of the longwall section.

In order to abate the cited condition, Mountain Coal assigned 12 miners to clean the longwall shields. Inspector Wilson required Mountain Coal to clean the longwall shields "to bare metal." (Tr. 580, 911-12). As a consequence, the crew removed the deck plates along the back walkway, washed under these plates with water hoses, cleaned out the leg cylinder pockets, and washed down the entire area. As part of the abatement process, more water hoses were attached to the longwall shields to facilitate the washing process. Prior to September 9, 2003, there was a hose located at every tenth shield but when abatement was completed there was a hose every fifth shield. Mountain Coal estimates that it took the crew about 31½ hours to abate the conditions cited in the order. The order was terminated on September 11, 2003.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary maintains that Mountain Coal permitted dangerous accumulations of loose coal, coal dust, float coal dust, and coal fines to accumulate on the longwall section in violation of section 75.400. The Commission has long held that, while some spillage of combustible material is inevitable in mining operations, a violation exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) (*Old Ben II*). The Secretary contends that the combustible accumulations were widespread and were likely to cause or propagate a fire or

explosion. She points out that multiple ignition sources were present along the longwall. The inspectors' determinations were confirmed by a second independent review by an assistant district manager. The Secretary contends that the evidence establishes that the violation was of a significant and substantial nature ("S&S") and that Mountain Coal unwarrantably failed to comply with the requirements of the safety standard.

B. Mountain Coal

The washing practices that Mountain Coal has always used are effective in preventing accumulations of combustible materials on the longwall during the mining process. The longwall mining process, by its very nature, continuously deposits dust and debris on the shields and shield components. No MSHA inspector has ever suggested that Mountain Coal's cleaning procedure on the longwall is inadequate or ineffective. Indeed, Inspector Wilson testified that Mountain Coal keeps its longwall clean. On the morning of September 9, 2003, the longwall was toured by senior management of Arch Coal, Inc., Mountain Coal's parent company. Mine crews took extra efforts to clean the longwall on the shift preceding the tour by senior Arch management. The conditions on the longwall at the time of the inspection on September 9 reflected normal spillage and deposits incidental to the longwall mining cycle. There were no accumulations of 12 inches or more. Mountain Coal submits that the only thing that changed on September 9, 2003, was the MSHA inspectors' opinion of how clean the longwall needed to be maintained during the mining cycle. Mountain Coal contends that the order was issued for conditions that had previously been accepted by MSHA as complying with section 75.400.

The longwall had been cleaned many times using Mountain Coal's normal practices after Inspector Wilson's September 7 inspection. The inspector's belief that the accumulations he observed on September 7 were still there on September 9 is incorrect. The Secretary simply changed her requirements for compliance with the safety standard and failed to provide Mountain Coal with fair notice of the change. In addition, by issuing the order, the Secretary violated the guidelines set forth in her Program Policy Manual ("PPM"). Finally, assuming that a violation was established, the Secretary failed to prove that the violation was S&S and was caused by Mountain Coal's unwarrantable failure to comply with the standard.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Violation of Section 75.400.

1. Findings of Fact Concerning Accumulations of Combustible Material.

The parties present opposing views of the evidence in this case. The Secretary believes that the accumulations were especially egregious and they presented an extremely hazardous condition. Although Mountain Coal disputes some of the testimony presented by the Secretary, such as the depth of the accumulations at certain locations, its primary argument is that the

conditions observed by Inspectors Wilson and Ramey were representative of the accumulations that always develop during the mining cycle. As the mining cycle progresses, accumulations are washed away and new accumulations develop as the shields are moved forward. Mountain Coal contends that what the inspectors observed was the accumulations that had developed during the normal mining cycle.

Mountain Coal believes that MSHA, acting through Supervisory Inspector Ramey, changed its policy as to the amount of accumulations that will be permitted on a longwall section under the standard. Mountain Coal argues that it was using its normal procedures for keeping the longwall clean which had not been questioned by MSHA in the past. Mountain Coal maintains that MSHA inspectors have observed conditions similar to those found on the longwall on September 9 during previous inspections and no citations were issued. It states that when Ramey and Wilson arrived at the mine on September 9 they did not follow the standard inspection procedure. Typically, MSHA inspectors begin their inspection at the portal and proceed inby to the working sections. In this instance, the inspectors prepared combustible material sample bags on the surface and proceeded directly to the longwall without checking the roof, ribs, or any equipment along the way. Mountain Coal believes that these actions establish that they were planning to cite the longwall under section 75.400 when they arrived at the mine based on their new interpretation of the standard.

For the reasons set forth below, I find that the Secretary established a violation of section 75.400. The Commission has grappled with the elements of a violation of the safety standard. "[T]he language of the standard makes accumulations impermissible." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (*Old Ben I*). This standard is "directed at preventing accumulations in the first instance, not cleaning up the materials within a reasonable period of time after they have accumulated." *Id.* The Commission held that "a violation of . . . 30 C.F.R. 75.400 occurs when an accumulation of combustible materials exists." *Id.* at 1958. The Commission went on to state that it accepts the fact that "some spillage of combustible materials may be inevitable in mining operations" but that whether such "spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." *Id.*

When the Secretary seeks to establish a violation of section 75.400, "the absence of evidence of depth and extent of the combustible materials will not, in and of itself, be cause for vacating a citation. . . ." *Old Ben II*, 2 FMSHRC at 2807. The Commission went on to state:

> We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.

Id. at 2808 (footnotes omitted). The Commission recognized that the validity of the inspector's judgment is subject to challenge by the mine operator at the hearing. *Id.* at note 7. The Commission subsequently explained that "the inspector's judgment will be reviewed judicially by reference to an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) (citation omitted); *aff'd* 951 F.2d 292 (10th Cir. 1991).

The Commission has also addressed the interplay between a mine operator's cleanup plan required under section 75.400-2 and the requirements of section 75.400. The Commission held that "an operator cannot avoid a finding of a violation of section 75.400 by arguing that it was merely following a section 75.400-2 cleanup plan that it established." *Id.* at 969. The 10th Circuit specifically affirmed the Commission's holding on this issue. 951 F.2d at 295. The court held that the cleanup plan provision in section 75.400-2 "is simply pedagogical or prophylactic, designed to bring the mandate of [75.400] more emphatically to the attention of mine managers." *Id.* (footnote omitted).

There is no bright line between acceptable accumulations of combustible materials and accumulations that violate section 75.400. The principal issue is whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent.

I credit the evidence presented by Mountain Coal that it cleaned the longwall the same way it always has using water sprays and hoses, as set forth in its cleanup plan. (Tr. 694-95 ; Ex. C-2). I also credit its evidence that, except as discussed below, the accumulations that Inspector Wilson observed on September 7, 2003, had been washed away prior to the inspection on September 9. I find that much of the combustible material observed by Inspectors Wilson and Ramey accumulated when the shields were moved forward, especially the material in and around the back walkway. I credit the evidence presented by Mountain Coal that, if the roof is composed of coal, the pressure of the canopy on the roof pulverizes the coal and this pulverized coal falls between the canopies as the shields move forward during normal mining operations. This pulverized coal falls onto the lower structural components of the shields and falling coal dust adheres to this equipment because it is wet from the water sprays. As a consequence, large amounts of combustible materials accumulate on each move of the shields that must be removed to comply with the safety standard.

It is not possible to maintain the longwall shields completely free of loose coal, coal dust, and float coal dust. Inspector Wilson testified that the longwall at the mine is "usually pretty clean." The key factual dispute is whether the conditions on September 9 were typical or whether the longwall was unusually dirty. As stated above, Inspector Wilson testified that the accumulations were the worst he had ever observed on the West Elk longwall. Inspector Ramey testified that the longwall contained the "most accumulations" he had ever observed at any longwall mine during his 34 years of mining experience. (Tr. 263-64, 348). Mountain Coal's

witnesses, on the other hand, testified that the accumulations on September 9 were well within the normal range observed over the past several years. For example, Peter Wyckoff, the operations manager, testified that the accumulations on the longwall on September 9 at the time of the inspection were neither excessive nor dangerous. (Tr. 908-09). Billy Towles, the longwall maintenance coordinator, testified the cited accumulations "were [the mine's] normal operating conditions." (Tr. 735). Steven O'Connell, a maintenance trainer, was the company walkaround representative during the September 9 inspection. He testified that he did not observe any excessive accumulations. (Tr. 1000). All of the company witnesses testified that the accumulations were not as extensive or deep as set forth in the order of withdrawal.

Mr. Wyckoff took several rolls of photographs shortly after the order was issued. (Ex. C-1). Although some washing occurred before the photos were taken (Tr. 989), I find that they illustrate some of the conditions observed by the inspectors on September 9. Wyckoff took another group of photographs after the longwall was thoroughly cleaned. (Ex. C-3). The "before" photographs show varying degrees of accumulations on the shields. The photos of the areas along the front walkway show light to moderate accumulations of coal dust on the equipment. (Ex. C-1, Bates pgs. 29, 32, 39, 44, 53, 54). Some of the leg cylinder pockets are full of small pieces of loose coal and coal dust. (*Id.* at pgs. 29, 37, 54). These photos can be contrasted with the "after" photos of the same areas in which very little loose coal or coal dust is visible. (Ex. C-3, Bates pgs. 76, 77, 79, 82-85, 88-91).

The "before" photos of the back walkway show extensive accumulations of loose coal, coal dust, and float coal dust in some areas. (Ex. C-1, Bates pgs. 30, 36, 38, 42, 46, 47, 49). In the photos taken after cleanup, these same areas are quite clean. (Ex. C-3, Bates pgs. 78, 81-83, 86, 88, 91, 92, 94, 108). It is this back walkway, including the lemniscate, that were of particular concern to Inspectors Wilson and Ramey. I find that, although some of the shields contained accumulations that may not have independently violated the standard if viewed in isolation, large areas were packed with loose coal, coal dust, coal fines, and also contained float coal dust.[1] The accumulations illustrated in these photographs supported the testimony of Inspectors Wilson and Ramey and the testimony of Mr. Cornett. I credit their testimony concerning the conditions along the back walkway.

I find that the accumulations of coal dust, loose coal, coal fines, and float coal dust discovered during the September 9 inspection violate section 75.400. The depth of the accumulations from shield 10 to 165 varied greatly, but large areas contained excessive accumulations. I find that a reasonably prudent person, familiar with the mining industry and the

---

[1] The following photographs in Exhibit C-1 illustrate the areas of extensive accumulations: photo 3-3 on pg. 30; photos 5-0 and 5-1 on pg. 36; photo 5-5 on pg. 38; photo 5-11 on pg. 41; photo 1-6 on pg. 46; photos 1-11 and 1-12 on pg. 49. Photos 1-6, 1-11, 1-12 and 3-2 show coal dust coating the hoses and the electrical boxes and cables. They also show loose coal and coal dust covering the metal deck plates. Photo 5-0 and 5-11 show loose coal under some deck plates. I base my findings on the testimony of MSHA officials but the photographs help illustrate the conditions.

protective purpose of the standard, would have recognized that the excessive accumulations presented a hazardous condition that the safety standard seeks to prevent.

I base my finding on the conditions found along the back walkway. The coal dust on the PM-4s and other equipment along the front walkway had been present for only a short period of time. The water sprays on the shearer and the hoses used by the miners would clean the dust off the equipment rather easily. At the time of the inspection, the water to the shearer and to the shields had been shut off to repair both the spray boom and the water hose fitting at Shield 89. The shearer had stopped at Shield 130 while making a headgate pass. Thus, the shields had been pulled forward from Shield 165 to about Shield 130 leaving considerable debris. If the inspection party had not arrived, any coal dust along the front walkway would have been cleaned once the repair was made and production resumed. In addition, much of the surface dust along the back walkway would have been removed by the tailgate shearer operator as mining progressed.

The accumulations along the back walkway were much more extensive, as discussed above. I credit Mr. Cornett's testimony that much of the combustible material that he observed in the back walkway had been there for some time. "[W]hat I saw, in my opinion, at that time was not something that was incidental, it was not something that had just occurred, it was not something that occurred after one pass [of the shearer], . . . it was not something that would have occurred over a shift." (Tr. 571). He testified that he observed accumulations along the back walkway that were between ½ inch and 12 inches in depth. He stated that the worst accumulations "were in areas where you didn't have deck plates and all you had was hoses there, where larger material could get wedged in the hoses, get stuck, where if you would hit it with water, it didn't really move it because the hoses held it in place [and] smaller stuff would pack around it. . . ." (Tr. 569, 590-91). Although the coal dust along the front walkway may have been recently deposited, I find that the combustible material along the back walkway was not all deposited on September 9 and that much of the material had accumulated over a considerable length of time. Combustible material had become wedged in the equipment to such an extent that washing the area with a hose as the shearer passed was not sufficient to remove the material. Indeed, in order to abate the order, Mountain Coal employees had to spend about 31 hours washing and cleaning the back walkway. The deck plates were removed in order to clean out combustible material that had accumulated under them.

Mr. Cornett returned to the mine on September 14-15, 2003, after the order had been terminated, to observe the mine's cleaning process on the longwall. Cornett testified that the there was a "night and day difference" between the conditions he observed in the early morning of September 10 and the conditions on September 15. The crew was able to keep the shields and back walkway clean while keeping pace with the shearer. Additional hoses had been added, which made it easier to keep the back walkway clean.[2]

---

[2] Cornett testified that it appeared that, on September 9, some of the dirtiest shields along the back walkway were in areas where water hoses were not as readily available. (Tr. 598-99).

In conclusion, I find that the Secretary established a violation of section 75.400 because of the extensive accumulations on the shields in the longwall section.[3] Although Mountain Coal was following its usual procedure to keep the area clean, circumstances may arise when more extensive cleaning is required to protect the safety of miners. When the longwall is passing through an area in which the shields are pulverizing the coal roof, Mountain Coal may be required to spend more time cleaning the back walkway to comply with section 75.400.

2. Fair Notice Issues

Mountain Coal contends that MSHA changed its interpretation of the safety standard without providing the company with fair notice of the change. It bases this argument on the fact MSHA inspectors have never suggested that its cleaning practices needed to be changed. In addition, Mountain Coal maintains that because it had never received citations for similar accumulations on the longwall in the past, it reasonably believed that such accumulations did not violate the safety standard. I have already found that at least some of the cited accumulations were not incidental to normal mining operations but had existed for a significant period of time. All three of the MSHA officials testified that the conditions were especially egregious on September 9 and, as a consequence, the conditions were not typical. My findings on that issue undercut Mountain Coal's notice arguments.

Mountain Coal relies on the Commission's decision in *Alan Lee Good*, 23 FMSHRC 995, 1004 (Sept. 2001), to support its position that it did not receive fair notice of the Secretary's new interpretation of the safety standard. In that case, the Commission held that prior inconsistent enforcement may be a defense to a citation issued under a vague or ambiguous safety standard. In general, if a standard is ambiguous because it is broadly worded, a judge should defer to the Secretary's interpretation of the standard as long it is reasonable, consistent with statutory purpose, and not in conflict with the statute's plain language. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (DC Cir. 1989); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (DC Cir. 1994). If the Secretary has enforced an ambiguous safety standard in a particular way at a mine, she cannot change her interpretation without giving fair notice to the mine operator. *See Higman Sand & Gravel, Inc.*, 24 FMSHRC 87, 94 (Jan 2002) (ALJ). The Secretary contends that she has not changed her interpretation of 75.400 to fit the circumstances in this case. As discussed above, the Secretary believes that the cited accumulations were worse than had been previously observed along the longwall and the order was issued as a result of these accumulations in accordance with her consistent interpretation of the standard.

As stated above, I find that the combustible materials had accumulated along the back walkway over a significant period of time. The material did not all accumulate during a normal mining shift. I agree with the Secretary that there has been no showing that she has changed her

---

[3] The incombustible content of the grab samples taken during the September 9 inspection ranged from 9.4 percent to 27.9 percent, with an average incombustible content of 15.5 percent. (Ex. G-7). Thus, the material was highly combustible.

interpretation of the standard in this case. Consequently, Mountain Coal had fair notice of the requirements of section 75.400.

3. Consistency with the Secretary's Program Policy Manual (PPM)

The Secretary's PPM provides, in part, as referenced by Mountain Coal:

> There may be times when the inspector's interpretation of what is an accumulation of float coal dust, loose coal and coal dust and/or other combustible materials will differ with the opinion of others. However, the inspector should base his decision upon the facts surrounding each occurrence, and document such facts as the dimensions, type, specific location, and all other related factors. The inspector's decision as to what is an accumulation must be an objective one based on the facts or circumstances surrounding each occurrence.

Mountain Coal contends that Inspectors Wilson and Ramey failed to adhere to this portion of the PPM. It maintains that neither Inspector Wilson nor Inspector Ramey could identify which shields along the longwall contained the deepest accumulations. Mountain Coal argues that the inspectors failed to "document such facts as the dimension, type, specific location, and all other related factors" as required by the PPM. (M.C. Br. 25-26). It states that the inspectors failed to take the kind of detailed notes of the conditions along the longwall that could provide an objective basis for reviewing their conclusions. An accurate description was essential "in order to evaluate the material in the overall context of the circumstances required by the PPM." *Id.* at 28. Finally, Mountain Coal argues that the Secretary "has the burden of establishing that the extent of the material observed exceeded that which is deposited on the shields in the normal mining cycle under those conditions existing at the time the order was issued." *Id.*

I agree that the Secretary has the burden to prove that the size and amount of the accumulation is more than incidental spillage and that the accumulation presents a hazard of propagating a fire or explosion. But I do not agree that the Secretary must prove that the combustible material observed exceeded the amount deposited on the shields in the normal mining cycle. The standard is directed at cleaning up accumulations as they develop. A mine operator cannot permit accumulations to pile up, as occurred along the back walkway in this case, even if the material was deposited in a relatively short period of time. It is important to remember that the accumulations in this case occurred on a working section at the face, not along an isolated belt or in an area that is only traveled by a miner once a shift. Moreover, as stated above, I find that some of the combustible material along the back walkway accumulated over a period of more than one shift.

I also find that Inspector Wilson's description of the conditions he observed is sufficiently specific to comply with the safety standard and is consistent with the language of the PPM.[4] The order sets forth the dimensions, type, and specific location of the accumulations. I find that it was not necessary for the inspector to describe, in either the order or in his notes, the specific condition of each individual shield, from shield 10 to shield 165. Although the amount of the accumulations varied along the longwall, Inspector Wilson believed that, taken together, the accumulations from shield 10 to shield 165 violated section 75.400. It is clear the Inspectors Wilson and Ramey considered the totality of the circumstances along the longwall. As a consequence, Inspector Wilson wrote a single order of withdrawal for the accumulations that extended for about 945 feet along the longwall. Some shields might not have independently been in violation of the standard if considered in isolation, but taken together the entire area contained excessive accumulations of combustible material. Looking at the entire area as a single violation does not violate the safety standard, Commission case law, or the PPM.

Mountain Coal also contends that MSHA did not fully investigate the situation on the longwall before the order was issued. During the inspection, neither inspector asked about the mining conditions that day, the cleaning practices on the longwall, the amount of coal produced or for any other information concerning the conditions that created the accumulations. They simply saw the conditions along the back walkway and assumed that no cleaning had occurred for several shifts. Significantly, it maintains that neither inspector had any knowledge of the amount of combustible materials that accumulate along the longwall during a single shift, assuming that no cleanup occurs. As a consequence, Mountain Coal contends that Inspector Wilson issued the order based on an incorrect understanding of what he observed. Mountain Coal believes that the inspection by Wilson and Ramey was cursory, their conclusions were subjective, and the order was issued in "dereliction of their inspection responsibilities outlined in [the] PPM." (M.C. Br. 24). The inspectors assumed that material had accumulated over at least several days and that little or no cleanup activities had taken place.

I agree that the inspectors did not obtain sufficient information to get a complete picture of what was occurring on the longwall. They observed the accumulations and took samples, but they did not ask any questions. Although it may benefit an inspector to ask questions, the answer to such questions were not necessary to establish a violation in this case. I find that the accumulations of combustible materials violated the safety standard.

Mountain Coal also contends that Inspector Wilson misinterpreted the safety standard because he testified that an accumulation of "any degree of dust" on equipment violates section 75.400. (Tr. 169). However, I find that Wilson clarified his testimony to state that, in order to operate the mine, "there will be some accumulations." *Id.* He went on to state that, on September 9, there were "too much accumulations, too many, the coal dust, the float coal dust, and there was no reason for it, it should have been cleaned up." *Id.*

---

[4] I do not credit the sentence in the order of withdrawal which states that the "shields were totally black in color." This statement is not supported by the evidence and is stricken.

During cross-examination, Inspector Ramey was unable to specify which shields had more accumulations than the others. Ramey contended that it didn't matter which shields were worse than others because the order applied to all shields from shield 10 to shield 165. During this testimony, Ramey stated that "the law says you are not allowed to have accumulations." (Tr. 352). He further testified that a mine operator cannot "pile or layer" accumulations of combustible material but it must clean these accumulations. (Tr. 353). Finally, he testified that a fine layer of float coal dust would violate the safety standard. (Tr. 355). From this testimony, Mountain Coal contends that Ramey was misinformed about the requirements of the standard because in other cases the Secretary has agreed that "the merest deposit of combustible material" does not violate section 75.400. (M.C. Br. 21, *quoting Old Ben I*, n.8). Mountain Coal argues that the Secretary's application of section 75.400 in this case is an impermissible interpretation of the standard "because it renders the standard incapable of compliance." (M.C. Br. 22). Requiring Mountain Coal to remove the deck plates along the back walkway to clean under them "was the height of capriciousness since the deck plates are seldom removed except to access hoses for maintenance or to move the longwall to another location." (M.C. Br. 23).

Mountain Coal's argument is not convincing. Inspector Ramey made clear that a large section of the longwall was cited, not just these areas with "the merest" deposits of coal dust. The conditions were viewed as a whole, not in isolation or shield by shield. Put into context, Ramey was stating that mine operators are required to clean the longwall as the coal is cut and that combustible materials cannot be allowed to accumulate in piles or layers. His testimony was all based on his belief that much of the combustible material he observed on September 9 had not simply accumulated on that shift but had been there for some time. I do not read his testimony to be inconsistent with the PPM or Commission case law.

In conclusion, I find that the Secretary established that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard, would have recognized that the quantity of combustible accumulations along the longwall was likely to cause or propagate a fire or explosion. The fact that deck plates had to be removed and that it took 31 hours to abate the condition demonstrates the extent of the accumulations. The evidence tends to validate the testimony of Mr. Cornett that water sprays alone were not sufficient to clean the back walkway on September 9. Depending on the composition of the roof in a particular area, Mountain Coal may need to more thoroughly clean the back walkway from time to time to comply with section 75.400. Cornett and Wilson noted that, after the back walkway was cleaned of accumulations, miners on the section were able to keep it clean with water hoses.

B. <u>Significant and Substantial Violation</u>

I find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an

injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The violation clearly contributed to a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury. The order was issued because there were excessive combustible accumulations along the shields in the active longwall section. Ignition sources were present on this section. The mine experiences rock spars during the mining process which can create sparks when struck by the shearer. Most of the equipment on the longwall section is metal, which creates a potential for sparks to be created or heat to develop in moving parts. In addition, electrical equipment is present which, if damaged, can emit a spark. The West Elk Mine is quite gassy. It liberates over one million cubic feet of methane in a 24 hour period which subjects it to five day MSHA spot inspections. Indeed, the mine actually liberates about 25 million cubic feet of methane per day. Finally, the extraction of coal results in the release of liquid hydrocarbons, which are highly flammable. Hydrocarbons, which are similar to crude oil or diesel fuel, can contribute to the propagation of a fire or explosion. *See Plateau Mining Corp.*, 25 FMSHRC 738, 739-40 (Dec. 2003) (ALJ).

I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Although the accumulations along the front of the shields would have been cleaned up once the boom for the water sprays was repaired and the section returned to production, most of the accumulations along the back walkway would have remained. As stated above, the Secretary established that most of the combustible material along the back walkway had accumulated over a period of time because the washing process was not removing all of it.

C. Unwarrantable Failure Designation

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991).

I find that the Secretary did not establish that the violation was caused by Mountain Coal's unwarrantable failure to comply with section 75.400. First, it is important to understand that Inspectors Wilson and Ramey were under the mistaken impression that little or no cleaning had occurred between the September 7 inspection and September 9. In fact, the mine had been following its usual cleanup plan during that time. I credit the testimony of Mountain Coal witnesses that it made sure that the longwall was clean when executives of Arch Coal toured the morning of September 9, except I do not credit this testimony with respect to the back walkway. (Tr. 1032-33). The order of withdrawal states that nobody was washing the shields at the time of the inspection. Although that statement is true, washing was not occurring because the section was shut down. Indeed, Mountain Coal shut down production to fix the boom for the water sprays and a water hose fitting that are used to suppress dust and clean the area. This conduct does not suggest "reckless disregard" or "indifference" to the safety of miners on the section.

The order states that the mine had been cited over 75 times for violations of section 75.400 since March 28, 2001. The order also states that MSHA had held meetings with management of Mountain Coal "addressing recurrent the problems of violating section 75.400." Finally the order states that "[m]anagement had been put on prior notice in the past that greater efforts need to be implemented to prevent accumulations from occurring at this mine."

Although these statements are generally correct, they fail to take into account that all of these prior warning and discussions concerned areas of the mine other than the longwall face. The evidence establishes that Mountain Coal received numerous citations for violations of section 75.400 in other areas of the mine. (Ex. S-9). It had only received one citation for a violation of that standard on the longwall face. The meetings mentioned in the order, which were generally closeout conferences, addressed problems of combustible accumulations in other areas of the mine.

A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, 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); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999).

In this case, the violation was extensive. The accumulations along the back walkway would not necessarily be obvious to someone working at the face in the front walkway, but they would be rather obvious to anyone looking into the back walkway, including crew members who were responsible for cleaning that area. Mountain Coal had followed its usual method to eliminate accumulations. The section was not in production because a water spray boom and water hose fitting were being repaired. It is not clear how long the accumulations along the back walkway had existed, but I find that they were present for longer than one shift. I find, however, that Mountain Coal had not been put on notice that greater efforts were necessary to keep the back walkway clean of combustible material. The method of cleaning the longwall shields is

quite different from the efforts necessary to clean up such conditions as coal fines and oil on diesel equipment, coal spills from a belt, loose coal on a continuous miner section, and float coal dust on rock dusted surfaces. With the exception of Wilson's inspection on September 7, Mountain Coal had never been put on notice that greater efforts were necessary to keep the longwall shields clean. Indeed, Inspector Wilson and Inspector David L. Head testified that Mountain Coal had done a good job of keeping the longwall shields clean of accumulations in the past. (Tr. 45, 53, 67, 531-32).

In evaluating evidence of prior warnings that greater cleanup efforts are necessary to meet the requirements of section 75.400, the Commission has generally not required that the previous conditions involve situations identical to those involved in the violation at issue. *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). In this case, however, I find that the meetings and advisories that greater cleanup efforts were necessary in other parts of the mine did not put Mountain Coal on notice that greater efforts were required on the longwall shields. The longwall is a mechanized, highly automated method of mining coal that involves a rather unique cleanup protocol. MSHA officials had given Mountain Coal the impression, during previous inspections, that its cleanup plan for the longwall shields was adequate to meet the safety standard as long as the plan was followed. The Secretary is being inconsistent when her witnesses testify that Mountain Coal had previously kept the longwall shields quite clean by following the cleanup plan and, at the same time, she argues that the accumulations on the shields were the result of the Mountain Coal's aggravated conduct because it had been warned that it needed to do a better job of cleaning the shields.

Although Inspector Wilson's inspection on September 7 provided some notice to Mountain Coal that it was not adequately cleaning the shields, mine management genuinely believed that the areas that concerned the inspector had been addressed. On cross-examination, Inspector Wilson admitted that he did not tell mine management that it needed to assign more people to help clean the longwall or that the mine's cleaning procedures on the longwall needed to be changed. (Tr. 158). Darrell Green testified that, following Inspector Wilson's inspection of the longwall on September 7, Inspector Wilson told him that "there were several areas on the face that he could have cited" but that he did not issue a citation because people were "washing there." (Tr. 1035). Green further testified that Inspector Wilson did not identify any particular shields that needed additional cleaning. (Tr. 1036). Wilson testified that he told Green that Mountain Coal needed to do "a better job washing" because Wilson believed that the company was not washing when inspectors were not around. (Tr. 44-45). Green further testified that Inspector Wilson told him that he was not sure how to "enforce cleanup" on the back walkway, but that Supervisory Inspector Ramey would tell him how to enforce it. *Id.*

Gaylon McDaniel testified that he traveled the longwall face with Inspector Wilson on September 7 and that Wilson did not point out any specific accumulations that needed to be cleaned. (Tr. 1051). He testified that, after the inspection, Inspector Wilson told him, along with Green, that there were "a few areas where the shields were dirty." *Id.* McDaniel did not understand Wilson to be saying that the company needed to do more than what was in the

cleanup plan to keep the shields clean. (Tr. 1052-53). McDaniel also testified that Wilson told them that he was going to check with Ramey about how the standard should be enforced. (Tr. 1053-54).

Although I have taken into consideration MSHA's discussions with mine management about accumulations in other areas of the mine, I find that Mountain Coal believed that it was doing all that was necessary to comply with the standard on the longwall shields. Other than Inspector Wilson's discussion on September 7, there had been no indication from MSHA that Mountain Coal was not doing enough to keep its longwall shields clean.[5] (Tr. 405, 541).

In conclusion, I find that the Secretary did not establish that Mountain Coal engaged in aggravated conduct constituting more than ordinary negligence when it violated section 75.400 along the longwall shields on September 9, 2003. Consequently, the unwarrantable failure designation is stricken from Order No. 7629370 and the order is modified to a section 104(a) citation.

IV. APPROPRIATE CIVIL PENALTY

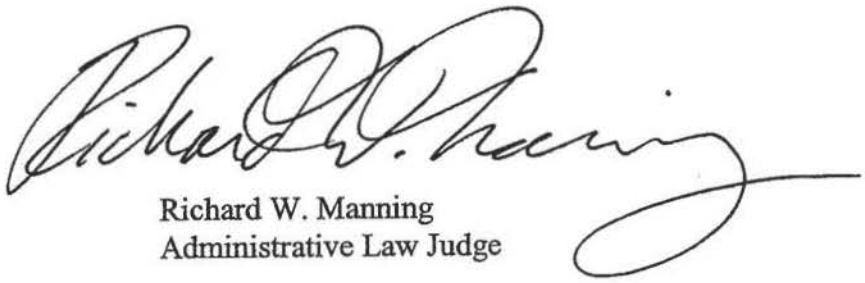
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Mountain Coal had 491 paid violations at the West Elk Mine during the two years preceding September 9, 2003. (Ex. G-1). Mountain Coal is a large mine operator as is Mountain Coal's parent company, Arch Coal, Inc. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Mountain Coal's ability to continue in business. The violation was serious and Mountain Coal's negligence was moderate. Based on the penalty criteria, I find that a penalty of $6,000.00 is appropriate.

---

[5] Apparently, Mr. Green also had some discussions with Inspector Wilson about washing on the longwall shields in August 2003, but the extent and nature of the conversations are not clear. (Tr. 1040-41).

V. ORDER

For the reasons set forth above, Order No. 7629370 is **MODIFIED** to a section 104(a) citation with a moderate negligence finding. Except as noted in this decision, the citation is **AFFIRMED** in all other respects. Mountain Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $6,000.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

November 5, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2002-111
Petitioner	:	A.C. No. 01-01247-03501 VAD
v.	:	
	:	Docket No. SE 2003-69
SEDGMAN,	:	A.C. No. 01-01247-03502 VAD
Respondent.	:	
	:	No. 4 Mine
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2003-189
MINE SAFETY AND HEALTH	:	A.C. No. 01-01247-06606 A
ADMINISTRATION (MSHA),	:	
Petitioner	:	No. 4 Mine
	:	
v.	:	
	:	
DAVID GILL, employed by Sedgman,	:	
Respondent.	:	

DECISION

Appearances: Leslie Paul Brody, Esq. Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for the Secretary;
R. Henry Moore, Esq., Jackson & Kelly, Pittsburgh, PA, for the Respondents.

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, are before me based on Petitions of Assessment of Civil Penalty ("Petition") filed by the Secretary of Labor, pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977 (the Act), alleging violations by Sedgman of 30 C.F.R. §§77.1710(g) and 77.200. Additionally the Secretary filed a petition seeking the imposition of a civil penalty against Sedgman's on-site representative, David Gill, related to the alleged violation by Sedgman of Section 77.200, supra.

Subsequent to notice, these cases were heard in Birmingham, Alabama, on April 20, 21, and 22, 2004. At the hearing, the parties filed a set of stipulations. On July 23, 2004, Respondents filed a Brief and Proposed Findings of Fact. On July 26, 2004, the Secretary filed a Post Hearing Brief. On August 7, 2004, Respondents filed a Reply Brief and Response to the

Secretary's Proposed Findings of Fact. On August 12, 2004, the Secretary filed a statement indicating that it does not object to Respondents' proposed finding of fact, and that it does not intend to reply to Respondents' Brief. On September 29, 2004, in a conference call with counsel for both parties, the parties were ordered to file a statement setting forth their position regarding the applicability of *Twentymile Coal Co.,* 29 FMSHRC 666 (Aug. 2004). The Secretary's statement was filed on October 12, 2004. On October 18, 2004, Respondents filed their statement.

I. Introduction and Findings of Fact

These cases involve the No. 4 Preparation Plant, a coal facility owned and operated by Jim Walter Resources (Jim Walter) that processes coal for Jim Walter's No. 4 underground mine. The plant was constructed in the 1970's, and since that time has undergone various upgrades and modifications.

In August of 2001, the plant was undergoing a major modification, and the work was being conducted on a contract basis. Sedgman was hired by Jim Walter to design and construct the modification of the plant ("the project"). Pursuant to the contract between Sedgman and Jim Walter, the latter expected that Sedgman would have existing steel structures demolished in order to erect new ones. It was not within the contract for Sedgman to replace or repair structural steel that was to remain in place but was subsequently identified as deficient as the project proceeded . Sedgman obligated itself to comply with all health and safety laws, and to supervise the project.

Sedgman entered into a contract with Pro Industrial Welding, Inc. ("PIW") which obligated the latter to provide the labor, equipment, services and materials required to perform the construction activities associated with the project.[1] It was PIW's responsibility to determine the exact method of demolition required by the project. Sedgman retained the right to order PIW to comply with any unsafe practices, and at its discretion to terminate the agreement with PIW.

Sedgman employed David Gill as its on-site representative. Gill came to the site during the first week of June 2001, and was Sedgman's sole employee on the site. Prior to that time, PIW had performed work on the project, including demolition of existing structure and removal of equipment.

It was not Gill's responsibility to directly supervise PIW employees. His responsibilities were to ensure that PIW complied with the engineering drawings, and to receive the equipment shipped to the site for the project. On occasion, Gill would correct safety deficiencies he observed, but PIW was responsible for the safety and supervision of its employees. When certain safety issues arose at the site in July 2001, Jim Walter dealt directly with PIW.

---

[1]PIW, as a contractor, also had other crews at the plant performing work directly for Jim Walter Resources

If during the project PIW discovered deteriorated steel, it was to repair it under a separate contract with Jim Walter. PIW regularly performed work for Jim Walter at this and other plants in repairing and replacing deteriorated steel.

In August 2001, Keith Crabtree, the President of PIW, was its construction supervisor. He was generally present on the site for some period every day but PIW employed "lead men" to direct the day-to-day construction activities of its 39 employees on site. Treavor William Rhine was PIW's lead man on the site in August 2001, and supervised the PIW employees.

On August 27, 2001, PIW encountered an overhang that consisted of a reinforced concrete slab landing that extended from the fifth to the seventh floor of the existing structure. On this date, Rhine was unaware of the need to demolish this landing.

On August 29, 2001, two PIW employees, Rich Fields and Gary McDonald, were assigned by Rhine to connect a steel skeleton that had been erected from the two and one half "decant" floor, into the existing fifth and sixth floor structure at the west side of the plant.

In order to perform this work, a reinforced concrete slab landing extending out from the fifth floor had to be completely removed in order to make the beam connections to the fifth floor. The landing was surrounded by opaque sheeting or siding, and supported a stairway that provided access between the fifth and sixth floors.

The landing consisted of a steel framework covered by a concrete slab. One 19-foot channel formed the outer (west) edge of the support steel. Four cross channels, one at each end (north and south) and two intermediate channels formed the rest of the supporting steel structure below the landing.

The steel landing structure was supported by support members from above; these were attached to the outside edge of the landing at either end (north and south) and at mid-span of the 19-foot channel that formed the outer edge of the landing.

On August 29, 2001, Rhine conferred with Gill; they discussed the fact that the structural drawings did not reflect the existence of the concrete slab landing on a connection point to the main beam on a column. They went to the site and determined that they would have to remove the concrete slab landing before erecting the new floor. Gill suggested that the landing be separated into pieces, cable slings strung through the pieces, and a mobile crane used to "fly" the pieces out. It was Gill's expectation that all of the concrete would be removed before the steel was cut or removed.

Rhine and Gill looked at the bottom of the landing from the second and fourth floors. The view of the steel structure supporting the landing was blocked by the concrete itself and obscured by the presence of the sheeting around the landing.

The underside of the landing could not be readily observed. Access to a view of the underside of the landing from the fourth floor of the plant was blocked by piping and the lighting was poor. In addition, the crane was not available as a personnel hoist to use a manbasket to view the underside of the platform.

During the discussion with Rhine, Gill noted some corrosion of the steel but believed it was in sufficiently good condition to demolish. It did not concern him "... because the whole walkway had to be removed anyway". (Tr. 534-535)

Fields and McDonald removed a portion of the landing. Working north to south, they used a concrete saw to make two cuts across the width of the landing, isolating two pieces, each approximately five feet long. These pieces were lifted out, as suggested by Gill. He did not observe the landing from the fifth floor after the concrete was removed.

In addition to removing two pieces of the landing, some pieces of steel that supported or formed the landing were removed or cut by Fields and McDonald. They also cut the 19-foot channel as the north end of the landing, eliminating any support for the outer edge of the channel at the north end and the stability that had been imparted by the connection at the end of that channel. In addition, they removed an intermediate channel cross piece that provided stability to the structure, particularly the 19-foot channel supporting the landing. The removal of these supports reduced the load bearing capacity of the 19-foot channel.

Three hangers supported the outside edge of the platform, one on the north end, one on the south end, and one in the middle of the channel formed the outer edge of the platform. The support from the north end hanger was eliminated when the north end of the 19-foot channel was cut. As a result only two hangers, the one at the south and the one in the middle, were left to support the outer edge of the platform. Fields cut the mid-span hanger that supported the outer edge of the platform, which caused the landing to fail. Fields fell to the floor located at level two and half, and suffered a fatal injury.[2]

There is not any evidence that Fields was wearing a safety belt immediately prior to the accident. In the post accident investigation of the site, fall protection devices were not found.

Subsequent to an investigation, MSHA issued Sedgman two citations alleging violations

---

[2]Respondents' expert, Fill, explained in credible testimony, as it was not contradicted or impeached, that a chain hoist had been attached to the steel channel on the other edge of the structure that improperly supported the landing and one of the stair treads above it. This arrangement pulled the channel laterally toward the building. In addition, removal of the cross piece and the cutting of the north of the 19-foot channel, lateral forces (i.e., torsion) on the channel that formed the outer edge of the platform and on the south hanger. These forces exceeded the design capabilities of the supports, causing their failure. Fill opined that due to the action of these forces, even if the supports were new, it was likely that the landing would have fallen due to failure of the supports

of 30 C.F.R. §§77.1710(g), and 77.200. MSHA also issued a citation to Gill under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("The Act") relating to the alleged violation by Sedgman of Section 77.200, supra.

II. Discussion

A. Docket No. SE 2003-69 Citation No. 7676881, violation of 30 C.F.R. § 77.200 (Docket No. SE 2003-6a), and Gill's liability under Section 110(c) of the Act (Docket No. SE 2003-189)

Subsequent to the investigation of the August 29 fatal accident, the Secretary issued Citation No. 7676881 to Sedgman. The citation alleges a violation of Section 77.200, supra, as follows: "Steel members and supporting structures beneath and attached to the concrete deck of the 5th floor level were not substantially maintained to prevent collapse of the structure. The steel beams and structure associated with the deck support showed signs of deterioration, corrosion, and fatigue which had seriously reduced their load carrying capacity."

Section 77.200, supra, provides, as pertinent, that all mine structures, or other facilities "... shall be maintained in good repair to prevent accidents and injuries to employees.

In support of its position that Section 77.200 was violated, the Secretary relies on the testimony of Terence Michael Taylor, its expert. On August 30 and September 1, 2001, he examined the structural steel members that had supported the landing at issue. He noted that the cited area contained significant amounts of rust, corrosion, delamination, and deterioration in supporting steel vertical, diagonal, and horizontal members. Photographs taken at the time illustrate his testimony (Exhibits P-5 through P-8, P-13 through P-19, P-21 through P-36).

On the other side, Respondents argue, *inter alia*, that Section 77.200, supra, does not apply to demolition work, and that even if it does so apply there was not any violation. Respondents also argue that even if it is found that Section 77.200, supra, was violated, the Secretary abused its discretion in citing Sedgman. Also, that the Secretary's delay in notifying Respondents of penalty proposals should result in dismissal of these petitions. For the reasons that follow, I find these defenses to be without merit.

1. The applicability of Section 77.200, supra, to structures being demolished.

In essence, Respondents argue that it is not logical to maintain a structure in good repair where, as here, it will no longer be used as it is in the process of being demolished. Respondents further argue that Section 77.200, supra, should not be applied to Sedgman because it was not in any position to maintain the structure in good repair inasmuch as the deteriorating rust conditions had existed for an extensive period of time, and Sedgman only became contractually involved with the cited area for a brief time in August 2001.

I recognize the logic inherent in Sedgman's position. However, in resolving the issue posed regarding the interpretation of the scope of Section 77.200, supra, I look first of all at its plain meaning. *Island Creek Coal Co.*, 20 FMSHRC 14, 18 (Jan. 1998). In this connection, the unambiguous wording of Section 77.200 imposes an unrestricted duty to maintain structures in good repair to prevent accidents and injuries. The regulation does not contain any exception for structures that are being demolished. Thus it would not be proper for me, as an Administrative Law Judge bound to follow the regulations, to carve out an exception where one does not already exist. To do so would usurp the congressionally delegated responsibility of the Secretary of Labor to promulgate appropriate regulations. Further not to apply the requirements of Section 77.200, supra, to the cited area because it was going to be demolished, would violate the purpose of Section 77.200, supra, i.e. to prevent accidents and injuries to employees. In this case, Sedgman's representative on the premises, Gill, and the employees of PIW, with whom Sedgman contracted to perform the demolition work, would be unnecessarily exposed to the hazards of working in and around structures not being maintained pending their actual demolition.

2. The Citation of Sedgman by the Secretary

It is well established by Commission precedent that "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner/operator, his contractor, or both." *W-P Coal Co.* 16 FMSHRC 1407, 1411 (July 1994). Thus, MSHA may properly hold an operator strictly liable for all violations of the Mine Act that occurred on the mine site "... whether committed by one of its employees or an employee of one of its contractors." *Mingo Logan Coal Co.*, 19 FMSHRC, 246, 249 (Feb. 1997). In *Mingo Logan*, supra, at 249, the Commission quoted its earlier holding in *Bulk Transportation Services, Inc.*" 13 FMSHRC 1354, 1359-60 (Sep. 1991), that ' ... "the Act's schemes of liability [that] provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors." '

The Commission's holding in *Mingo Logan*, supra, related to the citing of an operator for a violations committed by its contractor. The Commission in *Mingo Logan*, supra, at 251 rejected the operator's assertion "... that the citation against it fails to promote the safety purposes of the Act." The Commission reasoned that this assertion was inconsistent with the rationale of the Ninth Circuit in *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F 2d. 1116, 1119 (9th Cir. 1981). In this connection, the Commission, *Mingo Logan*, supra, at 251 quoted the following language from *Cyprus*, supra. ' "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work [Id.]" '. Applying this language, the Commission reasoned that holding a production-operator liable for violations of their independent contractors "... provides operators with an incentive to use independent contractors with strong health and safety records." (Id.) I find that the same rationale applies with equal force to the holding of a contractor liable for the violation of its subcontractor as an incentive to use a subcontractor with strong health and safety records.

I take cognizance of Respondents argument that, in essence, the Secretary abused her discretion in citing Sedgman as it did not have control over the conditions of corrosion and deterioration during their development, nor did it know of the existence of these conditions. Also alleged is that Sedgman was not a principle party responsible for the corrosion, and did not contribute to the violative condition.

On the other hand, I note that Sedgman, due to its contract with Jim Walter relating to the demolition project of the cited area, obligated itself to comply with all safety laws and to supervise the project. In this connection it furnished an on-site construction manager, and contracted with PIW for the latter to perform the work at the cited area. As such, Sedgman was clearly aware that as part of the project for which it was responsible to Jim Walter, employees would be working on or in close proximity to the cited area.

Within the context of all the above, I find that the Secretary did not abuse its discretion by citing Sedgman.[3]

3. The Violation of Section 77.200, supra

It is Respondents' position that since demolition of the cited structure was contemplated as part of the project, a reasonably prudent person would interpret the requirements of Section 77.200 in these circumstances as requiring maintenance of the structure in sufficiently good repair to prevent demolition.

Respondents argue that the area in question was in sufficiently good repair to allow demolition. In support of this argument, Respondents cite the testimony of the Secretary's expert, Taylor, that had the support framing not been cut on August 29, it would not have collapsed. In this connection, Sedgman's expert, Fill, described the actions taken by PIW's employees on August 29, which created various forces that caused the supporting members to fail. He opined that accordingly, these members would have failed even if they were in new condition. Thus, it is argued that there was not any violation of Section 77.200, supra.

For the reasons that follow, I find Respondents' interpretation not to be in harmony with the requirements of Section 77.200, supra.

I agree with the holding of former Commission Judge Koutras, that "... in order to establish a violation of Section 77. 200, supra, the disrepair or condition of the cited equipment must present a hazard to miners." *U.S. Steel Mining Co.*, supra, 13 FMSHRC 1465, 1473 (Sept.

---

[3]In support of its position that it was improperly cited by the Secretary, Sedgman cites *Industrial Company of Wyoming,* 12 FMSHRC 2463, 2478 (Judge Cetti) (Nov. 1990), as holding that Section 77.200, supra, does not apply to buildings under construction. To the extent that this decision, written by a fellow commission judge, is contrary to my decision on the issue presented herein, I choose not to follow it as it is not binding.

1991) aff'd 14 FMSHRC 973 (June 1992)). Subsequently, in *Freeman United Coal Mining Co.* FMSHRC 108 F. 3rd 358 (D.C. Cir. (1997)), the Court of Appeals, in rejecting the operator's claim that Section 77.200, supra, was vague and hence unconstitutional, held that the plain language of Section 77.200, supra, gives fair notice of what it requires. The court, in essence, agreed with the finding of former Commission Judge Koutras, that:

> the plain meaning of the standard's requirement that structures be "maintained" to prevent accidents and injuries is that the structures ... be " '[kept] in a state of repair or efficiency[,]. ...[kept] in good order [,] ... or preserv[ed]' " so that they do not deteriorate to a condition that is hazardous.' J.A. 67 (citing *Webster's Third New International Dictionary*, Unabridged) 1362 (1971); a *Dictionary of Mining, Mineral and Related Terms* 677 (1968); and *Black's Law Dictionary* 859 (ed. 1979)). *Freeman United,* supra, at 362.

Based on *Freeman United*, supra, I find that the plain meaning of Section 77.200 requires the cited structures to have been maintained at a level of repair sufficient to have prevented their condition from deteriorating to the point where they have become hazardous. To find, as argued by Respondents that Section 77.200 is satisfied because the cited structures were maintained sufficiently to allow demolition, would impose a lower duty of maintenance than that required by the plain meaning of Section 77.200, supra. It would allow supporting structures to be in such disrepair as to constitute a hazard, which is clearly precluded by the plain meaning of Section 77.200, supra.

According to Taylor, support for the southwest corner of the landing was provided by a hanger (the intersection of a vertical beam and a horizontal beam). Examination of the horizontal cross section of the hanger indicated it had lost 80% of its thickness due to corrosion. In addition, angles attached to the webbing of various horizontal supporting beams were corroded. A horizontal supporting beam had a notch the size of a half-dollar coin where it connected to another beam. Another area on this beam was torn. The beam itself and bolts on the beam were rusted. Also noted were areas of rust, notches, and delamination on other supporting steel members. In the main, this testimony was not impeached or contradicted.

I find that the record establishes the existence of extensive conditions of rust, deterioration, and corrosion including portions of supporting members that were no longer whole, or whose thickness had been significantly reduced. Based on these findings, I conclude that it was more likely than not that the supporting structures had deteriorated to a condition that was hazardous.

Therefore, based upon all the above, I conclude the Secretary has established by a preponderance of evidence that the cited area was not being maintained in good repair to prevent accidents and injuries to employees. Accordingly, I find that Sedgman did violate Section 77.200, supra.

4. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon 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." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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.

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

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

It is clear that the evidence establishes the violation of a mandatory standard and that the violation contributed to the creation of a hazard, i.e., structural failure of the landing at issue. Further, due to the extensive corrosion including holes in supporting members, and significant reduction of their thickness, it was reasonably likely that the hazard of a failure of supporting members would have occurred causing the landing to fall. I note the testimony of Boyle, that was not impeached or contradicted, that the hazard of a collapse of the landing, contributed to the violation herein, would have reasonably likely resulted in serious injuries.

With regard to the third element in *Mathies*, supra, it appears to be the position of Respondents that the landing at issue would not have failed had it not been for the mistakes made

by PIW employees. In this connection Sedgman's expert testified extensively that the failure of the supporting members was caused by lateral forces on these members created by mistakes made by PIW employees. It is argued that, accordingly, the rusted deteriorated condition of the supporting members did not play any part in the landing's failure.

I do not place much weight on this argument. The key issue for resolution is not whether the cited conditions caused the failure that actually occurred, but rather whether these conditions were reasonably likely to have resulted in collapse of the landing. (See, *U.S. Steel*, supra, at 1129). I find, based upon the evidence of extensive rust deterioration, holes in, and significant thinning and delamination of deterioration of supporting members, that the Secretary has established the third criteria of *Mathies,* supra, i.e., that there was a reasonable likelihood that the violative condition would have resulted in failure of support for the landing, an injury producing event. Further, inasmuch as the accident herein, failure of supporting members of the landing, resulted in a fatality, I find that the fourth criteria in *Mathies*, supra, has been met. Based on all the above, I conclude that the cited violation was significant and substantial.

5. Unwarrantable Failure and Gills liability Under Section 110(c) of the Act (Docket No. SE 2003-189)

It is the position of the Secretary that the record establishes that the violation herein was as a result of Sedgman's unwarrantable failure. The Secretary argues that the violative condition was obvious and extensive, referring to the fact that the conditions existed for 25 years. The Secretary also relies on the opinion of its expert, Taylor, who examined all structural members on August 30, that various corrosive and deteriorating conditions would have been observable before the structure collapsed.

The Secretary also alleges that Gill violated Section 110(c) of the Act[4] because he knowingly acted in giving instructions in how to demolish the landing, knowing it was in poor shape, having seen rust and corrosion without first checking the integrity of the structure .

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known"

[4]Section 110(c) of the Act imposes liability on an agent of an operator who " ... knowingly authorized, ordered, or carried out" a violation by the operator of a mandatory standard.

test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary* v. *VA. Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

In support of its position that the violation was as a result of Sedgman's unwarrantable failure, the Secretary refers to the testimony of the inspector in which he indicated, *inter alia*, that he determined Sedgman's negligence was high because Gill had stated to him that he (Gill) had observed some corrosion of the landing from underneath. On the other hand, Gill testified that on August 29, when he was on the 4th floor, there was some obstruction of his vision, the lighting was poor and he saw "some" rusting (Tr. 534). I find this testimony credible based on my observations of his demeanor while testifying, and because some obstructions are depicted in various photographs (Exs. P-17 and P-18).

The weight to be accorded to Taylor's opinion regarding the obviousness of the deteriorating conditions is diluted somewhat by the fact that it was based on an examination of structural items after the landing had already fallen. Prior to this occurrence, the entire area at question had been surrounded by an opaque sheeting that had reduced the lighting. The record does not establish that the sheeting was still in place when Taylor made his observations of the structures that remained in place.

Further, as noted by Respondents, the mid-span hanger, that, according to Taylor had rust on it that was visible, was located under the stairs thus reducing the likelihood that it would have been apparent to someone in the area.

In the two year period prior to August 29, 2001 there were not any violations of Section 77.200, supra, issued to Jim Walter who had control of the structure's supporting members of the entire plant including the area in question. This tends to weaken a finding that the violative conditions were obvious. Further, on August 28, 2001, an MSHA inspector who was on the site to inspect chain hoists used on the stairwell in question, did not make any comments about the condition of the steel on the landing.

Moreover, any failure on Gill's part to take action to assess the integrity of the supporting steel members or to repair them is mitigated by the fact that the conditions had existed for probably more than 20 years on a structure within the control of Jim Walters. In contrast, in examining Gill's relationship to the violative conditions, the record indicates; 1) that he and Sedgman were responsible mainly for adding on to the original structure rather than maintaining it; 2) that he and Sedgman had been involved in the area in question for just a very short period, and; 3)that Sedgman was not obligated to Jim Walters to replace any existing steel found to be in a deteriorated condition.

Within the above context, I find that the weight of the evidence does not establish that the

violation was as a result of Sedgman's aggravated conduct and hence there was not an unwarrantable failure. Further, within the context of this evidence, I find that due to various mitigating factors it has not been established that Gill knowingly authorized, ordered, or carried out the violation of Section 77.200, supra. (See, *Warren Steen Constr., Inc.* and *Steen*, 14 FMSHRC 1125, 1131 (1992). Accordingly, I find that it has not been established that Gill violated Section 110(c) of the Act.

6. Penalty

The gravity of the violation was relatively serious as discussed above. (II(B)(4), *infra*) However, for the reasons set forth above (II(B)(4) *infra*) the level of negligence is less than that originally found by the Secretary as set forth in the narrative findings for a special assessment appended to the petition. Thus, in weighing the various factors set forth in Section 110(I) of the Act, I accord considerable weight to the less than high degree of negligence. Placing considerable weight on this factor and considering the remaining factors in Section 110(I) of the Act, I find that a penalty of $1,000.00 is appropriate for this violation.

It is Sedgman's position that it should not be assessed any penalty and that the petition should be dismissed.[5] It is argued that Section 105(a) of the Act was not complied with by the Secretary inasmuch as Section 105(a), supra, requires that the Secretary shall "within a reasonable time" after the termination of an investigation notify the operator of the proposed civil penalty. Sedgman refers to the following facts that have been stipulated to; 1) on February 4, 2002, Citation No. 7676881 was issued to Sedgman and on the same date issued its accident investigation report; 2) the assessment of penalty for this citation was proposed on December 31, 2002, and; 3) the petition for assessment of civil penalty with respect to this citation was filed on February 27, 2003.

The Secretary argues that the delay in issuing the accident investigation report five months after the accident was reasonable given a multiple operator situation, and the complexity of determining whether Sedgman maintained the structures in good repair. The Secretary has also alleged in the set of stipulations filed that she "would offer evidence" that the reason for the

---

[5]Initially, Respondents, in their brief, had sought dismissal of the petition for assessment against Gill on the ground that the Secretary reasonably delayed notifying Gill of a civil penalty for almost two years after the accident and 18 months after the citation was issued. In light of the decision dismissing the 110(c) action against Gill consideration of this argument is moot at this point. However, in a footnote to its argument, Respondents assert that although they did not intend to brief a similar argument regarding a delay in the issuance to a penalty to Sedgman such a argument was not waived. In a statement filed subsequently on September 29, 2004, Sedgman stated its position that Citation No. 7676881 issued to it should be dismissed because the civil penalty was unduly delayed. Accordingly, the legal arguments set forth in their brief on this issue relating to the penalty proposed against Gill, were considered in deciding the similar issue raised regarding the penalty assessed against Sedgman.

passage of time between the issuance of Citation No. 7676881 and the issuance of the proposed penalty to Sedgman was "problems with the implementation of a new computer system for assessments".

Essentially the same issue presented herein was considered by the Commission in the recent case of *Twentymile Coal Co.*, 26 FMSHRC 666 (Aug 2004). In *Twentymile*, the Commission, in considering the requirements of Section 105(a), supra, held that "the issue ultimately turns on whether the delay is reasonable under the circumstances in each case". (*Twentymile*, supra, 682)

In *Twentymile*, supra, at 684 the Commission also noted that the Secretary set goals for timely proposing penalty assessments as set forth in its program policy letter (PPL) No. P 99-III-5, at 6 (Aug 16) 1999) which provides that even cases involving "a serious accident, fatality, or other special circumstance should be assessed within 180 days [6 months] of the accident." The Commission further noted that in addition the PPL stated that to meet that goal "the office of assessments should process citations and orders within ... 45 days for accident-related assessments." (Id.)

The Commission, in *Twentymile*, supra, at 682, reviewed *Salt Lake County Road Dept.*, 3 FMSHRC 1714, *Steel Branch Mining*, 18 FMSHRC 6 (Jan 1996), *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), and *Black Butte Coal Co.*, 25 FMSHRC 457 (Aug 2003). The Commission held that under these cases, in analyzing the Secretary's delay in proposing a penalty either resultant prejudice to the operator, or lack of proof of adequate cause may be a ground for dismissing the penalty petition. (Id.)

In the case at bar the only grounds asserted by the Secretary to establish reasonableness of a delay between the citation and the penalty proposal is the statement in the parties' stipulations that the Secretary "would offer evidence" that the reason for the passage of time between these periods was "... problems with the implementation of a new computer system for assessments." However, the Secretary has failed to establish any of the specifics to support this assertion. Thus, the record is devoid of evidence regarding the nature of the problems of the computer system when these problems were discovered, how long they lasted, and how they specifically caused a delay in the issuance of the proposed penalty to Sedgman. The lack of adequate proof to justify the Secretary's delay distinguishes the case at bar from *Black Butte*, supra, and *Steel Branch*, supra, where the Commission held that reasonableness of delay was established.[6]

In *Twentymile*, supra, the Commission found that the bulk of the delay was due to; 1) unexplained delays in the review and issuance of the accident report and; 2) neglect in moving

---

[6] In *Black Butte*, supra, the Commission found that a 13 month delay was due in large part to ongoing revisions to an accident report requested by the operator. In *Steel Branch*, supra, the Secretary delayed 11 months but did not offer any reason. However, the Commission took judicial notice of the Secretary's unusually high case load at that time and found justification for the delay.

the report through agency channels. (*Twentymille*, supra at 682) The Commission noted that the 17 month delay therein between the accident date and assessment "greatly exceeded" the Secretary's goal of six months. (*Twentymille*, supra at 684) The Commission found that the Secretary's handling of the penalty assessment and her rationale for the excessive delay was "wholly inadequate." (*Twentymille*, supra at 685) Based on this finding, the Commission held that it was "compelled" to vacate the civil penalty. (Id.)

The case at bar presents similar inadequate rationale for a delay. The 16 month delay herein between the accident on August 29, 2001, and the proposal of the penalty assessment on December 31, 2002, is substantially the same as the 17 month delay presented in *Twentymile*, supra. Also, in the case at bar, the accident report was not completed and issued until five months after the accident, which is comparable to the seven month delay in *Twentymile*, supra.

In *Twentymile*, supra, at 684, the Commission held as follows:

> While we could possibly excuse delay in *either* the preparation of the accident report *or* the processing of the proposed penalty, the cumulative effect of the two significant delays that took place in this case lies beyond the boundaries of what the Commission has previously allowed as reasonable under the circumstances.

In the case at bar the Secretary similarly delayed both the preparation of the accident report, and the processing of the penalty, and the extent of the delays were significant the same as in *Twentymile*, supra. Accordingly, the delays herein appear to fall squarely within the Commission holding that the cumulative effect of these delays "... lies beyond the boundaries of what the Commission has previously allowed in the past." (Id.)

Further, the unexplained delay in *Twentymile*, supra, is similar to the lack of facts in assertions by the Secretary herein to provide a rationale for the delay. Indeed, the Secretary did not adduce any evidence on this issue at the hearing.

I find that there were delays in issuing the accident report and the penalty but no facts adduced regarding a rationale for the delay in issuing the penalty assessment. I conclude, following *Twentymile*, supra, that it was not established by the Secretary that there was adequate cause for the delay. Accordingly, following *Twentymile*, supra, at 685, I am compelled to vacate the civil penalty, but stress that the finding of the violation remains intact.

C. Citation No. 7669633 (Docket No. SE 2002-111)

1. Violation of 30 C.F.R. §77.1710

Citation No. 7669633 cited Sedgman, as pertinent, as follows "contract employees did

not wear safety belts and lines when there was a danger of fall during demolition and reconstruction work at the JWR plant ... . Prior to the accident, Sedgman, the contractor responsible for directing and monitoring the construction activities, had observed the work area and work activities."

The citation alleges a violation of Section 77.1710, supra, which provides, as pertinent, that "each employee working in ... the surface working areas of an underground coal mine shall be required to wear protective ... devices as indicated below:

* * *

(g) safety belts and line where there is a danger of falling ... ."

On Wednesday August 29, 2001, PIW employees, Ricki Fields and Gary McDonald, were assigned by Rhine, PIW's lead man on the site who supervised their employees at the time, to work on the fifth and sixth floors of the west side of the plant. Their duties included connecting the steel skeleton that had been erected from the two and a half "decant" floor into the existing fifth and sixth floor structure. Their duties involved working on the fifth floor landing, approximately 35 feet above the ground.

James Robert Boyle, Jr., an MSHA ventilation specialist who was on the site on August 30, testified that during the investigation of the August 29 accident, fall protection devices were not found. According to Inspector Church, on August 30, he looked at the 5th floor landing area where a portion had collapsed. He observed that there were not any handrails, safety ropes, guarding, or safety devices installed on its outer edges. This testimony was not impeached or contradicted, and I so find.

Based on the testimony which was not contradicted or impeached I find that Fields, who had fallen from the landing on August 29 had not been wearing a fall protection device. Within the context of the above facts I find that on August 29 a violation of Section 17.10, supra, occurred.

As a defense, Sedgman argues that since Fields was an employee of PIW, Sedgman's subcontractor, it was improper of the Secretary to cite Sedgman for the violation which it did not commit. Further, Sedgman asserts that Fields had not been directly supervised by Sedgman. For the reasons that follow I find Sedgman's argument to be without merit.

As set forth above, the Secretary has the discretion to cite a contractor for violations committed by employees of its subcontractor. (IIA(2)(*infra*)) In evaluating whether the Secretary abused her discretion in citing Sedgman, focus is placed on the scope of Sedgman's supervision and control of its subcontractor's work practices.

Before Gill arrived on the site during the first week of June 2001, PIW, Sedgman's

subcontractor, had been performing work on the site, and supervising its own employees. PIW was responsible for their safety. In July 2001, after Gill arrived on the site, the owner, Jim Walter, dealt directly with PIW when certain safety issues arose On August 29, 2001, Rhine, who was PIW's lead man, directed the day to day construction activities of PIW's employees and supervised them.

On the other hand, pursuant to an agreement dated May, 2001, between Jim Walter and Sedgman, the latter obligated itself to comply with all health and safety laws. Sedgman was further obligated, under the agreement, to furnish labor, supervise the project, and complete it. In carrying out its agreement with Jim Walter, Sedgman employed PIW to provide the labor to perform the construction activities. In the agreement PIW obligated itself to comply with all safety regulations on the job but Sedgman retained the right to order PIW to comply with any unsafe practices and at its discretion, to terminate PIW.

Gill testified that, in his capacity as Sedgman's on-site manager, in the three months he was at the site prior to August 29 "on occasion" he told PIW employees to put on safety belts. Also, two to three times he had told PIW employees to come down from a ladder as they were not working safely, and the employees reluctantly did what he told them. Also, Gill testified that when PIW employees were operating a jackhammer he told them to make sure that they were tied off.

I find that the above factors are sufficient to validate the Secretary's action in citing Sedgman for the violation committed by PIW's employees. I thus find that the Secretary did not abuse its discretion.

2. Significant and Substantial

The record clearly establishes that a violation of a mandatory standard is the lack of safety-belt and line, which contributed to the hazard of falling off a elevated landing. Indeed, the fact that Fields did fall from the landing establishes that the hazard of falling off from the landing was reasonably likely to have occurred. The fall actually resulted in a fatality. I thus find that the evidence establishes that the violation herein was significant and substantial. (See, *Mathies*, supra)

3. Penalty

Based on all the factors set forth in Section 110(I) of the Act, I find that the proposed penalty of $160.00 is appropriate for this violation.

Order

It is **Ordered** that within 30 days of this Decision Sedgman pay a civil penalty of **$160.00** for the violation of Section 77.1710, supra, as alleged in Citation No. 7669633. It is further

Ordered that Citation No. 7676881 be amended to delete the finding of unwarrantable failure. It is further **Ordered** that Docket No. SE 2003-189 be Dismissed.

Avram Weisberger
Administrative Law Judge

Distribution:

Leslie Paul Brody, Esq. Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

R. Henry Moore, Esq., Jackson & Kelly, PLLC, Three Gateway Center, 401 Liberty Ave., Suite 1340, Pittsburgh, PA 15222

/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 29, 2004

HOBET MINING COMPANY, INC., dba DAL-TEX DIV.	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. WEVA 2004-64-R
	:	Citation No. 7205693; 01/13/2004
	:	
v.	:	Docket No. WEVA 2004-65-R
	:	Citation No. 7205696; 01/13/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2004-66-R
MINE SAFETY AND HEALTH	:	Citation No. 7214788; 01/08/2004
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 2004-67-R
	:	Citation No. 7214789; 01/08/2004
	:	
	:	Docket No. WEVA 2004-68-R
	:	Order No. 7224622; 01/13/2004
	:	
	:	Docket No. WEVA 2004-69-R
	:	Citation No. 7224624; 01/13/2004
	:	
	:	Docket No. WEVA 2004-70-R
	:	Order No. 7224625; 01/13/2004
	:	
	:	Docket No. WEVA 2004-71-R
	:	Order No. 7224626; 01/13/2004
	:	
	:	Peats Branch No. 3
	:	Mine ID 46-06740
HOBET MINING COMPANY INC.	:	Docket No. WEVA 2004-72-R
Contestant	:	Order No. 7224627; 01/13/2004
	:	
	:	Docket No. WEVA 2004-73-R
v.	:	Order No. 724628; 01/13/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2004-74-R
MINE SAFETY AND HEALTH	:	Citation No. 7205692; 1/13/2004
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 2004-75-R
	:	Citation No. 7205694; 1/13/2004

:	Docket No. WEVA 2004-76-R
:	Citation No. 7214786; 1/8/2004
:	
:	Docket No. WEVA 2004-77-R
:	Citation No. 7214787; 1/8/2004
:	
:	Docket No. WEVA 2004-78-R
:	Citation No. 7214790; 1/13/2004
:	
:	Monclo Prep Plant
:	Mine ID 46-03138

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Contestant;
Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Feldman

These consolidated contest proceedings arise from citations issued by the Department of Labor's Mine Safety and Health Administration (MSHA) to Hobet Mining Company, Inc., d/b/a Dal-Tex Div. (Hobet) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (Mine Act or Act). Hobet is a subsidiary of Arch Minerals (Arch Coal or Arch). These proceedings concern citations issued at an abandoned coal preparation facility and an adjoining former mountain-top mine site. The citations were issued at the Monclo Preparation Plant (Monclo) and the adjacent Peats Branch No. 3 mine property (Peats Branch) on January 8 and January 13, 2004. The citations were issued after MSHA resumed inspecting the sites in December 2003 following a fatality of a contractor employee that occurred at Peats Branch on November 14, 2003. The contested citations primarily concern alleged record keeping violations. The citations are not related to the fatal accident.

A hearing limited to the issue of Mine Act jurisdiction was conducted in Charleston, West Virginia on June 3 and June 4, 2004. The judge, Hobet counsel R. Henry Moore, and the Secretary's counsel Karen Barefield, traveled to Monclo and Peats Branch for on-site observations during the evening of June 3, 2004. Also present during the on-site visit were MSHA inspector Sherman L. Slaughter, James F. Johnson who is Arch Coal's manager of inactive and idled properties, and Dale F. Lucha who is Arch's manager of human resources. (June 4, 2004, Tr. 6-12). The record was left open for the deposition of MSHA inspector Bobby Moreland. Moreland was deposed on July 26, 2004. The parties' post-hearing briefs and replies are of record.

I. Statement of the Case

The Monclo plant and Peats Branch are adjacent sites located in Sharples West Virginia, that are owned by Hobet Mining Company. These properties are known as the "Dal-Tex complex." The Monclo and Peats Branch sites are located next to a 1,500 acre property known as the Bumbo Number 2 Mine (Bumbo), which is also owned by Hobet. The Bumbo property eventually will be mined, although there are no current on-site mining activities.

Monclo ceased processing coal in October 1999 and reclamation activities at Peats Branch were completed in June 2000. Hobet's contests are based on its assertion that MSHA no longer has jurisdiction over the subject sites because Monclo is abandoned and will be demolished, and because Peats Branch has been restored to its original contours. Both Monclo and Peats Branch contain structures that are no longer used in coal preparation or mining. These contest matters present the question of the jurisdictional significance of these structures at an abandoned coal preparation facility and a reclaimed mountain-top mine site. As discussed below, the Secretary has failed to demonstrate that the subject sites currently are governed by the Mine Act. Consequently, the contested citations shall be vacated.

II. Findings of Fact

A. Monclo Plant

Prior to October 1, 1999, the Monclo Preparation Plant was operated by Arch Coal. Monclo is currently owned by Arch's subsidiary Hobet, d/b/a Dal-Tex Division. The prep plant is located on a West Virginia state road before the main gate to the Dal-Tex complex. The prep plant structures consist of the main plant building, its stacker tubes, conveyors and thickening ponds. The Peats Branch mine site is located beyond the gate to the Dal-Tex complex. The coal extracted from Peats Branch was conveyed by truck or conveyor for processing at Monclo. Coal mining at Peats Branch was discontinued in July 1999. Coal preparation and production activities at Monclo ceased on October 1, 1999, and have never resumed.

The railroad tracks that access the public road in front of the Monclo plant are overgrown with weeds. The track is used infrequently by the railroad company for storage of defective railroad cars. The railroad company does not use railroad cars for transportation from the plant.

With the exception of a rear prep plant entrance, all Monclo entrances are welded or bolted shut. Portions of the plant have been disassembled and removed. Namely, the conveyor trusses and belts between the stacking tubes, as well as plant equipment, have been taken away. The plant's thickeners have vegetation growing in them. Hobet plans to demolish the Monclo buildings and the remaining plant structures in the future.

With the exception of power for lights to illuminate the area for security purposes, power was removed from the preparation plant in June 2001. Although electricity to the plant had been disconnected, there was an energized substation on the Monclo property beyond the main gate to the Dal-Tex complex. The substation was damaged by fire in November 2002. In January 2004, when the subject citations were written, the damaged substation transferred power to a portable substation that provided power to a dragline. The portable substation also powered a maintenance shop, warehouse and pond pump used to house and maintain equipment operated by D&M Construction (D&M), a Hobet contractor that performed maintenance work at the sites. The substation also powered other portable substations connected by 7200 volt cables at various locations at Peats Branch. The damaged substation and portable substations have since been removed.

Monclo also has a refuse impoundment area on its grounds. There are roads leading to the impoundment on the Monclo property. Unlike inspections of Monclo and Peats Branch which were discontinued for several years, MSHA has continued to inspect the impoundment. Hobet is not disputing MSHA's jurisdiction of the impoundment.

In October 1999 Arch requested MSHA to place the Monclo plant in a non-producing status for an indefinite period. In response to Arch's request, MSHA placed Monclo in "BA" status on October 21, 1999. "BA" status denotes a "Non-producing, Persons Working, Active" status. MSHA's Coal General Inspections Handbook (MSHA Handbook) defines "Non-producing, Persons Working, Active" status as:

> For surface operations, normal activity is not occurring and coal is not being produced or processed or other material is not being handled or moved. *Mines in this category are required to be inspected* and MSHA sampling is optional depending on the individual circumstances.

(Stip. 19). (Emphasis added).

MSHA modified Monclo from "BA" to "CF" status on July 5, 2000, after Hobet notified MSHA that all of its employees were laid off on June 6, 2000, when reclamation at Peats Branch was completed. (Gov. Ex. 2; Stip. 21). "CF" status denotes "No One Working, Idle/Inactive/Temporarily Idled/Inactive." The MSHA Handbook defines "CF" status, in pertinent part, as:

> [T]he work of all miners has been terminated and production related activity has ceased. It is anticipated that this is a temporary condition and that the mine will reopen in the near future. This category includes: . . . (4) mines that are idled and the only activity being conducted is security checks . . . . *Mines in this category are not required to be inspected* . . . . It is important to determine that no work is being done at a mine before placing the mine in this temporarily idled status. *Mine sites that have active impoundments are still subject to inspection and*

therefore cannot be placed in CF status. While there is no specific time restriction applied to mines in this status, *it is necessary to verify what activity is taking place at the mine once each quarter.* This may be accomplished by a brief mine visit or other documented contact with the mine operator.

(Stip. 22). (Emphasis added).

Since placing Monclo in non-production status on October 21, 1999, MSHA's only inspection of Monclo prior to the November 2003 fatality occurred on June 28, 2000. The June 28, 2000, inspection preceded MSHA's July 5, 2000, designation of Monclo as an "inactive" mine. No violations were cited during the June 28, 2000, inspection.

With the exception of the June 28, 2000, inspection, from November 1999 through November 2003, MSHA inspections at Monclo were limited to water/slurry technical inspections of the refuse impoundment. Thus, only one inspection of the Monclo plant and its structures was conducted during the approximate 3½ year period preceding the December 2003 inspection that culminated in the issuance of the subject citations.

B. Peats Branch

Peats Branch consists of approximately 5,000 acres. Coal was removed from the mine site via mountain-top mining until July 23, 1999. Reclamation activities by Hobet employees ceased on June 6, 2000, at which time all but one remaining highwall was reclaimed. Hobet contracted with D&M to perform the drainage construction during mining and reclamation. As discussed below, D&M continues to perform maintenance work at the Peats Branch and Monclo sites.

The remaining Peats Branch highwall is approximately 5,500 feet in length. The highwall defines a road that is constructed at the base of the highwall. This road contains remnants of a disassembled belt line. The belt line is being removed so that it can be used at another Arch mine site. Hobet will reach the final stage of bond release when reclamation of the remaining highwall at Peats Branch is complete. Hobet does not intend to reclaim the remaining highwall in the foreseeable future. Reclamation eventually will be accomplished with earthen material removed from the Bumbo property.

In addition to the highwall and remaining belt line, there is a dragline at the Peats Branch site. The dragline is surrounded by a chain link fence with barbed wire. The perimeter of the fence is overgrown with weeds. The dragline bucket has been removed. In short, the dragline had not been in service for several years and could not be returned to service without substantial restoration. The dragline is for sale. Power to the dragline was maintained to keep condensation from forming on the electrical components. As required by Hobet's state permits, D&M employees occasionally enter the dragline to spread saw dust on the floor to absorb and remove oil that leaks from the dragline pulleys and engine.

The roads on the Peats Branch property are used to access the dragline, the remaining belt line, the impoundment and the Bumbo property. In addition, there is a road to a warehouse and truck shop that are used to store and maintain D&M's equipment. As noted, the warehouse and truck shop are energized. These roadways are traveled by D&M personnel.

In correspondence dated June 8, 2000, Hobet notified MSHA that many of its employees at Peats Branch had been laid off after coal production ceased on July 23, 1999. Hobet also notified MSHA that all remaining employees were laid off on June 6, 2000, after reclamation activities had been completed. Consequently, Hobet requested that Peats Branch be placed in "Permanently Abandoned" status. (Gov. Ex. 2).

MSHA's Handbook defines an "abandoned" mine as one in which ". . . the work of all miners has been terminated and production activity has ceased and it is not anticipated that activity will resume in the near future . . . . Mines in this category are not required to be inspected or sampled." (Stip. 10). MSHA normally verifies the propriety of designating a mine site as "abandoned."

Prior to the December 2003 inspections that resulted in the contested citations, MSHA conducted its last inspection of Peats Branch on May 26, 2000. From June 2000 until the December 2003 inspections that resulted in the contested citations, MSHA did not conduct any inspections on the Peats Branch property. (Stip. 11).

C. Reclamation Process

The West Virginia Department of Environmental Protection (DEP) monitors reclamation activities at surface mines. Reclamation involves the return and regrading of displaced earth to its original configuration, as well as the re-planting of vegitation. State mining permits authorize the parameters for mining and reclamation activities. In this regard, West Virginia state permit I-634 governs the land use and drainage structures for both the Peats Branch watershed and the Bumbo watershed that eventually end in Beech Creek. Hobet posted a bond to ensure its compliance with state reclamation environmental requirements. The DEP determines when a surface mine has been sufficiently reclaimed to reach grade release, which is the first stage of bond release. The entire bond will be released after the remaining highwall is reclaimed.

D. D&M Construction

All Peats Branch drainage structures must be completed and maintained before Hobet submits the grade release to DEP. D&M is the maintenance contractor at the Peats Branch and Monclo sites. D&M maintains an equipment yard at Peats Branch. The equipment consists of excavators, dozers, dump trucks and a track loader. D&M's excavators and dozers are smaller in scale than the larger earth moving equipment used by Hobet employees during the reclamation process. D&M employs three workers at these sites. These employees maintain roadways and repair ground failures and erosion gullies.

D&M also built and maintains drainage structures such as sediment ponds, sediment ditches, sumps, conveyance ditches and rock channels. A sump is a hole in the ground on the side of a road. The sump allows sediment to settle out before water enters a culvert. A conveyance ditch moves surface water and runoff in a controlled manner to a pond or culvert. The majority of D&M's work is performed with excavators that are used to clean sumps and culverts. D&M also alleviates water flow problems by constructing rock channels with sized rock called "rip-rap" to direct and control runoff.

D&M employs three people at Monclo and Peats Branch. These employees work five days a week and they have been working at Peats Branch since 1990. Following MSHA's designation of the Peats Branch status as "abandoned" in June 2000, D&M continued working at Peats Branch primarily performing maintenance work. The D&M workers were never laid off from the Peats Branch site. As previously noted, MSHA's Handbook requires it to verify once each quarter what activities are occurring at an inactive mine. (Stip. 22).

E. November 14, 2003, Fatal Accident

At approximately 11:45 a.m. on November 14, 2003, a D&M equipment operator attempted to maneuver his Koehring 6633-7 excavator through a wet area at the Peats Branch site in an attempt to access and clean a roadside culvert. The accident occurred when the excavator overturned into a pond trapping the victim in the operator's compartment that had submerged under water. It took several hours for rescue workers to hook a wrecker to a crane to lift the overturned excavator out of the water. The victim died at the scene.

The accident was reported to MSHA's field office in Logan, West Virginia by Dale Lucha. Although he advised MSHA of the accident, Lucha testified that he was not certain that MSHA had jurisdiction.

F. Events Following Accident

Although MSHA last inspected the Monclo and Peats Branch sites in May and June 2000, respectively, MSHA continued to enter the Dal-Tex complex to conduct periodic impoundment inspections. As a consequence of its impoundment inspections, MSHA must have been aware of D&M's maintenance activities as D&M's excavator and dozer equipment is readily visible at the Monclo and Peats Branch sites. Moreover, Lucha testified, without contradiction, that MSHA inspector Dennis Holbrook had been sent to Monclo to observe the condition of a substation shortly after it was damaged by fire in November 2002. At that time, the substation was used to power D&M equipment. Lucha testified that Jake Blevins, a supervisor at the MSHA Logan, West Virginia field office, advised him that MSHA did not have jurisdiction of the substation fire because it was located in an abandoned area.

It wasn't until November 20, 2003, one week following the fatal accident, that MSHA modified the Monclo plant status from "CF" (No One Working, Idle/Inactive/Temporarily Idled/Inactive) back to "BA" (Non-producing, Persons Working, Active). The practical effect of the status change from "CF" to "BA" meant that MSHA inspections of Monclo, that had been discontinued for more than three years, were reinstated.

On December 23 and December 30, 2003, MSHA inspector Bobby Moreland visited the Monclo and Peats Branch sites "on a fact finding mission" to observe on-going activities for the purpose of reporting back to the District Office. (Moreland dep. at p.10). Moreland observed the substation that had been damaged by a fault condition fire a year earlier. As a result of Moreland's observations, on January 13, 2004, MSHA issued five citations and two failure to abate orders at the Monclo plant. The citations and failure to abate orders primarily concerned record keeping violations involving Hobet's alleged failure to maintain information regarding testing and repairing of circuit breakers, its failure to keep workplace examination records, and its failure to maintain information on independent contractors.

Moreland's December 23 and December 30, 2003, fact finding inspections also resulted in four record keeping citations and two failure to abate orders at Peats Branch. These citations concerned Hobet's alleged failure to maintain information regarding testing and repairing of circuit breakers, its failure to keep workplace examination records, and its failure to maintain information on independent contractors. In addition, a citation and 107(a) imminent danger order were issued because the energized dragline on the Peats Branch property was in a state of disrepair with numerous electrical circuits and devices missing. The citation and imminent danger order also noted that security had been breached as a result of an opening in the chain link fence surrounding the dragline.

G. On-Site Observations

The June 3, 2004, on-site observations of the Monclo and adjoining Peats Branch sites were very instructive. The preparation plant was abandoned. The entrances were chained or welded closed. Many of the windows were broken. The area surrounding the plant, including the thickeners, were overgrown with weeds.

Peats Branch is a 5,000 acre site consisting of mountains and valleys for as far as the eye can see. The site is very green with vegitation. The one remaining highwall, 5,500 feet in length, serves to preserve a road that traverses along its base. The road contained a partially dismantled conveyor, most of which had been removed. Putting the size of the remaining 5,500 feet long highwall in perspective, there is approximately one foot of remaining highwall per acre on the Peats Branch site.[1]

---

[1] An acre consists of 43,560 square feet. *Dictionary of Mining, Mineral and Related Terms* 5 (2nd ed. 1997).

The dragline on the Peats Branch property was enclosed by a barbed-wire chain link fence. The dragline appeared rusted and in a state of disrepair. The chain link fence was surrounded by overgrown weeds. The dragline bucket was disconnected and lying in a nearby field. It was also surrounded by weeds.

H. MSHA's Reclamation Enforcement

MSHA's Program Policy Manual does not refer to the issue of jurisdiction of abandoned preparation plants or abandoned surface mines. The Policy Manual also does not address the question of jurisdiction of reclamation of surface mines. (Joint Ex. 1).

MSHA has opined that Mine Act jurisdiction ceases after reclamation activities are completed. In a letter dated February 21, 1979, the Assistant Secretary of Labor for Mine Safety and Health advised the Ohio Mining and Reclamation Association that MSHA "would not exercise jurisdiction" after "all mining and mining related activities have been concluded and the site has been returned basically to its pre[-]mining state." The Assistant Secretary concluded "discing, fertilizing, mulching, seeding and the planting of trees at surface mine sites, after regrading and replacement of topsoil by the mine operators [when] no miners [were] engaged in the reclamation activities," did not give rise to Mine Act jurisdiction. (Joint Ex. 2).

In a Memorandum dated May 24, 1989, the Associate Solicitor advised MSHA's Administrator for Coal Mine Safety and Health that MSHA did not have jurisdiction of "activities more remote from mining" such as reclamation of gob material "after the mine operator had restored the mined land to its original contour." (Joint Ex. 3). The conclusion was based "on the nature of the activities, and the amount of time which [had] elapsed since mining took place on the site." *Id.*

III. Pertinent Statutory Provisions

Section 3(h)(1) of the Act defines what constitutes a "mine." The provision states:

> *"[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form* or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, *and* (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, *structures*, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing 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 if in liquid form, with workers underground, *or used in, or to be used in*, the milling of such materials, 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.

30 U.S.C. § 802(h)(1). (Emphasis added).

> Section 4 defines the scope of Mine Act coverage:
>
> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

30 U.S.C. § 803.

Section 103(a) authorizes the Secretary to "make frequent inspections and investigations in coal or other mines each year." 30 U.S.C. § 813(a). In this regard, *section 103(a) requires the Secretary to "make inspections* of each underground coal or other mine in its entirety at least four times a year, and *of each surface or other mine in its entirety at least two times a year.*" *Id.* (Emphasis added).

IV. Further Findings and Conclusions

As a threshold matter, I note that while the legislative history encourages the broadest possible interpretation in favor of expansive jurisdictional inclusion, in the final analysis, the Mine Act was intended to establish a "single mine safety and health law, applicable *to all mining activity*." S. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977) (emphasis added); S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977 at 14). The Secretary generally relies on the left over structures at the former prep plant and mine site as a basis for asserting Mine Act jurisdiction. Although she also relies on D&M's drainage construction during active reclamation, the Secretary has not articulated clearly and concisely what, if any, mining related activities serve as the jurisdictional basis after reclamation was completed and Hobet's workers were laid off in June 2000. Nevertheless, she argues that her statutory interpretation of section 3(h)(1) is entitled to deference.

It is long settled that ". . . considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, an agency's statutory interpretive authority is not unfettered. In considering the degree of weight to be accorded an agency's statutory interpretation, the Supreme Court more recently noted:

> The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the *degree of the agency's . . . consistency . . . and to the persuasiveness of the agency's position.* See *Skidmore*, *supra*, at 139-140. The approach has produced a spectrum of judicial responses, from great respect at one end, see *e.g.*, *Aluminum Co. Of America v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) ("'substantial deference'" to administrative construction), to near indifference at the other, see, *e.g.*, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore v. Swift & Co.*:
>
> > "*The weight [accorded to an administrative] judgment* in a particular case *will depend upon* the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier* and later *pronouncements*, and all those factors which give it power to persuade, if lacking power to control." 323 U.S., at 140

United States v. Mead Corp., 533 U.S. 218, 228 (2001) (footnotes omitted). (Emphasis added).

As discussed below, case law, the Secretary's former pronouncements concerning jurisdiction of reclamation sites, and MSHA's cessation of inspections at Monclo and Peats Branch, conflict with the Secretary's jurisdictional assertion. Consequently, the Secretary has not demonstrated that her proffered application of section 3(h)(1) of the Act to the facts in these proceedings is reasonable.

A leading case addressing the issue of MSHA's jurisdiction over the reclamation of structures at coal preparation plants and mine sites is *Lancashire Coal Company v. Sec'y of Labor*, 968 F.2d 388 (3rd Cir. 1992). In *Lancashire*, MSHA asserted jurisdiction over a silo at a coal preparation facility that it had ceased inspecting and declared "permanently abandoned" in September 1988. *Id.* at 389. MSHA asserted jurisdiction following its investigation of a fatal accident that occurred in March 1989 when the silo collapsed while being demolished killing an employee of the demolition contractor. *Id.*

In *Lancashire*, the Court distinguished Mine Act jurisdiction over structures located in preparation facilities from structures located at mine sites. The Court noted, although section 3(h)(1) of the Act includes structures "resulting from" the work of extracting coal within the definition of a "mine," section 3(h)(1) only considers structures located at preparation plants to be a "mine" if the structure is "used in, or to be used in," the work of preparing coal. Thus, the Court, after considering the legislative history, concluded the absence of the words "resulting from" before the words "the work of preparing coal" was dispositive and it rejected the Secretary's claim of Mine Act jurisdiction. *Id.* at 390, 392-93.

Significantly, the Court in *Lancashire* noted:

> If Congress does in fact intend *to cover the activity of reclamation of structures* that were once used in the preparation of coal, but are no longer being so used, within the jurisdiction of MSHA rather than the Occupational Safety and Health Administration, it can amend Section 3(h)(1) to add the two missing words.

Id. at 393 (footnote omitted). (Emphasis added).

Herein lies the rub in the Secretary's asserted jurisdiction. Obviously, structures "used in" or "resulting from" mining that are located *at active mine sites* are subject to the Act. However, the thrust of the Secretary's argument is that the presence of such "structures" *at abandoned mine sites*, provides the basis for Mine Act jurisdiction under section 3(h)(1).[2] This interpretation of section 3(h)(1) is unreasonable because it lacks context. Specifically, the Secretary disregards whether such structures are associated with normal mining or reclamation activities. According to her interpretation, a highwall at an amusement park located at a former mine site would be subject to MSHA regulation. However, as addressed in *Lancashire*, the jurisdictional significance of section 3(h)(1) *"structures"* no longer used in mining comes into play only when reclamation of such structures is being performed.

The significance of reclamation activity as a prerequisite for jurisdiction is illustrated in a summary decision issued by Judge Weisberger in *R.C. Enterprises*, 1995 WL 20256 (ALJ) (July 17, 1995).[3] This case concerned a surface mine that was designated by MSHA as permanently abandoned in February 1993. The mine operator contracted with an individual to perform reclamation activities beginning in June 1993. On September, 22, 1993, the contractor was fatally injured after his dozer tipped on its side at the toe of loose material on a sloped highwall. The reclamation site was reopened by MSHA to an active mine site over the objections of the mine operator.

---

[2] The Secretary acknowledges *Lancashire* may preclude jurisdiction over the Monclo structures (the main plant building and its stacker tubes, conveyors and thickeners). However, she relies on the substation as a section 3(h)(1) structure "resulting from" the extraction of coal because it was used to power the dragline. (Sec'y br. at 13). In addition, the Secretary contends the substation is a structure "to be used in" the extraction of coal because it may be used to provide energy for future Bumbo operations. *Id.* The Secretary's argument is unpersuasive in the absence of reclamation activity. With regard to speculated future use, the substation has been dismantled and removed from the Monclo property. (Moreland dep. p.42). The Secretary also argues that she has jurisdiction over Monclo's roadway because it is appurtenant to the impoundment. (Sec'y br. at 12-13). This jurisdictional question goes beyond the scope of these proceedings as the contested citations do not concern roadways.

[3] This decision was not reported in the bound volumes of FMSHRC Decisions.

In *R.C. Enterprises*, officials of the MSHA Birmingham Subdistrict Office stipulated that, prior to the September 1993 accident, it had officially expressed the position that reclamation sites were not subject to MSHA's jurisdiction, and, that MSHA had never asserted jurisdiction of reclamation sites in the Birmingham region. Judge Weisberger rejected the mine operator's estoppel argument. Judge Weisberger determined the contractor was a mine operator by virtue of his reclamation activity involving the restoration of a surface coal mine to its original contours. (*Id.* at p.4) (Emphasis added). Thus, it was the performance of reclamation activity that was determinative.

The proposition that reclamation activity normally associated with mining is a prerequisite for jurisdiction at abandoned facilities consistently has been supported by MSHA's earlier pronouncements. In February 1979, MSHA advised the Ohio Mining and Reclamation Association that it would not exercise jurisdiction after all mining related activities had ceased and the site was returned to its pre-mining state. (Joint Ex. 2). In a May 1989 memorandum, the Associate Solicitor addressed the issue of MSHA jurisdiction over reclamation projects and reached a similar conclusion . (Joint Ex. 3). He concluded the jurisdiction of reclamation sites must be resolved based on an evaluation of whether the on-site activities are remote in time and scope from the restoration of "the mined land to its original contour." *Id.* Specifically, the Associate Solicitor provided the following four criteria for determining if reclamation activities are subject to the Mine Act:

> (1) the nature of the activities, particularly in relation to activities normally associated with mining;
> (2) the relationship in time and the geographic proximity of the activities in question to active mining operations;
> (3) the nature of the land at the time of the activities; and
> (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which equipment or facilities are shared with active mining operations.

Id.

In the current case, Monclo ceased processing coal in October 1999, mining of Peats Branch terminated in July 1999, and reclamation was completed in June 2000. Thus, MSHA is relying on maintenance work performed several years after extraction and preparation activities ceased, and after Peats Branch had been returned to its original contours. Clearly, the D&M activity observed by Moreland in December 2003 is remote in time to active mining operations.

Moreover, D&M's maintenance activities are far removed from the mining process. These activities primarily consist of repairing and grading hillside erosion and maintaining drainage structures such as sediment ponds, sediment ditches and sumps. D&M uses its own small-scale dozers and excavators to perform its maintenance responsibilities. The activities are performed under the direction and supervision of D&M without any active participation by Hobet. Such activities are distinguishable from the reclamation that was accomplished by Hobet employees using Hobet equipment. The fact that D&M's work is required by a state permit does not alter the nature and scope of D&M's environmental maintenance activities. Such activities are not closely related to mining.

The conclusion that MSHA lacks jurisdiction also is supported by MSHA's own actions. Section 103(a) of the Mine Act *requires* MSHA to inspect surface mines and preparation facilities in their entirety twice yearly. Although MSHA has the prosecutorial discretion not to exercise enforcement authority, MSHA lacks the discretion to waive jurisdiction. *Air Prods. and Chems., Inc.*, 15 FMSHRC 2428, 2435 n.2 (December 1993) (concurring opinion).

Yet MSHA did not inspect Monclo and Peats Branch during the 3½ year period from June 2000 until December 2003. It is difficult to imagine that MSHA was unaware of D&M's maintenance activities during this period given MSHA's impoundment inspections and the obvious on-site presence of D&M equipment.[4] Moreover, MSHA was obliged to periodically verify the continuing absence of mining activity at the sites after they were designated as "idled/inactive" in July 2000. Significantly, MSHA declined to assert jurisdiction after it was summoned to observe the condition of the substation fire in November 2002. D&M's presence should have been readily apparent at that time as the substation was used to energize D&M equipment. It was only after Moreland's "fact-finding" mission that occurred following the fatality in December 2003 that MSHA decided to reassert jurisdiction. However, the evidence fails to demonstrate any change in the nature and scope of D&M's maintenance work since MSHA ceased inspections in June 2000.

I note, parenthetically, that although MSHA's Monclo and Peats Branch enforcement history is relevant, the conclusion that MSHA lacks jurisdiction because D&M's activities are to far removed from the reclamation process is based solely on the facts of this case rather than estoppel. *See King Knob Coal Co.*, 1417, 1421-22 (June 1981) (citations omitted).
So too, the Secretary's earlier inconsistent policy statements concerning jurisdiction of reclamation sites are relevant with respect to the issue of the reasonableness of the Secretary's current jurisdictional assertion.

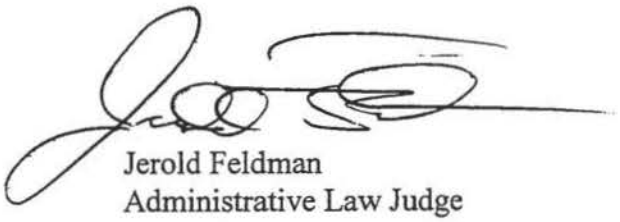
---

[4] As previously noted, Hobet has not challenged MSHA's jurisdiction of the impoundment located on Monclo property. Mine Act jurisdiction may exist over one portion of a site and not another. *Air Prods. and Chems., Inc.*, 13 FMSHRC 1657 (ALJ) (October 1991) *aff'd in part rev'd in part* 15 FMSHRC 2428, (December 1993) *aff'd without opinion* 37 F.3d (3rd Cir. 1994).

Finally, this decision should be narrowly construed as it applies only to the jurisdictional question arising out of the citations in issue. This decision does not preclude future Mine Act jurisdiction if circumstances change such as reclamation of the highwall.

ORDER

In the final analysis, in the absence of mining activity, or, activity normally associated with mining such as site restoration to its original topography, the Secretary has failed to demonstrate that the Monclo and/or Peats Branch sites are subject to Mine Act jurisdiction. **ACCORDINGLY**, the contests of Hobet Mining Company, Inc., d/b/a Dal-tex Div., **ARE GRANTED** and the captioned citations and orders **ARE VACATED**.



Jerold Feldman
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222 (Certified Mail)

Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209 (Certified Mail)

/hs

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 8, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-36
Petitioner	:	A.C. No. 46-08593-11714
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim's Branch No. 3a
Respondent	:	

ORDER DENYING MOTION FOR PARTIAL RECONSIDERATION

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 18, 2004, I granted, in part, and denied, in part, a motion of the Respondent to compel the Secretary to furnish certain documents. *Baylor Mining, Inc.*, 26 FMSHRC 739 (Aug. 2004). The Secretary has filed a motion for partial reconsideration of the order and the Respondent has filed a response in opposition. For the reasons set forth below, the Secretary's motion is denied.

The order contained a footnote which stated: "The Respondent will be receiving the names of the Secretary's miner witnesses two days before trial. At that time, counsel for the Respondent should also receive all statements made by those miners who will be witnesses." *Id.* at 744 n.5 (citation omitted). Contending that this "requires that miners who are named as witnesses will be simultaneously designated as informants," the Secretary requests that the footnote be retracted. (Sec. Mot. at 4, 10.) The Respondent states that the motion should be denied and that it should be furnished the miner witnesses' statements at the time such witnesses are identified.[1]

In making its argument, the Secretary relies on the Federal Register discussion of Commission Rules 61 and 62, 30 C.F.R. §§ 2700.61 and 2700.62, when they were adopted.

---

[1] Respondent also requests that I require the Secretary to furnish the witness statements forthwith because no finding was made in the order that the statements were subject to the "informant's privilege." No such finding was made because I determined that the "work product" privilege precluded discovery of the statements making it unnecessary to consider whether the "informant's privilege" also applied to the statements. 23 FMRHRC at 742-43. Therefore, to the extent Respondent requests reconsideration of the order, its request is denied.

There, in discussing the relationship between the two, it was stated that: "Consistent with § 2700.61, in disclosing the names of miner witnesses, a judge shall not disclose whether any were also informants." 58 FR 12158, 12163 (Mar. 3, 1992). This discussion to the contrary, however, the case law does not support the Secretary's contention that Rule 61 precludes release of miner witness statements because the statements might identify the witnesses as informants.

While the rule clearly forecloses the release of such statements during discovery, the Commission has recognized that a Respondent's right to witness statements "at the time of trial is a separate and procedurally distinct issue" from whether they can be discovered. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992). Furthermore, in the same case, the Commission stated that "any statement of a miner who is called as a witness may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial." *Id.* In a subsequent case, the Commission specifically stated that "the judge may at trial order disclosure of informants' statements" even if the statements had previously been determined not to be discoverable, *Sec'y of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237 (Nov. 1993). Consequently, I find that Baylor is entitled to the witness statements at the hearing.

As an alternative to her position that the witness statements should not have to be disclosed, the Secretary argues that if the witness statements must be disclosed, "the disclosure should take place only after conclusion of direct examination of the miner witness." (Sec'y Mot. at 9.) I decline to adopt such a procedure.

In *Brennan v. Engineered Products, Inc.*, 506 F.2d 299 (8th Cir. 1974), the court considered the same issue in a Fair Labor Standards Act case involving employee informants with the same interest against employer retaliation as miner witnesses. In discussing whether witness statements had to be provided to the employer defendant, the court stated:

> A resolution of this dilemma must be entrusted to the sensitive discretion of the trial court. One alternative is for the District Court to employ the Jencks Act approach urged by the government, allowing the defendant to examine the statements of witnesses only after completion of direct examination. It may be that, where the only possible use of the statement is for impeachment purposes, such an approach will be sufficient to protect the defendant. A second alternative would be for the District Court to order pretrial disclosure only of a summary of the evidence which will be presented by each witness it proposes to call, and not the statements themselves. A third alternative would be to order production of the statements themselves, either at the same time as the witness list is ordered, or at a shorter period of time before the witness' appearance.

Id. at 304-05 (citations omitted).

In *Asarco*, the Commission included the fact that witnesses would be named two days before the trial and that the witnesses' statements could be obtained in the same sentence. I infer from this that the Commission favored the third alternative, but did not specifically say so because it was not necessary to that decision. Even is this is reading too much into *Asarco*, I still find the third alternative preferable. Having to stop the hearing after each miner witness testifies so that the Respondent can read any statements and perhaps investigate other evidence brought to light by the statement will unnecessarily protract and delay the hearing. In addition, allowing the Respondent to have the statements two days prior to the hearing, permits Respondent's counsel to fully prepare their case prior to the hearing.

Finally, this determination in favor of judicial efficiency is not made at the expense of the witnesses' interest in being protected from retaliation. The Secretary's investigation should have long been completed two days before the trial so there is no incentive for the operator to harass the witnesses in the hope of precluding their giving information to the Secretary. Further, two days before the trial provides little opportunity for an operator to retaliate against a witness.[2]

Order

Footnote 5 in the original order was not intended to be an order but rather a statement of the way matters would proceed to hearing. However, inasmuch as the Secretary does not agree that that is how the witness statements should be handled, I will make it an order. Accordingly, the Secretary's motion is **DENIED** and it is **ORDERED** that the Secretary furnish the names of her miner witnesses to the Respondent two days before the hearing and that at the same time, the Secretary provide to the Respondent the statements, including memoranda of interview, of any miners who will be witnesses.[3]

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

---

[2] Of course, if retaliation occurs at anytime against a miner witness, he has a remedy under section 105(c) of the Act, 30 U.S.C. § 815(c).

[3] If any statement contains information which may tend to identify an informant who will *not* be a witness at the trial, that information may be redacted to protect the informant's identity.

Distribution: (Certified Mail)

James F. Bowman, Conference & Litigation Representative
U.S. Department of Labor, MSHA, 100 Bluestone Road, Mt. Hope, WV 25880

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

David J. Hardy, Esq., Spillman, Thomas & Battle, PLLC
Spillman Center, 300 Kanawha Boulevard, East, P.O. Box 273, Charleston, WV 25321

/hs

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 2004 310-984/15911