

July 2014

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Review was granted in the following case during the month of July 2014:

Pocahontas Coal Company, LLC., v. Secretary of Labor, Docket Nos. WEVA 2014-642-R, WEVA 2014-646-R, WEVA 2014-647-R, WEVA 2014-648-R, WEVA 2014-649-R. (Judge Miller, July 16, 2014).

Secretary of Labor, MSHA v. The American Coal Company, Docket No. LAKE 2011-13. (Judge Moran, July 11, 2014)

Review was denied in the following cases during the month of April 2014:

Secretary of Labor, MSHA v. Revelation Energy, LLC., Docket Nos. KENT 2011-357-R, KENT 2011-211-R, KENT 2011-1054, KENT 2011-1106. (Judge Andrews, July 15, 2014)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 16, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2009-401-M
v.	:	SE 2009-402-M
	:	SE 2009-553-M
MIZE GRANITE QUARRIES, INC.;	:	SE 2009-554-M
ROBERT W. MIZE III; and	:	SE 2010-849-M
CLAYBORN LEWIS	:	SE 2010-850-M
Both Employed by MIZE GRANITE	:	
QUARRIES, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The issues involve three penalties proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under section 110(c) of the Mine Act, 30 U.S.C. § 820(c),¹ against the mine’s owner, Robert W. Mize III (“Mize”), and, separately, against the mine’s foreman, Clayborn Lewis (“Lewis”).

¹ Section 110(c), 30 U.S.C. § 820(c), provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

For the following reasons, we remand this case to the Administrative Law Judge for further consideration of her negligence and gravity findings consistent with our decision.

I.

Factual and Procedural Background

Mize owns Mize Granite Quarries, Inc. (“MGQ”), a corporation that operates a stone quarry located in Elberton, Georgia. 33 FMSHRC 886, 888 (Apr. 2011) (ALJ). During inspections conducted in January and March 2009, MSHA inspectors issued a number of citations and orders to MGQ, including the citation and three orders involved in this proceeding. The Secretary subsequently conducted a special investigation which resulted in proposed individual penalties against Mize and Lewis under section 110(c) of the Act. *Id.*

Following a hearing, the Judge, among other things, dismissed the penalties against Mize and Lewis for Order No. 6505714. She also reduced the amounts of the remaining three penalties for both individuals. 33 FMSHRC at 914-18.²

The Commission granted the Secretary of Labor’s petition for discretionary review of the Judge’s decision. The Commission affirmed the Judge’s dismissal of the penalties proposed against Mize and Lewis associated with Order No. 6505714. 34 FMSHRC 1760, 1764 (Aug. 2012). We further concluded that the Judge had improperly based the amount of the individual penalties against Mize in part on the assumption that he would also be paying the penalties against MGQ as the corporate operator of the mine. Accordingly, we remanded the individual

² The proposed penalties, assessed penalties, and dispositions of these citations and orders are summarized below:

Citation or Order No.	Proposed Penalty	Assessed Penalty
1. Citation No. 6507102	Mize \$3,600 Lewis \$3,600	\$500 \$300
2. Order No. 6505709	Mize \$6,000 Lewis \$6,000	\$500 \$300
3. Order No. 6505714	Mize \$4,000 Lewis \$4,000	Dismissed Dismissed
4. Order No. 6505715	Mize \$4,000 Lewis \$4,000	\$500 \$300

33 FMSHRC at 916-18.

penalties against Mize so that the Judge could reconsider the penalties based solely on Mize's personal financial status, not the status of MGQ. *Id.* at 1765.

We also noted that the Judge had reduced the proposed penalties against Lewis although Lewis had not submitted any information concerning his personal income and financial responsibilities. We concluded that the Judge had not adequately explained the basis for the reductions and remanded the case for the Judge to reconsider the individual penalties assessed against Lewis, after offering him another opportunity to provide documentary evidence regarding his personal income and financial responsibilities. *Id.* at 1766.

On February 1, 2013, the Judge issued her Decision on Remand, which further explained her considerations in assessing the individual penalties against Mize and Lewis. After providing the explanation, the Judge assessed the same penalty amounts. 35 FMSHRC 414, 417-18 (Feb. 2013) (ALJ). The Commission again granted a petition for discretionary review filed by the Secretary of Labor.

II.

Disposition

A. Considerations Particular to Mize

On remand, the Judge reevaluated the individual penalties assessed against Mize, taking into consideration the section 110(i) criteria, as they apply to individuals.³ 35 FMSHRC at 416-17; *see Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 824 (May 1997) (explaining the application of the criteria in assessing section 110(c) penalties). Following the Commission's direction, the Judge took into account the fact that Mize had "no history of previous violations being assessed against him" and found that Mize "does not have sizeable personal net worth and the amount of the penalties proposed is disproportionate to his income." 35 FMSHRC at 417.

³ Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. It further directs that the Commission, in determining penalty amounts, shall 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 rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

It appears that the Judge may have once again taken into account the history of the corporation, stating that “the mine has not had any injuries or lost workdays and was the recipient of two safety awards.” *Id.* Although such considerations pertaining to the corporation should not play a role in the determination of personal liability, we find that the Judge’s mentioning of the mine’s enforcement history constituted harmless error, as substantial evidence supports the Judge’s determination of Mize’s section 110(c) liability based on his history of no personal violations.⁴ *See* 35 FMSHRC at 417; 33 FMSHRC at 917. Accordingly, we affirm the Judge’s findings with regard to Mize’s ability to meet his financial obligations and the appropriateness of the penalties in light of his income and net worth.⁵

B. Considerations Particular to Lewis

In accordance with our previous decision, the Judge issued an order on December 4, 2012, directing Lewis to provide his income information within 20 days of receipt of the order. 35 FMSHRC at 415. This order was mailed to Lewis’ personal address, Lewis’ work address, and to Mize as Lewis’ representative. Lewis did not respond to the order. *Id.* On remand, the Judge found that it is “safe to assume [Lewis’] income would be no greater than Mize’s and most likely sizably less and he is of modest means.” *Id.* at 417.

We find that documents already in the record support the Judge’s conclusions. The operator’s 2009 federal tax return reflects a total cost of labor of \$133,990 (a figure which presumably includes employer-provided payroll taxes and benefits). Resp. Ex. 1. The parties stipulated that the total 2009 production hours worked by the operator’s employees was 10,043. 33 FMSHRC at 888. MSHA’s 2009 printout of the operator’s Employment, Accident and Injury Data confirms this figure and also reflects that the average number of employees who worked for the operator over the four quarters of 2009 was 6.25. Resp. Ex. 5. From these figures one can derive an average hourly wage of \$13.34 and an average annual wage per employee of \$21,438.40 in 2009. While Lewis was presumably paid a premium over the average wage for his

⁴ When reviewing an administrative law Judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁵ We reject the Secretary’s characterization of the Judge’s findings regarding Mize’s income and personal net worth as “hopelessly vague.” PDR at 7. In particular, the Secretary confuses the gross income of Mize Granite Sales with the company’s net income. The record discloses Mize’s earnings from this company and also from Apex-Mize Granite. The Judge’s findings that Mize’s personal net worth was not sizeable, and the proposed penalties are disproportionate to his income are supported by substantial evidence and within the Judge’s discretion.

duties as a foreman, we believe, based on these figures, that it was reasonable for the Judge to conclude that Lewis was of “modest means” and “most likely [made] sizably less” than Mize. We therefore affirm the Judge’s findings with regard to Lewis’ ability to meet his financial obligations and the appropriateness of the penalty.

C. Negligence and Gravity Findings

Although we uphold the Judge’s findings with regard to Mize and Lewis’ financial situations, we conclude that, in assessing the penalties in her second decision, the Judge has misstated the negligence and gravity findings contained in her first decision. With respect to Citation No. 6507102, the Judge found in her first decision that the “callous and reckless disregard for the safety of the miners is sufficient [] to determine that this violation was correctly and justifiably assessed as unwarrantable failure to comply with the standard.” 33 FMSHRC at 897. In regard to Order No. 6505709, the Judge found the violation to be an unwarrantable failure and described Mize and Lewis’ conduct as “shocking disregard for the safety of the miners,” and “both individually and in concert, as egregious.” *Id.* at 903. However, in her second decision, the Judge described Mize’s negligence with respect to this citation and order merely as “high” and the gravity involved only “to be serious.” 35 FMSHRC at 417.

Likewise, with respect to Order No. 6505715, in her first decision, the Judge found the violation to be significant and substantial (“S&S”) and an unwarrantable failure due to “Mize’s complete indifference and reckless disregard for the safety of [] miners.” 33 FMSHRC at 911-12. However, in her second decision, the Judge described Mize’s negligence associated with this Order as “moderate,” and the gravity of the violation as “moderate.” 35 FMSHRC at 417.

The Judge’s negligence and gravity findings from her first decision constitute the law of the case. *See Manalapan Mining Co.*, 36 FMSHRC 849, 852 (Apr. 2014); *Douglas R. Rushford Trucking*, 24 FMSHRC 648, 650 (July 2002). We hereby remand this case for the Judge’s explanation of whether exceptional circumstances within law of the case principles warrant changes in the negligence and gravity findings, or the characterizations on remand were simply inadvertent misstatements of her prior findings. Having explained and reconciled her negligence and gravity findings, the Judge should re-assess the penalties against Mize and Lewis with appropriate consideration of all the section 110(i) criteria as applied to individuals.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determinations regarding Mize and Lewis' individual abilities to meet their financial obligations and the appropriateness of the penalties in light of their income and net worth. However, we remand this matter to the Judge for reconsideration of her negligence and gravity findings and assessment of penalties in light of such reconsideration.

/s/ Mary Lu Jordan
Mary Lu Jordan
Chairman

/s/ Michael G. Young
Michael G. Young
Commissioner

/s/ Robert F. Cohen, Jr.
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Commissioner

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-410
Petitioner	:	A.C. No. 11-02408-179543
	:	
	:	Gateway Mine
	:	
	:	Docket No. LAKE 2009-412
	:	A.C. No. 11-03060-179547-02
v.	:	
	:	Riola Mine Complex-Vermillion Grove
	:	
	:	Docket No. LAKE 2009-413
	:	A.C. No. 12-02010-179550-01
	:	
BLACK BEAUTY COAL COMPANY,	:	Docket No. LAKE 2009-414
Respondent	:	A.C. No. 12-02010-179550-02
	:	
	:	Air Quality #1 Mine
	:	
	:	Docket No. LAKE 2009-415
	:	A.C. No. 12-02295-179552
	:	
	:	Francisco Mine-Underground Pit

DECISION

Appearances: Nadia A. Hafeez, Esq., and Matthew M. Linton, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; R. Henry Moore, Esq., and Page Jackson Esq., Jackson Kelly, PLLC Pittsburgh, Pennsylvania, and Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Black Beauty Coal Company, owned by Peabody Midwest Mining, LLC (“Peabody”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

Peabody operated several large underground coal mines in southern Illinois and southern Indiana. A total of 16 section 104(a) citations and three 104(d)(2) orders of withdrawal were adjudicated at the hearing. Five orders and nine citations settled in these dockets, as discussed below.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8414205, LAKE 2009-410, Gateway Mine

On February 11, 2009, MSHA Inspector Bobby F. Jones issued Citation No. 8414205 at the Gateway Mine under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-1). The citation states that the rib on the travelway (east) side of the unit #2, #3 takeup between crosscuts 44 and 45 was fractured in two locations. The first area was 14 feet long, 8 feet high, and 9 to 12 inches thick. The second area was 4 feet long 8 feet high, 8 to 36 inches thick. The citation goes on to state that miners had been working in the cited area cleaning up the drive and takeup. Inspector Jones determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was significant and substantial ("S&S"),¹ the operator's negligence was high, and that one person would be affected.

Section 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of \$21,442 for this alleged violation.

1. Background

Inspector Jones testified that the "rib line along the unit #2, #3 drive and takeup on the travelway side was basically free standing." (Tr. 31, 37-38). He determined that the rib was not being "controlled in any way." *Id.* He determined that it was a hazard because this loose rib could fall upon a miner working in or traveling through the area. The rib was the full height of the entry, 9 to 12 inches thick and 14 feet long. The inspector determined that the violation was S&S because miners worked in the area cleaning coal accumulations. He determined that the condition existed for several shifts because some rock dust had blown in behind the loose rib.

¹ An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

(Tr. 33). He believed that it was reasonably likely that the rib would fall and hurt someone. Inspector Jones believed that any injury would be fatal due to the large size of the rib. The inspector determined that Peabody's negligence was high because the violation occurred in a well-lit area without anything to obstruct the examiner's ability to see the condition. The violation was quite obvious. (Tr. 34). At eye level there was a gap of about one inch between the cited slab and the wall behind it. (Tr. 38). The gap was wider at the top than at the bottom. (Tr. 49). Inspector Jones was not aware of a falling rib injuring anyone at the Gateway Mine. (Tr. 44).

Joseph Bullock, a beltman at the Gateway Mine, testified that he has never seen a rib fall at the mine. (Tr. 54). He had worked at the mine for less than a year, but he had extensive experience at other underground coal mines. He attributed the lack of rib falls to the fact that the mine's depth is only 230 feet. (Tr. 55). Although he never cleaned up coal at this particular location, he stated that cleanup is always performed from the off-walkway side because the water line would get in the way on the walkway side. The off-walkway side is a little wider than the walkway side at the cited location. Cleanup takes 20 to 30 minutes at each drive and the work is performed by newly hired miners. (Tr. 57). The floor around the area of the drive was made of concrete from rib to rib.

Compliance Manager Larry Holder testified that mines with a deeper overburden have more problems with falling ribs than the Gateway Mine. (Tr. 65). He worked at the Gateway Mine since 1996 and worked at other coal mines before that. He never saw a rib fall at the Gateway Mine. He only observed situations where the rib slid down. There were no reported injuries caused by rib falls since at least 2008. (Tr. 66). Injuries caused by rib and roof falls usually occur within 40 feet of the face, not in outby areas along belt lines.

2. Discussion and Analysis

I find that the cited rib was loose and therefore was not controlled to protect persons from hazards related to a fall of the rib. Thus, the Secretary established a violation. I also find that the Secretary established that the violation was S&S. There was a violation of the safety standard that created a discrete safety hazard that someone could be injured by a falling or sloughing rib. I also find that if someone were injured by a fall of the cited rib, the injury would have been serious or fatal.

Peabody argues that the third S&S element is not supported by the evidence. (Peabody Br. 32-33). Few miners had reason to work or travel in the cited area. The only miners who work in the area help clean up coal accumulations under the drive and they perform this work on the opposite side of drive against the opposite rib. As a consequence, if the rib were to fall, it would not endanger anyone working in the area. The preshift exams in the area take less than a minute and the cited area was only 4 feet long. It was highly unlikely that anyone would be in the area if the rib were to fall. Moreover, because the overburden was only 230 feet at this mine, the risk that the rib would fall was remote. At most the rib would slough off bit by bit. Peabody contends that "[g]iven the limited exposure as well as the testimony as to the presence of safe routes of travel and safe work locations and the behavior of failed ribs, the citation cannot properly be designated as S&S." *Id.* at 33.

The Secretary is not required to establish 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 Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). When evaluating whether a violation is S&S, the Commission takes into consideration the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. It is not clear how long the rib was in the same condition but, given that the inspector saw rock dust between the loose slab and the rib, it existed for at least a shift or two. It is clear, however, that Peabody was not planning to remove the loose rib without the inspector's actions.

The Commission has rejected a finding of an S&S violation based upon the "potential" that an injury could occur. *Texas Gulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988); *Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993). I find that the Secretary established that there was more than a mere potential that the cited condition would result in an injury. The evidence shows that there was a reasonable likelihood of an injury assuming continued mining operations. In reaching this conclusion, I considered the evidence that miners are not continually in the area.

The Secretary argues that Peabody's negligence was high because the violation was obvious. (Sec'y Br. 11). The mine examiner is an agent of the operator and should have noted the condition. Peabody contends that the high negligence finding was inappropriate. Peabody admits that preshift examiners regularly traveled through the area. The most recent examination was made four to six hours before the citation was issued. Peabody contends that the recently applied rock dust made the condition more obvious than it previously was. The gap between the rib and the slab could have widened since the previous preshift examination.

I find that the Secretary did not establish high negligence. Although the loose rib existed for a shift or two, it is unclear that it was obvious during the previous examination. It is also unclear when the rock dust was applied, but the area had been recently cleaned of accumulations and the operator applies rock dust after such cleaning operations. (Tr. 47). I modify the citation to allege moderate negligence. A penalty of \$18,000.00 is appropriate for this violation.

B. Citation No. 6680991, LAKE 2009-412, Riola Mine Complex

On January 30, 2009, MSHA Inspector George Heacock issued Citation No. 6680991 at the Riola Mine Complex under section 104(a) of the Mine Act for an alleged violation of section 75.517 of the Secretary's safety standards. (Ex. G-5). The citation alleges that the jumper power wires on the right side of the MPS Joy battery charger at the Unit #1 charging station were not adequately insulated or fully protected. The positive cable was cut or worn for a distance of 1/2 to 3/4 of an inch exposing the bare lead. The ground wire was cut or worn for a distance of about 1/2 an inch in close proximity to the power lead. The inspector determined that an injury or illness was reasonably likely and that any injury was likely to be fatal, that the violation was S&S, that one person would be affected, and that the violation was a result the operator's

moderate negligence. Section 75.517 provides, in part, that “[p]ower wires and cables . . . shall be insulated adequately and fully protected.” The Secretary proposed a civil penalty in the amount of \$5,080.00

1. Background

Inspector Heacock testified that he issued the citation because the positive and negative leads at the battery charging station were damaged. (Tr. 74). Because these leads only had one layer of insulation, the bare copper wire was exposed. This inspector has an electrical certification and, based upon his electrical training, he concluded that a fatal accident was reasonably likely as a result of this condition. (Tr. 76). The cables were at 200 amps. The cables are moved as batteries are charged. The cables would be handled once or twice a day. The inspector testified that these two exposed leads presented a significant electric shock hazard. He determined that the violation was S&S due to the significant risk of electrocution and burns. (Tr. 79). He observed dust and dirt on the damaged areas, which led him to believe that the condition existed for at least one shift.

The inspector admitted that the battery charger was equipped with ground fault protection. (Tr. 83). If there is a fault from the positive lead to ground, the device would trip instantaneously. To receive a shock, the miner would have to contact the two wires or just the positive wire that touched the metal casing. (Tr. 87). There was also a ground lead on this charger that is not insulated. (Tr. 89-90).

Charles Lyons, a shift maintenance manager at the mine, testified that the charger is deenergized at the time a miner connects the leads to the battery. (Tr. 99, 103). The output of the chargers is 240 volts DC. Lyons, who has extensive mining and electrical experience, did not know of any injuries caused by electrical current at the mine. (Tr. 100). He opined that a fatal accident was not likely because the current would have to travel through a person’s heart to be fatal. It was not likely that anyone would hold both leads at the same time. A more likely injury would be a burn to the hand if someone touched an energized lead. (Tr. 102).

Chad Barras, Peabody’s Midwest Safety Director, testified that miners were required to wear gloves at Peabody’s mines. (Tr. 106). The purpose of this policy was both to prevent cuts and to provide electrical protection. He said that the policy was strictly enforced. Wearing gloves while picking up the leads at the battery charger added additional resistance and reduced the potential current flow. (Tr. 107). All miners at the mine were required to wear boots that provide metatarsal and electrical protection. The boot policy was implemented in 2004 and boots were purchased for the miners. Such boots would “limit the current from the cable through the person to the earth.” (Tr. 108). Barras testified that the mine is generally dry. He researched MSHA’s online database going back to 1995 and he could not find a single fatal injury report involving DC power. Barras testified that the violation in this instance was not reasonably likely to result in an injury. (Tr. 110). He gave this opinion based upon the nature of the protective equipment used at the mine, the type of current involved, and lack of any record of any previous injuries involving this type of current.

2. Discussion and Analysis

I find that the Secretary established a violation. Peabody contends that the violation was not S&S and that the inspector erred when he labeled the gravity as potentially fatal. It asserts that when miners charge batteries at charging stations, they deenergize the charger, attach the battery to the charger, switch in the circuit breaker, and then turn the power unit on. (Peabody Br. 35). The charger will not function until the battery is plugged into the charger. After the battery is fully charged, the leads are deenergized before they are unplugged from the battery. As a consequence, there was only a remote possibility that anyone would handle the leads when they were energized.

Peabody also argues that, even if a miner touched the energized leads, it was unlikely that he would be shocked because he would not provide a path to ground. The area was dry and miners wear gloves and electrical-rated boots. The power in the leads was direct current which is less likely to injure a miner than alternating current.

I find that the Secretary did not establish that the violation was S&S. Although there was a potential that someone could be injured by the leads, an injury was not reasonably likely. I credit the testimony of Lyons and Barras on this issue. Although an inspector's opinion is entitled to weight, Inspector Heacock's testimony was confusing and muddled. In his citation, his notes, and his initial testimony, he believed that the ground wire had insulation that was damaged. At the hearing, he admitted that grounding conductors are not insulated. The inspector also overstated the risk of receiving an electric shock from the leads. I credit the company's testimony that, until the leads are connected to a battery, the charger will not energize the leads. The risk that a miner would come into contact with both leads or otherwise provide a path to ground was remote. I also find that the evidence establishes that the risk of a fatal injury was remote. Consequently, the S&S determination is deleted from the citation and the gravity is reduced.

The inspector's moderate negligence determination is affirmed. A penalty of \$1,000.00 is appropriate.

C. Citation No. 6680994, LAKE 2009-412, Riola Mine Complex

On February 5, 2009, Inspector Heacock issued Citation No. 6680994 at the Riola Mine Complex under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. (Ex. G-9). The citation alleges that oil, oil saturated coal fines, and brake fluid were present on a mantrip located in Unit #1. The accumulations were in the transmission compartment, brake caliper compartment, and muffler compartment and ranged from a film of oil to a quarter of an inch in depth.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that 14 people would be affected, and that the violation was the result of the operator's moderate negligence. Section 75.400 of the Secretary's regulations requires, in part, that "[c]oal . . . and other combustible materials shall be cleaned up and not be permitted to accumulate in

active workings or on diesel-powered and electric equipment therein.” The Secretary proposed a civil penalty in the amount of \$23,229.00.

1. Background

Inspector Heacock testified that the cited 14-man personnel carrier (mantrip) was used twice per shift to carry miners in and out of the mine. (Tr. 115). The oil that coated the diesel-powered mantrip was combustible. He believed that an injury was reasonably likely because the oil was in the transmission compartment and upon the brake calipers. The muffler of the mantrip gets hot, which could ignite the oil. The mantrip does not travel in by the last open crosscut because it is not permissible equipment. (Tr. 118). Injuries from fire, smoke, and carbon monoxide concerned the inspector. The inspector testified that he has personally observed a mantrip fire. (Tr. 120). He determined that the violation was S&S because the muffler can generate a lot of heat, especially when traveling up a slope. There are also many electrical and mechanical components present that could ignite the oil. He determined that the condition had existed at least one shift because there was some dirt upon the accumulations.

Inspector Heacock admitted that the mantrip was equipped with a fire suppression device. He also admitted that at least some of the material that accumulated in the oil could have been dirt from the roadways rather than coal fines. (Tr. 124). Smoke inhalation was one of the inspector’s major concerns.

Charles Lyons testified that the company’s mantrips are equipped with a heat activated fire suppression system. (Tr. 129). The mantrips are also equipped with a “murphy switch” that automatically shuts down the mantrip if engine temperatures exceed 230 degrees. Chad Barras testified that Peabody’s tests revealed that the temperature of the engine and transmission housing does not exceed 215 degrees and the exhaust could reach 230 degrees. (Tr. 134). Barras also testified that the flash point of both hydraulic oil and brake fluid are significantly higher than 300 degrees. (Tr. 135). He stated that cleaned coal from the mine will burn at 880 degrees. As a consequence, Barras testified that it was not reasonably likely that the cited conditions would have injured anyone.

2. Discussion and Analysis

I find that the Secretary established a violation of section 75.400. I find, however, that the violation was not S&S. The credible evidence establishes that it was not reasonably likely that the hazard contributed to by the cited conditions would have resulted in an injury. Assuming continued mining operations, it was unlikely that the accumulations would have caught fire. Even if these accumulations started to smolder, it was unlikely that anyone would be injured. The Secretary did not establish that the material in the oil was anything other than roadway dirt. The flash point of oil is higher than the temperatures likely to be experienced on the mantrip. A fire was unlikely to start.

In this instance, I find that consideration of the fire safety system on the mantrip is appropriate.² I credit the testimony of Barras and Lyons as to the safety devices on the mantrip and that the fire suppression system reduced the likelihood of a fire. I also considered Peabody's other evidence in concluding that the violation was not S&S.

The violation was serious and was the result of Peabody's moderate negligence. The penalty proposed by the Secretary was high because of the number of violations of section 75.400 violations that have occurred at the mine. Taking this history into consideration, I find that a penalty of \$12,000.00 is appropriate.

D. Citation No. 6681347, LAKE 2009-415, Francisco Mine

On February 2, 2009, MSHA Inspector Anthony M. DeLorenzo issued Citation No. 6681347 at the Francisco Mine under section 104(a) of the Mine Act for an alleged violation of section 75.370(a)(1) of the Secretary's safety standards. (Ex. G-12). The citation alleges that the approved ventilation plan was not followed on MMU 002-022. Dry and powdery clay, coal dust, and other fines were on the mine floor and were easily placed in suspension in the #3, 4, 5, and 6 entries from crosscut #72 to the last open crosscut. The approved plan states that haulage roads and travelways will be treated with water or calcium chloride to control dust.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a permanently disabling injury, that the violation was S&S, that seven people would be affected, and that the violation was the result of the operator's moderate negligence. Section 75.370(a)(1) of the Secretary's regulations requires, in part, that coal mine operators develop and follow a ventilation plan. The Secretary proposed a civil penalty in the amount of \$7,578.00.

1. Background

Inspector DeLorenzo testified that when he traveled through the cited area he observed dust and other particles in the atmosphere. (Tr. 141). The mine floor was so dry that any vehicle traveling through the area would throw dust into suspension. He did not take a sample of the dust to have it analyzed for content. *Id.* The mine's ventilation plan requires that "[d]ust on haulage roads and travel ways will be controlled by water or calcium chloride." (Ex. G-14 at 9). This provision is in a section of the ventilation plan entitled "Methods Employed Outby the Working Sections." (Tr. 152; Ex. G-14 at 9). The cited area was in an inby section of the mine, from the loading point to the working face. (Tr. 142-43, 147). The dusty roadways were inby

² The Commission, relying in part on *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995), rejected arguments that the presence of safety systems, such as fire suppression systems, should automatically negate an S&S finding. *AMAX Coal Company*, 19 FMSHRC 846, 849 (1997); *Cumberland Coal Resources, LP.*, 33 FMSHRC 2357, 2369 (2011); *Big Ridge Inc.* 35 FMSHRC 1525, 1529 (June 2013). The Commission reasoned that "adopting [the mine operator's] argument that redundant, mandatory protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made." *Cumberland Coal Resources*, 33 FMSHRC at 2369.

the isolation curtains. (Tr. 149). The area was rock dusted and the mine floor was fire clay. (Tr. 150). There is heavy traffic in the area. (Tr. 154).

The inspector determined that the violation was S&S because the condition created two hazards. First, the dust in the area inhibited visibility. “When you’ve got that much dust suspended in the air, the light will refract off the dust and . . . your visibility becomes limited to what would be in front of you as you’re driving a coal hauler or scoop.” (Tr. 143). An accident was likely because an equipment operator has a limited ability to see what is in front of him and the direction of other traffic or people in the area. Inspector DeLorenzo also believed that the violation created a health hazard of breathing the respirable dust. He testified that there was minimal air movement in the area. (Tr. 144-45). He determined that seven miners would be affected because that was the number of people working in this “fishtail” ventilation unit. (Tr. 144). Inspector DeLorenzo testified that it would take several hours for a wet roadway to become so dry and pulverized. He believed that if there were an accident due to limited visibility any injuries would result in lost workdays or restricted duty, but that prolonged exposure to the respirable dust would result in a permanently disabling injury. (Tr. 145).

Tommy Alvey, Jr., a fill-in boss at the mine, testified that he discussed the roadways with Inspector DeLorenzo. (Tr. 157). He told the inspector that he already noticed that the roads were dusty and, moments before, had requested that a water truck water down the area. (Tr. 158). He frequently calls to get roadways watered. (Tr. 160). Based upon that conversation, Alvey thought that no citation would be issued. Alvey did not believe that the roads were overly dusty or that the conditions created a hazard of vehicular accidents.

2. Discussion and Analysis

Peabody contends that it did not violate the safety standard because the section of the ventilation plan relied upon by Inspector DeLorenzo does not apply to inby areas, i.e. working sections, of the mine. (Peabody Br. 9). MSHA approved the language of the ventilation plan and it did not attempt to change it. The language of the ventilation plan is clear; no deference is owed to the Secretary’s interpretation. The citation must therefore be vacated.

The Secretary argues that “Respondent would have the Court hold that because the wetting down requirement is not listed under the ‘Methods Employed in Working Faces’ section, there was simply no requirements in place for roadways and haulage roads that were *technically* inby the working section.” (Sec’y Br. 19) (emphasis in original). He contends that the cited entries were either haulage roads or travelways and that it does not matter that the entries were in the working section.

Based upon the language of Peabody’s ventilation plan, I hold that the citation must be vacated. On page 9 of the mine’s ventilation plan, in a section entitled “8. Dust Control Provisions,” there are several subsections. In a subsection entitled “2b. Methods Employed Outby the Working Sections,” the plan provides that “Dust on haulage roads and travel ways will be controlled by water or calcium chloride.” (Ex. G-14 at 2). The citation at issue concerned conditions on the mine floor inby the last open crosscut. Thus, the citation was issued in a working face area of the mine. Another subsection entitled “1. Methods Employed in Working

Face Areas” does not contain language requiring that dust be controlled on the floor in working face areas using water or calcium chloride.

In cases where an operator believes that a certain provision should not be included in a ventilation or roof control plan, the Secretary insists that he has plenary authority to force the operator to include the provision in the plan. The Commission has determined that, absent an abuse of discretion, the Secretary can require the inclusion of most provisions in mine plans:

While the contents of a plan are based on consultations between the Secretary and operators, the Commission has recognized that “the Secretary is [not] in the same position as a private party conducting arm’s length negotiations in a free market.” *Id.* at 1746. As one court has noted, “the Secretary must independently exercise [his] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary’s part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996). “[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983)(withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA’s conduct throughout the process was reasonable).

Twentymile Coal Co., 30 FMSHRC 736, 748 (Aug. 2008). In *Jim Walters*, the Commission held that in plan violation cases, the Secretary “must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision.” *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Given the Secretary’s considerable authority in the mine plan process, he cannot deem that a particular requirement should be included in a plan when the requirement is not there. The language of the ventilation plan is clear on this point so the issue of deference does not arise.

I hold that the Secretary did not establish that the cited condition violated the ventilation plan. The inspector discovered the dust in an inby area and the plan does not contain a provision related to the control of nuisance dust on mine floors in the working face area. The citation is **VACATED**.

E. Citation No. 6681810, LAKE 2009-414, Air Quality #1 Mine

On February 3, 2009, MSHA Inspector David Cox issued Citation No. 6681810 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.370(a)(1) of the Secretary's safety standards. (Ex. G-18). The citation alleges that Peabody did not comply with the approved ventilation plan on the #5 unit, MMU 005-0 because haulage roads along the #4, #5, and #6 entries and the adjoining crosscuts were dry and dusty. Pulverized mine dust from 1 to 6 inches in depth was present from the unit feeder to the last open ventilating crosscuts, which was a total linear distance of approximately 840 feet. Visible dust was suspended in the air and coursed over miners required to drive coal haulers through the area from the continuous mining machines to the feeder area and back.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a permanently disabling injury, that the violation was S&S, that 12 people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$34,652.00.

1. Background

Inspector Cox testified that there was a lot of pulverized coal in the roadways from the feeder to the last open crosscut. (Tr. 169). Because the roadways were dry, coal haulers operating between the continuous mining machines and the feeder for the belt kicked up dust. (Tr. 170). The ventilation plan required Peabody to keep the haul roads watered down to control the dust. The mine's ventilation plan, under the heading "Additional Dust Control Measures Used and Maintained," states that "calcium chloride, water, or other suitable chemical treatment" shall be used. (Ex. G-22 at 7; Tr. 171). Inspector Cox determined that the violation was S&S because it could contribute to miners contracting pneumoconiosis. Everyone in that area was affected. He did not take any dust samples. (Tr. 176). The inspector believed that the conditions existed prior to the current shift because it would take some time to pulverize the coal and create the dust. Because the dust was dark, the inspector believed it was mostly pulverized coal. (Tr. 177, 183). The coal could have spilled from the coal haulers. (Tr. 184). The cited roadways were in neutral air. (Tr. 180). Inspector Cox did not believe that any effort was made to correct the condition. The cited areas were in the working section. (Tr. 182).

Matthew Kerry, a section foreman at the mine, testified that the intake was on the right side of the entries and the return went out the left side. (Tr. 191). There were eight entries in the area cited by Inspector Cox and the feeder was in the middle entry. The roadways were usually watered every shift. (Tr. 194). The provision in the ventilation plan discussing dust control measures in outby locations did not apply to the area cited by the inspector. (Tr. 195-96). Anything inby the tailpiece is in the working section. In addition, the cited roadways had been watered earlier in the shift. (Tr. 196).

Inspector Cox determined that the operator's negligence was high because he observed similar conditions in the same area the previous week and the supervisor told the inspector that the dust problem would be addressed. (Tr. 174).

2. Discussion and Analysis

For the same reasons discussed above in relation to Citation No. 6681347, issued at the Francisco Mine, this citation must be vacated. The section of the ventilation relied upon by Inspector Cox does not apply to working sections; it only applies to areas outby the working sections. The cited area was inby the tailpiece and the cited ventilation plan provision, by its own terms, only applies to areas outby the working sections. (Ex. G-22, p. 7). The language of the ventilation plan is clear. The citation is **VACATED**.

F. Order No. 8414938, LAKE 2009-413, Air Quality #1 Mine

On February 4, 2009, MSHA Inspector Danny Franklin issued Order No. 8414938 at the Air Quality #1 Mine under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. (Ex. G-24). The citation alleges that combustible material was allowed to accumulate in the last three crosscuts of the south slope belt. From the belt tail going outby for three crosscuts there was float coal dust deposited on rock dusted surfaces. These accumulations were distinctly black in color and ranged from a thin coating to approximately one quarter of an inch in depth, rib to rib in width, and were deposited on the timbers and belt structure.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$10,705.00.

1. Background

The order was issued at the bottom three crosscuts of the south slope belt. (Tr. 204). Inspector Franklin testified that the float coal dust was obvious and extensive; it was dry and black in color. It extended for at least three crosscuts. Miners are required to work or travel in the cited area. (Tr. 206). Inspector Franklin testified that it was reasonably likely that an injury would occur if the condition was not abated and any injury would be serious in nature. He believed that the condition created a fire hazard and that the fire could spread quickly given the amount of air traveling through the area, the size of the accumulations, and the ignition sources in the area. (Tr. 206-07). The inspector testified that a "traveling roller was rubbing very hard against the frame, causing an ignition source." (Tr. 207). There were belt shavings under the roller which indicated that the roller was rubbing for a considerable length of time. Inspector Franklin has personally observed fires at other mines that were started by malfunctioning rollers. *Id.* The most likely injury would be smoke inhalation and burns suffered by those attempting to put out the fire. Fire suppression devices were in the cited area, as well as carbon monoxide ("CO") monitors. (Tr. 208-09, 221). He acknowledged that each member of the fire-fighting brigades at the mine wear a breathing apparatus and turnout gear. (Tr. 221). He was not concerned about an explosion because no methane was present. Given the distance from more active areas of the mine, the inspector was concerned that it would take some time for firefighters to reach the area. (Tr. 226).

Inspector Franklin determined that the violation was the result of Peabody's unwarrantable failure³ to comply with the safety standard because the violation was obvious, extensive, and there had been many citations issued at the mine for accumulation violations. (Tr. 209). The inspector previously discussed the mine's accumulation problems with management and offered suggestions to address the problem. (Tr. 210).

Kimberly Orr, who was on the outby crew at the mine, testified that she accompanied Inspector Franklin during the inspection. (Tr. 234). She said that the slope tail is cleaned at least daily and there was not a "big accumulation of coal dust" at the time of the inspection. (Tr. 235). Coal dust can accumulate rapidly over the course of a shift.

Terrance Kiefer, an examiner at the mine, examined the tail at the south slope on February 4, 2009, during the 7:30 a.m. to 3:30 p.m. shift. (Tr. 251). He wrote "fines at tail" in the record book. (Ex. G-27 at 30). He did not observe a significant amount of float coal dust at that time. (Tr. 251). He stated that he would have shut the belt down if he observed the belt rubbing the support structure. Peabody cleans the tail while the belt is shut down and locked out using a shovel. (Tr. 252). Hoses are also used to wash the area down and there is a sump at this location. The bottom in this area is concrete.

Chad Barras testified that the Air Quality #1 Mine has firefighting brigades. (Tr. 256). They are equipped with firefighting equipment including breathing devices that supply up to one hour of air. The equipment includes foam generators and foam cannons. If a fire started at the south slope tail, the CO monitors would notify the fire brigade. (Tr. 257). He did not believe that an injury was likely. He pointed to the "Bentley Report," an MSHA report that shows that there were no reportable injuries or fatalities from belt fires in underground coal mines between 1980 and 2005. (Ex. R-16). The company's fire brigades receive extensive training at fire schools. (Tr. 258).

³ The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d. 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

2. Discussion and Analysis

I find that the Secretary established a violation of section 75.400, but whether the violation was S&S is a close question. There is no allegation that methane was present in the atmosphere and there was no allegation that there was a possibility that a methane explosion could put the float coal dust into suspension. The south slope belt was a long distance from the working sections. This slope was used to transport some of the coal out of the mine. The potential injuries that concerned Inspector Franklin were smoke inhalation and burns sustained by anyone who would be in the area to fight the fire. There was no risk that smoke would travel deeper into the mine if there was a fire.

I find that the credible evidence establishes that the violation was not S&S because it was not reasonably likely that the cited conditions would contribute to an event in which miners would be injured. With respect to citations or orders alleging an accumulation of combustible materials, the issue is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-971 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-503.

The accumulations were not particularly extensive considering the fact that a large amount of coal was conveyed out of the mine on that belt. The area was cleaned at least once a day. The parties dispute the amount of coal dust that was present. Peabody also argues that the cited accumulations included a lot of rock because the material conveyed upon the belt was 35 percent approximately coal and 65 percent rock.

The only ignition sources were the rollers. One roller was rubbing against the frame at the time of the inspection creating heat. There were belt shavings under that roller. There was no evidence, however, that the subject roller was in contact with or in the immediate vicinity of any coal fines or float coal dust. Inspector Franklin admitted that water sprays were directly above the roller in question. There was no other equipment in use in the area. There were CO monitors in the area and automatic fire suppression devices above the belt at the tail.

Finally, Peabody established that firefighters at this mine wear turnout gear and breathing devices that supply clean air. The fire brigade equipment was parked nearby. The floor of the slope in the cited area was concrete from rib to rib. A fire was not reasonably likely to start given that the operator examined the area each shift and cleaned the area at least once a day and, if a fire did start, it was not reasonably likely that anyone fighting the fire would be injured or that any injury would be of a reasonably serious nature.

The Secretary cites *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133 (7th Cir. 1995) for the proposition that the presence of safety features to combat fire hazards does not establish that a fire does not pose a serious safety risk to miners. It must be noted, however, that in that case the Commission judge determined that there were substantial accumulations of coal fines and float coal dust. The accumulations extended 116 feet, including at several dumping points, along a belt

line and they ranged from 2 inches to 3 ½ feet deep. The tail roller was completely covered and was turning in the coal fines. The court affirmed the judge's S&S finding and held:

The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires.

52 F.3d at 136. The court of appeals applied the preponderance of the evidence test to affirm the judge's decision.⁴

As stated above, the Commission has held that if redundant, mandatory protections were to provide a defense to an S&S finding, every protection would have to be nonfunctional before an S&S finding could be made." *Cumberland Coal Resources*, 33 FMSHRC at 2369. In this case, while I have considered the presence of water sprays, CO monitors and other protections, my non-S&S holding is not based solely on these protections. The risk of fire was quite low taking into consideration continued mining operations, including Peabody's practice of frequent examinations and cleaning.

Based on the above, I find that the Secretary did not establish that the violation was the result of Peabody's unwarrantable failure. The operator was negligent with respect to this violation but it did not rise to the level of aggravated conduct, which has been defined to include conduct that is "not justifiable" or "inexcusable." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). I find that the Secretary established that the violation was obvious because it extended for three crosscuts. The Secretary maintains that the condition had been noted in the examination books for six consecutive shifts. The last full examination of the belts would have occurred during the previous shift. At that time no hazardous or other conditions were reported with respect to the south slope belt. (Ex. G-27 at 33). Inspector Franklin issued the order at 1:10 p.m. on February 4. I find that the evidence establishes that the area was likely cleaned at some point prior to or during that shift. I do not credit the Secretary's position that the record shows that the condition existed over several shifts. I also find that the violation was not extensive. Most of the accumulations were trace amounts and it is unclear where and how extensive the quarter inch accumulations existed. Although the violation was serious, it did not present a high degree of danger. The operator did not have knowledge of the existence of violation. Peabody had been put on notice that greater efforts were necessary to keep its belt lines free of accumulations.

Order No. 8414938 is modified to a section 104(a) citation with moderate negligence. The S&S designation is vacated but the violation is serious. A penalty of \$8,000.00 is appropriate.

⁴ The court also noted that the issue on appeal was whether the Secretary established that a fire was reasonably likely to result in a serious injury as opposed to whether a fire was reasonably likely to start in the first place. 52 F.3d at 136 n. 1.

G. Order No. 8414939, LAKE 2009-413, Air Quality #1 Mine

On February 4, 2009, Inspector Franklin issued Order No. 8414939 at the Air Quality #1 Mine under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. (Ex. G-25). The citation alleges that combustible material was allowed to accumulate upon the energized main south belt from head to tail. The accumulations consisted of a thin coating of float coal dust on rock dusted surfaces that was distinctly black in color. A thin layer of float coal dust and fine coal had also been allowed to accumulate in crosscuts 8 and 9 for a distance of 55 feet.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$10,705.00.

1. Background

Inspector Franklin testified that the entire belt line had float coal dust upon the structure, water line, roof support, and any flat surfaces where dust could settle. (Tr. 212). The float coal dust was dry and black. There were "small chips of coal" and float coal dust up to a depth of 47 inches in the crosscuts. *Id.* The accumulations were in an active area of the mine. He determined that the violation was S&S because there were many rollers in the area and testified that "[a]ll it takes is one of the rollers malfunctioning, going out, dropping down in this material, and the hot bearings igniting the fuel source." (Tr. 212). The belt had accumulations all along it. (Tr. 213). As with the previous order, the people most likely to be injured are those trying control the fire. Burns and smoke inhalation were the most likely injuries. The inspector believed that the condition existed for six to eight hours. (Tr. 214). The area that was 47 inches deep was off to the side at the air lock, not under the belt. (Tr. 224).

As with the previous order, Inspector Franklin determined that the violation was the result of the operator's unwarrantable failure. He believes that management was aware of this condition and, if they were not, they should have been. (Tr. 214-15). The "Belt and Roadway Inspection Report" for January 30, 2009, for the preshift that started at 4:30 a.m. includes a notation "75-Head needs broomed, Take-up-9 fines and pressings." (Ex. G-27 at 2-3). The report for the shift that started 12:30 p.m., states "needs swept 75-head & fines 9-Take-up." *Id.* at 4-5. There are numerous other notations in the roadway book about fines and accumulations along the belt, some of the notations indicate that the accumulations were cleaned. (Tr. 215-16). Inspector Franklin believes that, given all the accumulations that developed along the main south belt, management did not take sufficient steps to control the situation. (Tr. 219). He did not believe that sending someone along the belt with a broom would fix the problem. The inspector noted that shovels were used to abate the condition in some locations and the entire area was rock dusted. (Tr. 220-21).

Kimberly Orr was with Inspector Franklin when he inspected the main south belt. (Tr. 236). She testified that she did not observe any accumulations that were a quarter inch deep, but some locations had a little coal dust. (Tr. 236, 238). She stated that there was one area between

crosscuts 7 and 8 where the belt travels through an airlock door. *Id.* Coal dust accumulated on the intake side where the belt and the air pass through an opening in the door. She does not believe that it was 47 inches deep and it was along the rib line rather than under the belt.

Gary Ball, who was a mine examiner when the order was issued, testified that he conducted the examination of the belt on February 4, 2009, during the shift that began at 7:30 a.m. (Tr. 242; Ex. G-27 at 30-31). During that shift, under the section entitled “Violations or Hazardous Conditions,” there is an entry in the roadway book that states, with reference to the main south belt, “47-head needs swept.” (Tr. 243; Ex. G-27 at 30). He wrote that notation and it means that “it’s starting to get grey in color and there is rock dust already there, so if you sweep it, it will come together and it will not be black float coal dust.” (Tr. 243). Coal dust also accumulated at the air lock and the roadway book notes that there were fines in that location. The accumulations at that location were not 47 inches deep. (Tr. 244, 248). The belt in that area was between 40 and 48 inches above the mine floor. (Tr. 245). There were no hot rollers. Terrance Kiefer was also at the airlock on the south mains on February 4 and he did not observe accumulations that were 47 inches deep. (Tr. 253).

2. Discussion and Analysis

I find that Peabody violated section 75.400 but the violation was not S&S. The main south belt was near the south slope belt discussed above in the previous violation. The accumulations were more extensive along the main south belt, however. The inspector found accumulations from head to tail ranging from a thin coating to a quarter inch buildup. It was black in color. Near the airlock, it was even deeper. I credit the testimony of Peabody’s witnesses that the accumulation at the air lock was not 47 inches deep, but I do find that it was considerable. It was not under the belt. I find that the Secretary established a serious violation of section 75.400. Although this is an extremely close case, taking into consideration the factors set forth above, I find that the violation was not S&S. The primary difference between this violation and the previous violation is the extensiveness of the violation. The cited condition extended about 55 feet along the belt. The accumulations were a quarter inch deep in some locations, but it is not clear if that depth was common. Nevertheless, there was no threat of a methane explosion that would put the coal dust and float coal dust into suspension. There were no ignition sources in the area other than the chance that a roller would malfunction or a roller’s bearings would freeze. While this is possible, it is not reasonably likely that such events would cause a fire, taking into consideration continuing mining operations. The belt line is frequently examined by Peabody’s mine examiners. The accumulations would be cleaned up and any malfunctioning rollers would be repaired. The material on the belt also contained a lot of rock that is not combustible. Finally, as stated above with respect to the previous violation, an injury would be unlikely if fire would start. It is not clear how long the cited accumulation was present.

I considered Inspector’ Franklin’s legitimate concern that accumulations along belt lines is a systemic problem at this mine. Coal dust and float coal dust frequently accumulate along these belt lines and many citations have been issued. He questioned whether Peabody is doing enough to prevent these accumulations. This is a reasonable concern and my determination that the violation was not S&S should not deter management at Peabody from improving its control measures along the beltlines at its mines.

I also find that the violation was not the result of Peabody's unwarrantable failure to comply with the safety standard. The accumulations were extensive and obvious, but the accumulation at the airlock was not as extensive as the Secretary contends and it was not near any of the belt line's moving parts. The violation did not present a high degree of danger. Peabody's certified examiners traveled along the belt line and cleaned up accumulations as necessary. (Ex. G-27 at 24-37). Cleanup occurred on the shifts immediately preceding MSHA's inspection. (See e.g. G-27 at 29, 33). There is no probative evidence that the accumulations existed for a long period of time. The operator had no knowledge of the accumulations. I agree with the Secretary, however, that greater efforts are necessary to either keep the beltline's clean or to take proactive measures to prevent accumulations from developing.⁵

Order No. 8414939 is modified to a section 104(a) citation with moderate negligence. The S&S designation is vacated but the violation is serious. A penalty of \$8,000.00 is appropriate.

H. Citation No. 8414944, LAKE 2009-414, Air Quality #1 Mine

On February 6, 2009, Inspector Franklin issued Citation No. 8414944 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-31). The citation alleges that ribs where people work or normally travel were not being supported or otherwise controlled upon the walkway (back) side of the main south beltline. The citation lists eight locations where the inspector observed loose ribs. The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$25,163.00.

1. Background

Inspector Franklin testified that he observed loose ribs at several locations along the south main beltline. (Tr. II 8).⁶ One of the areas of loose ribs was near Crosscut 95 3/4. The loose area was 3 to 8 inches thick and measured 8 by 5 feet. He did not want to walk in front of them because he did not want to endanger himself. (Tr. II 9). He measured each of the sections of loose ribs after they were taken down. Some of the loose areas had rock dust in the gap between the firm rib and the loose rib and others did not. He determined that the operator's negligence was high because there was an abnormal number of loose areas compared to other mines he had inspected. (Tr. II 11). In addition, the violation was serious and S&S because when a rib falls, a miner in the area would receive crushing injuries and would be pushed against the moving belt.

⁵ It should be noted that, at the time of the hearing, Peabody was no longer using the south slope and the main south belt. It had consolidated its operations to the west side of the mine. Problems with accumulations could exist in other areas of the mine, however.

⁶ The transcript was renumbered for each day of the hearing. Transcript references designated with a "II" refer to the second day of the hearing and those designated with a "III" refer to the third day of the hearing.

The distance between the cited ribs and the belt structure was about 19 to 20 feet. (Tr. II 10). Given the size and number of loose ribs, the inspector believed that it was reasonably likely that someone would be injured. The examiner should have noticed these conditions, recorded them in the book, and corrected the conditions. The loose ribs were not at the head or tail pulley. (Tr. II 16).

Richard Carrie, assistant manager at the mine, accompanied Inspector Franklin on February 6. He testified that the inspection party walked along the main south belt in an outby direction on the back side of the belt. (Tr. II 29). Carrie pried the ribs down as Inspector Franklin pointed them out. The ribs were 1 to 6 inches thick. He also testified that in the coal seam at the Air Quality #1 Mine, the ribs sluff down rather than fall over unless you pry them down. (Tr. II 30, 39). He believed that, if the ribs in question were not pried down, they would have sloughed down, which would not present a hazard to employees. He testified “I’ve worked in this seam all my life and I’ve never been threatened by one of the ribs flying down and hitting us.” (Tr. II 31). The rib breaks down into pieces when it sloughs down. He further testified that when miners need to work along the belt, they are on the roadway side, not the back side. The belt is examined every eight hours. (Tr. II 35).

Dennis Gibbons, a mine examiner, testified that at the time the citation was issued he was examining belts and roadways at the mine. (Tr. II 43). Examiners used golf carts to examine the beltlines on the roadway side, but would walk along the back side when conducting an examination.⁷ (Tr. 44; Ex. G-33 at 207). When Gibbons examines a belt, he looks for accumulations and other hazardous conditions. A rib creates a hazard and Gibbons will pry it down if “it has a severe gap in it.” (Tr. II 45). He testified that “if it comes down, then that’s a hazard, as far as I’m concerned,” but if it does not come down, then it is not a hazard. It is not always easy to see a gap because it can be on the opposite side of the direction of travel during examinations. (Tr. II 46). Gibbons had never observed a rib fail, but he has seen fallen ribs. The ribs slide down when they fail. (Tr. II 47).

Gibbons examined the main south belt on February 6, 2009. (Tr. II 47; Ex. G-33 at 207-08). He did not see any hazardous ribs that day, but he was on the roadway side when he conducted his examination. (Tr. II 51). Given his years of experience, Gibbons believes he is capable of recognizing unsafe ribs. (Tr. II 48).

Randall Hammond, a compliance official with Peabody, testified that he researched the company’s records for injuries caused by failing ribs since the mine opened in 1993. (Tr. II 55). He found that a rib failure injured one miner in an inby area of the mine and that there were no such injuries in outby areas. In the coal mining industry, the majority of roof and rib injuries occur in working sections inby the last open crosscut. Hammond testified that he observed a rib fail at the mine. The rib broke in the middle and slid down. (Tr. II 56-57). It was in an inby area.

The Secretary called Inspector DeLorenzo as a rebuttal witness; he testified that he recalls an injury caused by a rib failure in 2009. A miner was struck in the thigh by a falling rib

⁷ Although the main south belt was in neutral air, the back side of the belt was often referred to as the “intake” side.

and suffered lost workdays. (Tr. II 60). He issued a citation as a result of this accident. (Tr. II 132). The loose material came off a pillar. The accident occurred near the loading point on the working section. Hammond testified that, although this accident did occur, it was a roof fall that injured the miner rather than a rib roll. (Tr. II 61).

2. Discussion and Analysis

I find that the Secretary established an S&S violation of section 75.202(a). Peabody argued that an injury causing event was unlikely to occur. I find that the evidence establishes that it was reasonably likely that the cited conditions would contribute to an accident in which there was an injury. The ribs were loose in at least eight locations along the belt line. It is not dispositive that a rib often slides down and does not topple over. If large enough, a sliding rib can seriously injure a miner. Some of the loose ribs detected by Inspector Franklin were quite large. I also find that any injury was reasonably likely to be serious, but I agree with Peabody that the most likely accident would not be fatal. The evidence establishes that an accident involving lost workdays was the most likely type of injury that would occur.

The violation was the result of Peabody's moderate negligence. Inspector Franklin testified that the loose ribs were obvious and extensive. The Secretary argues that if "the examiners had been doing adequate examinations, the hazards would not have existed." (Sec'y Br. at 35). Gibbons should have at least recorded the ribs where there was rock dust in the gap. Peabody argues that mitigating circumstances were present. First, the inspector walked along the main south belt two days earlier and he did not identify any loose ribs. He was on the back side of the belt at least part of the time. Thus, it is not clear when the conditions developed. In addition, the conditions may have become easier to identify once the area was rock dusted. Rock dusting occurred between February 4 and February 6 in response to Order No. 8414944, discussed above. Indeed, that order idled the belt line and the area was not examined for at least one shift. I find that the Secretary did not establish that this violation was the result of Peabody's high negligence.

The citation is modified to reduce the gravity to lost workdays/restricted duty and to reduce the negligence to moderate. A penalty of \$18,000.00 is appropriate.

I. Citation No. 8414923, LAKE 2009-414, Air Quality #1 Mine

On January 27, 2009, Inspector Franklin issued Citation No. 8414923 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.1403-5(g) of the Secretary's safety standards. (Ex. G-86). The citation alleges that a clear 24 inch walkway was not provided on either side of the 2-B belt line at crosscut numbers 22 to 23. Water accumulated to a depth of 2 to 14 inches in the entry for a distance of 55 feet. The citation was based on Safeguard No. 7591942, issued on May 7, 2003, as modified on August, 9, 2007. (Ex. G-87).

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was

S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$3,996.00.

The underlying safeguard was issued because rib coal and rib rock fell into the travelway along each side of the 2-A conveyor belt at crosscut 17. *Id.* The safeguard required Peabody to maintain a 24 inch travelway on both sides of all belt conveyors. The safeguard was modified in August 2007 to include a requirement that "the 24 inch travelway shall be clear of mud and water." *Id.*

1. Background

The inspector testified that he observed water that was 2 to 14 inches deep from rib to rib for a distance of 55 feet along the 2B beltline. (Tr. II 68). The water was muddy and it would be difficult for miners to determine where the mine floor was. A miner could fall in to the muddy condition and injure himself.

Inspector Franklin testified that the conditions he observed violated the safeguard because the water blocked safe passage down the walkway. (Tr. II 69). The safeguard requires a "clear travelway of 24 inches on both sides of all conveyors." *Id.* The inspector relied upon the modification that was made to the safeguard notice. He testified that the safeguard was modified to give notice that it also applied to mud and water.

The inspector determined that the violation was S&S due to the distance involved and the depth of the water. The water made it difficult for miners to see the mine floor. (Tr. II 70). The inspector said he tried to walk along the rib to avoid some of the water but he could not do so. If a miner stumbled and fell, he could suffer cuts, a twisted ankle, or broken bones. A miner could also fall onto the moving belt. The inspector could not determine exactly how long the condition existed, but he believed that an injury was reasonably likely.

Inspector Franklin determined that the violation was the result of Peabody's high negligence because muddy conditions were recorded in the record books beginning January 15, with some work done to correct the situation on January 15 and 16. (Tr. II 72). Thus, he believed that the condition existed for at least 10 days. The water was removed to abate the condition. (Tr. II 73). The inspector admitted that the areas where the water was 2 inches deep were not hazardous. (Tr. II 74). The safeguard, as amended, does not state how deep the water can be before a hazard is created. (Tr. II 75). He believes that if water is a problem in an area of a mine, the operator is required to pump as much water out as possible and add a bridge if necessary. (Tr. II 80).

Trent Harris, a lead man on section 1, testified that he conducted an examination of the belt during the day shift on January 27, 2009. (Tr. II 84; Ex. G-88 last 2 pages). In the remarks section of the exam book he wrote "water needs pumped XC 22-23" in the section for the 2B belt. (Tr. II 85; Ex. G-88 last page). He did not believe that the water presented a hazard so he wrote the note in the remarks section. Harris testified that he walked through the water and he could see the bottom. He was wearing rubber boots and he did not believe that the water created

a hazard. (Tr. II 86). The boots were 18 inches high and the water did not reach the top. He considered the walkway to be “clear” for passage. (Tr. II 88).

A few days before the hearing, the Secretary filed a motion in limine to exclude from the hearing any testimony regarding the original notice to provide safeguard and its modification. The Secretary argued that such evidence should be excluded because Peabody had waived its right to challenge the validity of the safeguard notice because it did not raise this issue as an affirmative defense in its pleadings and because it has previously paid penalties for citations issued under the safeguard notice. The Secretary also argued that the validity of the safeguard notice is a question of law for the court to resolve. The parties presented oral argument on this issue at the first day of the hearing. (Tr. 7-18).

At the hearing, I ruled that the Secretary was required to present evidence to establish the validity of the modification of the safeguard notice that broadened the original safeguard notice to include the presence of water in the travelway. (Tr. 18-22). Specifically, I ordered the Secretary to present evidence that the August 9, 2007 modification of the safeguard notice was issued because water in a travelway presented a transportation hazard to miners.

At a subsequent Peabody hearing, the Secretary presented the testimony of MSHA Inspector Kenneth Benedict. He stated that he accompanied MSHA Inspector Johnny Moore during an inspection in August 2007. Benedict was an inspector trainee at that time. (Tr. 9, Peabody Hearing Transcript for LAKE 2010-39). Inspector Benedict testified that he was present when Inspector Moore wrote the modification of the underlying safeguard notice. *Id.* at 11. He observed a lot of mud and water along the belt lines at the Air Quality #1 Mine. *Id.* Along the 3 West B beltline there was water and mud up to 3 feet in depth. *Id.* 11-12. It was hazardous to walk through the travelway because you could easily fall over. Inspector Moore’s notes confirm that water and mud was along the walkway. *Id.* 13-14. (*See also* Ex. G-2 at 16).⁸

Inspector Benedict testified that he traveled around the wet area along the belt line by walking over an entry or two and then he reentered the belt entry to walk the remainder of the beltline. *Id.* 16. Inspector Moore walked through the water and he did not fall. There were other beltlines that had water in the travel way that day. *Id.* at 17-18. He recalls that the water was up to Inspector Moore’s knees in one location. *Id.* 18. Benedict believed that it was “very possible” that someone would fall down walking through the water. *Id.* at 23.

2. Discussion and Analysis

Peabody argues that the safeguard was not validly issued. It contends that the Secretary failed to adequately demonstrate the nature of the hazard and the conduct required to remedy it. (Peabody Br. 3). The safeguard modification states that travelways must be clear of “mud and water” without further elaboration. The safeguard fails to provide notice of the amount of mud and water necessary to establish a violation.

⁸ A copy of pages 7-26 of the transcript for LAKE 2010-39 and exhibit G-2 in that same hearing docket have been included in the record of the current case as Judge’s Exhibit 1. The pertinent pages of the Secretary’s brief on this issue are included as Judge’s Exhibit 2.

Peabody contends that the safeguard, as modified, also does not specifically identify the hazard to be protected against. Inspectors Benedict and Franklin testified that the hazard was the risk of falling, but the safeguard does not mention that as the hazard for which it was issued. The safeguard addresses conditions resulting from the fall the rib and the presence of mud and water, but it does not specify that the “conditions would lead to an event that would create a danger to miners, nor does it indicate what that danger might be.” *Id* at 4.

These issues have been address by the Commission in *The American Coal Co.*, 34 FMSHRC 1963 (August 2012). In that case the Commission rejected the argument that a safeguard must not only describe a hazard but must also describe the potential harms or risks associated with that hazard. *Id* at 1969-1971; *see also Oak Grove Resources, LLC.*, 35 FMSHRC 2009, 2014-2015 (July 2013). In this instance, the original safeguard notice states that “rib coal and rib rock have fallen blocking the travelways along each side of the 2-A conveyor belt (3 West/1 Right) at crosscut #17.” (Ex. G-87). The notice further describes the distance that the travelways were blocked on each side. The safeguard notice goes on to state that it requires a clear travelway at least 24 inches wide to be provided on both sides of all belt conveyors. The modification was made to the safeguard notice in 2007 directly references the original safeguard notice and states that the requirements of the notice are modified to require that the 24 inch travelway “shall be clear of mud and water.” *Id* at 3.

I find that the original safeguard specifies “the nature of the hazard,” i.e. rib coal and rib rock blocked each side of the belt for distances up to 25 feet, and specifies a remedy, i.e. a clear travelway of at least 24 inches wide on both sides of the belt conveyor. *See generally, The American Coal Co.*, 34 FMSHRC at 1975. The modification made about four years later simply added an additional requirement that prohibited water and mud from blocking travel along belt travelways. The evidence establishes that when the modification was issued, the travelways were not clear of mud and water and that this condition impeded travel. I find that the safeguard as modified is valid on its face.⁹

I find that the Secretary established a violation of the safeguard notice. While the Secretary’s authority to issue safeguards is broad, the language of a safeguard must be narrowly construed. *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1785 (Nov. 1997); *Southern Ohio Coal Co.*, 7 FMSHRC 590, 512 (April 1985). Whether the presence of mud and water violated the safeguard notice must be analyzed on a case by case basis. I credit the testimony of Inspector Franklin that he observed water that was 2 to 14 inches deep from rib to rib for a distance of 55 feet. Such a condition presents a tripping and stumbling hazard. I find that the Secretary established that the presence of mud and water violated the safeguard notice.

⁹ Commission Judge Miller also determined that this safeguard, as modified, was valid. *Black Beauty Coal Co.*, 33 FMSHRC 1504, 1517 (June 2011) (ALJ). She held that “the Secretary demonstrated that the inspector evaluated the conditions present at the mine and determined that the safeguard was warranted.” *Id*.

I find that the violation was S&S.¹⁰ Inspector Franklin testified that the amount of water present made it impossible to walk the beltline. (Tr. II 70-71). In order to pass by this area, the inspector exited the beltline and walked around the wet areas. I credit the inspector's testimony that the conditions made it reasonably likely that someone would be injured trying to navigate the cited area. The injuries would not be severe, but they would be of a reasonably serious nature. Twisted ankles, cuts, or broken bones were the most likely injuries. The cited condition was reasonably likely to contribute to a serious injury.

Inspector Franklin testified that the condition may have existed for ten days because wet conditions were recorded in the mine's books for that period of time. (Tr. II 72). He was not sure of this conclusion because when asked if the condition existed for ten days he replied, "[e]vidently." *Id.* He also noted that the books indicated some work was done to remove the water during this period. Finally, he admitted that determining how long the condition existed was difficult and involved "guessing." (Tr. II 71). I find that the Secretary did not establish that the violation was the result of Peabody's high negligence and I reduce the negligence determination to moderate. A penalty of \$2,000.00 is appropriate.

J. Citation No. 8414932, LAKE 2009-414, Air Quality #1 Mine

On January 29, 2009, Inspector Franklin issued Citation No. 8414932 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-35). The citation alleges that the rib adjacent to where people work and travel was not being supported or otherwise controlled at the #25 power center at the #62 cross cut between the #2 and #3 entries. It further states that the loose rib was 54 inches wide, 72 inches tall and 4 to 24 inches thick. The loose rib was separated from the solid by about 1 to 2 inches.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$25,163.00.

1. Background

Inspector Franklin designated the violation as S&S because the rib was large and near the transformer, which is a high traffic area. (Tr. II 91). Miners regularly go to the transformer to reset the breakers and disconnect the power. (Tr. II 99). He believed that it was reasonably likely that someone would be in the area when the rib fell. He would expect potential injuries to include broken bones, cuts, lacerations, and bruises. The inspector noted that the rib was pulled with little effort. (Tr. II 92). Inspector Franklin determined that the violation was the result of the operator's high negligence due to the number of times Peabody had been cited for violations of section 75.202(a) and this issue was discussed with mine management. (Tr. II 93). The violation was also obvious because the gap between the loose rib and the solid rib was 1 to 2 inches. He did not believe that there were any mitigating circumstances. (Tr. II 95).

¹⁰ A violation of a safeguard notice can be designated as S&S. *Wolf Run Mining Co.*, 659 F.3d 1197, 1204 (D.C. Cir. 2001).

Elliot Polston, a unit foreman for Peabody, testified that the cited rib was at crosscut 62 on the left side of the entry on the inby corner. (Tr. II 103). There was a power center in the crosscut. Polston did not believe that the loose rib was obvious. (Tr. II 105). He disagreed with the inspector that the rib was pried down easily. (Tr. II 106). It took two people to pry it down. (Tr. II 106, 112). He also testified that the material came down in small pieces. (Tr. II 107). As a consequence, he did not believe that it was reasonably likely that anyone would have been injured if the rib fell. In addition, miners did not have any reason to be in that area once the power center was set up. The only reason for anyone to be in that crosscut would be if the breakers tripped. It was not a high traffic area. Polston testified that the power center is moved a couple times a week as the section advances. (Tr. II 108).

Polston also testified that someone is more likely to be injured pulling down a rib than having one fall upon him at the Air Quality #1 Mine. (Tr. II 110). An MSHA inspector, who used to be a manager at the mine, would frequently tell miners not to pull down a rib until it was ready to come down. The rib in questions was clearly not ready to come down. *Id.* Based on his experience at the mine, if the bottom of a cracked rib is solid it is not likely to fall. (Tr. II 114). It was not reasonably likely that the cited rib would fail. (Tr. II 111).

2. Discussion and Analysis

Peabody argues that the adequacy of the support for a roof or rib “must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have provided in order to meet the protection intended by the standard.” (Peabody. Br. 21, quoting *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987)). It contends that the evidence establishes that, although the rib was cracked, it was difficult to pull down. The crew first tried to knock it down with a scoop. When that failed, two people pulled the rib down. One steel bar bowed as a miner tried to pull down the rib.

I find that the Secretary did not bear his burden of proof to show a violation of section 75.202(a). The inspector’s testimony was vague and he appeared to be uncertain with respect to the circumstances that gave rise to this citation. (Tr. II 98). I found Mr. Polston to be a credible witness, based in part upon his extensive experience and his knowledge of the circumstances surrounding this citation. I find that a preponderance of the objective evidence establishes that the cited rib was not loose and was not in danger of falling. The ribs were tested when the power center was brought into the crosscut and the work it took to bring down the rib established its stability. I credit the testimony of Polston as to the effort required to bring down the rib. Citation No. 8414932 is **VACATED**.

K. Citation No. 8414956, LAKE 2009-414, Air Quality #1 Mine

On February 11, 2009, Inspector Franklin issued Citation No. 8414956 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary’s safety standards. (Ex. G-39). The citation alleges that the ribs were not being supported or controlled on the 5 Main North beltline on the roadway side.

The inspector cited loose ribs at two locations, one at crosscut 34 ¼ and two loose ribs at crosscut 4 to 5. The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$25,163.00.

1. Background

Inspector Franklin testified that he observed three loose ribs along the 5 main north beltline on February 11, 2009. One measured 32 by 65 inches and up to 11 inches thick, another was 8 feet by 2 feet and up to 8 inches thick, and the third was 10 by 3 feet and measured ¼ to 5 inches thick. (Tr. II 118). He determined that the violation was S&S because miners work in the area "going up and down the beltline" cleaning accumulations, performing maintenance, rock dusting, and completing the required examinations. (Tr. II 119). His testimony with respect to this citation mirrored the other loose rib citation he issued, discussed above.

Trent Harris, a lead man at the mine, testified that he did not believe that the cited ribs were loose. (Tr. II 127). He testified that he did not even notice them. When ribs fail at the mine they slide down, they do not fall out. He had never seen a rib fail at the mine. (Tr. II 128). Miners are rarely walking or working along the 5 main north belt. Examiners use golf carts to conduct examinations on the roadway side.

2. Discussion and Analysis

I find that the preponderance of the evidence establishes that Peabody violated section 75.202(a) in this instance. Peabody argues that although the ribs were cracked in places, the Secretary did not establish that the ribs were likely to fall. The Secretary bears the burden of proof and Peabody maintains that the Secretary failed to meet this burden. (B.B. Br. 25). I credit the testimony of the inspector as to the conditions he observed, which support a violation of the safety standard.

I find that the Secretary did not establish that the violation was S&S. The testimony of the inspector was vague and did not include sufficient detail to show that the ribs were reasonably likely to fall and to injure a miner. Given that the Secretary bears the burden of proof, I delete the S&S determination from this citation. The gravity is also reduced because the evidence did not establish that a fatal accident would occur if the rib did slide down or fall.

I also find that the Secretary did not establish that the violation was the result of the operator's high negligence. Other than testimony concerning previous warnings about violations of section 75.202(a), there is no evidence to support a high negligence finding. A penalty of \$8,000.00 is appropriate.

L. Citation No. 8414936, LAKE 2009-414, Air Quality #1 Mine

On February 4, 2009, Inspector Franklin issued Citation No. 8414936 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.1725(a) of the Secretary's safety standards. (Ex. G-42). The citation alleges that the string of lights at the belt shack at crosscut #31 of the 4 Main North was not being maintained in a safe operating condition. There were two lights that did not have guards and the bulb of one light was broken exposing the electrical connections.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's moderate negligence. The safety standard provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating conditions and machinery and equipment in unsafe condition shall be removed from service immediately." The Secretary proposed a civil penalty in the amount of \$5,961.00.

1. Background

Inspector Franklin testified that the broken bulb had two filaments hanging down. (Tr. II 135). The belt shack is where miners keep their tools to work on the belt lines. The shack also contains "odds and ends" used to repair and splice belts. (Tr. II 136). He determined that the violation was S&S because the lights hung from the roof support about 3 feet from the rib and mantrips were often parked at that location. A miner getting off the mantrip right under these lights could make contact with the lights. (Tr. II 137). The lights hung about 5 feet above the mine floor. *Id.* A miner's cheek, neck, or face could contact a defective electrical fixture and he could suffer an electric shock. The inspector believed that such an injury was reasonably likely because the area is used "quite frequently by all three shifts." (Tr. II 138). The other lights were illuminated which showed that the broken bulbs were energized. He determined that a fatal accident was likely because 110 volts can kill someone who contacts it if the amperage is sufficient. He did not see a ground fault interrupter attached to the circuit. (Tr. II 139). The inspector admitted that the citation should have been written under section 75.512, which is an electrical standard.

Kimberly Orr testified that the lights in question were about 6 inches from the rib and that the defective lights had partial covers over them. (Tr. II 151). She also testified that it would be difficult to park under the cited lights because they were so close to the rib line. She said that a ground fault interrupter circuit designed to instantaneously de-energize the circuit in the event a fault protected the lights. (Tr. II 159).

2. Discussion and Analysis

I find that the Secretary did not establish a violation of section 75.1725(a) because the cited string of lights was not mobile or stationary machinery or equipment. That safety standard only applies to machinery and equipment and the string of lights was not a piece of machinery or

equipment; it was an electrical circuit. I also credit the testimony of Orr that the lights were next to the rib and that a significant hazard was not present. Citation No. 8414936 is **VACATED**.

M. Citation Nos. 8414908 and 9414913, LAKE 2009-414, Air Quality #1 Mine

On January 21, 2009, Inspector Franklin issued Citation No. 8414908 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.370(a)(1) of the Secretary's safety standards. (Ex. G-45). The citation alleges that the approved ventilation plan was not being followed for a distance of approximately 2,360 feet on the 4 Main North Haulage road between crosscuts number 112 and 154. The road, which was an alternate escapeway, was dry and had visible dust suspended in the air when mantrips, personal vehicles, and other mobile equipment traveled along this roadway. The ventilation plan requires that water or wetting agents be applied to haulage roads to control respirable dust.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a permanently disabling injury, that the violation was S&S, that 30 people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a civil penalty in the amount of \$10,437.00.

On January 26, 2009, Inspector Franklin issued Citation No. 8414913 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.370(a)(1) of the Secretary's safety standards. (Ex. G-54). The citation alleges that the approved ventilation plan was not being followed for a distance of approximately 9,680 feet on the 4 Main North haulage road. The road, which was an alternate escapeway, was dry and had visible dust suspended in the air when mantrips, personal vehicles, and other mobile equipment traveled this roadway.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that 60 people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a civil penalty in the amount of \$10,437.00.

1. Background

Inspector Franklin testified that he issued the citations because he observed that the 4 North haulage road was dry and dust was suspended in the air for a distance of 2,360 feet on January 21, 2009, and about 9,680 feet on January 26. (Tr. II 166, 199). The haulage road was outby the working sections and provided access to several working sections. The section of the ventilation plan entitled "Dust Control Provision," includes a subsection entitled "Methods Employed Outby the Working Sections." (Ex. G-50 at 7). In that subsection, under the heading "Additional Dust Control Measures Used and Maintained," the plan states "calcium chloride, water or other suitable chemical treatment." *Id.* Inspector Franklin testified that this provision was included in the plan because "haulage roads tend to dry out and become dusty and have dust suspended in the air." (Tr. II 167). Many miners traveled along the 4 Main North travelway each shift, including miners riding in mantrips in and out of the mine. (Tr. II 189). His

determination that up to 60 miners traveled along the road was based on the number of miners working in the active sections that used the roadway.

Inspector Franklin based his S&S determination on his conclusion that the miners were breathing suspended dust that would lead to permanently disabling injuries including black lung. (Tr. II 200). He was also concerned that the reduced visibility would lead to vehicular accidents or vehicle/pedestrian accidents. (Tr. II 167-68, 200). He believed that such events were reasonably likely to occur.

Kimberly Orr testified that, on January 21, part of the cited haulage road had been watered, but it was not yet watered between crosscuts 112 and 154. (Tr. II 193). As the inspection party traveled through this section, Inspector Franklin asked the driver to stop several times and “wait until some of the road dust got up to us.” *Id.* She testified that there was not a lot of dust and it looked more like dirt than coal dust. It took about 30 seconds for the dust to catch up with them at each stop and the dust stayed below the level of her head while she was in the mantrip. (Tr. II 294).

Damien Horst, a utility man and fill in foreman, accompanied the inspector during the January 26 inspection. As with the January 21 inspection, the inspector had the mantrip operator stop several times and wait to see if “dust would pass by us.” (Tr. II 215-16). Horst testified that the dust was not severe and that it did not obstruct his view.

Randall Hammond testified that the ventilation plan did not include any standards mandating how often roadways must be treated or how much dust may be present before roadways must be treated. (Tr. II 196). Outby roadways are watered daily and miners wear clothing that includes reflective strips. *Id.*

2. Discussion and Analysis

The applicable provision in the ventilation plan provides little guidance. I interpret it to require that “calcium chloride, water or other suitable chemical treatment” must be used as an “additional dust control measure.” The implication that these measures must be used to control dust on all outby roadways and haulage ways can be readily inferred. The language also states that these additional dust control measures must be “maintained.” Thus, calcium chloride, water, or other treatments must be applied to roadways with some frequency to control dust. The ventilation plan does not, however, provide any guidance as to how frequently the roadways must be treated or how dry the roads can get before further treatment is required.

Peabody argues that the evidence establishes that the cited roadway was being maintained. Hammond testified that the subject haulage road was treated at least once a day; therefore, Peabody argues that “the roadway was being maintained as required.” Peabody Br. at 14. The inspector acknowledged that it is not possible to eliminate all airborne dust. (Tr. II 182). Peabody contends that the mantrip could avoid the dust by “simply continuing to travel down the haulage way rather than stopping” as the inspector required to wait for the dust to drift up to the vehicle. Peabody Br. at 14.

The Secretary argues that because the wheels of the mantrip kicked up dust, the provision of the ventilation plan was violated. Thus, he maintains that if any visible dust is present, a violation is proven. In essence, any actions taken by the operator to control dust are irrelevant. The presence of dust establishes a violation.

I find that the Secretary did not establish violations of section 75.370(a)(1). The cited sections of the roadways were dry at the time of the inspection, but they are watered at least daily. The amount of dust produced could only be observed by stopping the vehicle, waiting about 30 seconds, and then letting the dust flow past the vehicle. There was no evidence that the ventilation was inadequate or that respirable dust in the air was greater than the amount allowed by MSHA's standards or the ventilation plan. There was also no showing that another vehicle was following close behind the mantrip or that vehicles frequently travel in close proximity, allowing dust kicked up by the front vehicle to impact miners in the second vehicle. I credit the testimony of Peabody's witnesses that their vision would not have been obscured in any way if the inspector had not required the mantrip operator to stop. I also credit their testimony that the dust tended to stay close to the floor and did not significantly obstruct their vision after the vehicle stopped. The dust did not form clouds that filled the entry.¹¹

I hold that, under the facts of this case, the Secretary did not meet his burden of proof. There was insufficient evidence that the amount of dust produced established a violation of the ventilation plan. Citation Nos. 8414908 and 8414913 are **VACATED**.

N. Citation No. 8414910, LAKE 2009-414, Air Quality #1 Mine

On January 21, 2009, Inspector Franklin issued Citation No. 8414910 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.370(a)(1) of the Secretary's safety standards. (Ex. G-59). The citation alleges that the approved ventilation plan was not being complied with in the number 1 active section (011-0MMU). The Joy continuous miner, company #56, being operated in the number 7 entry, did not have adequate ventilation to dilute, render harmless, and carry away flammable explosive and harmless gasses, dust, and fumes while mining. The air velocity at the inby end of the wing curtain was approximately 4,982 CFM and the plan requires a minimum of 7,000 CFM.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in permanently disabling injuries, that the violation was S&S, that four people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a civil penalty in the amount of \$3,996.00.

¹¹ In *Basin Resources, Inc.*, 19 FMSHRC 1391, 1399-40 (Aug. 1997) (ALJ), I vacated a similar citation on the basis that the ventilation plan was vague, but in that case the ventilation plan stated that dust suppressants had to be applied "as needed to maintain respirable dust on intake at or below 1.0 mg/m³" *Id.* The MSHA inspector did not take any dust samples. Former Commission Judge Weisberger, on the other hand, affirmed a similar citation because he credited the inspector's testimony that "the mantrip's wheels stirred up dust and dust hung over the mantrip." *Loan Mountain Processing, Inc.* 20 FMSHRC 430, 431-34 (April 1998) (ALJ). Judge Weisberger concluded that, because "there was dust in the air," the "roadway floor was not dampened sufficiently." *Id.* at 434. His decision was based on credibility determinations.

1. Background

The approved ventilation plan, in a supplement filed June 17, 2008, provides that the mine “will maintain 7000 cfm of air at the end of the line curtain without the scrubber running.” (Ex. G-63; Tr. II 223). Inspector Franklin tested the air velocity at the inby end of the wing curtain with a calibrated anemometer. He measured the velocity to be 4,982 cfm. (Tr. II 220). The operator shut down the scrubber and the continuous miner when the inspector arrived. The inspector testified that, without adequate ventilation, a back flow of dust could result and methane could build up. (Tr. II 220). He did not ask the section foreman if he had taken any air readings during the shift. (Tr. II 227). He agreed that it is a practice at the mine for section foremen and miner operators to take air readings before making a cut. (Tr. II 228). He also agreed that the air at the last open crosscut was over 20,000 cfm and the ventilation plan requires 19,000. *Id.* The methane monitor on the continuous miner was set at 2%.

Jason Nelson, a supervisor at the mine at the time this citation was issued, testified that a scrubber upon the cited continuous miner included water sprays to keep the dust down and a fan that pulls air across the duct work, faces, and the miner itself. (Tr. III 8). Nelson stated that there would have been more than 7,000 cfm of air at the end of the line curtain if the scrubber was active when Inspector Franklin took the air reading. (Tr. III 9).

2. Discussion and Analysis

I find that the Secretary established a violation. The ventilation plan provision plainly states that 7,000 cfm of air must be present when the scrubber is not operating and the evidence establishes that the air flow was less than 5,000 cfm at the time of the inspection.

Peabody maintains that the violation was not S&S because an injury causing event was unlikely to occur. I agree. Taking into consideration continued mining operations, the condition would have not existed for any length of time once mining resumed. The scrubber would have moved more the air through the face area and removed any respirable dust from the air coming back from the face. (Tr. II 231, III 8). In addition, the air quantity is regularly measured by the mine operator and any deficiency would have been noted and corrected. It was common to have over of 8,000 cfm of air on working faces at the mine. (Tr. III 9). The citation was abated by adjusting the curtains. (Tr. II 235). The continuous miner was equipped with methane monitor that would have shut the operation down if methane reached 2%. The inspector admitted that there have been no face ignitions at the Air Quality #1 Mine.

It was not reasonably likely that this violation would have contributed to conditions that would have led to an injury or illness. Consequently, the S&S determination is deleted and the gravity is reduced. Peabody’s negligence was moderate. A penalty of \$2,000 is appropriate for this violation.

O. Order No. 6682295, LAKE 2009-413, Air Quality #1 Mine

On February 4, 2009, MSHA Inspector Glenn Fishback issued Order No. 6682295 at the Air Quality #1 Mine under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. (Ex. G-64). The citation alleges that the tail of the energized Main West conveyor belt, located at #63 crosscut, was running in loose coal that was approximately 12 ½ inches wide, 4 feet long, and 15 inches deep. Float coal dust on rock dusted surfaces was dry had been allowed to accumulate in this area. This float coal dust ranged between a thin coating to 1 ½ inches in depth and was present on the belt structure, electrical cables and water lines.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that ten people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$38,503.00.

1. Background

Inspector Fishback testified that when he arrived in the area, the tail was running in accumulations of loose coal measuring 12 ½ inches wide by 4 feet long and 15 inches deep. (Tr. III 14, 43). Float coal dust was upon the rock dusted surfaces in the area. The float coal dust was black in color and was highly explosive. (Tr. III 15). These accumulations were on the Main West tail where the second Main West drive dumped onto that belt. He estimated that the float coal dust extended about 60 feet outby, 50 feet toward the roadway, and 120 feet inby toward the drive. (Tr. III 18; Ex. G-65 at 28-29). The float coal dust was upon the belt structure, the electrical cables, water lines, the ribs, and all other flat surfaces.

Inspector Fishback determined that an injury was reasonably likely because he found a tail roller turning in the material. The friction from the belt rubbing the coal would create heat "which would, under normal mining conditions, cause the coal to heat up, ignite the float coal dust and God forbid potentially [lead to an] explosion or ignition." (Tr. III 20). The inspector determined that if the cited conditions ignited, 10 miners could suffer injuries resulting in lost workdays or restricted duty. Injuries would include burns and smoke inhalation. Given the location of the violation, the smoke would be carried throughout the mine because the air traveled inby. (Tr. III 23). The air would not enter the working sections. (Tr. III 35).

Inspector Fishback determined that the operator's negligence was high "because this condition" existed in the mine throughout the previous quarter and "management was aware of this condition but still allowed it to continue." (Tr. III 24). He made this determination by reviewing the belt books before he traveled underground. (Ex. G-73). The examination report for the day shift on February 4, 2009, shows that the area needed to be cleaned. This examination would have occurred right before the shift and the book shows that the accumulations were present at that time. The inspector issued the order at 2:00 p.m. on that date. During the shifts immediately preceding this shift there were notations of accumulations in the same locations, some with notations that the area was cleaned to correct the condition. (Tr. III 28-30, Ex. G-73). The inspector recognized that the operator cleaned the area every shift but

believed that the violation was the result of its unwarrantable failure because management permitted coal to accumulate until it needed to be cleaned up and “by doing that they knew the condition was there and instead of correcting the cause of the condition, the root cause of it, they just allowed it to continue to exist and keep cleaning it up.” (Tr. III 30, 34-35). The accumulations in this area were obvious and extensive, with the result that management should have been aware of it. The mine was issued over 200 violations under section 75.400 in the 15 months preceding February 2009. Peabody was on notice that further actions were required as a result of these previous violations and the discussions the inspector conducted with management. (Tr. III 31).

Inspector Fishback admitted that the atmospheric monitoring system appeared to work and should provide a warning before there was any visible evidence of a fire. (Tr. III 37). He also agreed that if heavier rock was upon the belt, rather than coal, the training of the belt could be affected. (Tr. III 42). The inspector believes that Peabody did not take steps to make sure that their belt lines were properly trained to handle both rock and coal. (Tr. III 45). He could not estimate how long the loose coal was present, but he believed that “it took a substantial amount of time for the amount of float coal dust I found in this area to develop.” (Tr. III 50).

Jerry Ball, a mine examiner, testified that he performed the examination of the cited area prior to Inspector Fishback’s inspection. (Tr. III 55). In the examination book, he wrote that the tail of the Main West conveyor belt needed to be cleaned. He put his notation under the heading “Violations or Hazardous Conditions” because it needed to be addressed. (Tr. III 56). Ball testified that if he observed a belt running in loose coal, he would have locked and tagged out the belt and cleaned at least those accumulations that were in contact with the belt. (Tr. III 57). He said that the head and tail areas were cleaned every shift. Two people were assigned to follow the examiners and clean up any areas with accumulations. Mr. Ball acknowledged that accumulations frequently developed along the Main West belt at this location. (Tr. III 60).

2. Discussion and Analysis

I find that the Secretary established an S&S violation of section 75.400. The inspector observed the belt running in accumulations. He also observed large accumulations of float coal dust that were black in color. The belt records as well as the testimony of Mr. Ball clearly show that accumulations are quite frequent at this location. Management’s method of dealing with this problem is to clean up the spills every shift. The safety standard provides that “coal dust . . . loose coal, and other combustible materials shall be cleaned up and *not be permitted to accumulate* in active workings . . .” (emphasis added). As Peabody points out, accumulations are to be expected along belt lines at underground coal mines. If, however, accumulations occur every shift to the extent that miners must follow the examiners around to clean up, I find that the safety standard is not being complied with. The operator is permitting combustible materials to accumulate in active workings. As soon as the area is cleaned up, more coal, coal fines, and float coal dust start accumulating. It is entirely conceivable that such accumulations are present most of the time at the tail of the energized Main West belt. I hold that the Secretary established that accumulations are a systemic problem at that location. As Inspector Fishback observed, Peabody was not getting at the root cause of the problem. It allowed accumulations to persist, shift after shift, day after day.

The Secretary met all four elements of the *Mathies* test. The hazard was a fire or explosion. The evidence establishes that it was reasonably likely that the condition observed by Inspector Fishback would contribute to a serious accident, given continuing mining operations. Serious injuries would be the likely result. There was at least one ignition source present. I credit the testimony of Inspector Fishback with respect to this order, including his testimony that the accumulation of float coal dust had been present for a significant length of time. Peabody created a safety hazard that was both serious and S&S.

I also find that the Secretary established that the violation was the result of the operator's unwarrantable failure to comply with the safety standard. The accumulation of float coal dust existed for a substantial period of time and, as discussed above, accumulations in the cited area were a recurring problem. The accumulations were obvious and extensive. The operator was aware of the violation and was on notice that greater efforts were necessary to comply with section 75.400 at the cited location and at the mine in general. Although the evidence shows that Peabody generally cleaned up accumulations every shift, it did not take steps to address the root of the problem. The violation posed a high degree of danger. The violation was the result of Peabody's high negligence. I find that a penalty of \$40,000.00 is appropriate for this violation.

P. Citation No. 6682292, LAKE 2009-414, Air Quality #1 Mine

On February 4, 2009, Inspector Fishback issued Citation No. 6682292 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. (Ex. G-70). The citation alleges that float coal dust was allowed to accumulate under and upon the Main West Head drive and take-up unit in entry #6, crosscut #1 to #3. The accumulations measured approximately 4 ½ inches to 2 inches deep. Float coal dust was upon the belt structure between these two locations.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in permanently disabling injuries, that the violation was S&S, that ten people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$34,652.00.

1. Background

Inspector Fishback testified that the accumulations he observed were black, which he interpreted to mean that rock dust and dirt were not mixed with the accumulations. (Tr. III 64). He admitted that he did not observe an ignition source, but he said that "due to past history of this mine and past violations issued and this particular area here itself, if normal mining operations would've been allowed to continue, I feel that one would have existed." (Tr. III 65). He said that the amount of float coal dust that he observed would take several shifts to accumulate. The belt was the main line for the mine. (Tr. III 66). The types of injuries that this violation could reasonably be expected to contribute to included burns, smoke inhalation, and black lung disease. He determined that such injuries were reasonably likely due to the amount of coal dust that was present. (Tr. III 67). Because air traveled in by through the cited area, any smoke could overrun other areas of the mine. The air did not ventilate the working sections. Inspector Fishback determined that Peabody's negligence was high based upon the mine's

history of accumulation violations. (Tr. III 68). The specific area cited was previously cited several times for accumulations when ignition sources were present. In addition, he discussed accumulation issues with management on several occasions and they knew that the mine had a problem with accumulations. (Tr. III 69).

The inspector admitted that the cited area was at the bottom of the slope and, because the drive and take-up are anchored to a concrete pad, the area is washed down with water. There are several sumps in the area and the floor of the area was wet. (Tr. III 71). Inspector Fishback described the area at the bottom of the slope as a “problem area in the mine” because accumulations were frequently present. (Tr. III 72). There are two drive motors, a starter box, and two or three power centers, which are all potential ignition sources. *Id.* The bottom of the belt was more than 6 feet above the mine floor. (Tr. III 71). The cited accumulations were isolated from the accumulations described in Order No. 6682295, discussed above, and were far from the working sections of the mine. (Tr. III 76-77, 86).

Terrance Kiefer testified that he performed onshift and preshift examinations of the cited area on February 4. Inspector Fishback issued the citation at 2:30 p.m. on that date and Kiefer performed an examination at about 1:00 p.m. (Tr. III 90). In the section of the Roadway Inspection Report entitled “Violations or Hazardous Condition,” Kiefer wrote “Take-up to head needs cleaned and dusted” with respect to the Main West Head drive and take-up unit. (Tr. III 91; Ex. G-73). He recorded that condition in the hazards section of the report to ensure that immediate cleaning. (Tr. III 91).

2. Discussion and Analysis

I find that the Secretary established a violation of section 75.400 but that the violation was not S&S. I reach the conclusion that the violation was not S&S because there was no ignition source present and it was unlikely an ignition source would be present before the accumulations were removed. The cited take-up and head drive were high above the concrete floor; unlike the previous violation, the moving parts and the belt would not be able to run in the accumulations. The factors necessary for a fire or explosion were not present and were unlikely to present themselves. The cited area was at the bottom of the slope, was very wet, and was washed down on a regular basis. The area was isolated from the working faces and areas where miners work. It was also isolated from the accumulations described above in the previous violation and a fire or explosion at that location was unlikely to propagate a fire at Main West Head drive and take-up. The conditions cited in Citation No. 6682292 were not reasonably likely to contribute to an injury.

I also find that Peabody’s negligence was moderate. Inspector Fishback based his high negligence determination almost exclusively upon the mine’s history of accumulations and citations issued for violations of section 75.400. I have taken that history into consideration, but that is not the only factor to consider. The evidence does not establish that the operator was put on notice that greater efforts were necessary to clean up accumulations at the cited location. It is not clear whether the accumulations were present for a lengthy period of time. There is also no proof that management was aware of the condition. The violation did not pose a high degree of

danger. The citation is modified to delete the S&S designation and reduce the level of negligence. The violation was serious. A penalty of \$18,000 is appropriate.

Q. Citation No. 8415204, LAKE 2009-414, Air Quality #1 Mine

On February 10, 2009, Inspector Fishback issued Citation No. 8415204 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-74). The citation alleges that a loose coal rib approximately 12 wide, 6 feet high, and 12 inches thick gapped away from the solid pillar approximately by 5 inches. This condition was observed along the Main South roadway between the roadway and belt line in crosscut #9. This area was routinely traveled by mine examiners and other miners.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a civil penalty in the amount of \$7,578.00.

1. Background

Inspector Fishback testified that the loose rib gapped away from the solid pillar by about 5 inches. (Tr. III 101). The loose rib was in the Main South between the roadway and the belt. The area was routinely traveled by mine examiners, rock dusters, and belt shovelers. A miner could have been seriously injured if the rib rolled out or down while he was in the area. (Tr. III 102). The inspector marked the violation as S&S because of its size, the width of the gap, and because it took little effort to bring it down. *Id.* He marked the gravity as lost workdays/restricted duty because a miner could suffer lacerations or broken bones. He determined that Peabody's negligence was high because the cited area is frequently traveled and mine examiners should have discovered it. (Tr. III 104). The inspector saw the hazard as soon as he entered the area. In addition, the inspector referenced the mine's extensive history of violations of section 202(a) and had discussed this history with mine management in the past. He admitted that Respondent was not required to examine the crosscuts along the Main South roadway during onshift and preshift examinations unless miners were going to work the area. (Tr. III 109-10). He saw footprints in the crosscut. (Tr. III 114).

Todd Waldroup, who was a coal hauler at the mine in 2009, testified that he was present when Inspector Fishback issued the subject citation. (Tr. III 118). The cited rib was on the outby side of the crosscut. Waldroup did not see the loose rib until the inspector pointed it out; the headlights of their mantrip made it visible. (Tr. III 119). Waldroup observed the rib from both sides and determined that it "wasn't evident that there was a loose rib" when viewed from the belt side of the crosscut. (Tr. III 120). The loose area was not easy to bar down, but he did not have to strain to bring it down. *Id.* The loose rib in question could have been present for days or it could have just developed. If a miner walked down the middle of the crosscut, as miners are trained to do, he would not be injured if the rib fell. (Tr. III 122).

2. Discussion and Analysis

I find that the Secretary established an S&S violation of section 202(a) because the rib was loose and it gapped from the main pillar. A discrete safety hazard was presented by this violation. The loose pillar was quite large and was in an area that is traveled with some frequency by belt shovelers, rock dusters, belt examiners, and belt maintenance employees. There was a five inch gap between the loose area and the solid rib. I credit the testimony of Inspector Fishback with respect to the hazards presented and find that the cited conditions were S&S. The violation contributed to a hazard that was reasonably likely to result in broken bones and lacerations. I reach these conclusions for the reasons set forth with respect to Citation No. 8414205 in LAKE 2009-410, above.

I also find that the Secretary did not establish that Peabody's negligence was high. The loose rib was difficult to see from the belt entry where the examiners travel. Examiners are not required to examine every crosscut. There was nothing special about crosscut #9 that required examiners to carefully inspect it for hazards. As a consequence, mine management had no knowledge of this violation. In addition, it was not established that the violation existed for any length of time. I find that Peabody's negligence was moderate.

Citation No. 8415204 is modified to reduce the negligence to moderate. A penalty of \$6,000.00 is appropriate.

R. Citation No. 6682300, LAKE 2009-414, Air Quality #1 Mine

On February 6, 2009, Inspector Fishback issued Citation No. 6682300 at the Air Quality #1 Mine under section 104(a) of the Mine Act for an alleged violation of section 75.604(b) of the Secretary's safety standards. (Ex. G-78). The citation alleges that a 995 Volt trailing cable on a Joy Continuous mining machine contained a permanent splice that was not effectively insulated nor sealed to exclude moisture. The splice was approximately 60 feet from the machine in entry #8 crosscut #23 on the MMU-005 active working section.

The inspector determined that an injury or illness was reasonably likely to occur and could reasonably be expected to result in a fatal accident, that the violation was S&S, that one person would be affected, and that the violation was the result of the operator's high negligence. The cited safety standard provides that when "permanent splices in trailing cables are made, they shall be . . . effectively insulated and sealed so as to exclude moisture." The Secretary proposed a civil penalty in the amount of \$12,248.00.

1. Background

Inspector Fishback testified that the splice concerned him because it was not insulated to its manufacturer's thickness; the cable had likely been stretched at some point. (Tr. III 128). There was a 1 inch opening in the splice that exposed the cable's inner conductors. The splice was wrapped once in plastic tape which did not adequately insulate the area. (Tr. III 127-28). The cable was susceptible to punctures and further damage in the area of the splice. The continuous miner operated in a wet, active section and dragged the cable over the mine floor as it

worked. Inspector Fishback determined that the violation was S&S because the trailing cable could be further damaged under normal mining conditions. If the cable was punctured in the damaged area, water could enter the cable, exposing anyone who handled the cable to electrical shocks. Although miners wear protective gloves, these gloves get wet during the shift. (Tr. III 127, 130). The inspector testified that wet gloves will not protect a miner from electric shocks. Peabody's negligence was high because the condition was obvious. The inspector observed the condition from a distance of 60 feet. (Tr. III 131). The continuous miner operator, the section mechanic, and the section foreman should have noted the condition and taken steps to correct it.

Peabody, relying in part upon the testimony of the inspector, contends that the shielding was intact at the splice. (Tr. III 140). The cable is equipped with a ground fault monitoring and interrupting circuit that would trip if there was a fault, preventing the current from injuring a miner. Kenneth Shultz, a maintenance manager at the mine, testified that when the splice was opened, there was no water present, the shielding was intact, and two ground wires were present that were outside of the shielding. (Tr. III 142, 147, 152). He testified that the cable was equipped with built in protections and was unlikely to injure a miner even with the splice that was cited by the inspector. (Tr. III 158-59).

2. Discussion and Analysis

I find that the Secretary established an S&S violation of section 75.604(b). Although there was no moisture in the splice when it was opened after the citation was issued, there was an opening that exposed the inner conductors of the cable. Merely wrapping the defective splice with electrical tape did not remedy the condition. Although the splice may have been adequate at the time it was formed, I credit the inspector's testimony that the cable was stretched at some point to create the gap. The cable was not adequately insulated at the splice once it was stretched and it was no longer sealed against moisture. Assuming the continuation of normal mining operations, it was reasonably likely that the splice would be further degraded, moisture would get into the splice, and an injury of a reasonably serious nature or a fatality would result. It was reasonably likely that anyone handling the cable would receive an electric shock even if he were wearing gloves because the gloves would likely be wet. In reaching this conclusion I do not assume that the ground fault monitoring circuit fully protected a miner handling the cable. The Secretary established all four elements of the Commission's S&S test.

I find that the Secretary did not establish that the violation was the result of Peabody's high negligence. Inspector Fishback seemed to assume that the condition was obvious because he immediately saw it upon his arrival in the area. The open area in the splice could have developed over the course of the shift and it could easily have been hidden from view. The continuous mining machine operator would have concentrated on removing coal from the face and would not necessarily see a 1 inch portion of the cable that was 60 feet behind him upon the dark mine floor. The section foreman may not have been able to observe the condition either. I find that Peabody's negligence was moderate.

Citation No. 6682300 is modified to reduce the negligence to moderate. A penalty of \$10,000.00 is appropriate.

II. SETTLED CITATIONS AND ORDERS

A number of the citations and orders at issue in these cases settled. By order dated June 14, 2013, I approved the parties' settlement of Order Nos. 6681808, 6681809, 8415208, 8415209, and 8415212 in Docket No. LAKE 2009-413 and ordered Peabody to pay a penalty of \$75,879.00. By order dated June 14, 2013, I approved the parties' settlement of Citation Nos. 8414914, 8414917, 6682271, 6682273, 6682276, 6682279, 6682285, 8414947, and 6681948 in Docket No. LAKE 2009-414 and ordered Peabody to pay a penalty of \$35,812.00.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed. (Exs. G-82 through G-85). At all pertinent times, Peabody was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. (Joint Stip. ¶ 12). The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2009-410		
8414205	75.202(a)	\$18,000.00
LAKE 2009-412		
6680991	75.517	1,000.00
6680994	75.400	12,000.00
LAKE 2009-413		
8414938	75.400	8,000.00
8414939	75.400	8,000.00
6682295	75.400	40,000.00
LAKE 2009-414		
8414908	75.370(a)(1)	VACATED
8414910	75.370(a)(1)	2,000.00
8414913	75.370(a)(1)	VACATED

8414923	75.1403-5(g)	2,000.00
8414932	75.202(a)	VACATED
6681810	75.370(a)(1)	VACATED
8414936	75.1725(a)	VACATED
6682292	75.400	18,000.00
8414944	75.202(a)	18,000.00
6682300	75.604(b)	10,000.00
8415204	75.202(a)	6,000.00
8414956	75.202(a)	8,000.00

LAKE 2009-415

6681347	75.370(a)(1)	VACATED
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TOTAL PENALTY		\$151,000.00
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For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$151,000.00 within 40 days of the date of this decision.¹²

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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¹² Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2014-52-M
Petitioner	:	A.C. No. 05-02256-333003 P247
	:	
v.	:	
	:	
MOLTZ CONSTRUCTION, INC.,	:	Climax Mine
Respondent	:	

DECISION

Appearances: Jana Leslie, Conference & Litigation Representative, U.S. Department of Labor, Denver, Colorado, for Petitioner;
William Dominguez, Safety Director, Moltz Construction, Inc., Salida, Colorado, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Moltz Construction, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony, documentary evidence, and closing arguments at a hearing held in Denver, Colorado. Two section 104(a) citations were adjudicated at the hearing and one citation was settled prior to the hearing. Moltz Construction was an independent contractor performing work at the Climax Mine.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

A. Citation No. 8597347

On August 6, 2013, MSHA Inspector David Michael Sinuefield issued Citation No. 8597347 under section 104(a) of the Mine Act, alleging a violation of section 56.14132(a) of the Secretary’s safety standards. (Ex. G-2). The citation states that the backup alarm on an Ingersoll Rand compactor did not function when tested. Inspector Sinuefield determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to be fatal. He determined that the operator’s negligence was moderate and that one person would be affected. Section 56.14132(a) mandates that “[m]anually-operated horns or other audible warning devices

provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” 30 C.F.R. § 56.14132(a). The Secretary proposed a penalty of \$108.00 for this citation.

For the reasons set forth below, I reduce the negligence attributed Respondent.

Discussion and Analysis

I find that the condition cited in Citation No. 8597347 violated section 56.14132(a). Section 56.14132(a) requires that audible warning devices in self-propelled vehicles must be maintained in functional condition. The backup alarm of the cited self-propelled compactor did not function when tested and therefore was not maintained in functional condition, which is a violation of section 56.14132(a).¹ Respondent argues that an operator is not required to maintain equipment that is not in use. (Tr. 76). The Commission, however, rejected this argument and reversed the decision that Respondent relied upon. *Wake Stone Co.*, 35 FMSHRC 825 (Apr. 2014). The backup alarm of the cited compactor did not function when tested, which violates section 56.14132(a).

I find, furthermore, that the fatal designation is appropriate. I credit the inspector’s testimony that accidents caused by inoperative backup alarms frequently result in fatalities at mines. (Tr. 27-28). I agree with the inspector that a fatality or other injury was unlikely in this instance, however. The compactor operated in an area without foot traffic and only one other piece of mobile equipment entered the area. (Tr. 26-27). As a consequence, the gravity was low.

I find that Citation No. 8597347 was the result of Respondent’s low negligence. I credit the evidence that the alarm worked when the last preshift examination was conducted. The Secretary did not present evidence that suggested that Respondent knew or should have known of the violation. I **MODIFY** Citation No. 8597347 to reduce Respondent’s negligence to low and find that penalty of \$50.00 is appropriate for this violation.

B. Citation No. 8597348

On August 6, 2013, Inspector Sinquefield issued Citation No. 8597348 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary’s safety standards. (Ex. G-6). The citation states that a portable travel parts trailer was cluttered and crowded with spare parts, slings, a power saw, storage boxes, power cables and other materials that covered the back of the floor area. The citation alleges that the affected area was not being maintained in a clean and orderly manner. Inspector Sinquefield determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”), the operator’s negligence was moderate, and that one person would be

¹ The Mine Act is a strict liability statute. Violations of the Act, therefore, only require that violations exist because “strict liability means liability without fault.” *Sec’y of Labor v. Nat’l Cement of Cal, Inc.*, 573 F. 3d 788, 795 (D.C. Cir. 2009).

affected.² Section 56.20003(a) of the Secretary's safety standards requires "workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]" 30 C.F.R. § 56.20003(a). The Secretary proposed a penalty of \$162.00 for this citation.

For the reasons set forth below, I modify Citation No. 8597348 to be non-S&S and Respondent's negligence to be low.

Discussion and Analysis

I find that the condition cited in Citation No. 8597348 violated section 56.20003(a); the cited area was a storeroom and a workplace that was not kept clean and orderly. The cited area had both a table with a vice and a table suitable for office work, which made it a work area. (Tr. 34). The floor at the back of the trailer was completely blocked with tools and other debris for a distance of 4 feet. (Ex. G-8; Tr. 33). The debris blocked the rear entrance to the trailer. (Tr. 67). Respondent argues that no miners were exposed to the cited condition because the trailer was locked and had not been entered since it arrived at the Climax Mine. (Tr. 76-77). A locked door, however, does not constitute a barricade. Assuming continued mining operations, miners could access the cited trailer and it was not kept clean and orderly, which presented a slip, trip, and fall hazard in violation of section 56.20003(a). As stated above, the Mine Act is a strict liability statute.

I find that the Secretary failed to fulfill his burden to show that Citation No. 8597348 was S&S. The cited condition presented a violation of section 56.20003(a) and a slip, trip, and fall hazard because numerous tools and other items covered the floor of the trailer. The conditions could contribute to a serious injury such as a sprain or broken bone, but it was unlikely to do so. Although the cited area qualified as a work area and storeroom under section 56.20003(a), miners had not entered the trailer since it arrived at the mine site two weeks earlier. The trailer was not likely to be used for office work, as there were other locations for such work. (Tr. 68). Access to the trailer was controlled and reduced because the entrance to the trailer was locked and only one person had the key. (Tr. 37, 58). Kenneth Tunstall, a general superintendent with Moltz, testified that Moltz placed the tools and supplies on the floor of the trailer when it was taken to the Climax Mine so that they would not fall from the shelves in the trailer. (Tr. 66). He also stated that Moltz had other trailers at the Climax Mine that also contained tools. *Id.* Tunstall further testified that the trailer had been brought to the Climax Mine from another worksite where Moltz performed concrete work and that it was unlikely that the tools in the cited trailer would be used at Climax. (Tr. 66-67). I find that although it was possible for

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

Respondent's employees to enter the trailer through the back door, such access was not very likely making the cited condition unlikely to contribute to an injury. The Secretary presented little evidence to support his S&S designation and did not present evidence to dispute Tunstall's testimony. I find that Citation No. 8597348 was unlikely to lead to an injury and therefore I find that Citation No. 8597348 is non-S&S. The gravity was low.

I also find that the violation was the result of Respondent's low negligence. Although Moltz knew that there were tools and supplies on the floor of the cited trailer, there was no proof that anyone would enter the trailer through the back door without first cleaning up this material. Someone could enter the trailer from the front entrance, which was unobstructed, and place the tools and supplies on the shelves before using the trailer for any other purpose. I cannot assume that Moltz would require or need an employee to enter the trailer for the first time in the most hazardous manner. I **MODIFY** Citation No. 8597348 to delete the S&S determination and to reduce Respondent's negligence to low. I find that a penalty of \$50.00 is appropriate for this violation.

II. SETTLED CITATION

The parties presented the settlement of Citation No. 8597350 at the hearing. Respondent agreed to pay the \$100.00 penalty proposed by the Secretary. (Tr. 9-10).

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-1). Respondent was issued three citations in the 15 months prior to August 6, 2013. Two of these citations were designed as non-S&S. Respondent's operations at the Climax Mine were small. It is a medium-sized company but much of its work is at facilities that are not subject to the Mine Act. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Moltz Construction, Inc., to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

For the reasons set forth above, I **MODIFY** Citation Nos. 8597347 and 8597348. Moltz Construction, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.³

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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July 16, 2014

SECRETARY OF LABOR MINE	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-166
Petitioner	:	A.C. No. 15-17497-269552-01
	:	
v.	:	
	:	
LEECO INCORPORATED,	:	Mine: No. 68
Respondent	:	

DECISION AND ORDER

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties stipulated to the following: jurisdictional issues; that Respondent Leeco violated 30 C.F.R. section 75.220 (a)(1) by failing to ensure that Bobby Smith, the continuous miner operator, followed the approved Roof Control Plan by staying out of the red zone; that the violation was significant and substantial (S&S); that a fatal injury occurred with one miner (Smith) affected; that Respondent abated the Citation in a timely manner and in good faith; and that the proposed penalty of \$21,442 will not affect Respondent’s ability to remain in business. Tr. 8-9; Sec’y Br. at 2, R. Br. at 1. The only issues remaining are whether the violation occurred as a result of Respondent’s moderate negligence, as set forth in Citation No. 8359591, and whether the proposed penalty of \$21,442 is appropriate.

An evidentiary hearing on these issues was held in Tazewell, Tennessee. The parties introduced testimony and documentary evidence and filed post-hearing briefs.¹

For the reasons set forth below, I affirm the Citation as written with moderate negligence and I assess a penalty of \$21,442.

Based on the entire record and my observation of the demeanor of the witnesses, and after consideration of the parties' post-hearing briefs, I make the following:

II. Findings of Fact

Smith had twelve years of industry mining experience and had worked for 89 weeks as a continuous miner operator for Respondent, including about seven months under section foreman Harold Bronson's supervision. Tr. 49, 100. On one occasion, a couple of months before Smith's June 24, 2010 fatality, Respondent's superintendent Rick Campbell observed Smith operating the continuous miner "in the outer area of the red zone," when he was trammings the miner from cut to cut. Tr. 79. The red zone is a pinch point area between the continuous mining machine and the rib where serious and fatal crushing accidents have occurred while the miner is operating. Tr. 40.

The undersigned stumbled upon the above-mentioned incident during questioning of inspector Ashworth after re-cross examination. See Tr. 59-61. The Secretary apparently made a tactical decision not to raise the issue or subpoena Smith's personnel file because she did not know how this incident would cut on the supervision, training, and discipline of Smith, whose rank-and-file negligence was not imputable to Respondent Leeco. Tr. 61-62.

Thereafter, Respondent's counsel decided to address the issue through superintendent Campbell's testimony. Tr. 63, 79-80. Campbell testified that he had never observed Smith in the red zone, but had observed him in the outer area of the red zone. Tr. 79. Campbell testified that he instructed Smith to shut down the miner and then verbally admonished or counseled him about "what he did wrong" and told "him not to be in the red zone, how important it is not to be in the red zone" Tr. 79-82. Campbell then showed Smith where to be and not to be,

¹ Petitioner Exhibits 1-5 (P. Exs 1-5) were received into evidence. These exhibits included Citation No. 8359591, MSHA inspector and accident investigator Robert Ashworth's notes, MSHA's Preliminary Report of Accident, Respondent's MSHA-approved Roof Control Plan, and MSHA's certified Assessed Violation History Report for Respondent. Respondent's Exhibits 1-3 (R. Exs. 1-3) were also received into evidence. These exhibits included the training records for Smith, another copy of Respondent's MSHA-approved Roof Control Plan, and a poster entitled a "Red Zones are No Zones." A redacted portion of inspector Ashcroft's notes (P. Ex. 2), which revealed an MSHA informant, were reviewed in camera and placed under seal. Tr. 13-19.

although Campbell did not recall having a safety meeting with employees about the incident. Tr. 82.

Campbell brought the incident to foreman Bronson's attention and told him to keep an "eye out for it." Tr. 111. Bronson testified that thereafter he observed Smith operate the machine, but did not observe Smith trammng the machine very often. Tr. 112. Bronson testified as follows:

BY MS. THOMAS:

Q: Do you recall Mr. Campbell telling you anything about Mr. Smith being in or around the area and he disciplined Mr. Smith? He didn't discipline. Counseled Mr. Smith about approaching the red zone.

A. Yes.

THE COURT: Yes, you do recall a discussion with Mr. Campbell?

THE WITNESS: Yes, sir.

THE COURT: What do you recall about that discussion?

THE WITNESS: Mr. Campbell was on the section one day, and, to my understanding, Mr. Smith was not in the red zone but he was borderline while moving the continuous miner from one place to another. Mr. Campbell told me he had, you know, gave, you know a discussion with Mr. Smith about that and told me to keep an eye out for it as well.

THE COURT: Did you keep an eye out for it?

THE WITNESS: Yes.

THE COURT: Did you observe Mr. Smith thereafter approaching the red zone when he was moving the machine?

THE WITNESS: No.

THE COURT: How often would you observe him?

THE WITNESS: I'd say two to three times a day.

THE COURT: What particular operations would you observe him engaging in?

THE WITNESS: Well, every cut we went to, I was there before we started the cut. Different times I have observed him moving the continuous miner. I have observed him loading coal with the continuous miner.

THE COURT: How often would you observe him tramming the miner?

THE WITNESS: Actually, not a lot.

THE COURT: On a weekly basis, would you observe him at all or once a week or a couple of times a week or it depends on the week?

THE WITNESS: It would depend. Maybe two to ten times, you know, depending in a week.

THE COURT: In the six to seven month period that Mr. Smith operated the continuous miner under your watch, how often did you observe him tram the miner? How many times?

THE WITNESS: Just like I - - that's what I was saying; maybe two to ten times a week on the tramming, moving place to place. When he would be moving, you know, I would be getting the ventilation and things like that established.

THE COURT: Did you ever see him approach the red zone?

THE WITNESS: No.

THE COURT: Did you ever see him in the red zone?

THE WITNESS: No.

THE COURT: Do you have anything else?

BY MS. THOMAS:

Q: Did you ever observe him making a cleanup? In other words, cleaning up the area with the continuous miner.

A. Yeah.

Tr. 110-113.

On March 17, 2011, MSHA accident investigator Ashworth investigated the June 24, 2010 fatality. Ashworth found that Smith had finished cutting coal in the No. 4 entry and hung the miner against the rib during a cleanup run before roof bolting. Tr. 36, 38. Ashworth concluded that while attempting to free the miner, Smith stepped into the red zone near the stand-off chain toward the back of the miner. When the miner broke free, Smith was pinned against the rib and killed. Tr. 39.

No witness saw the accident occur. The last shuttle car operator to load before the accident told Ashworth that he did not see Smith in the red zone at any time. Tr. 46-47. Based on his investigation, however, Ashworth concluded that Smith was in the red zone while the machine was running because he “was standing real close to the back of the machine where the tail, the conveyor tail connects to the back of the frame.” Tr. 39.

Foreman Bronson was with Smith at the start of the cut, but had moved to the No. 5 entry to conduct a pre-shift examination when the accident occurred. Tr. 99, 101. Bronson recalled sitting beside Smith in annual training during which red zone issues were discussed in a group setting. Tr. 102, 104. Respondent also held weekly safety meetings at which red zone issues were discussed about once a month. Tr. 102. Bronson testified that posters about the red zone were hanging in the foreman’s office, the light house, the change room(s), and the warehouse. Tr. 103-04. Bronson testified that he had never seen Smith in the red zone while operating the continuous miner accident. Bronson further testified that he had no reason to believe that Smith would stand in the red zone while operating the machine. Tr. 101.

As noted, Respondent stipulated that it violated 30 C.F.R. section 75.220 (a)(1) by failing to ensure that Smith followed the approved Roof Control Plan by staying out of the red zone. Respondent argues that Leeco neither knew nor should have known of the violation and therefore there can be no finding of any negligence. R. Br. at 7.

III. Legal Analysis

When assessing penalties, section 110(i) of the Mine Act requires the Commission to consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. If a violation of the standard occurs, an operator’s failure to meet the appropriate duty of care can lead to a finding of negligence. *A.H. Smith Stone Co.*, 5 FMSHRC 13 (1983).

For purposes of assessing a proposed penalty, the Secretary, by regulation, defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety

or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

30 C.F.R. § 100.3(d). High negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence occurs when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

In this case, the negligence of Smith, a rank-and-file miner, cannot be attributed to Respondent Leeco for civil penalty purposes. See *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). The fact that a violation was committed by a rank-and-file miner, however, does not necessarily shield Respondent from being deemed negligent. Rather, the Commission must look to the operator’s actual or constructive knowledge of the violative condition or practice and its supervision, training, and disciplining of its employees. Thus, “where a rank-and-file employee has violated the Act, the operator’s supervision, training, and disciplining of its employees must be examined to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner’s violative conduct.” *SOCCO*, 4 FMSHRC at 1464.

Just a couple of months prior to Smith’s June 24, 2010 fatality, Respondent’s superintendent Campbell observed Smith operating the continuous miner “in the outer area of the red zone,” when he was tramming the miner from cut to cut and verbally admonished or counseled Smith about “what he did wrong” and told “him not to be in the red zone, how important it is not to be in the red zone” Tr. 79-82. Campbell informed Bronson to keep an eye out for Smith. Tr. 111. Given Campbell’s instruction to Bronson to keep an eye out for Smith in or near the red zone, I find that Bronson should have known that Smith may visit the red zone area again. Accordingly, I discount Bronson’s testimony that he had no reason to believe that Smith would stand in (or approach) the red zone while operating the machine. Rather, I find that it was reasonably foreseeable that Smith may do so again, and Respondent should have known about, and been on the lookout for, the violative conduct, which eventually killed Smith.

Some circumstances mitigate Respondent's negligence. Respondent trained production crew and management generally about staying out of the red zone and hung posters around the shop. Also it appears that Respondent reviewed, retrained and discussed, in general fashion, avoiding red zone areas when operating or working near a remote-controlled continuous mining machine.

After Smith's "borderline" incident, however, Respondent did not meet the standard of care that a reasonably prudent operator, with knowledge of the goals of the Mine Act, would have undertaken in the same or similar circumstances to ensure against any recidivism by Smith. Respondent provided no evidence that it developed any specific or concrete programs, policies or procedures for starting and tramming remote-controlled continuous mining machines. Respondent failed to take specific or concrete steps to ensure that mining machine operators, including Smith, were outside the machine's turning radius before starting or moving the equipment, or to ensure that they were in a safe location while tramming the continuous miner from place to place, or repositioning the miner in the entry during cutting and loading. Although Campbell counseled Smith after the "borderline" incident about what he was doing wrong, and instructed foreman Bronson to keep an eye out for Smith, there is no evidence that Campbell followed up with Smith or Bronson about how Bronson was keeping an "eye out for it." Tr. 111. Further, although Bronson thereafter observed Smith operate the machine, he conceded that he did not observe Smith tramming the machine very often. Tr. 112. Nor did Campbell or any other member of management recall having any safety meeting about the serious incident and "how important it is not to be in the red zone, and how dangerous it would be." Tr. 81-82.

In short, Respondent failed to take sufficient steps to ensure that mining machine operators, including Smith, were outside the machine's turning radius before starting or moving the equipment, or to ensure that they were in a safe location while tramming the continuous miner from place to place, or repositioning the miner in the entry during cutting and loading. Although Respondent generally trained production crews and management to understand the hazards associated with avoiding red zones, there is no evidence that Respondent established any specific programs, policies, and procedures for avoiding red zone areas. There is also no evidence that Respondent routinely monitored work habits to ensure that operators were avoiding red zones. No engineering controls were in place to prevent this type of fatality. Nor did Respondent assign another miner or buddy to assist Smith or other continuous miner operators when the miner was being moved or repositioned. In these circumstances, Respondent failed to follow many of the best practices promulgated by MSHA. Accordingly, the citation was appropriately written with moderate negligence.

Guided by the regular assessment criteria set forth in § 100.3 and applying the penalty criteria set forth in section 110(i) to my findings above, I assess a penalty of \$21,442.

IV. ORDER

It is ORDERED that Citation No. No. 8359591 is affirmed as written with moderate negligence. It is further ORDERED that Respondent pay penalty of \$21,442 within thirty days of this Order.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-82
Petitioner	:	A.C. No. 15-19374-300393
	:	
v.	:	
	:	
RIVER VIEW COAL, LLC,	:	Mine: River View Mine
Respondent	:	

DECISION

Appearances: Elizabeth Friary, Esq., U.S. Department Labor, Nashville, Tennessee, for Petitioner

Gary McCollum, Esq., River View Coal, LLC, Lexington, Kentucky, for Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(d). The Secretary’s petition alleges that River View Coal, LLC (“River View”) is liable for a total of seven violations of the Secretary’s mandatory safety standards for underground coal mines.” 30 C.F.R. § 75. It proposes the imposition of penalties totaling \$9,748.00. A Decision Approving Partial Settlement was issued on October 23, 2013 for six of the seven citations. The parties presented testimony and documentary evidence at a hearing in Henderson, Kentucky on the one remaining citation with a proposed penalty of \$687.00. Post-hearing briefs and responses to my intent to take judicial notice of certain documents were submitted by both parties.¹

¹ The parties filed responses to my intent to take judicial notice of documents that explained the effects of electrical current on the human body. These documents were from the Occupational Safety and Health Administration (OSHA) and the Department of Health and Human Services (DHHS). The Secretary did not object. The Respondent argued that the court should decline to take judicial notice of the documents or, alternatively, take judicial notice of additional documents that reflect the effect of direct current (DC) on the human body. Ultimately, I took judicial notice of the OSHA and DHHS documents as well as the additional documents that Respondent proposed.

After consideration of evidence on the record, the judicial notice documents, and post-hearing briefs submitted by the parties, I find that the Secretary has proven a violation as alleged. I impose a civil penalty in the amount of \$125.00 for the violation.

The parties submitted the following stipulations: 1) River View operates the River View Mine; 2) River View is subject to the Mine Act and the undersigned has authority to hear the case and issue a decision; 3) River View is a mine as defined in section 3(h) of the Mine Act; 4) River View produced 7,582,894 tons of coal in 2011; 5) At all times relevant to this proceeding, River View had an effect upon interstate commerce within the meaning and scope of section 4 of the Mine Act; 6) Copies of the citations in contest are authentic and were served on River View by an inspector employed by MSHA; 7) River View timely contested the violations; 8) Imposition of a reasonable penalty will not affect the ability of River View to remain in business. Ex. J-A.

Findings of Fact and Conclusions of Law

The River View mine is a large underground coal mine with two seams, the No. 9 and the No. 11. Tr. 17. On August 3, 2012, MSHA Inspector Sammy Pollard, Jr.² conducted an E01, general inspection, in the No. 11 seam for diesel equipment and outby equipment. Tr. 16, 17. He was accompanied by the No. 11 seam safety director, Jerry Hedgepath.³ Tr. 17.

Citation No. 8508352

Citation No. 8508352 was issued by Pollard on August 3, 2012 at 7:00 a.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.512 which states, “[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. . . .” The violation was described in the citation as follows: “[t]he operator failed to maintain the electrode holder provided for the welder located on the CO#5080 2-man Diesel Mantrip in safe operating condition in that the insulation provided on the electrode end is broken and missing for 1 inch on both sides. . . .” Ex. S-1.

Pollard determined that the violation was reasonably likely to result in lost workdays or restricted duty, that it was S&S, that one person was affected, and that the level of negligence was moderate.

² Pollard joined MSHA in 2009 as a coal mine inspector. Tr. 15-16. He worked for several underground coal mines from 1994-2009, 2 years of which were as a section foreman. Tr. 14-15. He is certified as a Kentucky foreman, instructor, and Southern Illinois mine examiner. Tr. 16. Pollard is not a certified electrician. Tr. 38.

³ Hedgepath has been an employee at River View since 2009. Tr. 112. He started as an assistant safety director and was the safety director of the No. 11 seam at the time that the citation was issued. Tr. 113. Before starting at River View, he spent 23 years in the underground coal mining industry as a mechanic. Tr. 114. Hedgepath is a certified underground and surface foreman, and a certified electrician. Tr. 116.

Pollard testified that he issued the citation because about one inch of insulation on both tips of an electrode holder on a welder were missing. Tr. 18, 20. Hedgepath confirmed this condition. Tr. 128. The welder was attached to a two-man diesel trip, used by belt mechanics, and was powered hydraulically from the engine. Tr. 19. It was available for use at the time that the citation was issued. Tr. 21.

An electrode holder is an insulated clamp, located on a welder, and when squeezed, opens up to allow space for a welding rod. Tr. 20, 98, 99, 125; Ex. R-1. The clamp holds the rod in place while welding occurs. Tr. 20. Pollard stated that the purpose of the insulation is to prevent accidental contact which could result in electrocution or a shock. Tr. 20, 22.

Pollard did not know what the output voltage of the welder was when he cited the condition and was not familiar with the specifics of how to determine whether the missing insulation would be dangerous if a miner unintentionally came in contact with the bare metal. Tr. 36, 40.

However, Michael Moore⁴, a certified electrician and MSHA electrical inspector, believed that the missing pieces of insulation posed a danger to miners. Tr. 51, 52. Moore explained that the amps that the welder puts out are what can injure a person.⁵ Tr. 51. He maintained that if a miner touched the bare spot left by the missing insulation when up against wet metal⁶, he would have received 2,000 milliamperes (mA). Tr. 55, 57. In reaching this number, Moore took notice of the fact that the resistance rating of the human body is between 500 and 1500 ohms, depending on how dry the body is. Tr. 58.

Moore, however, did not contact anyone at River View Mine to obtain the voltage output of the welder during normal mining operations, a number that Respondent's counsel asserted was needed to perform accurate calculations. Tr. 66. In addition, when Respondent's counsel did the math with Moore⁷ at the hearing, they reached a number of 28 mA, which Moore agreed was correct. Tr. 66. Moore contended that any amount over 20 mA would create a shock that affects the heart. Tr. 73. He determined this from internet research. Tr. 76.

⁴ Moore has been an electrical inspector with MSHA since 1986. Tr. 47. He received his Bachelor's degree in electrical engineering technology and completed an apprenticeship in hydraulic, electrical, and mechanical areas. Tr. 46. Moore is a certified electrician and foreman and has performed welding tasks in the past. Tr. 47-48.

⁵ Moore further explained that amps are needed for the actual operation of the equipment and milliamperes are used for the calculation of human exposure. Tr. 74.

⁶ Pollard posited that the belt mechanics may use the welder on metal belt headers which are damp areas because of the sprays used to prevent dust. Tr. 23.

⁷ During this analysis, Moore used 140 amps in the calculation as an estimate. Tr. 65. The welder could run up to 240 amps. Tr. 65.

Respondent called Daryl Halcom⁸, Alliance Coal Company's electrical safety inspector, to rebut Moore's testimony. Halcom confirmed that the welder had direct current (DC), which is current that moves in a straight line and does not vary or change. Tr. 83. He spoke with the chief electrician at the River View Mine and asked the chief to check the voltage output of the welder while welding. Tr. 85. Halcom testified that the chief reported that the output voltage was 22 to 35 volts.⁹ Tr. 85.

In making his calculations, Halcom stated that the resistance of a human body is 1,000 ohms fingertip to fingertip and that it takes one volt to push one amp through one ohm. Tr. 92. He calculated that the welder would create an exposure of 35 mA and that if accidentally touched by a miner, would only tingle. Tr. 93.

Arguments and Analysis

Respondent argues that no violation of section 75.512 exists because the Secretary failed to prove that the welder attached to the mantrip was electrical. Resp. Br. at 10. It states that the welder and its components were attached to a diesel personnel carrier and powered by a diesel engine, which does not constitute electrical equipment. *Id* (citing *Mettiki Coal Co.*, 11 FMSHRC 2435 (Dec. 1989) (ALJ), where the judge vacated a citation for failure to record examinations of two diesel-powered locomotives, stating that the locomotives were not subject to section 75.512 even though its lights and gauges operated off an electric generator).

The Secretary argues that the welder is in fact electrical equipment because it is undisputed that the welder ran on DC current, and a large portion of the testimony at hearing involved assessing the electrical shock potential and whether it was a hazard. Sec'y Resp. at 2. He also distinguished *Mettiki Coal* from the current situation, pointing out that the citation was issued for failure to record an examination of two diesel locomotives that contained lights and gauges that were an integral part of their operation as opposed to this case where the welder was not an electrical component of the mantrip. Sec'y Resp. at 5-6.

I find the Secretary's arguments to be persuasive and give deference to his interpretation. It is undisputed by the testimony at hearing that the welder ran on DC current and had the potential to cause an *electrical* shock. Here, the welder was added on to the mantrip and was not an integral component or part of the mantrip's operation as in *Mettiki Coal*. While the welder ran on a diesel engine, it was still a piece of electrical equipment and subject to section 75.512.

Respondent also asserts that the Secretary must prove an inadequate examination by a qualified person, as defined in the regulations, at the time of the examination, not at the time of

⁸ Halcom is presently employed by Alliance Coal Company as a safety class instructor on electrical safety. Tr. 78-79. He graduated from Eastern Kentucky University with a degree in industrial technology, specializing in electronics. Tr. 78. He also worked for Peabody Coal for 26 years as maintenance foreman and chief electrician. Tr. 79. Afterwards, Halcom joined MSHA for 7 years as electrical inspector. Tr. 79. He is a certified underground and surface mine foreman, instructor, and a master electrician. Tr. 81, 82.

⁹ The test was done on a new welder, not the welder for which the citation was issued. Tr. 107. Halcom stated that the voltage output would have been the same as the cited welder. Tr. 111.

the inspection, in order to prove a violation, Resp. Br. at 15 (citing *Excel Mining*, 35 FMSHRC 2511, 2522-2525 (Aug. 2013) (ALJ) and *Twenty Mile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 2012)).

The cases cited by Respondent are quite distinguishable from this case as they involve citations for an inadequate preshift examination and an inadequate on-shift examination. Here, the inspector did not write the citation for an inadequate examination during the previous week, he wrote the citation for failure to maintain the electrode holder. The standard requires that electrical equipment be maintained by a qualified person. While Respondent argues that a qualified person meets the requirements of section 75.512-2 by performing an exam and maintenance on a weekly basis, this does not excuse or require vacating a citation for failure to address hazardous conditions in the interim. Adopting Respondent's interpretation of this standard would frustrate the protective purposes of the Act by allowing any hazard on any electrical piece of equipment to go unaddressed for up to a week. The Commission has consistently interpreted "maintain" to mean continuing functioning condition and stated that "the inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator." *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011). Company policy required the performance of a preoperational exam before every new operator, even if one had already been done, in order to correct conditions or hazards that arise between required weekly exams. Tr. 132. If the belt mechanic found a problem, it would be his duty to report that to the qualified person who would then be responsible for addressing the issue. Tr. 140. These actions were not taken in this case.

As the most contentious issue at hearing seemed to be the level of danger that the condition posed, determining that level is not necessary to find a violation of the standard. On this front, the standard only requires that the welder have been safe to use and did not pose a potential danger. It is undisputed that touching the bare metal where the electrode holder had broken off would have caused a shock. Even if the shock was not a significant one, I agree with the testimony from Pollard and Moore that a miner's initial reaction would be to jump back, which could cause a head injury if in a confined space or cause a miner to fall or slip. Tr. 24, 53.

As a result of these determinations, I find that the welder was not maintained in safe operating condition and that Respondent violated section 75.512.

S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck*

Creek Coal Co., Inc. 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130. The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

I have found that the violation has been established. The failure to maintain the electrode holder contributed to a discrete safety hazard, a miner receiving an electrical shock. The validity of the S&S finding turns on whether the hazard was reasonably likely to cause an injury or injuries of a reasonably serious nature.

Pollard explained that the belt mechanics may use the welder on metal belt headers which are damp areas because of the sprays used to prevent dust, and can also be in a confined space. Tr. 23, 25. He determined that injury was reasonably likely to result because if a belt mechanic was allowed to continue working, he would use the welder in damp, wet areas, or his hands could be wet, and without insulation, he would make accidental contact with the bare metal and be shocked. Tr. 24. Pollard contended that if a miner was shocked, he might jump, and if in a confined area, could hit his head, fall down, or possibly break a leg, resulting in lost workdays or restricted duty. Tr. 24.

Moore also believed that the conditions posed a hazard to a miner that was reasonably likely to result in a serious injury because the belt mechanics had to use the welder in order to weld the belts. Tr. 49-50. He stated that a shock over 20 mA, 28 to 35 in this case, would affect the heart, and that it was highly likely that if shocked, the miner would jump, resulting in slip and fall injuries. Tr. 53. In addition, Moore maintained that underground welders normally used regular leather gloves, which could get wet, but did concede that a miner could “get by” if the gloves were dry. Tr. 50, 56.

Hedgepath did not agree with Pollard’s statements about the dampness of the No. 11 seam, stating that there were many days when he walks around and his feet do not get wet. Tr. 115. He also testified that it is company policy to wear welding gloves, and that miners are disciplined for breaking safety rules. Tr. 127, 133.

Halcom confirmed that it was company policy to wear welding gloves. Tr. 100. He also disagreed with both Pollard and Moore, stating that even 35 mA would only tingle if the bare metal of the electrode holder was accidentally touched and that it was not reasonably likely to kill a miner or even cause lost workdays or restricted duty. Tr. 92, 93.

Analysis

Company policy required miners to wear welding gloves and there were disciplinary measures in place for failing to do so. Moore and Pollard testified to the fact that if regular leather gloves got wet, the protection they provide could be compromised. However, neither made any such statement about that situation being the same with welding gloves and Moore confirmed that welding gloves are of a higher grade than regular leather gloves. Tr. 51.

Based on the documents that I took judicial notice of, Moore's assumption that a shock of over 20 mA affects the heart would have been close to correct if the welder ran on alternating current (AC). However, the welder ran on DC current which has a very different effect at 28 to 35 mA. According to *The MERCK Manual*, "the threshold for perceiving DC current entering the hand is 5 to 10 milliamperes (mA). . . . The maximum amperage that can cause flexors of the arm to contract but that allows release of the hand" is called the let-go current. *The MERCK Manual of Diagnosis and Therapy* 3248 (Robert S. Porter & Justin L. Kaplan eds., 19th ed. 2011). The let-go current varies with weight and muscle mass, but for an average 154 pound male, the current is 75 mA. In order for the heart to be affected, 300-500 mA are required. *Id.* The estimated current of 28-35 mA is above the perception threshold but significantly below the let-go current.

Moore's testimony regarding the likelihood and injury revolved around the use of wet leather gloves and AC current. The current level being significantly below the "let-go" threshold, the use of welder gloves, and the fact that the areas in which the welder was used were only wet on occasion, makes the likelihood of injury too speculative to find that it was reasonably likely a miner would be exposed to the danger of a shock from the broken electrode holder. I, therefore, find that the hazard was unlikely to cause an injury or injuries of a reasonably serious nature. The violation was not S&S.

Negligence

Pollard determined that Respondent's level of negligence was moderate because the operator should have known through visual observation and a proper examination that the welder was not being maintained. Tr. 27, 31; Ex. S-2 at 21. Pollard, however, was unable to determine how long the condition existed for but noted that the last exam was on July 31, 2012. Tr. 31; Ex. S-2 at 22. He did not speak to the examiner or any of the belt mechanics to determine the approximate time that the condition occurred and agreed that it could have developed after the last weekly examination. Tr. 32.

Moore testified that the condition must have existed for several days because welders are generally used in rough conditions and someone would have to mistreat them for the insulators to break off. Tr. 142. He provided no further explanation.

Hedgepath confirmed that there were no hazards found during the weekly examination on July 31. Tr. 130. He testified that the belt mechanics are required to do preoperational exams before using the mantrip, even if it has already been done by a previous mechanic. Tr. 132. They are to report any issues to management, and tag out the equipment. Tr. 140. In regards to the

length of time that the condition existed, Hedgepath contended that damage to the welder can happen in an instant and that he has seen the tips of electrode holders break off because they become brittle from extreme heat exposure. Tr. 131, 146.

Respondent performed the required weekly examination on the mantrip and made no comments about hazardous conditions. Company policy required the belt mechanics to do preoperational exams on the mantrip before operating it, providing for the opportunity to observe and report issues sometimes multiple times per day. There was no evidence, other than Moore's general statement, presented by the Secretary as to whether Respondent mistreated the equipment and caused the electrode holders to break. In addition, there was no evidence that management was aware of the condition and the Pollard was uncertain how long the condition had existed for. Based on these facts, I find the level of negligence to be low.

Civil Penalties

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. §820(i). It further directs that the Commission, in determining penalty amounts, shall 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 rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

Ability to Continue in Business, Good Faith, and Size of the Operator

The parties have stipulated that the proposed penalty will not affect the Respondent's ability to continue in business. Ex. J-A. I find that Respondent made a good faith effort to abate the citation. The parties stipulated that the mine produced 7,582,894 tons of coal in 2011. Ex. J-A. Based on 30 C.F.R. § 100.3, I find that the size of the operator is large and therefore, that the penalty assessed herein is appropriate to the size of the business.

History of Previous Violations and Negligence

The history of violations provided reflects that 472 violations became final between May 2011 and August 2012. Ex. S-3. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24. The Secretary's form reflecting the originally assessed penalty amount for the litigated violation (Secretary's Exhibit A), does, however, give some qualitative information by assigning points for the number of violations. 30 C.F.R. § 100.3(c). For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment form for the litigated violation reflects that 2 points were assigned for overall violation history. I find that Respondent's violation history is low. The negligence and gravity of each violation is discussed at length above.

Citation No. 8508352 is affirmed. However, I find that the violation was unlikely to result in an injury of a reasonably serious nature, requiring the removal of the S&S designation, and that Respondent's level of negligence was low. I assess a penalty of \$125.00.

ORDER

It is **ORDERED** that Citation No. 8508352 be **MODIFIED** to reduce the likelihood of injury from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to reduce the level of negligence from "moderate" to "low."

It is further **ORDERED** that the operator pay a total penalty of \$125.00 within 30 days of the date of this order.¹⁰

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

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Gary D. McCollum, Esq., River View Coal, LLC, 771 Corporate Drive, Suite 500, Lexington, KY 40503

¹⁰ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2014

SECRETARY OF LABOR, (MSHA),	:	DISCRIMINATION PROCEEDINGS
on behalf of Cameron Garcia,	:	
Complainant,	:	Docket No. WEST 2014-788-DM
	:	MSHA Case No.: WE MD 14-17
v.	:	
	:	Docket No. WEST 2014-789-DM
VERIS GOLD U.S.A., INC.,	:	MSHA Case No.: WE MD 14-16
Respondent.	:	
	:	
SECRETARY OF LABOR, (MSHA),	:	
on behalf of Cheryl Garcia,	:	
Complainant,	:	
	:	
v.	:	
	:	
VERIS GOLD U.S.A., INC.,	:	Jerritt Canyon Mill Mine
Respondent.	:	Mine ID: 26-01621
	:	
	:	

DECISION

Appearances: Seema Patel, U.S. Department of Labor, Office of the Solicitor
90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Peter Gould, Squire Patton Boggs (US) LLP
1801 California Street Suite, 4900 Denver, CO 80202

Before: Judge Simonton

**DECISION AND ORDER GRANTING APPLICATION FOR REINSTATEMENT
FOR CAMERON GARCIA AND CHERYL GARCIA AND DENYING REQUEST
FOR ECONOMIC REINSTATEMENT OF CHERYL GARCIA**

On June 20, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) filed Applications for Temporary Reinstatement of miners Cameron Garcia and

Cheryl Garcia¹ to their former positions with Veris Gold U.S.A., Inc. (“Veris” or “Respondent”) at the Jerritt Canyon Mill Mine.

Read in full, Mr. Garcia’s original complaint stated “I was terminated because I reported unsafe actions to my employer.” Cameron Garcia Discrimination Complaint, 2. Read in full Ms. Garcia’s original complaint stated “I was let go immediately after giving my notice because I was constantly being harassed and discriminated against because I reported safety/ health concerns to my employer.” Cheryl Garcia Discrimination Complaint, 2.

Based upon the findings of an MSHA Special Investigator, the Secretary asserts that these Complaints were not frivolously brought and requests an Order directing Respondent to reinstate Mr. Garcia to his former position and rate of pay including overtime, which Mr. Garcia has represented to be between 24-30 hours per week. Cameron Garcia Application, 3; Cameron Garcia Discrimination Complaint, 1. The Secretary also asks that I order economic reinstatement for Ms. Garcia at her previous rate of pay including overtime, which Ms. Garcia has represented to be between 24-30 hours per week. Cheryl Garcia Application, 3; Cheryl Garcia Discrimination Complaint, 1.

On June 30, 2014 Respondent filed a “Combined Opposition to the Secretary’s Application for Temporary Reinstatement.” “Resp. Mot.” Within, the Respondent presented a detailed rebuttal argument and requested that the Court deny the applications, stating that Mr. Garcia and Ms. Garcia’s complaints were frivolously brought and that Mr. Garcia’s complaint was late filed and time barred. Resp. Mot., 12, 16. Additionally, the Respondent asserted that even if the court granted temporary reinstatement, both Mr. and Ms. Garcia’s overtime requests were grossly in excess of their actual overtime work history and presented copies of Mr. Garcia’s and Ms. Garcia’s pay stubs to support this claim. *Id.* at 16; Ex. K-L.

The Respondent did not explicitly request a hearing in these matters within their brief. Sec’y Supp. Br., 3. However, after the Court requested clarification from the Respondent on whether they were requesting a hearing, Respondent’s Counsel issued an e-mail on July 1st to the Court and the Secretary’s representative stating that they were reserving a right to a hearing in these dockets. July 1, Gregory M. Louer. On July 2, the parties participated in a teleconference where the Respondent stated that they preferred the Court to rule after considering the Secretary’s application and the Respondent’s Motion in Opposition but would participate in a hearing if the Court or Secretary objected. Sec’y Supp. Br., 3. The Secretary did not object to the proposed procedure and I requested that the parties file a Joint Stipulation agreeing to a “decision on the motions” and then submit appropriate briefs per an agreed upon schedule. *Id.* During the conference call, I emphasized to the parties that I would only consider evidence and arguments appropriate to these temporary reinstatement proceedings.

On July 3, 2014 the parties submitted the following Joint Stipulation:

1. The Secretary filed an Application for Temporary Reinstatement of Cheryl Garcia and an Application for Temporary Reinstatement of Cameron Garcia in above captioned proceedings, respectively, on June 20, 2014.

¹ Cameron Garcia is Cheryl Garcia’s son. I have referred to Cameron Garcia as Mr. Garcia and Cheryl Garcia as Ms. Garcia throughout.

2. Veris timely filed its Combined Opposition to the Secretary's Applications for Temporary Reinstatement on Behalf of Ms. Cheryl Garcia and Mr. Cameron Garcia on Monday, June 30, 2014.

3. The Parties recognize, however, that an evidentiary hearing on the Secretary's applications for the temporary reinstatement of Mr. Cameron Garcia and Ms. Cheryl Garcia (collectively, "the Complainants") may not be necessary to the proper disposition of the instant temporary reinstatement cases.

4. Instead, Petitioner and Respondent agree that this Court shall rule on the Secretary's applications after considering:

- a. The applications filed on June 20, 2014;
- b. Respondent's Combined Opposition to the Secretary's Applications for Temporary Reinstatement on Behalf of Ms. Cheryl Garcia and Mr. Cameron Garcia filed on June 30, 2014;
- c. A responsive brief to be filed by the Secretary no later than July 7, 2014; and
- d. A reply brief to be filed by the Respondent no later than July 9, 2014.

5. The Court will limit its review of the documents listed in paragraph 4, above, to the scope of a hearing on an application for temporary reinstatement, as defined by Commission Rule 2700.45(d), "to a determination as to whether the miner's complaints [subject to the above captioned proceedings] were frivolously brought."

6. If the Court is unable to make a determination on whether the complaints subject to the above captioned proceedings were frivolously brought on the basis of the documents listed in paragraph 4, above, the Court shall schedule an evidentiary hearing in accordance with Commission Rule 2700.45(d).

Jt. Stip., 1-2.

On July 7, 2014 the Parties also filed the following Joint Stipulation for Purposes of Supplemental Briefing:

1. At all relevant times hereinafter mentioned, Veris Gold U.S.A, Inc., ("Veris" or "Respondent") was an "Operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. §802(d). The federal mine identification number for Jerritt Canyon Mill Mine is 26-01621.

2. Jerritt Canyon Mill Mine, the mine and milling operation at which Respondent operated and performed services or construction, is located at or near Elko, Nevada and is a "mine," the product of which enters commerce or the operations or products of which affect commerce, all within the meaning of Sections 3(b), 3(h) and 4 of the Mine Act, 30 U.S.C. §§ 802(h) and 803.

3. Complainant, Cameron Garcia, worked for Respondent at Jerrit Canyon Canyon Mill Mine as a Strip Operator, and is a “miner” within the meaning of Section 3 (g) of the Mine Act, 30 U.S.C. § 802(g). Complainant, Cheryl Garcia, worked for Respondent at Jerrit Canyon Mill Mine as an Industrial Hygiene Coordinator, and is a “miner” within the meaning of Section 3 (g) of the Mine Act, 30 U.S.C. § 802(g).

4. On January 28, 2014 Respondent Terminated Mr. Garcia’s employment.

Jt. Stip. for Supp. Br., 1-2.

On July 7, 2014 the Secretary filed a Supplemental Brief per the stipulated briefing schedule. Sec’y Supp. Br. The Secretary moved within her supplemental brief to wholly exclude the Respondent’s Motion in Opposition and subsequent Reply Brief. Sec’y Supp. Br., 3. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike this request as contrary to the specific stipulation agreed to by the parties on July 3, 2014 and Commission Rule 2700.45(d). Jt. Stip., 2, 4- b, d; 29 CFR § 2700.45 (d) (“The Respondent may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.”). On July 9, 2014 the Respondent filed a Response Brief per the stipulated briefing schedule. Resp. Br. As the Secretary and Respondent stipulated to the above procedure, I have considered 1) the Secretary’s June 20 Application for Temporary Reinstatement, 2) the Respondent’s June 30 Combined Motion in Opposition, 3) the Secretary’s July 7, 2014 Supplemental Brief and 4) the Respondent’s July 9, 2014 Reply Brief.² However, as the Commission has issued strict evidentiary guidelines for temporary reinstatement proceedings, while I have considered facts presented by the Respondent in consideration of the totality of the circumstances, I have primarily restricted my review of the Respondent’s Motion in Opposition and Reply to properly raised arguments regarding the legal sufficiency of the Secretary’s application. *Sec’y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). For the reasons stated below, I **GRANT** both Cameron Garcia and Cheryl Garcia’s Application for Temporary Reinstatement at the Jerrit Canyon Mill Mine, but **DENY** the Secretary’s request for the economic reinstatement of Cheryl Garcia.

TEMPORARY REINSTATEMENT

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

² In agreeing to the referenced procedure, I am aware the Commission has held that summary decision is not appropriate when the operator has requested a hearing. *Sec’y of Labor o/b/o Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 999-1000 (May 2012). However, as the Respondent requested and stipulated to a “summary decision” in this case, I find no reason to object to the stipulated procedure. If I have erred in granting such a request, I have erred in the interest of reaching an efficient resolution of the parties’ dispute, rather than disregard for Commission precedent.

Congress created the temporary reinstatement as “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec’y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies. *Sec’y of Labor o/b/o Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining “whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990). In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). “Courts have recognized that establishing ‘reasonable cause to believe’ that a violation of the statute has occurred is a ‘relatively insubstantial’ burden.” *Sec’y of Labor o/b/o Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matters, the Secretary need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor o/b/o Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec’y of Labor o/b/o*

Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Timeliness

Cameron Garcia was discharged by the Respondent on January 28, 2014. *Jt. Stip. for Supp. Br.*, 2. Cheryl Garcia resigned from her position on February 28, 2014. *Cheryl Garcia Aff.*, 3; *Resp. Mot. Opp.*, 8. Cameron and Cheryl Garcia both filed their discrimination complaints on May 6, 2014. *Sec'y Supp. Br.*, 13-14. Thus, Mr. Garcia filed his complaint 98 days after his discharge, while Ms. Garcia filed her complaint 67 days after her resignation. As such, both Complainants failed to file within the 60 day period allowed for by Section 105(c) 2. ³30 USC 815 (c) 2. However, as acknowledged by both parties, the Commission has held that this filing period is not jurisdictional and may be equitably tolled by justifiable circumstances including genuine ignorance, mistake, inadvertence, and excusable neglect. *Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984); *Phillips Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996). The Secretary contends that neither Ms. Garcia nor Mr. Garcia were aware of their right to file a discrimination complaint until former Veris Safety Manager Danny Lowe informed them of this right.⁴ *Sec'y Br.*, 14.

Furthermore, based upon a footnote contained in *Sec'y of Labor o/b/o Young v. Lone Mountain Processing*, 20 FMSHRC 927, 932 n. 6 (Sept. 1998) (declining to consider timeliness of underlying discrimination complaint at the Commission level after finding that job applicants were barred from seeking temporary reinstatement altogether), the Secretary also contends that the Court may not consider timeliness during temporary reinstatement proceedings. After carefully reviewing the *Lone Mountain Processing* decision and a recent citing Commission case, I disagree with the Secretary's interpretation. *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000-01 (May 2012) (declining to consider timeliness during Commission review after remanding case for a temporary reinstatement hearing). I do recognize that the Commission has stated that the timeliness of a discrimination complaint was to be properly considered during the "proceeding on the merits". *Armstrong Coal Co.* 34 FMSHRC, 1000-01. This language might ordinarily appear to refer to the substantive discrimination hearing. However, as the effect of the *Armstrong Coal Co.* decision was to remand the case to the ALJ for a temporary reinstatement hearing, I am left to conclude that the Commission simply remanded the timeliness question to the ALJ and declined to decide the issue at the Commission level, rather than absolutely prohibit considerations of timeliness at the temporary reinstatement stage. Indeed, when outlining the appropriate review standard for late filed complaints, the Secretary cites to a case in which the ALJ fully considered the issue of timeliness during a

³ The discrimination complaints filed by Mr. Garcia and Ms. Garcia appear to have been signed on April 23, 2014. *Cameron Garcia Discrimination Complaint*, 2; *Cheryl Garcia Discrimination Complaint*, 2; However, the time stamp on both of these documents indicate that they were received by MSHA on May 6, 2014. *Id.* As the Secretary has indicated that both applications were filed on May 6, 2014, absent any evidence to the contrary, I am considering both applications as filed outside the 60 day filing period. *Sec'y Supp. Br.*, 14.

⁴ None of the briefs, application or affidavits submitted by the Secretary specify when Mr. or Ms. Garcia learned of their right to file a discrimination claim or clarify whether they were informed of this right before or after their termination.

temporary reinstatement proceeding. *Sec'y of Labor o/b/o Keith Overfield v. Highland Mining Co.*, 2014 WL 2920571, *13-14 (Jun. 2014) (ALJ).

However, in this particular proceeding, as I am not able to assess the credibility of Mr. Garcia and Ms. Garcia's claims that they were not aware of their right to file a discrimination complaint, or fully consider the Respondent's rebuttal evidence on this point, I decline to decide this issue at this time. Prior to a hearing on the merits, I would consider summary judgment motions on the timeliness of these complaints if properly submitted to me by either party with sufficient factual stipulations.

Cameron Garcia- WEST 2014-788-DM

Cameron Garcia worked for Veris Gold from April 30, 2012 to January 28, 2014 and at all times relevant to these proceedings served as a Strip Operator. Cameron Garcia Aff., 1. The following is a complete list of Mr. Garcia's representation of his protected activities and the alleged hostility and adverse actions encountered by Mr. Garcia. At this temporary reinstatement proceeding, I have detailed Mr. Garcia's assertions not as findings of fact, but as possible support for his discrimination claim. All of the following representations are taken from Mr. Garcia's affidavit and the Secretary's supplemental brief.

January 6, 2014 - Mr. Garcia reported that the pressure gauge on the Strip Vessel 2 was not working to his supervisor Cecil Pranke and documents this report on a "Five-Point Safety Card." Cameron Garcia Aff., 1.

January 17, 2014 - Mr. Garcia reported that the pressure gauge on the Strip Vessel 2 was not working to Supervisor Pranke and documents this report using a "Five-Point Safety Card." *Id.*

January 18, 2014 - Mr. Garcia reported that the Strip Vessel 1 vent, the Strip Vessel 2 pressure gauge, and the auto valves on the bottom of a vessel were not working. Mr. Garcia also reported that there was carbon in the Strip Vessel 2. *Id.*

January 24, 2014 - Mr. Garcia filed a hazard complaint with MSHA after his safety reports were not addressed by Veris Gold. *Id.*

January 25, 2014 - Veris Gold suspended Mr. Garcia when he arrived at work, pending further notice. *Id.*

January 28, 2014 - Veris Gold terminated Mr. Garcia's employment at the Jerritt Canyon Mill Mine. *Id.*

After reviewing the Secretary's Application, the Secretary's supplemental brief, and Mr. Garcia's affidavit, it is clear that the Secretary has presented evidence that Mr. Garcia engaged in protected activity by filing in-house safety complaints with Veris management and filing a MSHA hazard complaint after those concerns were allegedly not addressed by Veris. The Respondent has not, at this point, contradicted Mr. Garcia's representation of his protected activities. As it is undisputed that Veris terminated Mr. Garcia on January 28, 2014 it is also clear that there is evidence of an adverse action. *Jt.*

Stip. For Supp. Br., 2. Additionally, Veris's alleged failure to respond to Mr. Garcia's safety concerns could support an inference of Veris's hostility towards proper maintenance of safety mechanisms. Cameron Garcia Aff., 1, e. Furthermore, the close proximity in time between Mr. Garcia's safety reports/ MSHA complaint and his termination stand as supportable evidence of a nexus between Mr. Garcia's protected activities and the adverse action.

I have reviewed the Respondent's Motion in Opposition and Reply Brief in full as it pertains to Mr. Garcia's discrimination claim. I acknowledge that the Respondent has provided affidavits and documentary evidence indicating that Mr. Garcia was issued numerous disciplinary warnings prior to and during the time period relevant to this complaint for unsafe or substandard work performance, including an alleged failure to properly maintain the temperature log in the Assay Laboratory immediately prior to his termination. Resp. Mot., 4-5; Ex. B-D. I also acknowledge that the Respondent has provided affidavits and documentary evidence demonstrating that another miner with a clean disciplinary record submitted similar safety complaints in December of 2013 and was not discharged or disciplined by Veris Gold after those safety complaints. Resp. Mot. In Opp., 5, 11; Ex. E. Although such evidence could successfully rebut Mr. Garcia's discrimination claim at the substantive discrimination proceeding, Commission precedent prevents me during this temporary reinstatement proceeding from weighing such evidence against Mr. Garcia's presentation of a timeline that could support a discrimination claim. *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

I also acknowledge that the Respondent has noted that Mr. Garcia has not presented any evidence of obvious hostility towards his protected activities to support his claim that he was terminated, at least in part, due to his safety hazard reports. However, the Commission has held that it is difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Additionally, as noted above, the Commission has specifically listed knowledge of the protected activity and a coincidence in time between the protected activity and the adverse action as factors that may support a discrimination claim. *Sec'y of Labor o/b/o Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). As Veris terminated Mr. Garcia just weeks after he submitted multiple safety complaint to Veris management, and just one day after he filed a hazard complaint with MSHA, I find that the Secretary has established that Mr. Garcia's discrimination claim was not frivolously brought.

In making this determination, I acknowledge the Respondent's argument that I must consider the totality of circumstances and that a coincidence in time cannot by itself support a discrimination claim, even at the temporary reinstatement proceedings. *Sec'y of Labor o/b/o Markovich v. Minnesota Ore Operations, USX Corp*, 18 FMSHRC 1250, 1256-57 (July 1996) (ALJ), aff'd by an equally divided court, 18 FMSHRC 1349 (Aug. 1996); *Sec'y of Labor o/b/o Gregory Bradley v. Climax Molybendum Co.*, 34 FMSHRC 2080, 2823 n. 13 (Oct. 2102) (ALJ). However, in reviewing the cases in which a coincidence in time between the protected activity and the adverse action has been insufficient to sustain an application for temporary reinstatement, it is clear that the

miners in those cases explicitly admitted to impermissible activities that clearly warranted termination. *Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1257 (Secretary conceded that miner had vandalized no smoking signs on many occasions, an offense that had also led the operator to discharge a different foreman); *Sec’y of Labor o/b/o Jeffrey Fletcher v. Frontier-Kemper Constructors*, 34 FMSHRC 2189, 2200 (August 2012) (ALJ) (miner admitted to working under unsupported roof in same timeframe as other workers who were also discharged for working under unsupported roof). In this case, neither the Secretary nor Mr. Garcia have conceded that Mr. Garcia committed the work infractions alleged by Veris. Furthermore, at this temporary reinstatement proceeding, even if I were to take the Secretary’s silence on this matter within her brief as an admission of Mr. Garcia’s misconduct, I am not currently prepared to conclude that the Mr. Garcia’s alleged errors, including his failure to update the temperature log at the Assay Laboratory, were so obviously egregious that they would regularly result in termination. Resp. Mot., 4-5, Ex. B-D.

Therefore, I **ORDER** that Cameron Garcia be reinstated to his former position as Strip Operator at the same rate of pay and overtime as reflected in his official pay records. The Respondent has submitted copies of Cameron Garcia’s pay records indicating that he worked an average of 6.75 hours of overtime per week over the previous 12 months. Resp. Mot. 16, Ex. L. Mr. Garcia claimed within his discrimination claim that he worked an average of 24-30 hours of overtime per week. Cameron Garcia Discrimination Complaint, 1. As the Respondent has requested a ruling on this discrepancy; I **ORDER** the Respondent to reinstate Mr. Garcia to the amount of overtime established by the Respondent’s payroll records. If Mr. Garcia chooses to dispute the Respondent’s payroll record, he may elect to file a separate complaint with the U. S. Department of Labor’s Wage and Hour Division.

Cheryl Garcia - WEST 2014-789-DM

Cheryl Garcia worked for Veris Gold a total of three years and at all times relevant to these proceedings served as an Industrial Hygiene Coordinator. Cheryl Garcia Aff., 1. The following is a complete list of Ms. Garcia’s representation of her protected activities and the alleged hostility and adverse actions encountered by Ms. Garcia. At this temporary reinstatement proceeding, I have detailed Ms. Garcia’s assertions not as findings of fact, but as possible support for her discrimination claim. All of the following representations are taken from Ms. Garcia’s affidavit and the Secretary’s supplemental brief.

August 16, 2013 - Ms. Garcia submitted safety complaints to upper management regarding faulty alarms in the Refinery and Strip. Cheryl Garcia Aff., 1.

September 10, 2013 - Ms. Garcia observed temporary employees working without restroom facilities, water or radios and reported the condition to a supervisor. Ms. Garcia later learned that port-a-johns had not been ordered and ordered them herself from a vendor, and verified that the port-a-johns were in place on September 16, 2013. On the same day, after a miner raised concerns regarding a “potential safety hazard,” Ms. Garcia advised a worker that he did not have to work in unsafe conditions. *Id.*

October 2013 - Ms. Garcia responded to a complaint regarding a mouse problem in the lunchroom, photographed “evidence of mice eating the food in the refrigerator” and sent an email to Mill Manager Kiedock Kim and Assistant Mill Manager Chris Jones about the issue. Chris Jones responded with an e-mail sitting “What do you want me to do about it?” *Id.* at 1-2.

October - November 2013 - Ms. Garcia posts a do not enter sign on the lunchroom in response to high levels of mercury in the lunchroom. According to Ms. Garcia, Chris Jones yelled at Safety Manager Danny Lowe about the sign and stated that Mr. Lowe and Ms. Garcia were trying to “stab him in the back.” *Id.* at 2.

December 11, 2013 - Ms. Garcia questioned management regarding why management was requiring her son, Cameron Garcia, to see a doctor regarding caustic burns on his feet, when it did not require other similarly situated miners to do the same. Ms. Garcia also told management that such an incident must be reported to MSHA as a potential lost time injury, to which HR Manager Dwayne Ward indicated the company would just claim to have changed Cameron’s work schedule. *Id.*

December 14, 2013 - Chris Jones asked Ms. Garcia in a company hallway “Why are your boys the only ones high on mercury? Do you go home and stick a thermometer up their a** and break it.” Ms. Garcia responded to Chris Jones by telling him that other miners also exhibited high levels of mercury. *Id.*

December 16, 2013 - Chris Jones sees Ms. Garcia limping in the hallway and asks her, “What is the matter with you? Do you have caustic burns on your feet?” *Id.*

December 17, 2013 - Ms. Garcia met with MSHA Special Investigator Kyle Jackson in connection with another MSHA investigation. Ms. Garcia testified in that case and Ms. Garcia alleges that Dwayne Ward learned of her involvement with that case. *Id.* Dwayne Ward confirms within his affidavit that he believes Ms. Garcia made allegations regarding his conduct to a MSHA investigator. Resp. Mot: Ex. B, 3.

December 18, 2013 - Ms. Garcia submits a report to Manager Johnston claiming that she is being harassed and that Chris Jones has stated “Danny Lowe and Ms. Garcia are stabbing me in the back and f**cking me over safety issues in the Fine Crush.” Ms. Garcia also reports that Chris Jones has stated he was going after Ms. Garcia’s other two kids. Cheryl Garcia Aff., 3.

February 18, 2014 - Ms. Garcia is questioned regarding an allegation that she improperly provided Danny Lowe with company documentation in connection with Lowe’s separate MSHA complaint. Ms. Garcia denied the allegation and requested that the report be removed from her record. Chief Operating Officer Graham Dickson urged her not to quit and assured Ms. Garcia that he would take care of the write-up. Ms. Garcia claims that she “continued to experience harassment by Chris Jones in the work place” following this meeting. *Id.*

February 28, 2014 - Ms. Garcia submitted a two-week notice of resignation to the Respondent. *Id.* The Respondent agreed to, and did in fact, pay Ms. Garcia for the next two weeks but ordered her to leave the mine property that same day. Resp. Mot., 8.

After reviewing the Secretary's application, the Secretary's supplemental brief, and Ms. Garcia's affidavit, it is clear that Ms. Garcia has presented evidence that she engaged in protected activity by filing hazard reports, posting danger signs, and participating in an MSHA special investigation. The Respondent's Motion in Opposition concedes that Ms. Garcia did in fact engage in these protected activities, but emphasizes that they encouraged such efforts. Resp. Mot., 14.

As Ms. Garcia resigned and did not suffer any formal demotion, transfer, or work reduction prior to her resignation, I must find there is a reason to believe that Ms. Garcia's resignation was the result of "constructive discharge" in order to grant her application for temporary reinstatement. Sec'y Br. 10 n. 5, Resp. Mot., 13. Specifically, I must find that there is supportable evidence that the Respondent created a workplace environment "so intolerable that a reasonable miner would have been compelled to resign." *Sec'y of Labor o/b/o Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994).

When viewed in isolation, none of the alleged hostility encountered by Ms. Garcia appears to rise to the level of a serious threat or vulgarity that would truly shock the conscious. However, when viewed together, accepting Ms. Garcia's representations as true at this stage, I cannot rule out the possibility that a reasonable miner would have felt compelled to quit after experiencing continued harassment from a fellow employee even after reporting that harassment to upper management. Cheryl Garcia Aff., 2-3. Additionally, as Chris Jones alleged harassment stemmed from his hostility to Ms. Garcia's chemical contamination reports and her son's injury reports, it appears that there is some evidence of a nexus between Mr. Jones hostility and Ms. Garcia's protected activities. *Id.* Although Ms. Garcia has not asserted that Mr. Jones was her direct supervisor, she has alleged that Mr. Jones continued to harass her after her December 2013 complaint to upper management and the February meeting regarding a separate MSHA complaint. *Id.*; Resp. Mot., 14-15 n. 3. As such, at this preliminary stage, there is a non-frivolous reason to believe that Ms. Garcia was compelled to quit because she believed upper management had not and would not take action to prevent Mr. Jones from continuing to harass her.

I have reviewed the Respondent's Motion in Opposition and Reply Brief in full as it pertains to Ms. Garcia's discrimination claim. I acknowledge that the Respondent asserts that management conducted a prompt and thorough investigation of Ms. Garcia's harassment complaint against Mr. Jones and found it meritless. Resp. Mot. 7: Ex. B, D. However, as Commission precedent precludes me from making credibility determinations at this stage, I cannot discount Ms. Garcia's version of events. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). I also acknowledge, as pointed out by the Respondent and conceded by Ms. Garcia, that the Respondent actively tried to retain Ms. Garcia when she first threatened to resign following the February 18 meeting regarding her alleged involvement in Danny Lowe's MSHA complaint. Cheryl Garcia Aff., 3; Resp. Mot. 8, 15. Still, as Ms. Garcia has alleged that Mr. Jones continued to harass her following assurances from management that she would not be written up, there is some evidence that Ms. Garcia continued to face hostility up until her resignation. Cheryl Garcia Aff., 3. For these reasons, I find that the Secretary has established that Ms. Garcia's complaint was not frivolously brought.

Therefore, I **ORDER** that Cheryl Garcia be reinstated to her previous position at the Jerritt Canyon Mill Mine at the same pay rate and overtime amount as reflected upon her official pay records. The Respondent has submitted copies of Cheryl Garcia's pay records indicating that he worked an average of 5.77 hours of overtime per week over the previous 12 months. Resp. Mot. 16: Ex. K. Ms. Garcia claimed within her discrimination claim that she worked an average of 24-30 hours of overtime per week. Cheryl Garcia Discrimination Claim, 1. As the Respondent has requested a ruling on this discrepancy; I **ORDER** the Respondent to reinstate Ms. Garcia to the amount of overtime established by the Respondent's payroll records. If Ms. Garcia chooses to dispute the Respondent's payroll record, she may elect to file a separate complaint with the U.S. Department of Labor's Wage and Hour Division.

At this point, I **DENY** the Secretary's request to order economic reinstatement. As a jurisdictional matter, this Court does not have the authority to order economic reinstatement without the prior express agreement of both the miner and the operator. *Sec'y of Labor o/b/o Kenneth Wilder v. Bledsoe Coal*, 33 FMSHRC 2031, 2032 (August 2011) (ALJ); *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 589, 592-93 (Mar. 2011).⁵ Based upon the record, it does not appear that the Respondent has made any such agreement.

Furthermore, I do not agree with the Secretary's argument that economic reinstatement is necessary due to Ms. Garcia's allegations of a hostile work environment at the Jerritt Canyon Mine. All discrimination claims, in essence, involve a claim of a hostile work environment. Nevertheless, it is clear that, absent a voluntary agreement to the contrary, "The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits." *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 592. Additionally, my temporary reinstatement findings are not a finding that Ms. Garcia actually was constructively discharged or actually did or would face an intolerable environment at the Jerritt Canyon mine. They are merely a finding pursuant to Commission precedent that Ms. Garcia has presented evidence establishing that her claims are non-frivolous. However, I am amenable to approving the economic reinstatement of Ms. Garcia if the Respondent agrees to such a measure.

⁵ A previous Commission decision, *Sec'y of Labor o/b/o Mark Gray v. North Fork Coal*, 33 FMSHRC 27 (Jan. 2011), involving the same parties was overturned by the 6th Circuit. *North Fork Coal Corp v. FMSHRC*, 691 F. 3d 735 (6th Cir. 2012). However, the 6th Circuit decision held solely that temporary reinstatement orders must be dissolved if the SOL concludes there is no discrimination and did not disturb the Commission's separate holding that economic reinstatement is a voluntary option requiring consent of both parties. *Id.*; *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 592-93.

ORDER

Based on the above findings, the Secretary's Applications for Temporary Reinstatement are **GRANTED**. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Cameron Garcia, as a strip operator, and Cheryl Garcia, as an industrial hygienist, at the same rate of pay, for the same number of hours worked, and with the same benefits, as reflected upon their official pay records, as at the time of discharge. For the reasons detailed above, the Secretary's request for economic reinstatement of Cheryl Garcia is **DENIED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (First Class U.S. Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 21, 2014

SECRETARY OF LABOR MINE	:	CIVIL PENALTY PROCEEDING:
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-357
Petitioner	:	A.C. No. 15-18353-309799
	:	
v.	:	
	:	
R7 ENTERPRISES, LLC,	:	Mine: Frasure Creek Mining, LLC F-2
Respondent	:	

DECISION

Appearances: J. Malia Lawson, Esq.; Office of the Solicitor, U.S. Department of Labor,
618 Church Street, Suite 230, Nashville, TN 37219-2440 for Petitioner;

Mark E. Heath, Esq.; Spilman, Thomas & Battle, PLLC; 300 Kanawha Blvd.,
East, Charleston, WV 25301 for Respondent

Before: Judge David Barbour

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. 801 *et seq.* (2012) (Mine Act or Act), the Secretary alleges that R7 Enterprises, LLC, (R7) violated mandatory safety standard 30 C.F.R. 77.404(a), while performing contract work at the F-2 Mine of Frasure Creek Mining, LLC.¹ The standard requires that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” 30 C.F.R. 77.404(a). The Secretary asserts that on November 9, 2012, Mine Safety and Health Administration Inspector Brian K. Robinson found that a hydroseeding truck had excessive slack on its right steering tie rod end and on its short steering arm. In addition, the truck’s right rear tandem brake was inoperative. The truck, which was in use at the mine, was owned by R7 and was being operated by one of its employees. The inspector cited R7 for the alleged violation. He found that the violation was reasonably likely to cause a fatality, that the violation was a significant and substantial contribution to a mine safety hazard and that R7 was highly negligent in allowing the

¹ The mine is a surface coal mine located in Floyd County, Kentucky.

condition to exist. The Secretary petitioned for the assessment of a civil penalty of \$51,236 for the alleged violation.

After the petition was filed, the company answered essentially asserting the truck's defects were discovered by the company on November 8, 2012, that its employees were told not to operate the truck until it was repaired, and that the mechanic arrived to repair the truck on November 9, but before he could act, the inspector, who was on the scene, issued the citation. The Commission's chief judge assigned the case to the undersigned who directed the parties to engage in discussions to determine whether they could resolve their differences. When, after working with the Commission's settlement counsel, the parties reported they remained at loggerheads, the undersigned scheduled the matter for hearing.

After a continuance due to a conflict on the undersigned's part, the parties agreed to go forward on June 17, 2014, in Prestonsburg, Kentucky. Upon arriving in Prestonsburg on the evening of June 16, 2014, the undersigned found a message left at his hotel stating that the parties settled the case. By e-mail, the undersigned asked counsels to proceed to the courthouse in the morning and there to put the settlement on the record.² The hearing convened as scheduled on the morning of June 17, and counsel for the Secretary explained the settlement as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>	<u>Settlement Amount</u>
8275983	11/9/12	77.4045(a)	\$51,236	\$18,000

Counsel for the Secretary stated that the parties agreed the inspector's negligence finding should be modified from high to moderate. Tr. 12. The bases for the agreement are assertions in R7's answer that on November 8 the defects were discovered by the truck operator, that the parts needed for the necessary repairs were picked up by R7's mechanic the next morning, that he brought the parts to the mine, but that the inspector cited the company before the truck could be repaired. *Id.* The parties also agreed a total penalty of \$18,000 was warranted and requested that it be paid in three installments of \$6,000 at 30 day intervals. *Id.* In addition, counsel for R7 maintained that except for proceedings brought under the Mine Act, the settlement does not represent an admission by the company that it violated section 77.404(a). Tr. 13.

² Due to fiscal constraints under which his client was operating, counsel for R7 requested permission to enter an appearance telephonically sparing his client time and travel expenses. There being no objection from counsel for the Secretary, the undersigned agreed. Tr. 10.

ORDER

The undersigned, who is loath to second guess counsels, finds the settlement eminently reasonable. Tr. 13. Therefore the settlement **IS APPROVED**. Within 30 days of the date of this decision, R7 **IS ORDERED** to pay a total penalty of \$18,000 for the violation in question and to do so in three installments of \$6,000, the first installment being due 30 days from the date of this decision and the other two installments being due at 30 day intervals thereafter.³ In addition, the settlement is approved with the understanding that R7 agrees it violated section 77.404(a) for Mine Act purposes only and that its admission may not be used for proceedings under any other act.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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Ryan Risner, Owner/Manager, R7 Enterprises, LLC, HC 88 Box 119, Gunlock, Kentucky 41632

³ Payment shall be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, Missouri 63197-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2014

NORTH COUNTY SAND & GRAVEL, INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	
v.	:	Docket No. EAJ 2014-0001-J Formerly WEST 2010-365-M
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 04-05632 Mine: Roadrunner 32
	:	

FINAL DECISION
ORDER OF DISMISSAL

This case is before me upon an application for the award of fees and expenses under the Equal Access to Justice Act (“EAJA”) 5 U.S.C. § 504 and the Commission’s regulations at 29 C.F.R § 2704. North County Sand & Gravel, Inc., filed the application against the Department of Labor’s Mine Safety and Health Administration based upon my decision in *North County Sand & Gravel, Inc.*, 35 FMSHRC 3217 (Sep. 2013) (ALJ).

In an Interim Decision dated May 13, 2014, I determined that North County was entitled to an EAJA award under 29 C.F.R § 2704.105(a). 36 FMSHRC 1214 (May 2014). My Interim Decision is incorporated herein by reference. I ordered the parties to attempt to reach an agreement as to the proper amount payable under EAJA in this case.

On June 30, 2014, the parties filed a Joint Stipulation on Reimbursement. Applicant agreed to “accept an EAJA award of \$40,923 for attorney’s fees and litigation-related expenses associated with EAJ 2014-0001-J, formerly WEST 2010-365-M.” (Joint Stipulation). The parties also agreed that payment would be made by the Secretary directly to Applicant’s counsel and that counsel would move for dismissal of its fee application pursuant to 29 C.F.R. § 2704.305 once the fee had been paid.

On July 18, 2014, counsel for Applicant notified this court that the Secretary paid the agreed-upon fees and expenses in this case. On that basis, Applicant moved that this proceeding be dismissed. The Secretary does not oppose the motion. This settlement furthers the objectives of EAJA. For good cause shown, the motion is **GRANTED** and this proceeding is **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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July 22, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-772
Petitioner	:	A.C. No. 15-18889-282185-01
	:	
v.	:	
	:	
FOUR STAR RESOURCES, LLC,	:	Mine: Harlan Strip No. 1
Respondent	:	

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq. U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for Petitioner

James F. Bowman, Midway, WV, for Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent was issued a single citation for an alleged violation 30 C.F.R. § 77.1607, failure to maintain control of a vehicle.¹ The Secretary proposed a penalty of \$52,500.00. A hearing was held in Kingsport, Tennessee on March 19, 2014. The parties submitted post hearing briefs which were considered in rendering this decision.

For the reasons set forth below, I find the Respondent violated the mandatory standard and impose a penalty of \$52,500.00.

The parties stipulated to the following facts relative to this proceeding: 1) Respondent is subject to the Federal Mine Safety and Health Act of 1977 (the “Act”) and to the jurisdiction of the Federal Mine Safety and Health Review Commission; 2) The Administrative Law Judge has authority to hear and decide the case; 3) Respondent has an effect upon commerce within the meaning of the Act; 4) Respondent is the operator of Panther Harlan Strip No. 1 Mine; 5) The violation in this docket is complete, authentic and admissible; 6) The inspector’s notes for the violation are complete, authentic and admissible; 7) Respondent mined 190,056 tons of

¹ Docket KENT 2013-116 was settled prior to hearing and a Decision Approving Settlement was issued by me on March 27, 2014.

bituminous coal in 2011 at Panther Harlan Strip No. 1; 8) The Secretary proposed an assessment of \$52,500 for Citation Number 8349347 in Docket KENT 2012-772; 9) The violation was properly served on Respondent by a duly authorized representative of the Secretary on the date stated therein; 10) The penalty proposed will not affect Respondent's ability to remain in business; and, 11) Respondent abated the citation in a timely manner and in good faith. JE-A.

Findings of Fact

On July 25, 2011 at approximately 11:30 p.m., a Caterpillar 777 dump truck ran off the haul road down an embankment, traveled 84 feet, and came to rest against a tree with its front bumper buried into the ground. The right side of the truck was crushed, the frame was bent, the steering wheel was broken and the engine was damaged. Tr. 27, 31-33; photographs S-13, 14 and 15. The driver, Phillip Short, was uninjured in the accident. Tr. 15.

Shortly after the accident occurred, MSHA inspector Argus Brock received an anonymous phone call informing him of the events. He arrived on scene at 12:05 a.m. to conduct an accident investigation, during which he learned of the conditions surrounding the accident. He estimated that he arrived 35 minutes after the accident had occurred. It was drizzling when he arrived. Tr. 85. J.B. Frasure, the evening shift foreman, informed Brock that Short had told him that the road was slick and muddy. As he applied his brakes, the truck slid and then started to "wheel hop" (or bounce). He lost control of the truck as it slid sideways and went over the berm and down the hill. The truck was loaded with about 50 to 70 tons of rock at the time. Tr. 17. It had been raining on and off that day, making the road muddy and slick. As a consequence, Frasure said they had had to push a truck up the hill with a bull dozer that evening. He also informed Brock that he felt the road was too narrow for adequate berms for the haul trucks. He stated that he discussed this with the superintendent, Don Browning several times. Tr. 18; Ex. S-1 pg. 11. Frasure told Brock that he had put gravel down on the road which had helped "some." Ex. S-1 pg.10. Brock also interviewed miners on the scene who stated that they felt the road was too muddy, slick and narrow to run trucks. Ex. S-1 pg. 8, 12.

On the 26th, Brock met with Superintendent Don Browning at 8:30 a.m. Brock began taking measurements of the road, berms and the truck. He measured the grade of the road at 18 to 23% which Brock testified would call for additional safeguards such as higher berms, runaway ramps and travel berms. Tr. 22. He measured the width of the road as ranging from 16 to 24 feet wide and the width of the Caterpillar 777 truck at 15 feet 8 inches wide. According to Brock, the roadway should be twice the width of the largest equipment used on it. Tr. 23-24. The berm, which was made up of mostly loose material, measured 2 to 3 feet in height; a 40 foot stretch of which was 2 feet in height and included the site where the truck left the roadway. Tr. 21. The mid-axle height of the truck measured 4 feet 6 inches which should have been the height of the berm as well. Tr. 24-25. The haul road is unlit, the only illumination coming from the headlights of the vehicles traveling on the road. Tr. 114.

The Violation

As a result of his investigation, Brock issued a citation under 30 C.F.R. § 77.1607(b) which provides “[m]obile equipment operators shall have full control of the equipment while it is in motion.” The narrative portion of the violation reads:

The operator failed to maintain control of the Caterpillar 777A Rock Truck, SN-84A0899, while descending the mine haul roads #6 Hill. Due to the haul road being narrow, wet, muddy and slick, the drive lost control of the loaded truck resulting in traveling over an 85 foot embankment. The overall grade of this section of the haul road was approximately 21 per cent.

Ex. S-9.

Brock testified that he has 14 years of experience with MSHA, including 6 years as a surface specialist and 20 years as underground miner. Tr. 10-13. Brock stated that he has investigated many haul road accidents in the same geographic area. It has been his experience that these accidents result in fatalities or serious injuries due to the steep roads. Tr. 38-39. He marked the violation as significant and substantial (“S&S”) because it is highly likely that such an accident would result when management knowingly puts a driver in harm’s way under such adverse road conditions. Tr. 44. Management was aware of the slick muddy conditions on this steep and unlighted road with berms that were inadequate and the roadway too narrow to operate this type of truck based upon the obvious conditions and the admissions made by Frasure at the scene. For this reason, he felt there were no mitigating circumstances and marked the negligence as high. Tr. 41-44. The Secretary proposes a specially assessed penalty of \$52,500.00.

The operator admits to the violation.

Significant and Substantial

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “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 Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); see also, *Buck Creek Coal Co., Inc.*, 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel*

Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

Respondent contests the S&S designation and the gravity based upon the fact that the accident did occur and there were no severe injuries. Brock, therefore, should have assessed the accident as unlikely to result in serious injuries. As the Secretary correctly states “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011). Likewise, that a fatal injury did not occur here does not preclude a finding of S&S or a gravity of likely to be fatal. They also assert that the berms were adequate and the road was not too narrow for safe operation of the rock truck and did not pose a hazard.

Superintendent Don Browning, Respondent’s sole witness, testified that the roadway was not too narrow and that they stopped running equipment on the road from 12:30 p.m. until 4:30 p.m. while it was raining. Tr. 28. He informed Frasure, the night foreman, to wait until the rain had stopped and they had dried the road before running equipment again. He estimated this to be at midnight since it was raining again at 6 p.m. when he left the mine, and it had rained “quite a while” requiring some time to dry out the road. Tr. 108. He stated that Frasure put gravel on the road but acknowledged that “those rock trucks, a loaded rock truck in that condition, once they run up and down that hill a couple times the gravel is going to mash out of site.” Tr. 100, 109. Browning stated that the width of the haul road was the same as it had always been and that MSHA had never cited it before. Tr. 97-98, 102. He stated that they had followed the appropriate procedures to dry the road by cutting the mud off the road and pushing it to the side. He stated that this would make the road narrower by a couple of feet. Tr. 98, 110. However, when the road dried out, they would grade the road, dragging the material back across the road and making the road wider again. Tr. 101. He believed the road was approximately 16 feet wide where the accident occurred. Tr. 101. Browning denied having ever spoken to Frasure about the width of the road being an issue. Tr. 103. He also stated that the berms were sufficiently high but not wide enough at the base. Tr. 110. He believed the cause of the accident was the driver losing control of his truck because the road was not sufficiently dry, causing it to slide and bounce. Tr. 105-06. Browning acknowledged that a truck had to be pushed up the road during the night shift as Frasure had told Brock. Tr. 121.

I find that Browning’s testimony does not support the Respondent’s argument that the violation was not S&S.

When Brock questioned Browning on July 26th as to whether he thought the road was too narrow to establish adequate berms, Browning responded that it was. Ex. S-2 pg. 8-9. His

admission to Brock was recorded by Brock at the time the statement was made. It is consistent with Frasure's statement that the haul road was too narrow and that he had discussed it with Browning on several occasions. I find Browning's denial at trial that he had such a conversation with Frasure is self-serving and not credible. Ex. S-1 pg. 11. It is also indicative of the fact that Browning was well aware of the hazards posed by running trucks on a narrow road with inadequate berms. Brock pointed out in Exhibit S-10, a photograph of the haul road, it was apparent that as the truck was sliding down the road, it was running berm to berm; it took up the entire width of the road. Tr. 29-30. While Browning testified that the tracks on one side were from another vehicle, Brock measured the road at 16 to 18 feet wide where the accident occurred while the truck measured 15 ½ feet wide, confirming Brock's observations. Tr. 21, 101. Browning also admitted that the roadway where the truck ran over the berms was about 16 feet wide. Tr. 101. As Brock testified, it should have been twice the width of the truck. Tr. 23-24.

Browning testified that the road has always been this same width. However, as Brock explained, this road had never been used by these significantly larger 777 rock trucks. Tr. 60. Browning confirmed that it had only been used to haul rock trucks for about two weeks at the time of this accident. Tr. 108-09. Regardless of whether MSHA had been aware that large trucks were using this road and had not issued a citation, it is readily apparent that the roadway was only inches wider than the rock truck and was too narrow. Both Browning and Frasure are experienced in mining and were well aware of the hazards. That other trucks may have used the road without incident, as Browning claimed, is also of no import. *See Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

Browning went on to explain that when the wet material is removed from the road and put to the side, it could narrow the roadway by as much as 2 feet. When the road is dried and the material is spread back across, it is widened again. Tr. 100, 110. Even assuming this were true, Browning testified that by the time the trucks started running again that night, the road had been dried and the gravel brought across the road, which would mean it was at its widest point when the accident occurred. Tr. 101. Nothing had been altered at the scene from that time until Brock took his measurements and photographs.

With respect to the height of the berms, Browning testified that the berms were adequate in height but were too narrow at the base. Tr. 110. Brock measured the berms at 24 to 36 inches high with a span of some 40 feet where it was only 24 inches. This being where the truck went off the road. Tr. 21. The mid-axle height of the dump truck was measured at 54" which should have been the height of the berms, not taking into account the 18-23 per cent grade which would require higher berms or runaway ramps. Tr. 22-24. Browning confirmed that the citation was correctly written and that it was highly likely to result in an injury and that the injury could be fatal. Tr. 113.

Brock testified that in his opinion, the violation is S&S based upon the narrowness of the road coupled with the inadequate berms, the steep grade and the adverse weather conditions. It has been his experience having investigated haul road accidents in this geographic area that they are highly likely to result in a fatality. Tr. 38-39. In many instances, when an operator loses

control of a vehicle, especially one as large as the instant one, the driver will jump from the truck resulting in death. A truck could also very easily flip over or run into a tree, as this one did, causing severe injuries or death from traumatic impact or impalement. Tr. 31-32. Short was extremely fortunate in not having been impaled by the tree that landed just inches from the driver's window. Ex. S-15.

I find Brock's designation of this violation as S&S to be fully supported by the evidence. Browning and Frasure were well aware of the weather and road conditions throughout the day and evening. Putting the driver behind the wheel under these conditions in which maintaining control of the truck was all but impossible was highly likely to result in an accident in which injuries would be highly likely to be very serious or fatal.

Negligence

Negligence is conduct which falls below the standard of care established under the Mine Act. Under the Act, an operator is held to a high standard of care and is required to be on alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 100(d). High Negligence is defined as when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." 30 C.F.R. § 100.3 Table X.

Four Star contests the negligence, alleging that the operator took all normal precautions in making the road safe for travel which should be considered in mitigation of high negligence. It contends that the trucks were laid up while it was raining. Then, the road was graded and gravel was put down which is the normal procedure for compensating for adverse weather conditions.

Frasure was told to park the trucks and dry the road before running them again on the 25th. It had been raining on and off all day and continued to rain through the evening. Tr. 96, 107-08. It was still raining and foggy when Brock arrived at the mine at 12:05 a.m., about 30 minutes after the accident occurred. Tr. 16. Despite the weather conditions, Frasure elected to run the rock trucks. Although he put some gravel on the road, he told Brock that it had only helped "some." Ex. S-1. The ineffectiveness of the gravel was obvious to Frasure as he told Brock that a truck had to be pushed up the hill that evening due to the slick roads. Tr. 18; Ex. S-6. Browning acknowledged that pushing a truck up the hill was unsafe practice. He said, "if it's so slick you have to push them up the hill, it's too slick to haul down the hill." Tr. 121; Ex. S-2. Browning added that gravel is only effective for a short period of time in providing traction. Tr. 109. Based upon their experience as miners and foremen, Browning and Frasure knew the meager attempts made in putting some gravel on the road would not prevent an accident under these circumstances. I find no mitigation.

Clearly, the weather, the steep grade and narrowness of the road, and the lack of adequate berms presented an extremely hazardous situation. Both Browning and Frasure were well aware of the hazards and, yet, instead of making the prudent decision not to run the trucks that night, they put the life of a miner in serious jeopardy. I find high negligence is appropriate.

Gravity

Gravity is an evaluation of the seriousness of the violation. It is the likelihood of the occurrence the standard seeks to prevent and the severity of the illness or injury and number of persons potentially affected by the event should it occur. 30 C.F.R. § 100.3(e). It is the effect of the hazard if it occurs that determines the gravity of a violation rather than the likelihood of serious injury which is the focus of whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541 (Sep. 1996).

I find the effect of the hazard, the losing control of a rock truck on a steep haul road under these treacherous conditions, is very likely to result in the death of the truck driver. I find the gravity to be extremely serious.

PENALTY

The Commission has recently reiterated that Section 110(i) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in the Act.” 30 C.F.R. § 820(i). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760 (Aug. 2012). The Act delegates the duty of proposing penalties de novo to the Commission ALJ and requires that the following six statutory criteria be considered: 1) the history of violations, 2) the size of the operator, 3) the negligence of the operator, 4) the gravity of the violation, 5) the ability of the operator to continue in business and, 6) good faith in attempting to achieve rapid compliance after notification of the violation. Not all criterions need be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495 (Sept. 1997). It is appropriate for the ALJ to give the magnitude of the gravity of a violation and negligence of the operator greater weight in imposing a substantial penalty. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010).

I have addressed the negligence and gravity of the violation above. The parties have stipulated to the size of the operator and that it abated the violation in good faith. They further stipulated that the proposed special assessment will not affect the operator’s ability to continue in business. The Secretary has provided that the operator does not have any previous violations of 30 C.F.R. § 77.1607(b).

Based upon the high negligence and the very serious gravity of this violation, which demonstrated a complete disregard for the safety of a miner by running production in such hazardous conditions, I find the special assessment proposed by the Secretary appropriate.

ORDER

Four Star Resources, LLC is hereby ORDERED to pay a total penalty of \$52,500.00 within 30 (thirty) days of this decision.²

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

James Bowman, P.O. Box 99, Midway, WV 25878

² Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

The Secretary reviewed the Citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Secretary has agreed to a reduction of the proposed civil money penalty. Neither party admits that the arguments of the other party are correct.

WEST 2014-31M

8762608	\$100.00		\$50.00
---------	----------	--	---------

No modifications to the citation; Reduce the proposed penalty

The Secretary represents that the Respondent takes the position and would have alleged at hearing that the cited area was not a roadway. In addition, the Respondent contended that the citation should be vacated because the CAT 930G only traveled the cited area once and a spotter was used to help guide the equipment through the cited area. Respondent has also contended that this area was not part of the mine and was on a separate commercial area not subject to MSHA jurisdiction.

The Secretary reviewed the Citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Secretary has agreed to a reduction of the proposed civil money penalty. Neither party admits that the arguments of the other party are correct.

8762609	\$100.00		\$50.00
---------	----------	--	---------

No modifications to the citation; Reduce the proposed penalty

The Secretary represents that the Respondent takes the position and would have alleged at hearing that the gravity was less than contended because the 120v well pump was not plugged in and the copper conductors were not exposed. Respondent would have argued the cited splice did not create an electrocution hazard. In addition, Respondent maintains that the splice was temporary, and it was performed to prevent miners from contacting the wires. Finally, Respondent would have argued that a permanent splice had been ordered to comply with MSHA requirements prior to the inspection. Once Respondent received the permanent splice, and prior to resuming production, it was installed.

The Secretary reviewed the Citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Secretary has agreed to a reduction of the proposed civil money penalty. Neither party admits that the arguments of the other party are correct.

		Total Amended Penalties:	\$150.00
--	--	---------------------------------	-----------------

The Court accepts the representations and modifications of the Secretary as set forth in the motion to approve settlement. However, the Court unequivocally rejects the Secretary's claim in its motion that it need not supply a factual basis to the Court for any compromised, mitigated or settled proposed penalty as that stance is contrary to Congress' express command at section 110(k) of the Mine Act. The Motion takes what has become the Secretary's now routine approach of insisting that it need do no more than rely upon its pleadings together with a

statement reflecting its changes but without any explanation to justify those changes. Then, within the same motion, the Secretary proceeds to provide the required information and thereby relents from its claim that the information need not be supplied. Viewing the reluctantly supplied justification, the Court then considered the representations supplied and finds that the modifications are reasonable and therefore concludes that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act.

Accordingly, the motion to approve this settlement is **GRANTED** and the settlement amount of \$150.00 is accepted as appropriate. The Court further notes that the parties agree that the Respondent has already recently paid the settlement amount of \$150.00 associated with these two dockets.¹

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Lauren A. Polk, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

John Richards Construction, Attn: John Richards, Owner 2824 Hwy 83 Seeley Lake, MT 59868

¹ On July 1, 2014, Respondent mailed the agreed upon settlement amount of \$150.00 to the MSHA U.S. Department of Labor Payment Office. Payment was received at the assessments office on July 3, 2014.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

July 24, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. SE 2009-401-M
Petitioner	:	SE 2009-402-M
	:	A.C. No. 09-01036-179032
	:	
	:	Docket No. SE 2009-553-M
	:	A.C. No. 09-01036-184807
	:	
v.	:	Docket No. SE 2009-554-M
	:	A.C. No. 09-01036-184807
	:	
	:	Docket No. SE 2010-849-M
	:	A.C. No. 09-01036-219258
	:	
MIZE GRANITE QUARRIES, INC.;	:	Docket No. SE 2010-850-M
ROBERT W. MIZE III; and	:	A.C. No. 09-01036-219259
CLAYBORN LEWIS	:	
Both Employed by MIZE GRANITE	:	
QUARRIES, INC.,	:	Mine: Mize Granite Quarries
Respondents	:	
	:	

DECISION AND ORDER

Appearances: Charna C. Hollingsworth-Malone, Esq., Sophia E. Haynes, Esq., Angela R. Donaldson, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, GA for Petitioner

Robert W. Mize III, President Mize Granite Quarries, Inc., Elberton, GA for the Respondents

Before: Judge Rae

These cases are before me upon petitions for assessment of a civil penalty under sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(c) (The "Act"). On April 20, 2011, I issued a decision upholding seven violations and three orders assessed by MSHA against Mize Granite Quarries, Inc. with totaled penalties in the

amount of \$25,811.¹ *Mize I*, 33 FMSHRC 886, 915 (Apr. 2011) (ALJ). I further assessed penalties under section 110(c)² of the Act against Robert W. Mize III in the amount of \$1,500.00 for one citation and two orders and against Clayborn Lewis in the amount of \$900.00 for the same violations. *Mize I* at 917-18.

The Commission remanded the decision with instructions to make further attempts to obtain financial documents from Respondent Lewis and to reassess the individual penalties under 110(c). 34 FMSHRC 1760 (Aug. 2012).

Thereafter, I issued a second decision assessing penalties against Mize and Lewis individually. *Mize II*, 35 FMSHRC 414 (Feb. 2013) (ALJ). However, inadvertently and as a result of clerical error, when assessing the penalties under 110(c), I incorrectly stated the negligence with respect to Citation No. 6507102 and Order No. 6505709 as “high” and for Order No. 6505715 as “moderate” rather than as unwarrantable failure as I had found in my first decision. I stated the gravity as “serious” for the first two violations and “moderate” for the third rather than the graver findings I had made previously. *Mize II* at 417. I imposed the identical penalties against Mize and Lewis in both decisions, for the reasons set forth in *Mize I*, after careful consideration of the appropriate section 110(i) criteria³, including the financial positions of both individuals.

¹ As it relates to this decision, I found Citation No. 6507102 and Order Nos. 6505709 and 6505715 to be significant and substantial and an unwarrantable failure to comply with the relevant mandatory standards. I found the gravity to be egregious, callous and reckless in total disregard for miners’ safety.

² Section 110(c), 30 U.S.C. §820(c), provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

³ Section 110(i) of the Act grants the Commission the authority to assess all civil penalties provided under the Act. It further directs the Commission and its ALJs to consider: 1) the operator’s history of previous violations, 2) the appropriateness of such penalty to the size of the business of the operator charged, 3) whether the operator was negligent; 4) the effect on the operator’s ability to continue in business, 5) the gravity of the violations, and 6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. As they relate to individuals, the ability to continue in business is evaluated as the individual’s ability to meet his or her financial obligations. With respect to size, the inquiry is whether the penalty is appropriate in light of the individual’s income and net worth. *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997). If the individual is married, the individual’s share of the household net worth, income and expenses should also be considered. *Ambrosia II*, 19 FMSHRC 381, 385 (Apr. 1998).

On July 16, 2014, the Commission noted the incorrect statement of negligence and gravity in my second decision and remanded for clarification and assessment of the penalties against the two individuals under the section 110(i) criteria.

As stated in my first decision with regard to the individual penalties, I found the gravity and negligence for Citation No. 6507102 and Order Nos. 6505709 and 6505715 to be as set forth under the discussion of each of the violations. In other words, I assessed each of these three violations as unwarrantable failure and of the highest gravity demonstrating egregious, reckless and callous disregard for the safety of the miners. *Mize I*, 33 FMSHRC at 917. Having taken that negligence and gravity into consideration, I also took into consideration the remaining 110(i) criteria including the financial obligations and the appropriateness of the penalty in light of the net worth and income of both Mize and Lewis. I assessed penalties in the aggregate amount of \$1,500.00 against Mize and \$900.00 against Lewis.

I find that in consideration of all section 110(i) factors, including the negligence and gravity of the violations as stated in my first decision, the amount of the penalties against both individuals is appropriate and I reiterate my decision.

ORDER

Robert W. Mize III is directed to pay total penalties of \$1,500.00 within 40 days of the date of this decision. Clayborn Lewis is directed to pay total penalties of \$900.00 within 40 days of the date of this decision.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

Clayborn Lewis
P.O. Box 881
Elberton, GA 30635

Clayborn Lewis,
Mize Granite Quarries, Inc.
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Elberton, GA 30635

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Mize Granite Quarries, Inc.
P.O. Box 299
Elberton, GA 30635

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

July 24, 2014

TWENTYMILE COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2008-0788-R
v.	:	Order No. 7622426; 03/12/2008
	:	
SECRETARY OF LABOR	:	Docket No. WEST 2008-1093-R
MINE SAFETY AND HEALTH	:	Order No. 6686312; 05/06/2008
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2008-1094-R
	:	Citation No. 6686313; 05/06/2008
	:	
	:	Mine ID 05-03836
	:	Foidel Creek Mine
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-0333
Petitioner	:	A.C. No. 05-03836-169779-01
	:	
	:	Docket No. WEST 2009-0579
v.	:	A.C. No. 05-03836-175445-01
	:	
	:	Docket No. WEST 2009-1174
TWENTYMILE COAL COMPANY,	:	A.C. No. 05-03836-189502-02
Respondent	:	
	:	Foidel Creek Mine
	:	

DECISION APPROVING SETTLEMENT ON REMAND

On June 13, 2014, the Commission issued a decision in these consolidated proceedings. 36 FMSHRC____(June 2014). In its decision, the Commission affirmed in part and remanded in part my decision of October 18, 2010. 32 FMSHRC 1431 (Oct. 2010) (ALJ). In my original decision, I determined that the Secretary established a violation of 30 C.F.R. § 75.400 in Order No. 6686312 and a violation of 30 C.F.R. § 360(a)(1) in Citation No. 6685313¹ and that the violations were of a significant and substantial (“S&S”) nature. 32 FMSHRC at 1439-45, 1448-50. The Commission vacated my S&S findings and remanded this issue for further proceedings

¹ The MSHA inspector issued Citation No. 6685313 as a section 104(d)(2) order but the Secretary modified it at the hearing to a section 104(a) citation with high negligence. 32 FMSHRC at 1449.

consistent with its decision.² The specific issues of fact on remand are described in the Commission’s decision. Slip op. at 12.

Consistent with the Commission’s decision, I encouraged the parties to settle the S&S issue and, if a settlement was not possible, I ordered them to file statements of position. On July 18, 2014, the parties filed a motion to approve settlement of the remaining issues in these cases. The parties agreed to modify the gravity in the order and citation from “reasonably likely” to “unlikely” and to strike the S&S determinations. In WEST 2009-333, the parties proposed that the civil penalty for Order No. 6686312 should remain unchanged at \$50,700 and the penalty for Citation No. 6686313 should be reduced from \$50,700 to \$10,000.³

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve the settlement of these items is **GRANTED** and Peabody Twentymile Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$60,700 within 40 days of the date of this decision.⁴ Upon payment, these consolidated proceedings are **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204-3516

R. Henry Moore, Esq., Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222

² The remanded citation and order are at issue in docket numbers WEST 2008-1093-R, WEST 2008-1094-R, and WEST 2009-333 only.

³ The Secretary originally proposed a total penalty of \$101,400 for the citation and order and I assessed a total penalty of \$55,000 in my decision. 32 FMSHRC at 1462. The remaining six citations and orders in WEST 2009-333 have been resolved and are not at issue on remand.

⁴ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. The payment should reference WEST 2009-333, A.C. No. 05-03836-169779-01.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-781
Petitioner	:	A.C. No. 46-01816-316352
	:	
v.	:	
	:	
PINNACLE MINING COMPANY, LLC,	:	Mine: Pinnacle Mine
Respondent	:	

DECISION AND ORDER

Appearances: John R. Slattery, Esq., U.S. Department of Labor, Philadelphia, PA for Petitioner

Jason M. Nutzman, Esq., Dinsmore & Shohl LLP, Charleston, WV for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petition charges Respondent, Pinnacle Mining, LLC (Pinnacle), with a significant and substantial (S&S) violation of 30 C.F.R. § 75.370(a)(1).

A settlement was reached regarding 21 of 22 citations at issue in this docket. Tr. 9; Jt. Ex. 1. I have reviewed the parties' joint settlement motion and I approve the parties' settlement agreement set forth in Joint Exhibit 1 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

Citation No. 7195128 remains unsettled. Tr. 10. Respondent concedes that it violated the standard and acted with low negligence. Tr. 19. Respondent disputes the S&S designation and the number of persons affected by the violation. Tr. 20.

A hearing was held in Beckley, West Virginia on December 10, 2013. Witnesses were sequestered. Tr. 15-18. MSHA inspector Joshua S. Bennett testified for the Secretary. Pinnacle mine foreman John David Cox, II, testified for Respondent.

Based on the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,¹ I find that Citation No. 7195128 was properly designated as S&S and that ten persons were reasonably likely to suffer fatalities or injuries of a reasonably serious nature as a result of the hazard contributed by Pinnacle's violation of mandatory safety standard 30 C.F.R. § 75.370(a)(1).

II. Factual Background

A. Stipulations of Fact and Law

At hearing, the parties agreed to the following stipulations:

1. Respondent is the owner and operator of Pinnacle Mining Company, LLC and is subject to the jurisdiction of the Mine Act.
2. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.
3. Pinnacle Mining may be considered a large size mine operator for the purposes of 30 U.S.C. § 820(i).
4. The assessed penalties will not affect the ability of Respondent to remain in business.
5. Certified Mine Inspector (CMI) Bennett from MSHA was acting as a representative of the Secretary of Labor when he issued Citation No. 7195128.
6. Citation No. 7195128 was properly served by a duly authorized representative of the Secretary of Labor upon the agent of Respondent at the date, time, and place stated therein.
7. MSHA's Proposed Assessment Data Sheet and Petitioner's Exhibit 1 set forth: (a) the number of assessed penalty violations charges to Respondent for the period stated and (b) the number of inspection days per month for the period stated.

¹ In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

8. On December 28, 2012, Respondent violated 30 C.F.R. 75.370(a)(1) by failing to follow the approved ventilation plan on the 071-0MMU longwall, which requires a minimum air velocity of 500 feet-per-minute (“fpm”) to be maintained at the trailside location.
9. The Citations may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

Tr. 7-8

B. Background

Pinnacle Mine is a bituminous underground coal mine located in Pineville, West Virginia. The gassy mine and produced approximately five million cubic feet of methane daily at the time that Citation No. 7195128 issued on December 28, 2012. P. Ex. 6 at 2; P. Ex. 3. Section 103(i) of the Mine Act provides that any mine liberating over one million cubic feet of methane daily must be spot checked for methane emissions at least once over each five-day period. Tr. 85.

MSHA regulations provide that gassy mines must be ventilated in order to flush methane and coal dust from the mine according to a ventilation plan developed by the mine operator and approved by a MSHA representative. 30 C.F.R. § 75.370(a)(1).² At the time of the violation, Pinnacle’s ventilation plan required a minimum air velocity of 500 feet-per-minute along the 9G tailgate working face. R. Ex. 1, at 1; Tr. 44.

Pinnacle has a history of ignitions over the past 25 years at the mine. In its Belt Air Justification submitted to MSHA in 2010, Pinnacle references 16 confirmed instances of ignitions and one alleged ignition at the mine. P. Ex. 6, at 6.³

² The standard provides: “The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.” 30 C.F.R. § 75.370(a)(1).

³ The Belt Air Justification was a revision to the original ventilation plan. Tr. 33; *see also* 30 C.F.R. § 75.370(a)(2).

C. The Instant Inspection

On December 28, 2012 at approximately 7:45 a.m., inspector Bennett⁴ arrived at Pinnacle Mine in order to conduct a methane spot inspection. Tr. 34. Bennett, accompanied by a management and miner representative, traveled to the 9G longwall tailgate. Tr. 36-37. A longwall continuous miner plow (longwall plow) was actively mining coal was cutting coal and generating a large amount of coal dust. Tr. 65.

After arriving at the 9G longwall tailgate, Bennett walked to the working face and entered the shield line to take a methane reading with his multi-gas detector.⁵ Tr. 38, 40, 44. The detector registered a methane concentration in the ambient air of between .9-1% and an oxygen concentration of 20.8%. Tr. 38. Bennett's multi-gas meter registered between .9% and 1% methane during the entire time that Bennett traveled along the longwall tailgate area. Tr. 43.

Bennett also took an air velocity reading at the longwall with his Davis anemometer. Tr. 43. The anemometer registered an air velocity of 435 feet-per-minute (fpm). Tr. 44. After obtaining this air velocity reading, Bennett took another reading using a wand anemometer. Tr. 44. The wand anemometer also registered an air velocity of approximately 435 fpm. Tr. 45.

Thereafter, Bennett informed the tail boss that his anemometers had registered air velocities along the longwall face that were below those required by Pinnacle's ventilation plan. Tr. 45. The tail boss then contacted mine workers on the headgate side to make adjustments to the ventilation system for the tailgate side. Tr. 45.

About 30 minutes later, Bennett took another air velocity reading at the working face. Tr. 46. At that time, Bennett's anemometer registered an air velocity of 550 fpm and Bennett's multi-gas detector registered a methane content of .5%. Tr. 46.

Bennett then travelled toward the 9G longwall tailgate entry and issued Citation No. 7195128 for a violation of § 75.370(a)(1). Tr. 47. The violation was designated S&S, reasonable likely to result in fatal injuries affecting ten miners, and was attributed to Respondent's low negligence. P. Ex. 1, at 18. The proposed penalty was \$5,503.00. P. Ex. 1 at 9.

⁴ Bennett had been a ventilation specialist for MSHA for about six months. Tr. 26. Before that, he had been a CMI for about three and one-half years. Tr. 26. Bennett was familiar with Pinnacle Mine and had conducted numerous inspections there for MSHA. Tr. 30. At MSHA, Bennett received a year-long training course, which included a three to four week module on ventilation. Tr. 27-28. Prior to employment with MSHA, Bennett had worked in the mining industry for about six years. Tr. 16-27.

⁵ Bennett credibly testified that he had calibrated his Solaris multi-gas detector at the Pineville MSHA field office earlier that morning. Tr. 40.

Bennett designated the citation as S&S because substandard air velocities from the failure to follow the ventilation plan would result in an accumulation of methane that would cause an ignition resulting in an explosion from methane liberated at the face where float coal dust was present. Tr. 75-77. Bennett explained that methane would accumulate quickly because Respondent was actively cutting coal, not following the ventilation plan, and if normal mining operations continued, an explosive amount of methane would likely have been liberated. *Id.*

Bennett testified that the three conditions necessary for an explosion were present: fuel, oxygen, and an ignition source. Tr. 64. There was fuel in the form of methane at the longwall face and in the gob. Tr. 65. There was also float coal dust, coal fines, and accumulations of grease near the working face. Tr. 65, 104. There was oxygen in the ambient air at a concentration of 20.8%.⁶ Tr. 117. Further, Bennett highlighted several potential ignition sources: frictional heat sources, including the conveyor chain running in a metal pan; the tail drive sprocket on the continuous miner; sparks from the longwall plow scraping against rock streaks in the coal seam; and electrical sources, such a high voltage cord feeding the longwall plow, a starter box, telephones, and lighting across the face. Tr. 65-67, 104-105. Bennett further testified that Pinnacle had been cited for numerous permissibility issues, both before and after Citation No. 7195128 was issued. Tr. 67.

Respondent's sole witness, John David Cox, II,⁷ conceded that substandard ventilation practices could contribute to methane accumulations in the mine. Tr. 146. Cox testified that the longwall plow was equipped with several safety devices, including water sprays to reduce dust accumulations at the face. Tr. 137. In addition, he testified that the longwall plow was designed to stop working the face once it encountered rock, thus reducing the likelihood of sparking. Tr. 137. Further, the plow was designed to stop operating once a methane concentration of 1% was detected. Tr. 141. Cox also testified that coal production would stop if substandard air velocity was detected at any point along the working face, or if methane sensors in a single location along the working face stopped working. Tr. 130.

III. Legal Analysis - Significant and Substantial Analysis and Disposition

Section 104(d) of the Mine Act describes a S&S violation as "a violation of any mandatory health or safety standard ... [when] such violation is of such a 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)(1).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission announced four criteria for an S&S violation, "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Id.* at

⁶ Bennett testified that methane explosions are possible at oxygen levels above 10.0%. Tr. 117.

⁷ Cox holds an electrical engineering degree and a mechanical engineering degree from Bluefield State College. Tr. 127. At the time of the hearing, Mr. Cox was employed as a longwall foreman. Tr. 127. He is certified by West Virginia as an assistant underground mine foreman. Tr. 127.

3-4. The Secretary must introduce substantial evidence to support a finding for each of these four factors. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

As to the first *Mathies* factor, section 3(l) of the Mine Act defines “mandatory health or safety standards” as “the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act.” All standards are promulgated pursuant to title I of the Mine Act. The parties have stipulated to the violation of section 75.370(a)(1), a mandatory safety standard. Tr. 19.

As to the second *Mathies* factor, the Secretary need only identify a discrete safety hazard associated with the putative S&S violation. *Bledsoe Coal Corp.*, 34 FMSHRC 2569, 2573 (Oct. 2012) (ALJ) (explaining that the second *Mathies* factor requires the Secretary to identify a discrete hazard contributed to by an underlying violation). The risk of a methane explosion articulated by inspector Bennett is a discrete safety hazard. *See Knox Creek Coal Corp.*, 36 FMSHRC , slip op. at 6 (May 28, 2014); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013) (upholding an ALJ’s finding that the “danger of methane accumulation” was a safety discrete hazard); *Jim Walter Res.*, 28 FMSHRC 579 (Aug. 2006) (stating that methane buildup is a discrete safety hazard).

I credit both Bennett’s and Cox’s testimony that substandard ventilation practices, including insufficient air velocities, contribute to the risk of a methane explosion in a gassy mine. Tr. 75, 146. Moreover, once Respondent’s tail boss had the ventilation system adjusted and compliant air velocity levels were achieved at the working face, the methane concentration was cut nearly in half in a matter of twenty minutes. Tr. 45-46.

Respondent’s brief makes too much of inspector Bennett’s testimony that “an operator is permitted to continue to operate a coal mine when there is 1% of methane or less present.” R. Br. 15. On this basis, Respondent argues that “if an operator is permitted to continue to operate with 1% or less of methane [*sic*] MSHA does not believe a hazard is created.” R. Br. 15. This conclusion, however, discounts the substandard air velocities that were found by inspector Bennett. Citation No. 7195128 was issued *precisely because* they were *impermissible* under MSHA regulations. Accordingly, the Secretary has shown by substantial evidence that there was a discrete safety hazard contributed to by the section 75.370(a)(1) violation.

The third *Mathies* factor requires that the Secretary show “a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An injury need not be more probable than not to be “reasonably likely.” *Id.* at 1130. The reasonable likelihood determination is made “in terms of continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). That is, whether the hazard (methane explosion) contributed to by the violation (failure to follow the ventilation plan because of insufficient air velocities) has a reasonable likelihood of resulting in an injury if the mine were to continue in normal operation.

When analyzing the “reasonable likelihood” of an ignition or explosion, “the Commission examines whether a ‘confluence of factors’ is present on the particular facts surrounding the violation.” *Texas Gulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors include “the extent of accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area.” *Utah Power & Light Co.*, 12 FMSHRC 964, 970-71 (May 1990).

I credit Bennett’s testimony that in order for the discrete hazard of methane explosion to be reasonably likely to result in an injury, the so-called “fire triangle” must be present: oxygen, a fuel source, and an ignition source. Tr. 64. This testimony is consistent with Commission and ALJ precedent establishing that the fire triangle must be present in order for an explosion to be reasonably likely. *U.S. Steel Mining Co.*, 27 FMSHRC 435 (May 2005); *see also Highland Mining Co.*, 35 FMSHRC 221 (Jan. 2013) (ALJ).

At hearing, Bennett testified that the ambient air at the working face consisted of 20.8% oxygen. Tr. 83. Bennett’s testimony establishes that a methane explosion may occur when the oxygen concentration reaches 20.8%. Tr. 117.

I also find a fuel source in the form of methane that would have led to an explosion if Pinnacle’s mine had continued to operate with substandard air velocity at its face. Tr. 65. While Bennett’s gas meter registered a methane concentration in the ambient air of only .9-1.0%, and methane is generally explosive only at concentrations of 5-15%, the explosive point of methane is lowered when there are substantial quantities of coal dust in the air. Tr. 75. Bennett credibly testified that there were large amounts of coal dust present at the working face, where coal was actively produced upon his arrival. Tr. 75. Furthermore, I credit Bennett’s testimony that methane concentrations may have risen dramatically in a short period of time so as to reach explosive levels. Tr. 75. I emphasize that Bennett was an experienced MSHA inspector whose opinion that the violation was S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995).

I also find that there were several potential ignition sources present, including sparks generated from the longwall plow’s contact with rock or geological irregularities. Commission precedent has recognized that the operation of a continuous miner at the longwall face is a potential ignition source. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Pinnacle argues that its longwall plow would stop operating once it contacted rock or geological irregularities. R. Br. at 16. That is immaterial as sparks maybe generated during the plow’s *initial* contact with rock or geological irregularities. Furthermore, there were several electrical devices at the face during Bennett’s inspection. Any one of these devices may have generated a spark or arched, especially given Pinnacle’s history of permissibility violations. Tr. 67.

While Pinnacle relies on several safety measures⁸ designed to reduce the likelihood of explosions, Commission and Circuit Court precedent in analogous situations discounts such measures when making S&S determinations. *Buck Creek Coal Co.*, 52 F.3d at 136 (“The fact that [a mine] has safety measures in place to deal with a fire does not mean that fires do not pose a serious risk.”); *Cumberland Coal Co.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (explaining that the presence of safety measures is immaterial in a *Mathies* S&S analysis). I thus give little weight to the secondary safety measures relied on by Respondent.

As to the fourth *Mathies* factor, the injury identified in the third *Mathies* factor must be of a reasonably serious nature. The Commission has held that injuries resulting from a methane explosion are of a reasonably serious nature. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2339 (Aug. 2013) (upholding an ALJ’s finding that injuries resulting from a ventilation violation were “reasonably serious”); *see also Buck Creek Coal Co. Inc.*, 52 F.3d at 135 (finding that a fire burning in an underground coal mine posed a risk of injuries of a reasonably serious nature).

I credit Bennett’s testimony that there were ten miners in the immediate vicinity of the 9G tailgate working face. Tr. 74. Thus, I find that if an explosion had occurred, which was reasonably likely under the particular facts and circumstances, it would have led to fatalities or injuries of a reasonably serious nature to ten miners.

I have evaluated the Secretary’s proposed penalty in light of the principles announced in my recent *Big Ridge*. decision. *Big Ridge Inc.*, 36 FMSHRC _____ slip op. at 4-6 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary is consistent with the statutory requirements of section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Thus, I assess a \$5,503 penalty against Respondent.

⁸ Respondent alleges a “redundant system” of methane monitors designed to immediately stop coal production if monitors malfunctioned at any location at the working face. R. Br. 12. Respondent also alleges that its longwall plow was designed to shut off once methane concentrations of 2% were detected. R. Br. 12.

IV. Order

For the reasons set forth above, Citation No. 7195128 is **AFFIRMED**, as written. Within 40 days of the date of this decision, Respondent, Pinnacle Mining Company, LLC, is **ORDERED TO PAY** a total civil penalty of \$24,573.00 for the previously settled penalties⁹ and for the S&S violation litigated at hearing.¹⁰

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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⁹ As stated earlier, I approve the parties' settlement agreement set forth in Joint Exhibit 1 and **ORDER** the modifications and reductions in penalty found therein.

¹⁰ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 29, 2014

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf	:	
of REGALD ROBBINS,	:	Docket No. KENT 2014-594-D
Complainant,	:	BARB-CD-2014-04
	:	
v.	:	
	:	
ALDEN RESOURCES, LLC,	:	Mine ID: 15-17691
Respondent.	:	Mine: Mine #3

AMENDED ORDER ON TEMPORARY REINSTATEMENT

Appearances: Angele Gregory, Esq., U.S. Department of Labor, Office of the Solicitor
Nashville, Tennessee for the Complainant

Tony Opegard, Esq., Attorney-at-Law Lexington, Kentucky for Regald Robbins

Billy Shelton, Esq., Jones Walters Turner & Shelton, PLLC, Lexington, Kentucky
for Respondent

Before: Judge James G. Gilbert

This case is before me upon an application for temporary reinstatement filed by the Secretary on behalf of the complainant under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c) and 29 C.F.R. §2700.45.

On June 25, 2014, Respondent made a timely request for a hearing that was held on July 22, 2014, in Louisville, Kentucky.

I. Facts Not in Dispute

1. Respondent Alden Resources, LLC (“Alden Resources” or “Respondent”) is an “operator” as defined in section 3(d) of the Mine Act.
2. Mine #3, located in Knox County, Kentucky is a coal mine and is subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its designated Administrative Law Judge pursuant to sections 105 and 113 of the Mine Act.

4. Prior to his termination by Alden Resources, Regald Robbins was a “miner” as defined in section 3(g) of the Mine Act.

II. Summary of Relevant Evidence

Regald Robbins was employed by Alden Resources at Mine #3. He began his employment with Alden Resources in 2011. Gov. Exh 1. Prior to his termination on April 26, 2014, Robbins was section foreman for the first shift (commencing at 7:00 a.m. and ending at 4:00 p.m.). Tr. 16-18.

On March 13, 2014, Robbins was working the continuous miner in section 007 of Mine #3. Tr. 44. On that day, he had a conversation with Mine Superintendent Ernie Miller. *Id.* Robbins testified that he expressed to Miller his concern about operation of the continuous miner with a faulty scrubber. Tr. 44-45. Robbins stated that Miller told him to continue the operation of the continuous miner because the MSHA Inspector had left for the day. *Id.* Robbins stated that operation of the continuous miner with the faulty scrubber would likely result in another citation from MSHA. *Id.* He was told by Miller to do so anyway. *Id.*

After that date, Robbins testified that his formally cordial relationship with Miller changed. Tr. 46. He stated that Miller was no longer willing to engage in “friendly chit-chat” and that he had become distant. Tr. 62.

On March 24, 2014, MSHA Inspector Wendill Fuson conducted an inspection of Mine #3, including the area of section 007 of the mine in which Robbins was section foreman. Tr. 19; Resp. Exhs. 5-8. As part of the inspection, the mine received four 104(d) citations for roof issues, including one citation for failure to conduct proper pre-shift examinations. Resp. Exhs. 5-8. At a safety meeting convened the following day, several members of Alden Resources management, including Ernie Miller, George Saylor, Frank Shannon, Ted Harrell, Sam Brashear, Shannon Jones, and Globe Specialty Metals Vice-President Jean Duplessis, met with the section foremen of the mine that received the citations, including Robbins, Hobart Teague, Bryan Lewis, and Lawrence Bray. Tr. 22. In the meeting, conducted by Duplessis, the attendees were asked if they had any concerns about the safety of the mine. Tr. 23. Robbins testified that, in response to this question, he stated that he intended to place five-foot bolts in the roof of section 007. “That’s when Fred said, do you all think this mine is hazardous or unsafe? That’s when I said, yes, I think we need to start putting up five-foot roof bolts because the top is busted up everywhere.” Tr. 23. No one else answered the question or offered any comments regarding the safety of the mine. Tr. 24.

At the meeting, Robbins was informed that he and the other foremen for that section were suspended for three days. Tr. 24. On March 27, 2014, the day before the termination of the three day suspension, Miller telephoned Robbins and told him he would be working the weekend shift. Tr. 27. Miller stated that Robbins was to work Fridays, Saturdays, and Sundays until he completed a course on pre-shift examinations. *Id.* Miller told Robbins that after the completion of the course, he would return to his regular shift. *Id.* Following those instructions, Robbins worked the weekend of March 28, 2014, and worked the weekend beginning on Friday, April 4, 2014. Tr. 28. Robbins attended the required training on Tuesday, April 8, 2014, and returned to

the mine for his regular shift on Wednesday, April 9, 2014, consistent with Miller's instructions. Tr. 30. However, when Robbins returned to work on April 9, 2014, he was informed by Miller that he was to remain on the weekend shift. *Id.* Robbins asked why, and Miller said that among other things, his men did not like him. Tr. 30-31. Miller did not alter Robbins' weekend work schedule at that time. Tr. 31. Robbins then had a conversation with Shannon in which he requested leave for the following weekend due to his wife's surgery. Tr. 33. Shannon approved the leave for the requested dates of Friday, April 18, 2014, through Sunday, April 20, 2014, to attend to his wife's scheduled surgery. *Id.*

Robbins returned for his shift on Friday, April 11, 2014, through Sunday, April 13, 2014. Tr. 32. As he had approved leave for the following weekend, Robbins did not return to work the weekend of April 18, 2014. On April 24, 2014, Robbins received a telephone call from Harrell in which Harrell informed Robbins he was terminated for unexcused absences. Tr. 36. Robbins requested to meet with Shannon and a meeting was held the following day with Shannon, Harrell, and Saylor. Tr. 36-37. Robbins protested his termination and explained that he had followed the schedule given to him by Miller. Tr. 38. As Miller was not at the meeting, Shannon stated they would meet after he discussed the matter with Miller. Tr. 38-39. The following day, April 26, 2014, Shannon met with Robbins and told him that Miller denied giving him the modified schedule and Robbins was terminated. Tr. 39.

Respondent presented several witnesses whose stories diverged from Robbins' testimony. Regarding the meeting on March 25, 2014, Duplessis stated that Robbins did make a comment about putting up five-foot roof bolts but that he did not consider the comment a safety complaint. Tr. 112. Shannon testified that Duplessis asked the question of safety concerns but that Robbins' comments were not in response to that question. Tr. 221. Saylor corroborated Shannon's testimony on this issue, though Saylor testified that Shannon asked the question. Tr. 136-37.

Saylor claimed to have explained to Robbins that his schedule for the weekend meant Thursday, Friday, Saturday, and Sunday and either Monday or Tuesday third shift. Tr. 140-41. Saylor testified that the conversation with Robbins regarding his schedule occurred on Sunday, April 13, 2014. *Id.* Saylor also testified that when Robbins failed to show for the Monday or Tuesday shift on April 14th and 15th, he reported the absence to Miller but did not write up Robbins for his absence. Tr. 157. Shannon testified that he took Saylor's statement as to the conversation with Robbins on April 13th as true, although Robbins denied that Saylor ever said anything to him regarding his schedule. Tr. 241-42. Respondent argues that Robbins' unexplained absences were the sole basis for the termination.

Complainant argues that Respondent's termination for unexcused absences was merely a pretext. Complainant's case theorizes that the termination was likely the result of either the protected activity that took place on March 13, 2014, when Robbins argued with Miller about the inoperable scrubber, or as the result of the comments he made at the safety meeting on March 25, 2014, or a combination of both. Complainant argues that Miller's attitude toward Robbins after the scrubber incident changed, and that it was also Miller, who now had a level of animus toward Robbins, who gave Robbins the apparent misinformation regarding the shift he was supposed to work. Thus, Complainant surmises that Miller set up Robbins for his termination by deliberately misleading him as to his proper schedule.

III. Discussion

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that “if miners are to be encouraged to be active in matters of safety and health they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. §2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been “frivolously brought.” Rule 45(d) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d).

In its decision in *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted that the “frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

The legislative history of the Act defines the ‘not frivolously brought standard’ as indicating whether a miner’s ‘complaint appears to have merit’—an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the ‘reasonable cause to

believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.'

920 F.2d at 747 (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in a safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

It is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and adverse action. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009).

For its part, Respondent argues that there exists a lack of nexus between the alleged protected activity and the termination. However, Respondent views the case too narrowly. At this stage, Complainant need only make a non-frivolous allegation. Complainant's theory of his case is a bit more nuanced than Respondent acknowledges. Complainant cites two protected activities; the first occurring on March 13, 2014, and the second occurring on March 25, 2014. Likewise, Respondent alleges two adverse actions. The first being placed on the weekend shift after completion of the mandatory training while presumably similarly situated individuals (namely Lawrence Bray) were not similarly punished after the completion of the training. Management testified that Bray returned to work as shift foreman on or about April 8, 2014. Tr. 238. Thus, the nexus is approximately three weeks. The second adverse action was the termination of his employment on June 26, 2014.

The first adverse action is clearly in a timeframe closely related to the date of Robbins statements in the safety meeting. The second adverse action, the termination on April 26, 2014, is about six weeks after the initial alleged protected activity. Intervening in that time period is the allegation that Miller deliberately misled Robbins regarding his schedule, the three-day suspension, and other factors relating to the discrimination claim. I cannot state as a matter of law that the adverse action in this case is not so close in time to the protected activities alleged to render the allegation frivolous. The Commission has found lengths as far as several months as being within the nexus to permit a finding of discrimination. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks); *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21

FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Thus, I cannot conclude that the allegations regarding the timing of the protected activity to the adverse action are frivolous under existing Commission precedent.

Respondent also argues that the statement made by Robbins at the safety meeting on March 25, 2014, does not constitute "protected activity" because it was not in response to the question posed to the group about the safety of the mine. This argument fails for several reasons. First, Robbins' statement is related to a safety issue that was serious enough to result in MSHA citations. Robbins' statement relates to a repair that could or should be done to protect miners from danger of roof collapse, which was the subject of the citation. Whether that is or is not the most appropriate repair or remedy for the situation is not an issue. Thus, the statement certainly is sufficient to render it a non-frivolous allegation of protected activity. Also, Respondent's argument requires me to accept Respondent's witnesses' testimony as more credible than Robbins' testimony that his statement indeed was in response to the query presented by management regarding safety of the plant. That calls for a credibility determination that is beyond the scope of this temporary reinstatement proceeding. Finally, the argument that the potential protected activity must be in response to a specific query from management in a meeting held to discuss safety issues seems to me to be quite a stretch.

While Respondent presented witnesses in this hearing to contradict facts testified to by Robbins, the temporary reinstatement hearing is not the forum to try Complainant's discrimination case or Respondent's defense. In the limited review that is the subject of a temporary reinstatement hearing, Complainant need only show that the allegations presented in the Complaint are not frivolously brought. The Complainant succeeded in doing so at this hearing. The evidence is sufficient to establish reasonable cause that Robbins did engage in protected activity, management was aware of the protected activity, and there was a sufficient nexus in time between the protected activity and the adverse actions, including his termination.

The Secretary seeks reinstatement to Robbins' former position as section foreman. Respondent argues that reinstatement should be to the position he occupied on the date of his termination, which was electrician troubleshooter on the weekend shift. Respondent offers that since the weekend shift has been eliminated, Robbins can return to his position as electrician troubleshooter on the first shift during the week.

The goal of the temporary reinstatement is to place the miner in the same financial position as though the alleged discrimination had not occurred. This requires that we turn back the clock to March 25, 2014, at which time Robbins was a section foreman at Mine #3, prior to his suspension, and prior to the decision to place him on the weekend shift, both of which are included as allegations of discrimination under the Complaint, and resulted in fewer hours, and therefore less pay than Robbins received prior to March 25, 2014.

ORDER

For the reasons set forth above, the Secretary's *Application for Temporary Reinstatement* is **GRANTED**.

Alden Resources, LLC is **ORDERED** to immediately reinstate Regald Robbins to his former position as section foreman in Mine #3 during the first shift (7:00 a.m. to 4:00 p.m.) with all rights and benefits to which he is entitled. This includes a forty-hour workweek at the rate of pay of \$28 per hour, as well as all overtime customarily available to similarly situated employees.

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2014

SECRETARY OF LABOR MINE	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-13
Petitioner	:	
	:	Mine ID 11-02752
v.	:	
	:	A.C. No. 1102752-000232235
The American Coal Company,	:	
Respondent	:	Mine: New Era Mine

ORDER DENYING PETITIONER’S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

CERTIFICATION BY THE COURT UPON ITS OWN MOTION THAT ITS INTERLOCUTORY RULING INVOLVES A CONTROLLING QUESTION OF LAW

Before: Judge Moran

Order denying petitioner's motion for certification for interlocutory review

This matter involves, in part, the Secretary’s Motion to Certify for interlocutory review this Court’s May 13, 2014 Order Denying the Secretary’s Motion for approval of settlement upon the Secretary’s Motion for reconsideration. (“Motion to Certify”). A Motion to stay the May 13, 2014 Order accompanied the Motion to Certify.¹ For the reasons which follow, the Secretary’s Motion to Certify is DENIED.

¹ Absent contrary direction from the Commission, the Secretary’s accompanying motion to stay is denied. This is because, if interlocutory review is granted, a significant period of time may elapse between the time review is granted and a decision is issued. During that interval, of uncertain duration, witnesses may be lost, memories may fade and other evidentiary infirmities may ensue. It is noted that the provision addressing interlocutory review, 29 C.F.R. Section 2700.76, arguably anticipates such problems by providing: “Interlocutory Review by the Commission shall not operate to suspend the hearing *unless otherwise ordered* by the Commission.” (emphasis added).

Concomitantly, the Court certifies upon its own motion that its interlocutory ruling involves a controlling question of law and that, in its opinion, immediate review will materially advance the final disposition of the proceeding.

In its Motion to Certify, the Secretary of Labor requested “that the Court certify, pursuant to 29 C.F.R. § 2700.76(a)(1)(i), that its May 13, 2014 Order involves three questions appropriate for the Commission's interlocutory appellate review.” The Secretary framed the issues it seeks for certification as follows:

- “I. Does Section 110(k) provide any meaningful standards to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions?
- II. In the absence of any meaningful standard in Section 110(k), what standard of review applies when the Commission or a court of appeals reviews the Secretary's settlement agreements under Section 110(k)?
- III. Does the settlement the Secretary proposes here satisfy the standard that applies?”

Motion to Certify at 3.

Each of these three questions posed for certification are **denied** because they ask the wrong questions and attempt to limit the scope of interlocutory review, should the Commission, in the exercise of its sound discretion, grant such review. The Secretary contended in its Motion to Certify that this Court did not answer the questions it posed and now it seeks to have the Commission answer those questions, again confining the questions in issue according to *its* terms. This is significant, because the “Scope of Review” subsection, § 2700.76(d), provides “Unless otherwise specified in the Commission’s order granting interlocutory review, *review shall be confined* to the issues raised in the Judge’s certification or *to the issues raised in the petition for interlocutory review.*”

Certification by the court upon its own motion that its interlocutory ruling involves a controlling question of law

As noted above, the Court certifies upon its own motion that its interlocutory ruling involves a controlling question of law and that, in its opinion, immediate review will materially advance the final disposition of the proceeding. The issues have already been clearly expressed by the Court in its May 13, 2014 Order Denying [the Secretary’s] Motion for Approval of Settlement upon the Secretary’s Motion for Reconsideration and need not be repeated here.

That Order is incorporated by reference in this document. At its core, the Court’s May 13, 2014 Order involves the Commission’s role, and indeed its statutory duty, under section 110(k). The Secretary persists in its debilitating interpretation of that provision and it does this, despite the Commission’s decision in *Secretary of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1856,

2012 WL 4026640 (Aug. 2012), and in other decisions the Commission has issued, which clearly identify, and set forth, its review role under the statutory provision.

Here, the Secretary, disregarding the plain command of section 110(k), continues to assert that it “has the ‘prosecutorial discretion to negotiate percentage-reduction settlements’ and that it is under no obligation to do more than to announce that the Commission.” Order Denying Motion for Approval of Settlement upon Secretary’s Motion for Reconsideration at 10. As this Court observed, the Secretary’s Motion “asserts that the Commission’s approval authority is a ministerial task [and that] a uniform across-the-board reduction is within the Secretary’s authority to present to the Commission and [that] the Commission, [is] unauthorized to do anything except approve such a settlement, as long as it is clear and transparent to the public, [and that] the Secretary, without more, may always enter a uniform percentage reduction, apparently of any amount.” *Id.* at 11.

On the basis of the express words in section 110(k) of the Mine Act, the legislative history pertaining to that provision, and the decisions of the Federal Mine Safety and Health Review Commission, the Secretary is flatly incorrect about the asserted feeble nature of the Commission’s role in these matters.

Accordingly, the Court certifies that its interlocutory ruling involves a controlling question of law and, in the Court’s opinion, immediate review will materially advance the final disposition of the present case, and many others like it.

Denial of the Secretary’s Motion to Stay

As noted in footnote 1, the Court DENIES the Secretary’s Motion to stay. The parties are directed to participate in a conference call on July 15, 2014 at 1 p.m. EDT for the purpose of setting this matter for a prompt hearing. The parties are directed to email the Court confirming the date and time of this conference call. The Court will then provide call-in instructions for the call.

So Ordered.

/s/ William B. Moran

William B. Moran

Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 18, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2014-609-D
on behalf of JEROMY COOTS,	:	Case No. BARB-CD 2014-05
Complainant	:	
	:	
v.	:	
	:	
LONE MOUNTAIN PROCESSING, INC.,	:	Mine ID: 15-18647
Respondent	:	Mine: Clover Fork No. 1

**ORDER GRANTING RESPONDENT’S MOTION TO WITHDRAW
REQUEST FOR HEARING AND
ORDER GRANTING TEMPORARY REINSTATEMENT
OF JEROMY COOTS**

Before: Judge Harner

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on July 2, 2104, filed an Application for Temporary Reinstatement of miner Jeromy Coots (“Complainant”) to his former position with Lone Mountain Processing, Inc. (“Respondent”) at the Clover Fork No. 1 Mine pending final hearing and disposition of the case.

The case was assigned to me on July 7, 2014, and Respondent filed its timely Request for Hearing on July 9, 2014. Following conference calls with the parties, Respondent later filed its Motion to Withdraw Request for Hearing on July 17, 2014. For the following reasons, the temporary reinstatement of Jeromy Coots is hereby **GRANTED**.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on

Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(b). If no hearing is requested,¹ the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, s[he] shall issue immediately a written order of temporary reinstatement. *Id.*

In adopting section 105(c) of the Act, Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). The plain language of the Act states that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner "is supported substantial evidence and is consistent with applicable law."² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The Declaration of Freddie Fugate was filed with the Complainant's Application for Temporary Reinstatement and asserts the following:

1. Mr. Fugate is a special investigator with the Mine Safety and Health Administration ("MSHA") and was assigned to conduct an investigation into a complaint filed by the Complainant. Decl. 1-2.
2. The Complainant was employed at the Clover Fork No. 1 Mine ("Mine") and was assigned to replace roof bolts that had become dislodged in the rehab section of the Mine. Decl. 2a-2b.
3. The roof of the rehab section was 12 feet tall, and the Complainant initially used the Automated Temporary Roof Support System ("ATRSS") to support the roof while roof bolting. Decl. 2b. However, the Complainant was advised after a short time that this system could no longer be used because it took too long to set in place. Decl. 2c.

¹ As noted, Respondent has withdrawn its request for hearing, which was timely filed. I shall grant Respondent's Motion to Withdraw its hearing request and proceed as required by 29 C.F.R. § 2700.45(c).

² "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

4. On that same day, the Complainant inquired why the ATRSS could no longer be used, to which he received a response from mine management that the work needed to be done quickly. Decl. 2d.
5. The Complainant continued to work on the rehab section without the ATRSS for six days, but continued to complain to mine management. Decl. 2e.
6. The Complainant was struck and injured by falling material, and he raised the issue of the ATRSS at a mine safety meeting on May 12, 2014. Decl. 2f-2g.
7. Immediately following the meeting, the Complainant was called to the General Mine Foreman's office where it was explained that the ATRSS took too much time to set up, and the work needed to be done quickly. Decl. 2h. The Complainant was then sent home for the day. *Id.*
8. On May 13, 2014, the Complainant was fired. Decl. 2i.

Based upon the affidavit of the special investigator and the asserted facts therein, I find that the Secretary's complaint is not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Respondent's Motion to Withdraw Request for Hearing is **GRANTED**. It is further **ORDERED** that Jeromy Coots be **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime and benefits pending final order on the complaint.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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July 31, 2014

KINGSTON MINING, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEVA 2014-812-R
	:	Safeguard No. 9001627; 03/12/2014
	:	
SECRETARY OF LABOR, MINE	:	
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Kingston No. 2
Respondent	:	Mine ID: 46-08632

**ORDER DENYING SECRETARY OF LABOR’S MOTION
TO DISMISS SAFEGUARD CONTEST
ORDER DENYING CONTESTANT’S MOTION FOR EXPEDITED HEARING
AND STAY ORDER**

Before: Judge Feldman

This matter is before me based on a Notice of Contest filed by Kingston Mining, Inc. (“Kingston”), regarding Safeguard No. 9001627 that was issued on March 12, 2014, by the Secretary of Labor (“Secretary”) pursuant to section 314(b) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 874(b) (2006) (“Mine Act”) or (“the Act”).¹ On April 11, 2014, Kingston filed a motion seeking an expedited hearing of its safeguard contest. Thereafter, on April 30, 2014, the Secretary filed both a Motion to Dismiss Kingston’s contest and an opposition to Kingston’s request for an expedited hearing.

Disposition of the parties’ motions has been held in abeyance to provide the Secretary with an opportunity to issue a justiciable notice of violation of the subject safeguard. To date, the Secretary has not issued a citation for the violation of the safeguard. Consequently, for the reasons set forth below, both the Secretary’s Motion to Dismiss and Kingston’s motion for an expedited hearing **ARE DENIED**. Kingston’s contest **SHALL BE STAYED** pending the issuance of a citation that alleges a violation of the subject safeguard.

¹ Section 314(b) of the Mine Act authorizes the Secretary to issue safeguards that require remedial actions “to minimize hazards with respect to the transportation of men and materials” based on consideration of the specific conditions at the particular mine. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 7 (Jan. 1992).

I. Background

Kingston operates two types of mobile coal haulage equipment at its No. 2 mine: traditional coal haulers, which are battery-powered; and shuttle cars, which are operated by trailing cables. Mot. to Expedite at 2. Following a mobile coal hauler accident, the Mine Safety and Health Administration (“MSHA”) concluded that camera systems must be installed on both types of haulage equipment. *Id.* Consequently, on March 12, 2014, MSHA issued Safeguard No. 9001627 pursuant to section 75.1403,² 30 C.F.R. § 75.1403, which states:

A mobile coal hauler was involved in an accident that injured a miner. The root cause of the accident was due to inadequate vision. This is a safeguard requiring that all mobile coal haulage equipment be equipped with a camera system that will provide adequate vision in all required directions to insure the safety of all miners.

Id. at 1.

Kingston asserts that it will be irreparably harmed and denied due process if it is obligated to install the camera systems required by the safeguard before it is given the opportunity to litigate the propriety of the safeguard in an expedited hearing. Mot. to Expedite at 3. As previously noted, to date, MSHA has not issued a citation for a violation of the safeguard.

In seeking to dismiss Kingston’s contest, the Secretary argues that the Commission lacks jurisdiction to review safeguard notices absent a relevant citation for an alleged violation of the safeguard issued pursuant to section 75.1403-1(b). The Secretary has filed a Motion to Dismiss Kingston’s contest and an opposition to Kingston’s request for an expedited hearing.

II. Discussion

Section 104(a) of the Act authorizes the Secretary to issue a citation for an alleged violation of the Act, or any mandatory health or safety standard. 30 U.S.C. § 814(a). The statutory authority in section 105(d), 30 U.S.C § 815(d), for the filing of contests by mine

² Section 75.1403 of the Secretary’s regulations repeats verbatim the provisions of section 314(b) of the Act that address hazards associated with the transportation of men and materials. The procedure for issuing citations for safeguard violations under section 75.1403 is described as:

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. 75.1403-1(b).

operators is limited to those pertaining to the issuance of a citation under section 104 of the Act. It is well settled that a safeguard issued pursuant to section 314(b) of the Act is an interim mandatory safety standard,³ the violation of which constitutes a mandatory safety standard contestable under sections 104(a) and 105(d). *Wolf Run Mining Co.*, 32 FMSHRC 1228, 1236 (Oct. 2010). While it is clear that the Commission has the authority to adjudicate contests of citations for violations of safeguards, as noted by Judge Steele, “[t]here is no explicit grant of authority in the Mine Act empowering the Commission to consider the validity of safeguards” in the absence of a citation issued for its violation. *Elk Run Coal Co.*, 36 FMSHRC 805, 806 (Mar. 2014) (ALJ).

In the instant matter, I am sensitive to Kingston’s due process concerns. Kingston asserts that it will be irreparably harmed and denied due process if it is obligated to install the camera systems required by the safeguard before it is given the opportunity to litigate the propriety of the safeguard in an expedited hearing. Mot. to Expedite at 3. Balancing the limited authority in section 105(d) of the Act to challenge only post-enforcement safeguards with a mine operator’s due process rights to challenge a pre-enforcement safeguard is, essentially, a matter of first impression. However, adherence to the terms of section 105(d) limiting contests to only post-enforcement safeguard matters, while protecting a mine operator’s due process rights, may be accomplished by utilizing procedures similar to those established for resolving disputed provisions during the approval process for roof control or ventilation plans.⁴

When mine operators and the Secretary are unable to resolve disputed roof and ventilation plan provisions, the Secretary issues a citation alleging a violation for operating without an approved plan, sometimes referred to as a “technical citation,” so that the operator can litigate the matter before the Commission, satisfying its due process rights. *Prairie State Generating Co., LLC*, 35 FMSHRC 1985, 1985 n.1 (July 2013). Under such circumstances, a de minimis civil penalty can be proposed along with a reasonable abatement period to allow disposition of the validity of the “technical citation” in an expedited Commission proceeding.

This technical violation approach, as it is used to resolve disputes over provisions in roof or ventilation plans, can be utilized to satisfy Kingston’s contest of the subject safeguard. Following this procedure, Kingston’s contest of the safeguard can be merged with any subsequent relevant contest Kingston may file if a violation of the safeguard is issued. Merger can be best accomplished by staying this matter pending potential consolidation of any relevant future contest Kingston may file under section 105(d). Under such circumstances, I trust that a de minimis penalty will be imposed, as well as a reasonable abatement period to allow for litigation. The propriety of a reasonable abatement period is evidenced by the fact that the Secretary has, to date, not yet issued a violation of the subject safeguard. Consequently, the Secretary’s Motion to Dismiss Kingston’s contest, as well as Kingston’s motion for an expedited

³ Section 3(l) of the Act defines “mandatory health or safety standard” as “the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act.” 30 U.S.C. § 802(l).

⁴ Analogous to safeguards, roof or ventilation plans are considered mandatory safety standards under section 104(a). *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 382 (D.C. Cir. 1976).

hearing, shall be denied in favor of staying this matter pending consolidation with a contest of any citation alleging a relevant violation of the safeguard.

In staying this matter, I am cognizant of Judge Steele's thoughtful decision in *Elk Run Coal Co.* that there is a "close nexus between a safeguard and a citation or order" that provides adequate implied authority under section 105(d) to hear pre-enforcement safeguard contests. 36 FMSHRC 805, 807 (Mar. 2014) (ALJ Steele). However, Judge Steele's decision was primarily predicated on due process concerns, which I have addressed above. Moreover, I decline to adopt Judge Steele's approach as it may result in unintended and undesirable consequences. Namely: (1) Adjudication of a pre-enforcement safeguard may result in an advisory opinion if a citation for a violation of the safeguard is never issued; and (2) the Commission's jurisdiction to adjudicate a pre-enforcement safeguard contest presents a controlling question of law that can only be resolved, in the absence of a relevant citation, through interlocutory review, a process that does not address the validity of the safeguard. See 29 C.F.R. § 2700.76 (a)(1)(i).

ORDER

In view of the above, **IT IS ORDERED** that the Secretary's Motion to Dismiss Kingston Mining, Inc.'s contest of Safeguard No. 9001627 **IS DENIED**.

It is **FURTHER ORDERED** that Kingston Mining, Inc.'s Motion for Expedited Hearing **IS DENIED**.

It is **FURTHER ORDERED** that this contest proceeding **IS STAYED** pending consolidation with any relevant contest of a citation for a violation of Safeguard No. 9001627 filed pursuant to section 105(d) of the Act.

It is **FURTHER ORDERED** that the parties should file, with the undersigned, a joint motion for consolidation and to lift this stay **within 30 days** of the docketing of any relevant 105(d) contest proceeding.

I will entertain a motion to vacate Safeguard No. 9001627 by Kingston Mining, Inc. if a relevant citation for a violation of the safeguard is not issued on or before **October 1, 2014**, approximately seven months after the issuance of the subject safeguard.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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