

June 2015

**TABLE OF CONTENTS**

**COMMISSION ORDERS**

06-06-15	ALIMAK HEK ELEVATOR COMPANY	CENT 2014-523-M	Page 1147
06-18-15	FOUR CORNERS MATERIALS	CENT 2014-46-M	Page 1150
06-18-15	DANNY GIBBS, employed by TENNESSEE MATERIALS CORP.	SE 2014-172-M	Page 1152
06-18-15	JIM WALTER RESOURCES, INC.	SE 2014-487	Page 1154
06-18-15	COMMONWEALTH MINING, LLC	WEVA 2013-1324	Page 1156
06-22-15	J & J STONE COMPANY, INC.	CENT 2014-601-M	Page 1158
06-22-15	REX COAL COMPANY, INC.	KENT 2014-490	Page 1160
06-22-15	SOLAR SOURCES, INC.	LAKE 2014-535	Page 1162
06-22-15	LIVINGSTON LIMESTONE COMPANY, INC.	SE 2014-195-M	Page 1164
06-22-15	WAKE STONE CORPORATION.	SE 2014-314-M	Page 1166
06-22-15	SIERRA SILICA RESOURCES	WEST 2014-769-M	Page 1168
06-22-15	BAY MATERIALS, INC.	WEST 2014-772-M	Page 1170
06-30-15	SUNBELT RENTALS, INC.; LVR, INC.; and ROANOKE CEMENT CO., LLC	VA 2013-275-M	Page 1172

## **ADMINISTRATIVE LAW JUDGE DECISIONS**

04-28-15	HECLA LIMITED	WEST 2012-760-M-A	Page 1175
06-02-15	VERMONT QUARRIES CORPORATION	YORK 2014-2-M	Page 1195
06-04-15	DRUMMOND COMPANY, INC.	SE 2013-303	Page 1201
06-04-15	DRUMMOND COMPANY, INC.	SE-2014-0197	Page 1217
06-05-15	NORTHERN ILLINOIS SERVICE CO.	LAKE 2013-616-M	Page 1225
06-08-15	PEABODY MIDWEST MINING LLC	LAKE 2011-302	Page 1250
06-11-15	MIZE GRANITE QUARRIES, INC.	SE 2014-407-M	Page 1253
06-11-15	SCOTT D. MCGLOTHLIN v. DOMINION COAL CORPORATION	VA 2014-233-D	Page 1256
06-12-15	THE AMERICAN COAL COMPANY	LAKE 2011-589	Page 1267
06-19-15	SEC. OF LABOR O/B/O GARY BROOKS v. KINGSTON MINING INC.	WEVA 2015-784-D	Page 1282
06-23-15	THE DOE RUN COMPANY	CENT 2015-49	Page 1300
06-25-15	BLACK BEAUTY COAL COMPANY	LAKE 2008-378-R	Page 1306

## **ADMINISTRATIVE LAW JUDGE ORDERS**

06-01-15	OAK GROVE RESOURCES, LLC	SE 2013-301	Page 1311
06-01-15	OAK GROVE RESOURCES, LLC	SE 2013-301	Page 1322

06-05-15	UTAHAMERICAN ENERGY, INC.	WEST 2015-435-R	Page 1325
06-09-15	AUSTIN POWDER COMPANY	SE 2012-391M	Page 1337
06-12-15	MARK L. LUJAN v. SIGNAL PEAK ENERGY, LLC	WEST 2015-252-D	Page 1362
06-18-15	POCAHONTAS COAL COMPANY, LLC	WEVA 2014-395-R	Page 1368
06-22-15	TRAYLOR MINING, LLC	WEST 2014-351-M	Page 1373
06-23-15	STAR MINE OPERATIONS, LLC	WEST 2014-592-RM	Page 1377

**Review was granted in the following case during the month of June 2015:**

Secretary of Labor v. BHP Navajo, Docket No. CENT 2013-541-D (Judge Lewis, April 24, 2015)

Secretary of Labor v. Hecla, Ltd., Docket No. WEST 2012-760-M (Judge Manning, April 28, 2015)

**Review was denied in the following case during the month of June 2015:**

Secretary of Labor v. Knox Creek Coal Corporation, Docket No. VA 2014-343-D (Judge Moran, May 26, 2015)

Secretary of Labor v. Oak Grove Resources, Docket No. SE 2013-301 (Judge Feldman, June 1, 2015)

Secretary of Labor v. Virginia Drilling, Docket No. KENT 2012-182 (Judge McCarthy, April 29, 2015)

# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

June 6, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

ALIMAK HEK ELEVATOR COMPANY

Docket No. CENT 2014-523-M  
A.C. No. 41-02885-337327 Z674

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

**ORDER**<sup>1</sup>

BY: Young, Nakamura, and Althen, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 4, 2014, the Commission received from Alimak Hek Elevator Company (“Alimak”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Due to a clerical error, this Order is being amended pursuant to 29 C.F.R. § 2700.79.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on December 14, 2013, and became a final order of the Commission on January 13, 2014. Alimak asserts that it changed its physical location in October and never received any documentation regarding the citation at issue until July 30, 2014. The Secretary does not oppose the request to reopen. However, he notes that the proposed assessment had been correctly mailed to Alimak's official address of record before being returned as "Undeliverable" with no forwarding address. After placing a phone call to the company to receive its new address, the Secretary re-mailed the proposed assessment by certified mail, which Alimak signed for on December 14, 2013. The Secretary offers a copy of a certified mail receipt to this effect and urges Alimak to ensure that its address of record remain current.

Having reviewed Alimak's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

Chairman Jordan and Commissioner Cohen, dissenting:

We would deny the motion to reopen filed by the Alimak Hek Elevator Company (“Alimak”). The only reason Alimak provides for failing to timely contest the \$100 penalty proposed by the Secretary is that it changed its physical location in October 2013 and never received any information about the citation until July 2014. However, the Secretary has submitted a certified mail receipt showing that the assessment was delivered to Alimak and signed for on December 14, 2013. The tracking information also shows that the assessment was delivered on that date to its destination in Dallas, Texas (where the Secretary states he sent it after consulting with Alimak).

Given that it appears that the proposed assessment was delivered to the operator on December 2013, it is irrelevant that the operator changed locations two months prior to that date. Moreover, its claim that it never received any information about the citation is controverted by the exhibits submitted by the Secretary.

Consequently, because the operator has not demonstrated that its failure to timely contest the penalty proposal was due to its excusable neglect, we would deny relief.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Robert F. Cohen Jr.  
Robert F. Cohen Jr., Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 18, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

FOUR CORNERS MATERIALS

Docket No. CENT 2014-46-M  
A.C. No. 29-01258-179614

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 14, 2013, the Commission received from Four Corners Materials (“Four Corners”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 24, 2009, and became a final order of the Commission on April 23, 2009. Four Corners asserts that it had timely filed a notice of contest to the proposed penalty assessment by mailing a notice of contest to MSHA. However, in August of 2009, the operator noticed that a final order had been issued in this matter, and at the same time realized that its contest to the proposed penalty assessment, sent on March 25, 2009, contained the wrong case number.

The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on June 10, 2009, and that the case was referred to the U.S. Department of Treasury for collection on October 1, 2009. MSHA received payment through the U.S. Department of Treasury collection system on September 12, 2013.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). This motion to reopen was filed more than four years after the operator received a delinquency notice informing it that the penalty assessment had become a final order. Therefore, under Rule 60(c), Four Corners' motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Four Corners' motion with prejudice.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

June 18, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

DANNY GIBBS, employed by  
TENNESSEE MATERIALS CORP.

Docket No. SE 2014-172-M  
A.C. No. 40-03354-304247-A

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 20, 2014, the Commission received a motion from Danny Gibbs (“Gibbs”) seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 25, 2012, and became a final order of the Commission on November 26, 2012. Gibbs asserts that he believed the assessment was a mistake since he lacked supervisory authority, and believed that the company's bankruptcy proceedings would preempt the individual civil penalty assessed against him under section 110(c). The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to Gibbs on January 9, 2013, and the case was referred to the U.S. Department of Treasury for collection on May 2, 2013.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

Counsel for Gibbs was informed by MSHA in September 2013, within a year of the proposed assessment becoming a final order, of Gibbs' right to file a motion to reopen. However, the motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Gibbs' motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Gibbs' motion with prejudice.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 18, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

JIM WALTER RESOURCES, INC.

Docket No. SE 2014-487  
A.C. No. 01-01247-355367

Docket No. SE 2014-488  
A.C. No. 01-01401-355368

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 12, 2014 the Commission received from Jim Walter Resources, Inc. (“JWR”) a motion seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on July 11, 2014, and became final orders of the Commission on August 11, 2014. JWR asserts that it failed to timely contest the proposed assessments due to a mail processing error that led JWR to believe its deadline for contesting the proposed assessments was two days later than docketed. This led JWR to miss the actual deadline for contesting the proposed assessments by one day. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed JWR's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 18, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

COMMONWEALTH MINING, LLC

Docket No. WEVA 2013-1324  
A.C. No. 46-09096-295800-U67  
7

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 24, 2013, the Commission received from Commonwealth Mining, LLC (“Commonwealth”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 31, 2012, and became a final order of the Commission on August 30, 2012. The assessment was paid in full by the operator by a check dated August 10, 2012. Commonwealth asserts that on March 28, 2012, it requested a conference with MSHA regarding the violations at issue. After MSHA denied Commonwealth's request for a conference, the operator claims that it incorrectly assumed that this denial ended its right to contest the violations at issue. The Secretary opposes the request to reopen as the motion to reopen was filed more than a year after the proposed assessment became a final order.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). This motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Commonwealth's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Commonwealth's motion with prejudice.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

J & J STONE COMPANY, INC.

Docket No. CENT 2014-601-M  
A.C. No. 41-04979-354273

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 11, 2014, the Commission received from J & J Stone Company Inc. (“J & J”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 26, 2014, and became a final order of the Commission on July 28, 2014. J & J asserts that the assessment at issue was not timely contested because its safety supervisor, who was responsible for receiving and contesting penalty assessments, was hospitalized on June 24, 2014 and again on June 30 through July 7, 2014. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed J & J's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

REX COAL COMPANY, INC.

Docket No. KENT 2014-490  
A.C. No. 15-19260-345221

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 12, 2014, the Commission received from Rex Coal Company Inc. (“Rex”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 15, 2014, and became a final order of the Commission on April 14, 2014. Rex asserts that it was two days late in contesting the proposed assessment due to a clerical error. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Rex's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

SOLAR SOURCES, INC.

Docket No. LAKE 2014-535  
A.C. No. 12-02374-345540

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 17, 2014, the Commission received from Solar Sources, Inc. (“Solar”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 20, 2014, and became a final order of the Commission on April 21, 2014. Solar asserts that it had mailed a contest of the proposed assessment within the required time period. The Secretary notes that MSHA has no record of receipt of a contest of the proposed assessment. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Solar's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

LIVINGSTON LIMESTONE  
COMPANY, INC.

Docket No. SE 2014-195-M  
A.C. No. 40-00065-327746

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 12, 2014, the Commission received from Livingston Limestone Company (“Livingston”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 24, 2013, and became a final order of the Commission on August 23, 2013. The operator paid the penalty in full by check dated August 12, 2013. On January 24, 2014, MSHA informed an agent of the operator of its proposal to assess an individual civil penalty against him under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Livingston contends that it would not have made the above payment if it had known that MSHA intended to pursue a 110(c) investigation followed by a finding of individual liability. Therefore, the operator seeks to reopen this matter, presumably to ensure that payment will not constitute an admission of wrongdoing on the part of the operator or its agents.

The Secretary opposes the request to reopen, noting that the operator's concerns are unfounded. The Secretary assures the operator that he will not argue that Livingston's payment estops its agent from litigating any aspect of the underlying violation.

Having reviewed Livingston's request and the Secretary's response, we conclude that the outcome of the matter before us will not prejudice any future section 110(c) proceeding.

Accordingly, we deny Livingston's motion with prejudice.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

WAKE STONE CORPORATION.

Docket No. SE 2014-314-M  
A.C. No. 31-00564-343555

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 16, 2014, the Commission received from Wake Stone Corporation (“Wake”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on February 22, 2014, and

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

became a final order of the Commission on March 24, 2014. On January 14, 2014, the Chief Judge issued an order staying the dockets in this matter pending the assessment of proposed penalties. Wake asserts that it misread this order to mean that the operator's obligation to contest the proposed assessment of penalties was stayed. The Secretary asserts that the Chief Judge's order did not stay the Secretary's issuance of the proposed assessment or the operator's obligation to contest the proposed assessment. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Wake's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

SIERRA SILICA RESOURCES

Docket No. WEST 2014-769-M  
A.C. No. 04-05879-345520

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 13, 2014, the Commission received from Sierra Silica Resources (“Sierra”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 20, 2014, and became

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

a final order of the Commission on April 21, 2014. Sierra asserts that because it was new to MSHA procedures, it mistakenly failed to forward the proposed assessment to its counsel for review and contest. The Secretary notes that the operator should have ensured that it was aware of all procedural requirements. However, the Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Sierra's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 22, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

BAY MATERIALS, INC.

Docket No. WEST 2014-772-M  
A.C. No. 24-02221-348002

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 17, 2014, the Commission received from Bay Materials, Inc. (“Bay”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on April 18, 2014, and became a

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

final order of the Commission on May 19, 2014. Bay asserts that it failed to timely contest the proposed assessment because between April 17 and May 19, 2014, the individual responsible for contesting proposed assessments was working on a limited basis as he was recovering from surgery. Bay claims that all future MSHA correspondence will be flagged for immediate review, in order to ensure that all penalty assessments in the future are timely contested. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Bay's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

June 30, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

SUNBELT RENTALS, INC.; LVR, INC.;  
and ROANOKE CEMENT CO., LLC

Docket Nos. VA 2013-275-M  
VA 2013-276-M  
VA 2013-291-M

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

ORDER

BY THE COMMISSION:

On November 18, 2013, the Secretary filed a letter designating his Petition for Discretionary Review as his opening brief. The Secretary chose not to file a reply brief in this matter.

On June 10, 2015, the Commission received a letter from the Secretary setting forth additional authorities pursuant to Federal Rule of Appellate Procedure 28(j) (citation of supplemental authorities). On June 15, 2015, Sunbelt Rentals, Inc., LVR, Inc., and Roanoke Cement Co., LLC (“Respondents”) jointly submitted a response to the Secretary’s letter.

In their response, the Respondents requested that the Commission strike the Secretary’s letter from the record because Rule 28(j) limits the body of the letter to 350 words and the Secretary’s letter substantially exceeds that word limit. Additionally, the Respondents pointed out that the authorities listed in the Secretary’s letter each pre-dated the Secretary’s filing of his petition and opening brief by more than a decade.

Since the Secretary's letter substantially exceeds the word limit for such filings and cites cases decided substantially before the filing of his petition and opening brief, we decline to review the Secretary's letter. Accordingly, the Respondents' motion to strike the Secretary's letter from the record is granted. The letter will not be considered in this proceeding.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

April 28, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

HECLA LIMITED,  
Respondent

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

DOUG BAYER, employed by  
HECLA LIMITED  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2012-760-M-A  
A.C. No. 10-00088-283636-02

Docket No. WEST 2012-986-M  
A.C. No. 10-00088-289913

Lucky Friday Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-591-M  
A.C. No. 10-00088-347067 A

Lucky Friday Mine

**DECISION AND ORDER**

Appearances: Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington and Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;<sup>1</sup>  
Laura E. Beverage, Esq., and Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondents.

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 Hecla Limited and Doug Bayer pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Coeur D’Alene, Idaho, filed post-hearing briefs, and filed reply briefs.

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<sup>1</sup> Matthew Vadnal of the Office of the Solicitor in Seattle, Washington, also represented the Secretary in these cases until his retirement in October 2014.

Hecla Limited operates the Lucky Friday Mine in Mullan, Idaho. One section 104(d)(1) citation and three section 104(d)(1) orders brought against Hecla and a civil penalty proceeding brought against Hecla's mine superintendent Doug Bayer under section 110(c) of the Act were adjudicated at the hearing.

## I. BACKGROUND

The Lucky Friday Mine is a silver, lead, and zinc mine in the Coeur D'Alene Mining District of northern Idaho. The mine is divided into two sections: the Gold Hunter section and the Lucky Friday section. On April 15, 2011, a large fall of ground occurred in cut 3 of stope 15 west at the 6150 level of the Gold Hunter section ("15 west"). Larry Marek was fatally injured in the accident.

### A. Mining Method<sup>2</sup>

The Lucky Friday Mine is subject to intense horizontal pressure that significantly exceeds the vertical pressure in the Mine. This intense horizontal pressure is a characteristic of the Coeur D'Alene Mining District. The pressure prompted Hecla Limited to refine a mining technique known as underhand cut and fill mining, as described below.

The mining process consists of five stages: drilling, ramping, slotting, stoping, and backfilling. Drifts are developed horizontally from the mine shaft. Ramps are then developed that spiral up or down from a drift. Slots are developed from the ramp, perpendicular to the ore vein. The slot is used to access the vein. The mining of ore takes place in the stope, which extends to the right and to the left of a slot. The stope is mined to follow the vein or veins of silver, lead and zinc. Each slot is used to access 50 vertical feet of ore in five separate cuts in the stope. These five cuts make up a sublevel. Each cut is ten feet high.

The crew follows the same sequence of events in each cut in the two sides of the stope. They muck out rock from the previous shift, bolt the area, drill the next round, and blast the next round at the end of the shift. This process is repeated many times, extending the ten feet high and twenty foot wide stope up to several hundred feet horizontally to the limits of the ore vein. After completing the extraction of ore from a cut in the stope, the miners prepare to backfill the entire length of the stope before moving down to the next level. The engineered backfill is a combination of cement, water, and classified mill tailings. The backfill is mixed on the surface and pumped underground through a series of pipes. This backfill is often referred to as "sandfill" or "pastefill." In preparation for backfilling the stope, miners place a one to two foot layer of prep muck over the stope floor. Miners install what are called "Dywidag" bolts in a designated pattern in the prep muck on the stope floor. This pattern is specified in the "Lucky Friday Ground Support Standards." The bolts, which stand upright, act as rebar giving strength to the backfill.

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<sup>2</sup> The description of the mining method is taken from the "Parties' Joint Stipulations" and is supplemented by undisputed testimony.

Miners build a sandwall to contain the cement backfill during the pouring process. The sandwall and backfill extend from the floor of the stope to approximately two feet below the back.<sup>3</sup> Once the backfill has hardened, the next cut is taken about 10 feet below the backfill with the result that the hardened backfill from the previous cut becomes the back (roof) of the next cut. Although the pastefill is firm and solid, it has enough elasticity to withstand the horizontal pressure exerted upon it. (Tr. 419, 531-32). The horizontal pressure holds the backfill in place.

Hecla used extensive engineering and geological expertise to refine this underhand cut and fill method. This method made mining safer by reducing rock bursts and roof falls. Hecla's work to improve this mining method is well known in the mining industry. The Secretary does not take issue with this mining method in ordinary circumstances.

In stope designation, the first number refers to the sublevel; the second number is the stope; and the third number is the specific cut within a sublevel. The sublevel designation is determined by the depth of the sublevel measured in feet from the collar of the shaft. Sublevel 615 is 6150 below the top of the shaft. The fatal accident occurred in 615-15-3.

Cuts in the 15 stope were typically 18 to 20 feet wide. Under the mine's ground support standards, cuts were permitted to be wider, but extra ground support was necessary if the cut exceeded 20 feet for a distance of 25 feet. (Ex. R-19 p. 3). Cuts that exceeded 20 feet slowed the mining process because muck could not be removed quickly enough and the ratio of ore containing rock and waste rock usually decreased. Both Hecla and its miners sought to speed the mining process by keeping the width of cuts under 20 feet.

At the Lucky Friday Mine, miners bid to work in specified areas of the mine and the most senior miners get first priority and are able to pick the area that they will mine as well as the miners who will be on their mining team. After winning a bid, miners work in the same area for a long period of time, allowing the miners to become familiar with that area. A bid covers two sublevels (10 cuts) which typically takes two years to complete. (Tr. 456). The pay for miners working in the stope is based on the number of feet that they advance the stope. (Tr. 517).

## **B. Events Leading up to the Accident**

The primary source of silver and the economic lifeblood of the Gold Hunter Section is the 30 vein. There are other ore veins in that section, some of which are economical to mine while others are not. Hecla deemed that mining the 41 vein was also economically beneficial and simultaneously mined the 30 and 41 veins in the Gold Hunter section. Mine geologists regularly visited the stope and prepared a cut projection map, which provided miners the information they need to advance the stope. In the 15 west stope, miners advanced cut 1 as a single 20 foot wide cut but after advancing approximately 50 feet, they were instructed to create two roughly parallel entries that split like the tines on a barbecue fork, following each vein

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<sup>3</sup> The roof is generally referred to as the "back" at the Lucky Friday Mine. I use the terms "roof" and "back" interchangeably in this decision.

separately.<sup>4</sup> The 15 east stope was mined in the same manner. Thus, there were four advancing faces at the opposite ends of the stope, two on the west side and two on the east. The width of the cut for each vein was significantly narrower than 20 feet. Mining advanced more than 200 feet on each side of the stope in this fashion. This method of mining was common in the Gold Hunter section of the mine. The space between the veins was not mined, creating a pillar of unmined rock.<sup>5</sup> The miners followed the procedure described above when backfilling the cuts so that in the area where the veins diverged, there were two backfilled areas on each side of the slot separated by the waste rock pillar that was not mined. A similar procedure was followed in cut 2 of the 15 stope. The solid waste rock left between the two advancing faces on the west side of stope 15 cut 2 varied in width between six and nine feet. Mine geologists determined that 30 vein merged with the 41 vein in the area of cut number 3, however. At Hecla's direction, the miners removed all of the rock in the west stope, including the rock directly under the waste rock pillar that was left in cuts 1 and 2, for a distance of about 75 feet. The plan was that miners would proceed in this fashion into the stope until the veins diverged again 75 feet or more into the cut. At that point miners would again leave a waste pillar down the middle of the stope.

The mining of 615-15-2 started on January 27, 2011 and was completed on March 16, 2011. The mining of 615-15-3 started on March 30. In cut three, miners in both the east and west stopes were extracting the ore-bearing rock under the pillar that was present in cuts 1 and 2. On April 13, 2011, Hecla Management toured all the active stopes, including 15 west. Management evaluated the geology, ground conditions, and general characteristics of the active areas and found no problem with the back or ribs in the area or with the fact that miners were not leaving a pillar down the middle of the cut.

On April 15, 2011, the back and the waste rock pillar above cut 3 in stope 15 west fell into cut 3, fatally crushing miner Larry Marek in the west stope. By all accounts, the rock fall was massive. Following the rock fall, both Hecla and MSHA initiated rescue efforts, but were unable to save Larry Marek. Michael Marek, Larry's brother, was working in the east stope at the time of the accident.

MSHA investigated the rock fall and issued the citation and orders at issue. Numerous MSHA personnel were involved in the investigation, but Rodric B. Breland was the lead inspector. The Secretary of Labor alleges that Hecla failed to control ground in the east and west 15 stope as well as the 12 stope. He also alleges that Hecla failed to properly examine the ground in the 15 west stope. The Secretary charged Doug Bayer with a violation of section 110(c) of the Mine Act. That charge relates to the failure to properly examine ground conditions.

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<sup>4</sup> The horizontal distances referenced in this decision are not exact but are approximations based upon the testimony and the projection maps presented at the hearing. (*See e.g.* Tr. 80, 143, 214-15; Exs. P-9, R-1, R-6, R-8).

<sup>5</sup> This unmined rock between the veins was referred to as "waste rock" at the hearing because it did not contain valuable ore. It was also referred to as the "pillar" or "waste rock pillar." Pillars are not part of the ground control system at the mine. (Tr. 209, 408). Pillars are not designed to support the weight of the roof as pillars are in a "room and pillar" mine.

At hearing, both the Secretary of Labor and Hecla Limited presented numerous witnesses and exhibits focusing upon the geology, engineering, and events leading up to the rock fall at the mine. The Secretary called Inspector Kevin Hirsh, an Assistant District Manager, Inspector Rodric Breland, a Field Office Supervisor and the Lead investigator of the rock fall, Paul Tyrna, a Geologist for MSHA Technical Compliance, and Ron Krusemark, Lucky Friday's Chief Engineer at the time of the rockfall. The Secretary also presented three miner witnesses: Mike Marek, Tom Ruff, and Doug McGillis. Hecla called as witnesses Doug Bayer, the current general manager of the Mine who was mine superintendent at the time of the rockfall, Terry DeVoe, the Mine's chief geologist, Nick Furlin, a senior geologist, Scott Hogamier, the safety supervisor, John Jordan, Hecla's Vice President of technical services who was the general manager at the time of the rockfall, John Lund, a Mine foreman, Cliff Shiner, an assistant mine foreman, and Bruce Cox, lead production geologist. John Jordan, Terry DeVoe and John Lund were principal witnesses for the Secretary as well as Hecla.

## **II. Citation No. 8559607 and Order No. 8559608; WEST 2012-986-M**

On August 8, 2011, MSHA Inspector Rodric B. Breland issued Citation No. 8559607 and Order No. 8559608 under section 104(d)(1) of the Mine Act. Citation No. 8559607 states:

A fatal accident occurred at this mine on April 15, 2011, when a miner was struck by falling material while working in the 6150-15-3 West stope. A substantial quantity of material (measuring approximately 25 feet in width, 74 feet in length, and 25 feet in height) fell 10 feet from the stope back after portions of a supporting pillar were removed to extract ore. Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed, and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground. This is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1 at 1). Citation No. 8559607 alleges a violation of section 57.3360 of the Secretary's safety standards, which requires in pertinent part:

[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3360. Order No. 8559608 states, in pertinent part:

Management failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken. This was necessary due to constantly changing ground conditions, they were mining a wide stope and

removing the support pillar. The operator has engaged in aggravated conduct constituting more than ordinary negligence, as they needed to make examinations and conduct tests to ensure that all feasible precautions were taken. This is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1 at 8). Order No. 8559608 alleges a violation of section 57.3401 of the Secretary's safety standards, which requires:

[p]ersons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

30 C.F.R. § 57.3401. The Secretary proposed a penalty of \$159,100.00 for each alleged violation. For both Citation No. 8559607 and Order No. 8559608 Inspector Breland determined that a fatal injury occurred. Further, he determined that the violations were Significant and Substantial ("S&S"), the operator acted with reckless disregard, and that one person was affected. The penalties were proposed under section 110(b)(2) of the Mine Act for flagrant violations.

MSHA also proposed a penalty against Doug Bayer under section 110(c) for the conditions set forth in Order No. 8559608, alleging that he knowingly authorized, ordered, or carried out the violation of Section 57.3401. The Secretary proposed a \$4,500.00 penalty for this alleged violation.

## **A. Discussion and Analysis**

### **1. Section 57.3360, Ground Support - Citation No. 8559607**

Both parties agree that whether section 75.3360 was violated turns on what action a reasonably prudent person familiar with the facts and the protective purpose of the safety standard would have taken to provide the protection intended by the standard. *Canon Coal*, 9 FMSHRC 667, 668 (April 1987).<sup>6</sup> Hecla argues that the safety standard must be interpreted in the context of the conditions and experience specific to the mine and notes that the Commission has held that "experience" includes "practical wisdom resulting from what one has encountered,

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<sup>6</sup> After the parties filed their briefs, the Commission issued its decision in *Jim Walter Resources, Inc.*, 36 FMSHRC \_\_\_\_, No. SE 2007-203-R etc. (March 31, 2015). In that decision, the Commission discussed issues surrounding the use of the reasonably prudent person test set forth in *Canon Coal* when there has been a fall of ground. Commissioner Robert F. Cohen stated in a concurring opinion that the Commission decision in *Jim Walter* "effectively overrules the Commission's decision in *Canon Coal*["] Slip op. at 6. I have applied the reasonably prudent person test in the present cases. Because of my holdings in this decision, I need not reach the issues raised by the Commission in *Jim Walter*.

undergone, or lived through” and that a “mine’s ‘operating experience’ broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary.” *Copper Range Co., White Pine Copper Div.*, 5 FMSHRC 825, 836 (May 1983) (interpreting § 57.3-20, the predecessor for the cited standard). The Commission further stated that “this determination takes into account the operating history of the mine (*i.e.*, its past mining practice), geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from potential roof fall.” *Copper Range Co.*, 5 FMSHRC at 838.

Hecla contends that whether a reasonably prudent person would have installed ground support requires the review of a number of factors including the drumminess of the ground, the presence of visible fractures, the presence of sloughed material, whether popping or snapping sounds emanated from the roof, whether the operator was complying with its ground control plan, and the operating experience at the mine. It argues that, in this instance, the evidence demonstrates that a reasonably prudent person would have concluded that Hecla’s ground control plan was sufficient to protect miners from roof falls. First, there were no audible or visual indications that additional roof support was necessary. Second, the ground support met or exceeded the standards set forth in Hecla’s ground support standards. Miner Eric Tester installed additional bolts and wire mesh in the back on April 13 but this fact does not support the finding of a violation. Rather, it shows that Hecla took appropriate actions when the need for additional support was appropriate. There was no indication of a pending back failure in the 15 stope.

Hecla also contends that it was reasonable for it to believe that mining rock between a split stope did not present an unusual or higher level of risk. The evidence demonstrates that stopes often split and then re-converge at the mine given the geometry of the ore veins. “This was simply another instance of two veins merging together and the mining plan calling for the pillar nose to be mined on multiple successive cuts.” (Hecla Br. 30, citing Tr. 533-34). The mine’s “operating experience” supported management’s conclusion that the existing support was adequate to maintain the stability of the back. Hecla contends that mining an area below a waste rock pillar on successive cuts was not an unusual practice. Thus, “the overall experience of the mine in mining in this configuration in various stopes without back instability supports the mine’s conclusion that the existing support of reinforced backfill and bolting was sufficient.” (Hecla Br. 31).

## **Findings of Fact and Analysis**

### **Fact of Violation**

I find that the Secretary established that the circumstances leading up to the fall of ground would have put reasonably prudent person on notice that additional measures were required. The back of cut 3 was not the typical 20 foot wide expanse of backfill from the previous cut. The back of the west and east stope in cut 3 consisted of three parts once the miners advanced beyond the point where the pillar existed in cut 2. There was backfill on either side abutting the north and south ribs. The remnant of the waste rock pillar, called the “nose of the pillar” at the hearing, ran down the center of the cut parallel to the ribs. There was nothing below the nose of

the pillar in cut 3 to directly support it. Hecla had installed extra support in the backfill itself as directed in its ground support standards. The crew placed timbers across the backfill as it was being formed on the floor of cut 2. But these timbers were not in the area where the rock fall occurred but were placed closer to the slot where the stope was wider than 20 feet.<sup>7</sup> At least one of these timbers is visible in a post-accident photograph. (Ex. R-16 p. 1). These timbers did not help support the nose of the pillar.

I find that the conditions cited in Citation No. 8559607 violated section 57.3360 of the Mine Act. The pertinent part of section 57.3360 requires that in locations (1) where ground support is necessary (2) the support system shall be designed and installed to control the ground (3) in places where persons work or travel. 30 C.F.R. § 57.3360. The cited area of the mine clearly required ground support; the Mine's Ground Support Standards mandate numerous requirements for underhand stopes. (Ex. 7 at 2-4). There is no doubt that 15 west was a place where persons work or travel. Although the conditions cited in Citation No. 8559607 complied with the Hecla's Ground Support Standards, the standards were not designed to control the ground in situations where a pillar will be undercut for more than a few feet. Supplemental ground support was necessary in the cited work area and Hecla did not design or install additional ground support, violating section 57.3360.

Based on the evidence presented at the hearing, I find that a reasonably prudent person familiar with the facts and the protective purpose of the safety standard would have recognized that additional measures were required to protect miners working in the stope. I have relied on the record as a whole, but the evidence summarized below is particularly pertinent to my finding of a violation and my findings with respect to S&S and unwarrantable failure.

Dan McGillis testified for the Secretary. He was employed as a miner at the Lucky Friday Mine for 38 years. He testified that he and other miners asked their shift bosses what was holding up the pillar in cut 3. He stated that he was never given a direct answer but was told that the pillar would not come down. (Tr. 324-25). McGillis further testified that Eric Tester, another miner, told him that when he was bolting the back on the west side "the whole back just started dribbling." (Tr. 325, 340). This reported condition worried McGillis enough that he talked to Bayer about it. He told Bayer that he was concerned about a cave in. *Id.* He offered several suggestions. (Tr. 325-26, 331-32). Bayer replied that he would "look into it" and "[m]aybe next cut we can do something different." (Tr. 326, 343). McGillis testified that the miner's felt uncomfortable working on both sides of the stope in cut 3. (Tr. 327). McGillis could only recall one other time when he was involved in undercutting a pillar and, in that instance, the crew only set off one or two rounds under the pillar. (Tr. 338). As a

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<sup>7</sup> There is no dispute that the stope was four to five feet wider in cut 3 than called for in the projection map on April 13, 2011. (Tr. 585, 658). The mine's ground support standard provides for extra support when stope width exceeds 20 feet for a distance of more than 25 feet. (Ex. R-10 p. 3). The parties' briefs discuss this issue at length and they disagree as to the significance of the testimony presented. Although it is possible that the width of the stope may have contributed to the fall of ground, I have not relied on issues surrounding the width of the stope in reaching my findings and conclusions in this decision.

consequence, only a small part of the pillar was undermined. He was the most senior miner working in the 15 stope at that time and I credit his testimony.

Mike Marek, the Larry's brother, testified that he was worried about the stability of the pillar above cut 3 and asked his shift boss, Cliff Shiner, if the crew could install 10 by 10 timbers in the stope wedged up tight against the back. (Tr. 296). He was told that timbers were not going to be installed.

Tim Ruff, a mine geologist, testified that miners voiced concerns to him about mining under the pillar. (Tr. 356-57). Tim Ruff testified that he told another mine geologist that the "cement waste backfill on either side of the pillar" could not hold the pillar up "because the [backfill] was designed to crush." (Tr. 354). Ruff raised these concerns with Bayer when they were both in the 15 stope. The face of cut 3 had advanced about 40 feet under the pillar on the west side at the time of their conversation. (Tr. 357). Ruff suggested that a pillar be started with the next round so that there would be two 10 foot wide stopes on either side of a pillar. He testified that Bayer seemed to understand his concerns and told him that the miners would only take one more round under the pillar. *Id.* When Ruff came to the mine a day or two later, he could see that more than one round had been taken. He confronted Bayer in his office and was told "[w]ell, let me think about it." (Tr. 358).

Ron Krusemark was Hecla's chief mining engineer at the Lucky Friday Mine at the time of the roof fall. He testified that mining under a pillar in the manner that was performed in cut 3 was "way out of the norm." (Tr. 143-44, 153). He was not directly included in the planning for undercutting the pillar and did not know it was occurring until after the accident. (Tr. 150). After the accident, he investigated the mining of pillars at the mine going back a few years. Other than instances where pillars were undercut for short distances, he found only three situations where large pillar undercuts of 50 to 70 feet were taken. (Tr. 159). These undercuts occurred in the 15 stope west cut 3, 15 stope east cut 3 and in the 12 stope. Finally, Krusemark testified that if he had been consulted about undercutting the pillar, he would not have approved it without an engineered ground support plan. (Tr. 153).<sup>8</sup>

Paul Tyrna, a geologist from MSHA's technical support group, visited the accident site. He concluded that because the fallen material consisted of large blocks of rock, the ground had separated along faults, joints and other geologic features. (Tr. 234). He was not familiar with the practice of undercutting a pillar so he decided to investigate whether the practice had been validated. He testified that a practice can be validated by engineering analysis and by a history of successful operation. (Tr. 216). As part of his investigation, Tyrna gathered technical information and talked to miners, managers, mine engineers and geologists. He also reviewed

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<sup>8</sup> I recognize that after a fatal accident witnesses will always testify that the mine operator should have provided additional protection. That is self-evident; everyone would agree with such a conclusion in this case. Nevertheless, I credit Krusemark's testimony in this regard and I credit his conclusion that undercutting pillars in the Gold Hunter section of the mine was not the normal method of mining. Krusemark had only been the chief engineer for a short period of time and might not have been aware of some of the earlier discussions about undercutting pillars.

documents including cut and projection maps. He concluded that the fall occurred because the stope was too wide, no additional ground support had been installed under the pillar, and there was a significant fault cutting across the pillar. (Tr. 214, 221-22, 225, 233-34). Although six- to eight-foot Dywidag bolts had been installed, they were not long enough to intersect the fault. (Tr. 227).

Hecla believed that this pillar nose would act like a keystone and that the horizontal pressure would keep it in place. (Tr. 507, 645, 657). A keystone only works when placed at the top of an arch.<sup>9</sup> Here the back was entirely horizontal with this nose protruding down a little from the backfill that was on either side of the nose. The host rock is subject to slips, strikes, dips, faults, and fractures. A reasonably prudent person familiar with the mine would comprehend that, with nothing to support the weight of the nose of the pillar, rock would tend to fall if any fractures or faults were present. The weight of the rock would tend to put stress on any fractures or faults above the nose. Separation of rock at a fault or fracture was likely given the lack of support. Placing rock bolts in the nose would not provide sufficient protection from roof fall. Inspector Breland estimated that the rock fell from as high as 25 feet above the back of cut 3. Krusemark estimated that pillar had separated about 50 above. (Tr. 150). Thus, a substantial portion of the waste rock pillar fell into cut 3. The fall was a catastrophic failure of the entire system of roof support. It was foolhardy to believe that horizontal pressure applied to the backfill on either side of the nose of the pillar would be strong enough to hold up the fractured rock in the pillar above cut 3 with the addition of some 6 or 8 foot roof bolts. I recognize that the mine is subject to tremendous horizontal pressure, but that pressure was obviously not enough to overcome the weight of the rock in the pillar above cut 3.<sup>10</sup>

If Hecla wanted to remove the pillar in Cut 3, it should have analyzed its ground support standards to determine whether they were sufficient to control the ground in the cited area including the pillar. As Krusemark testified, Hecla should not have undercut the pillar “without a tested, designed, engineered ground support plan” because undercutting the pillar was “way outside of the norm.” (Tr. 151). At hearing, Hecla used only conclusory statements to defend its decision to undercut the pillar in 15 west without providing additional ground support, as its witnesses testified that they were not worried about a ground fall and that the horizontal pressures of the mine made a fall unlikely. (Tr. 440). Hecla did not present any data, evidence,

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<sup>9</sup> A keystone is defined as a “symmetrically tapered piece at the center or crown of an arch.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 297 (2d ed. 1977).

<sup>10</sup> Doug Bayer drew an analogy with an example involving a stack of books. (Tr. 507). If you pick up three books hold them horizontally and apply pressure to the two outside books with your hands, the book in the middle will not fall. There is a significant problem with this analogy. It assumes that the three books weigh about the same amount. If you put a heavier book, such as an unabridged dictionary, in the middle surrounded by two paperback books, you will have a difficult time keeping the dictionary from falling no matter how hard you squeeze. At the mine, you had a heavy rock pillar in the middle and backfill on either side. Although the backfill had considerable strength, the mass of the pillar was too great even accounting for the horizontal pressure.

or test results to demonstrate that the horizontal pressures were sufficient to support the ground under these conditions.<sup>11</sup> Hecla violated section 57.3360 because it did not design or install a support system adequate to control the ground in the cited area.

### **Significant and Substantial**

I find that the Secretary established that the violation was S&S. A lengthy analysis is not required for this finding. A violation occurred that contributed to a discrete safety hazard, a measure of danger to safety. The Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an event in which there is an injury. The discrete hazard was a fall of ground and such a fall was reasonably likely because the pillar was inadequately supported. The roof did fall and a miner was killed. Thus, all four elements of the Commission's S&S test were met.<sup>12</sup>

### **Unwarrantable Failure**

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct,"

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<sup>11</sup> The parties agree that the standard ground support used by Hecla was tested and safe under usual mining conditions. Undercutting a pillar for a distance of 75 feet, however, was an unusual situation. Hecla's argument that it was planning on creating a new pillar in cut 3 after mining about 75 feet into the stope does not support its position.

<sup>12</sup> 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 Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

“indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).<sup>13</sup>

I find that the violation was the result of Hecla’s reckless disregard and unwarrantable failure to comply with the safety standard. The Secretary argues that Hecla was fully aware that undercutting the pillar in 15 West could cause a ground fall, but that Hecla risked miner safety due to its desire to “chase ore.” Hecla, conversely, argues that it had undercut pillars many times without incident and had no reason to believe that the roof support would be inadequate in this instance. Although I do not believe that Hecla intentionally risked the lives of miners, I find that Hecla should have known that the roof support in 15 west beneath the waste pillar would endanger miners and violate section 57.3360. Previously, Hecla only undercut waste pillars for a horizontal distance of 10 to 20 feet. The pillar in 15 west was undercut for about 75 feet. Hecla provided no data to substantiate its claim that the provisions in its ground control standards would control the back when a pillar is undermined for a significant distance. Hecla only significantly undercut pillars in two other locations, which was not enough history to prove that those actions were safe. It was reckless for Hecla to mine ore in a more invasive manner than it had in the past without considering whether additional ground support was required. It should have been obvious that a large, unsupported rock mass could endanger miners, yet Hecla did not ascertain whether the waste pillar in 15 stope was adequately supported.

Several other factors contribute to my finding that Citation No. 8559607 was the result of Hecla’s reckless disregard and unwarrantable failure. As stated above, the rock at the Lucky Friday Mine was subject to faults and fractures.<sup>14</sup> The cited condition was extensive; the rock fall measured about 25 feet wide, 25 feet deep, and 75 long. Everyone agreed that it was a massive ground fall, with many witnesses saying it was the largest fall they had ever seen. This violation posed a high degree of danger, evidenced by the death it caused. The standard requires

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<sup>13</sup> Aggravating factors include: (1) the length of time that the violation has existed, (2) the extent of the violative condition, (3) whether the operator has been placed on notice that greater efforts are necessary for compliance, (4) the operator’s efforts in abating the violative condition, (5) whether the violation was obvious or posed a high degree of danger, and (6) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

<sup>14</sup> Testimony was presented at the hearing relating to whether Hecla knew or should have known about a particular fault in the rock above the third cut. I do not resolve the disputed testimony because I find that a reasonably prudent person would have recognized that faults and fractures were a common occurrence in the Gold Hunter section of the mine and that the ground support system had to be designed to account for fractures, faults, and other geologic structures, known and unknown, when undermining a pillar. Hecla should have designed a support system that would assure that the pillar would stay in place even if a fracture was present and a large section of rock began to separate from the remainder of the pillar above it.

that ground support be designed in a manner to control the ground. The failure to analyze the risks posed by removing a pillar for a distance of 75 feet demonstrates aggravated conduct because it shows that Hecla made no effort to properly design its ground support in this situation. Hecla's aggravated conduct and unwarrantable failure led to a violation of the Mine Act for its failure to design and install adequate ground control in cut 3.<sup>15</sup>

For the reasons set forth above, Citation No. 8559607 is **AFFIRMED** as written by Inspector Breland.

## **2. Section 57.3401, Examinations of Ground Conditions - Order No. 8559608**

Section 57.3401 contains two important requirements. "First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions warrant. *Asarco, Inc.*, 14 FMSHRC 941, 945 ((June 1992). "Second, where applicable, ground conditions in work areas must also be tested." *Id.* The Commission held that "[n]either the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined." *Id.* at 946. I find that the back and ribs in cut 3 of Stope 15 were examined numerous times by management and hourly employees.

The Secretary did not establish a violation. Section 57.3401 "does not specify how testing for loose ground is to be performed, nor has the Secretary described the procedure or set forth guidelines in her Program Policy Manual or other interpretative material." *Asarco, Inc.*, 14 FMSHRC at 947 (June 1992). The standard is intentionally broad to cover a variety of situations. The back of the stope was 10 feet above the floor, putting it only a few feet above miners' heads. Management employees and miners examined the back and ribs and found no problems. Miners were trained to examine ground conditions by looking at the angle of the bolts, assessing whether the bolts are taking any weight, looking at the plates around the bolts to see if they are being sucked up into the backfill, and evaluating the condition of the backfill. (Tr. 474-75). The miners can also use a scaling bar to scale and sound the back. There is no evidence that Hecla did not perform such examinations on a regular basis as cut 3 was being advanced.

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<sup>15</sup> Hecla started mining cut 3 on March 30, 2011. Miners started undercutting the pillar on the west side of the stope on April 4 or 5. Thus, the condition was created 10 days before the roof fall. The violation was extensive and obvious. It posed a high degree of danger. The operator had not been placed on notice that greater efforts were necessary for compliance. I reject the Secretary's argument that previous rock bursts gave the requisite notice that greater efforts were necessary. These rock bursts were not related to undercutting pillars. Nevertheless, as stated above, Hecla had not performed an analysis of the risks posed by undermining the pillar. Hecla did not attempt to abate the condition before the citation was issued because it did not consider the condition to be a violation of the safety standard.

There was no “loose ground,” as that term is generally used, in cut 3 in the days leading up to the fatal accident.<sup>16</sup> Larry Marek was not stuck and killed by loose ground that could be detected by a visual examination or by sounding the back. Rather, there was a sudden and catastrophic failure of the entire ground support system in the west side of stope 15. The Secretary suggests that examinations were not adequate because miners did not know how to examine the area and that engineering analysis was required. “The evidence shows that Hecla management failed to design any sort of ground examination system in 15 stope west that could pinpoint problems with ground support before they became a hazard.” (Sec’y Br. 19) The standard requires observation and careful examination of ground conditions not an engineering analysis.<sup>17</sup> There is no test or examination technique that could allow Hecla’s employees to determine that rock was starting to fracture and separate 25 feet above the back. The failure to perform engineering analysis before undermining the pillar relates directly to the requirement to design suitable ground control under section 57.3360. Citation No. 8559607 for that violation has been affirmed in all respects. Although Hecla failed to design adequate ground support, it carefully examined the back and ribs in the cited area with sufficient thoroughness to comply with section 57.3401.

For the reasons set forth above, Order No. 8559608 is **VACATED**.

### **III. WEST 2014-591-M; § 110(c) Penalty Proposed Against Doug Bayer**

In WEST 2014-591-M, the Secretary filed a civil penalty case against Doug Bayer, who was the mine superintendent, under section 110(c) of the Mine Act. 30 U.S.C. § 810(c). This penalty case alleges that Bayer was an agent of Hecla “who knowingly authorized, ordered, or carried out” the violation of section 57.3401 as alleged in Order No. 8559608. The Secretary contends that Hecla failed to adequately examine and test the ground conditions in the west stope. In his brief, the Secretary states that Bayer approved the plan to undermine the pillar on the third cut without conferring with Hecla’s engineering department and without conducting any studies to see if additional ground support would be necessary. (Sec’y Br. 21). The Secretary relies on evidence that Bayer failed to advise upper management that undercutting a pillar for such a long distance had never been tried before. With a degree mining engineering, Bayer should have known that undermining the pillar was risky and that Hecla’s normal methods of examining and testing the back were inadequate during cut 3 in 15 Stope west. *Id.* at 23. He concludes that “Doug Bayer is guilty of aggravated conduct beyond ordinary negligence and he should pay a personal penalty . . . of \$4,500[.]” *Id.*

The Secretary does not allege that Bayer “knowingly authorized, ordered, or carried out” a violation of section 57.3360 for inadequate ground support in the west stope. Rather, he

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<sup>16</sup> As stated above, McGillis testified that Tester told him that the back “started dribbling” when he was bolting the back on the west side. (Tr. 325, 340). Although this dribbling concerned McGillis and Tester, it does not help establish that thorough examinations were not being conducted. Extra bolts and mesh were installed as a result of this examination.

<sup>17</sup> Inspector Breland testified that the examination should have been conducted by “an individual with a geomechanic background” who would have advised management “[n]ot to mine it that way.” (Tr. 118). Such an examination is not required by the safety standard.

alleges that Bayer violated section 57.3401 for inadequate examinations of the stope. A necessary prerequisite to section 110(c) liability is a finding that the corporate operator violated the safety standard. I vacated Order No. 8559608 so the penalty proceeding brought against Bayer cannot stand. The proposed penalty brought against Bayer is **VACATED** and WEST 2014-591-M is **DISMISSED**.

#### **IV. Order Nos. 8559609 & 8559610; WEST 2012-760-M-A**

Also on August 8, 2011, Inspector Breland issued Order No. 8559609 under section 104(d)(1) of the Mine Act, alleging a violation of section 57.3360. The order states, in part:

Portions of a supporting pillar were removed to extract ore in the 6150-15-3 East stope. The section of removed pillar measured approximately five to nine feet wide by 85 feet long. This stope is approximately 18 to 20 feet wide and was mined similar to the 6150-15-3 west stope that resulted in a fatal accident when the pillar fell.

(Ex. G-1 at 11). Inspector Breland determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the alleged violation was an unwarrantable failure. The Secretary of Labor proposed a penalty of \$20,900 for this alleged violation.

Also on August 8, 2011, Inspector Breland issued Order No. 8559610 under section 104(d)(1) of the Mine Act, alleging a violation of section 57.3360. The order stated, in part:

The pillar separating the 30 and 41 veins was undercut in the 6100-12 stope. A 56 foot long portion of the pillar longitudinally spans the 3-way slot intersection in 6100-12-1 that is seven to 10 foot wide. The intersection is approximately 22 feet wide and was mined similar to the 6150-15-3 west stope that resulted in a fatal accident when the pillar fell.

(Ex. G-1 at 12). Inspector Breland determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the alleged violation was an unwarrantable failure. The Secretary of Labor proposed a penalty of \$20,900 for this alleged violation.

Both orders contain the following additional language to support the alleged violations:

Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under

inadequately supported ground. This is an unwarrantable failure to comply with a mandatory standard.

For the reasons set forth below, I affirm both Order Nos. 8559609 and 8559610.

### **Discussion and Analysis**

Although Order Nos. 8559609 and 8559610 concern different areas of the mine, for the purposes of section 57.3360, I consider the two orders together. The area where the violations are located is immaterial here; the focus is upon the action of significantly undercutting a pillar without providing additional ground support. Hecla undercut waste rock pillars for long distances in both of the cited areas, using the same ground support in each without analyzing whether that support was adequate. Although the undercut area was of a different size in each order, both were significant: the pillar was undercut for a distance of 85 in the east side of stope 15 and for a distance of 56 foot in the 6100-12 stope

I find that the condition cited in Order Nos. 8559609 and 8559610 violated section 57.3360 for the same reasons I found a violation of the standard with regard to Citation No. 8559607, discussed above. The ground control used in all three cited area was inadequate for the same reason; a large portion of a waste rock pillar was undercut and miners worked beneath that pillar. Although Order Nos. 8559609 and 8559610 did not contribute to fatal injuries, these two orders address the same practices and the same safety standard. In each of these stopes, Hecla undercut pillars for a significant distance without analyzing the possible outcomes of doing so. Although neither of the cited undercut pillars cited in Order Nos. 8559609 and 8559610 collapsed, the ground support used in those areas was the same as the support used in the area cited by Citation No. 8559607, which was not properly designed to support the ground under a waste pillar and was therefore inadequate under the standard. Hecla relied on the horizontal pressure to support the nose of the pillar in each location. I credit the testimony of Inspector Breland, Krusemark, and several other witnesses that this ground support was inadequate. I find that both Order Nos. 8559609 and 8559610 violated section 57.3360 because the ground support used in those areas was proven to fail under similar conditions.

I find that Order Nos. 8559609 and 8559610 were S&S and highly likely to cause a fatal injury. Both orders violated section 57.3360. Inadequate ground support contributes to the hazard of a rockfall, which can clearly cause a fatality. Miners worked in both of these stopes. Hecla's own experience shows that significantly undercutting pillars while using its normal ground control standard can lead to ground falls. I credit the testimony of Inspector Breland that the conditions were highly likely to contribute to a rockfall and a serious or fatal injury.

As discussed above, I affirmed MSHA's determination that the violation in the 14 west stope was the result of Hecla's reckless disregard as alleged in Citation No. 8559607. MSHA determined that Order Nos. 8559609 and 8559610 were the result of Hecla's high negligence. At the hearing, Inspectors Hirsch and Breland testified that they could have designated the level of negligence for these two violations as reckless disregard for the same reasons as the violation in Citation No. 8559607. (Tr. 43, 98-99). I affirm MSHA's negligence determination as set forth in the two orders and find that Hecla's high negligence contributed to the violations.

I also affirm MSHA's unwarrantable failure designation for each order for the reasons set forth above with respect to Citation No. 8559607. Failing to adequately support a large section of roof in areas where miners work constituted aggravated conduct greater than ordinary negligence. This practice posed a significant hazard as the fall in 15 West demonstrated. The inadequately supported roof in each cited area was extensive. It was obvious that these large rock masses posed a danger if inadequately supported, but Hecla made no effort to ascertain whether the ground support was effective, which demonstrated aggravated conduct.

## V. 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-5). Respondent was issued 55 section 104(a) citations and 1 section 104(g)(1) order in the 24 months prior to April 15, 2011, and 12 of these violations were designated as S&S. The Secretary determines the size of a metal mine operator by calculating the employee-hours worked during the previous year. 30 C.F.R. § 100.3(b). MSHA records show that the Lucky Friday Mine worked 407,847 hours which makes it a medium to large mine operator. MSHA's records show that the hours worked for Hecla Limited was 1,189,458, which makes it relatively large. The violations were abated in good faith. The parties stipulated that if the "assessed penalty, if affirmed, will not impair Hecla's ability to remain in business." (Joint Stips. ¶ 18).

I find that the penalties for Order Nos. 8559609 and 8559610 should be increased from \$20,900 for each violation to \$50,000 each. I reached this conclusion because of the serious safety hazard created by these violations and Hecla's high negligence. Management knew that (1) fractures and faults were often present in the host rock; (2) miners were going to undercut the pillars for a considerable distances; (3) undercutting pillars for significant distances was not a typical practice in the Gold Hunter section of the mine, and (4) no engineering study or any other study had been undertaken to determine whether its ground support plan would adequately support the roof under such conditions. Hecla also relied on a misplaced theory that the nose of the pillar would act as a keystone to hold up the pillar and the back.

### **Penalty for Flagrant Violation**

The Secretary proposed a higher penalty for Citation No. 8559607 because he deemed the violation to be flagrant. The flagrant violation provision was added to the Mine Act in section 110(b)(2) by the Mine Improvement and New Emergency Response Act of 2006. The provision defines a flagrant violation to mean "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2).

The Commission has not yet had the opportunity to issue a decision concerning this provision as relevant to the present case. The lead administrative law judge decision is *Stillhouse Mining LLC*, 33 FMSHRC 778 (Mar. 2011) (Judge Paez). There is no dispute that the Mine Act's enforcement scheme is designed to provide "increasingly severe sanctions for increasingly

serious violations or operator behavior.” *Emery Mining*, 9 FMSHRC 1997, 2000 (Dec. 1987). Assessing a flagrant penalty is one of the more severe sanctions in the Mine Act.

The issue in this case is whether Hecla’s conduct amounted to a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard. As applied to this case, the four point test set forth by Commission Judge Paez is whether there was:

- (1) A reckless failure to make reasonable efforts to eliminate
- (2) A known violation of a mandatory safety standard
- (3) That substantially and proximately caused
- (4) Death or serious bodily injury.

*Stillhouse*, 33 FMSHRC at 802. In his decision, Judge Paez analyzed the flagrant violation provision at length. His analysis was detailed and well-reasoned. *Stillhouse* 33 FMSHRC 798-808. I agree with his analysis and incorporate it herein by reference.

I find that the Secretary establish that the civil penalty for Citation No. 8559607 should be assessed under the Mine Act’s flagrant violation provision. I find that Hecla’s decision to undercut the pillar in cut 3 was reckless. As stated by Judge Paez, “an operator is ‘reckless’ for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.” *Id.* at 803. In determining whether a risk of harm is “unjustifiable,” a judge should compare the “burdens of ameliorating the risk” to the severity of the risk of harm created by the violation. *Id.* at 803-04. In this instance, Hecla could have either mined cut 3 without removing a substantial portion of the pillar or conducted an engineering study to develop a method to support the pillar as mining progressed. I find that Hecla created an unreasonable risk of harm and that it could have taken reasonable efforts to eliminate this risk. Hecla did not “take the steps that a reasonably prudent person ‘familiar with the mining industry and the protective purposes of’ the safety standard would have taken to support the back. *Id.* at 805.

A flagrant penalty cannot be assessed unless the Secretary establishes that there existed a “known violation of a mandatory health or safety standard.” 30 U.S.C. § 820(b)(2) (emphasis added). In the present case, Hecla management had knowledge of the cited conditions. Management authorized miners during cut 3 to undercut the pillar that had been left in cuts 1 and 2. Hecla, contends, however, that this condition did not violate section 57.3360. I hold that the use of the term “known” in the context of a flagrant violation contemplates an objective test. As Judge Paez held:

In the legal context, “knowledge” may be understood as “actual” or “constructive.” *Black’s Law Dictionary* at 888 [8<sup>th</sup> ed. 2004]. Actual knowledge may be “express,” which is “[d]irect and clear knowledge,” or it may be “implied,” which is “[k]nowledge of such information as would lead a reasonable person to inquire further.” *Id.*

33 FMSHRC at 806.

Hecla's management knew that miners were going to undercut the pillar for a distance of about 75 feet during cut 3, knew that it was unusual for miners to undercut a pillar for such a significant distance in the Gold Hunter section of the mine, and knew that no engineering study or any other study had been undertaken to determine whether its existing ground support standards would adequately support the roof or the pillar under such conditions. Hecla also knew that the rock structure in the host rock was subject to faults and fractures in the rock. It is universally recognized that a keystone will support weight only if it is placed at the top of an arch, so Hecla's theory that the nose of the pillar would act as a keystone lacks credibility. Management did not ask its own engineering group at the mine to analyze the matter. Hecla simply assumed that the horizontal pressure would keep the nose of the pillar and the rock above it securely in place. I find that Hecla had at least implied knowledge of the violation.<sup>18</sup>

I also conclude that the violation substantially and proximately caused the death of Larry Marek. If the pillar had not been undermined the roof would have been adequately supported so long as the mine followed its ground support standards. In the alternative, Hecla may have been able to engineer a ground support system that would have allowed it to mine the pillar in cut 3 without the risk of a fall of ground.

In conclusion, I assess a penalty for Citation No. 8559607 in accordance with section 110(b)(2) of the Mine Act. I find that a civil penalty of \$180,000 is appropriate for this violation. I increased the penalty above that proposed by the Secretary for same reasons discussed with respect to Order Nos. 8559609 and 8559610.

## VI. ORDER

For the reasons set forth above, Citation No. 8559607 is **AFFIRMED** and a penalty of \$180,000 is assessed for the violation, Order No. 8559608 is **VACATED**, Order Nos. 8559609 and 8559610 are **AFFIRMED** and a penalty of \$50,000 is assessed for each violation. WEST 2014-591-M, the proceeding brought against Doug Bayer, is hereby **DISMISSED**. Hecla Limited is **ORDERED TO PAY** the Secretary of Labor the sum of \$280,000 within 40 days of the date of this decision.<sup>19</sup>

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

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<sup>18</sup> The "known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it." *Stillhouse*, 33 FMSHRC at 807.

<sup>19</sup> 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.

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2015

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

VERMONT QUARRIES CORPORATION,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. YORK 2014-2-M  
A.C. No. 43-00042-332434

Docket No. YORK 2014-135-M  
A.C. No. 43-00042-348071

Mine: Danby Quarry

## DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

The Secretary has submitted a motion to approve settlement. Originally, the proposed penalties totaled \$42,122.00. Under this submission the proposed reduction would be \$30,200.00. Because the reductions have been insufficiently explained, the motion must be denied.

**From Docket No. YORK 2014-2-M**,<sup>1</sup> in Citation No. 8715409, originally assessed at \$2,901.00<sup>2</sup> and now proposed to be settled at \$2,200.00, the Secretary “alleges that the Respondent failed to install wood cribbing between freestanding slabs of marble and the steel frame of the Simec saw structure resulting in an injury to a miner.” Mot. to Approve Settlement and Order Payment 4. The Respondent contends that the citation should be reduced to a section 104(a) citation

because *no one from management directed the miners or was aware this was happening. Company policy requires that miners lower the hydraulic table the slabs are on, put in spacers between the slabs with spreader bars and block the slabs with wood cribbing. The two hourly employees involved were trained on this policy but disregarded it and were disciplined accordingly.* At hearing, the Secretary would have presented evidence to refute this assertion. Without conceding any merit to Respondent’s arguments, the Secretary acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to modify

<sup>1</sup> Docket No. YORK 2014-2-M contains a single citation.

<sup>2</sup> One must not lose sight of the fact that before the reduction, the penalty proposed already includes a 10% reduction for good faith. Thus, the penalty was originally assessed at \$3,224.

the 104(d)(1) citation to a 104(a) violation and to reduce the proposed penalty from \$2,901.00 to \$2,200.00[, an additional 25 % reduction].

Mot. at 4 (emphasis added).

The problem with the Secretary's representation is that it does not address the inspector's statement that an "[a]cting foreman . . . was one of the miners attempting to push over the marble slabs, which each weighed about 1,000 pounds." Citation No. 8715409 (emphasis added). Therefore, the issuing inspector concluded that as the acting foreman knew that the company policy was to install wood cribbing between the slabs of marble and the steel frame, this was aggravated conduct and therefore beyond ordinary negligence, prompting the section 104(d)(1) citation issuance. The extent of the injury is not disclosed in the official file.

A serious omission, the Secretary's motion makes no disclosure that one of the hourly employees was an acting foreman. The Secretary has not explained why an "acting foreman" should not be treated as a foreman in terms of imputing the negligence. Instead, the motion implicitly endorses the claim that "no one from management directed the miners or was aware this was happening." Case law does not appear to support the idea that an acting foreman is not part of management. For example, in *Sec'y of Labor v. Auxvasse Stone & Gravel and Robert Kuda*, 19 FMSHRC 384, 389 (Feb. 1997) (ALJ), involving both a section 104(d)(1) citation and a 110(c) action as well, the judge there noted that the cited defective conditions were very obvious *and the inspector determined* that the *acting foreman* was aware that these conditions had existed. That court noted that "[a]s a management employee, a foreman, Mr. Kuda is held to a high standard of care with regard to the safety of the men who work at his direction." *Id.* at 390; *see also Sec'y of Labor v. A & L Coal Co., Inc.*, 6 FMSHRC 2549 (Nov. 1984) (ALJ).

A second problem with the submission is the representation that "the two hourly employees involved were trained on this policy but disregarded it." Mot. at 4. Apart from inaccurately repeating the status of one of the employees, this part of the motion appears to be at odds with the issuing inspector's statement that "[t]he mine operator needs additional time *to write the policy and procedures* for the securing of the finished slabs of marble in the Simec saw, implement the policy and procedures and *provide the training* to the miners." Citation 8715409-01.

Accordingly, the fundamental problem is that, while the Secretary claims that its evidence would refute the Respondent's claims, it then asserts that there are "legitimate factual and legal disputes." Given the foregoing, these disputes have not been adequately set forth.

**From Docket No. YORK 2014-135-M, in Citation No. 8797772**, Respondent was cited for a violation of 30 C.F.R. § 57.3200. Here, the Secretary proposes a 62% reduction in the penalty down from the \$1,304.00 to \$500.00.<sup>3</sup> The motion provides:

Specifically, the Secretary alleges that the Respondent allowed dangerous ground conditions in the form of ice buildup overhead to accumulate without taking it down or installing barriers to prevent miners from entering the area. Respondent takes the position, and would have alleged at hearing, that the gravity and negligence should have been reduced because Respondent has two 10 foot culverts which have been placed in the past to protect miners traveling this escape way and Respondent was going to place the culverts there as in the past but inspector was in this area before culverts could be placed. At hearing, the Secretary would have presented evidence to refute this assertion.

Mot. at 4-5. As with each proposed reduction, the Secretary asserts, but with no express articulation, “that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing.”

The citation informs that ice buildups present at the secondary escapeway portal of the Brook Quarry consisted of a 3 foot by 8 foot piece and a 3 foot by 4 foot piece. The Inspector, noting that with a height of about 40 feet, if the ice were to fall fatal injury “would be expected.” The problem with this reduction is that, rather than helping the Respondent, the defense hurts the position taken as it acknowledges that it knew of the issue *from past and present experience*, and that it was going to place the culverts but that the inspector found the condition first.

Accordingly the Secretary has not identified the “legitimate factual and legal disputes” it contends exist. The Court would also note that photographs were taken by the inspector, although these have not been viewed by the Court as they were not provided with the motion. A persistent problem with the Secretary’s motions for settlement is the absence of any statement that the Secretary has consulted with the issuing inspector for input and reaction to the mine operator’s claims. With the important and diligent efforts made by MSHA’s inspectors, it seems to this Court that the Secretary should make such inquiries to its inspectors when assessing such claims. Here, a natural line of inquiry would involve the inspector’s input as to the amount of time it would take for such an ice buildup to develop. If consultation with the issuing inspectors is not occurring, it would be a natural consequence for inspectors to become discouraged with their efforts to guard the safety and health of miners.

**In Citation No. 8797784**, Respondent was again cited for a violation of 30 C.F.R. § 57.3200, this time a mere six days after the condition noted in **Citation No. 8797772**, above. For this one, the Secretary seeks better than a 63% reduction, down from \$8,209.00 to \$3,000.00. “Specifically, the Secretary alleges that the Respondent allowed dangerous ground conditions in the form of ice buildup overhead in the entry portal to the Norcross Quarry to accumulate without taking it down or installing barriers to prevent miners from entering the area.” Mot. at 6.

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<sup>3</sup> The Court will not repeat that for each of the matters that the proposed penalties already bestow a 10% reduction. For example, the proposed assessment of \$1,304.00 was actually set at \$1,449.00.

This should sound familiar; it is the same hazard identified the week prior per **Citation No. 8797772**. While at a different location, it still involved the same mine.

In this instance, the motion relates that the “Respondent takes the position, and would have alleged at hearing, that the gravity and negligence should have been reduced because Respondent addresses the ice buildup several times per day using an excavator to scale down ice and therefore, the buildup was not likely to lead to an injury.” Mot. at 6-7. The Secretary asserts that at hearing it would have presented evidence to refute this assertion but, without elaboration, states that “there may be legitimate factual and legal disputes regarding gravity and negligence.” Mot. at 6-7.

Review of the Citation, the statements therein not being challenged, reveals that the ice buildup was about 15 feet high by 30 feet wide and 3 inches thick and about 30 feet above the portal. As with **Citation No. 8797772**, the Inspector stated that such an ice fall could be expected to result in a fatality if a miner were struck. At odds with the claim that the mine addresses the ice buildup *several times per day* using an excavator to scale down ice and, therefore, the buildup was not likely to lead to an injury, is the Inspector’s termination note that “the mine operator *has developed* a written SOP for maintaining and inspection for the ice build up at the Norcross portal.” Here again, a consultation with the Inspector and an averment in the motion that such a consultation occurred is an important inclusion for a motion seeking a penalty reduction of this magnitude. This consultation should include inquiring whether such an ice buildup could occur if it was truly being addressed several times per day. One could fairly ask why there was a need to develop a plan to address ice buildup while maintaining that the ice buildup is addressed *several times per day*. As with the other ice buildup citation, the Secretary has not identified the “legitimate factual and legal disputes” he contends exist.

**In Citation No. 8797785**, Respondent was cited for a violation of 30 C.F.R. § 57.11001. This citation is connected with **Citation No. 8797784** in that it addresses the same condition and makes the connection that the Court was concerned about for **Citation No. 8797784**; namely, the period of time that it would take for such an ice buildup to develop. The difference is that the former two citations dealt with § 57.3200, addressing ground conditions that create a hazard to persons and requiring that they are to be taken down or supported before other work or travel is permitted in the affected area, and that until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier is to be installed. However, for **Citation No. 8797785**, the focus is upon a safe means of access being provided and maintained to all working places. This citation *does not duplicate* the hazard identified in **Citation No. 8797784** as it speaks to ice buildup on the *walkway* for access to the Norcross portal face and it presented a slip and fall hazard. In fact, the citation relates that miners had been exposed to that hazard that morning. To correct the hazard, a man tube was installed and the walkway was sanded. Photos were taken here as well.

For this matter, **Citation No. 8797785**, the Secretary’s motion seeks a 68% reduction, from the proposed \$3,143.00 to \$1,000.00 on the basis that “miners had been instructed not to enter the area until proper sanding had been done.” Mot. at 7. This “defense” means that the mine was aware of the condition. Given that admitted awareness, it is difficult to appreciate the reduction sought. In fact, the Secretary, while seeking the near 70% reduction, steadfastly

maintains it would be able to refute the Respondent's claim. Again, the Secretary has not identified the "legitimate factual and legal disputes" it contends exist.

Next, there is **Citation No. 8797786**, in which Respondent was cited for a violation of 30 C.F.R. § 57.3401. As with the previous alleged violation, the Secretary seeks a 68% reduction from the proposed \$3,143.00 to \$1,000.00. It, too, involves the Norcross Quarry as, in combination, these three alleged violations become, to borrow a phrase, "curiouser and curiouser." In relevant part, the cited section provides:

Examination of ground conditions. Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift.

30 C.F.R. § 57.3401.

The Secretary alleges that the "Respondent failed to have a designated person present at the mine to inspect changing ground conditions, which was needed because of the weather and icy conditions." Mot. at 7. To justify the nearly 70% reduction, the Secretary relates Respondent's position that "the gravity and negligence should have been reduced because the Respondent was *in the process of assigning another miner to inspect ground conditions* at the time that this citation was issued." Mot. at 7-8 (emphasis added). This is nearly an echo of Respondent's defense for Citation No. 8797772, in which Respondent contended that *it was going to place the culverts there* as in the past, but the Inspector was in this area before culverts could be placed.

Once again, without explaining how Respondent's claim warrants a 68% reduction, the Secretary merely states that "Respondent was in the process of assigning another miner to inspect ground conditions at the time that this citation was issued." This does more than admit knowledge of the problem, and the citation itself reveals no such mitigating factor, but instead asserts that the mine had not designated another person to perform the examination task. In fact, indicative of a deeper problem, the abatement reveals that the mine wrote a new SOP for the examination of ground conditions, an odd need to address the absence of the designated person unless it was a chronic problem. Then, additional time was needed to conduct training for this new SOP and that training included how to conduct a proper inspection of ground conditions prior to each shift, another odd result in the wake of a designated person's absence.

Again, the Secretary has not identified the "legitimate factual and legal disputes" it contends exist to support this very large reduction.

Finally, we come to **Citation No. 8797791**, in which the Respondent was cited for a violation of 30 C.F.R. § 57.4533(a). That provision provides that "Surface buildings or other similar structures within 100 feet of mine openings used for intake air or within 100 feet of mine openings that are designated escapeways in exhaust air shall be— (a) Constructed of

noncombustible materials.” Very directly, the Secretary “alleges that the Respondent failed to ensure that the brattice cloth that was hung in the entrance way/escapeway for the Norcross Quarry was made of noncombustible material.” Mot. at 8. The motion relates that “Respondent takes the position . . . that the gravity and negligence should have been reduced because the tarp in question would not burn under direct fire and therefore there was no likelihood of injury.” *Id.* On that assertion, the Secretary, while not conceding any merit to Respondent’s arguments, acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and proposes a 56% reduction in the penalty from \$1,657.00 to \$735.00.

Even if the claim that the tarp would not burn under direct fire is true, something which the Secretary does not concede, the motion fails to address the citation’s inclusion of dry lumber to which the tarp was fastened along with the notation that the cited escapeway is the only way out of the mine. Further, the implication of the defense is that the brattice cloth was noncombustible. Yet, it is not explained why, if the tarp would not burn under direct fire, fire resistant brattice cloth was then purchased.

As with each of the foregoing, the Secretary needs to provide the basis for its claim that there are “legitimate factual and legal disputes” which exist to support this very large reduction.

The Secretary is directed to either provide additional information to support the settled order and citations in these two cases, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks of the issuance of this decision.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 4, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

DRUMMOND COMPANY, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2013-303  
A.C. No. 01-02901-314991

Mine: Shoal Creek Mine

**DECISION AND ORDER**

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

Noelle Holladay True, Esq., Lexington, Kentucky, and Damon J. Boiles  
III, Esq., Birmingham, AL, for Respondent

Before: Judge McCarthy

**I. Statement of the Case**

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”), 30 U.S.C. §814(d). The parties agreed to settle 12 of the 13 citations originally included in this docket and filed a Joint Motion to Approve Partial Settlement. I issued an Amended Decision Approving Partial Settlement on August 6, 2014. Only Citation No. 4481323 remains at issue.

On August 16, 2012, MSHA issued Citation No. 4481323 to Drummond Company, Inc. (“Drummond” or “Respondent”) for an alleged violation of 30 C.F.R. §75.333(h). That standard mandates that in underground coal mines, “all ventilation controls, including seals, shall be maintained to serve the purpose for which they were built.” Citation No. 4481323 states:

In the I-1 Longwall Panel Entries, the mandoor between Entry #2 and #1 at Block #34 was not being used to serve the purpose for which it was installed. At the time of the inspection the mandoor was being held open by a piece of plastic 14” inside diameter Drisco pipe. The man door measured 30” by 30.” The air flow was from the #2 entry (intake) to the #1 Entry Return.

The citation was designated as significant and substantial (“S&S”) because it was reasonably likely to result in a lost-workdays or restricted-duty injury, with 10 persons affected, as a result of Respondent’s high negligence. P. Exh. 1.

Specifically, the Secretary alleges that Drummond violated 75.333(h) when it propped open a man door with a very large drainage pipe for over 90 minutes. The Secretary argues that the mandoor was built for the purpose of ventilation control to separate intake and return air, while allowing miners to travel between air courses. The Secretary argues that propping open the mandoor with a large pipe in order to transport the pipe or other large equipment contravenes the standard. P. Br. 6, 16-19. Respondent contends that MSHA abused its discretion by issuing the citation because the mandoor was not damaged and was maintained properly. Respondent also disputes the S&S, gravity, and negligence designations, and the appropriateness of the \$8,893 proposed penalty. R. Br. 1-2.

A hearing was held in Birmingham, Alabama. The parties introduced testimony and documentary evidence, and witnesses were sequestered.<sup>1</sup> The parties submitted post-hearing briefs. For the reasons set forth below, I affirm the S&S citation, as modified, to reduce Respondent’s negligence from high to moderate, and assess a civil penalty of \$2,678.

## **II. Stipulations**

At hearing, the parties agreed to the following stipulations:

1. The Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and the Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.
2. Drummond Company, Inc., has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Drummond Company, Inc., operates Shoal Creek Mine, Mine ID No. 01-02901.
4. Drummond Company, Inc. is a large operator.
5. The proposed penalty assessments will not affect Respondent’s ability to continue in business.
6. The citation at issue in this case was properly served by a duly authorized representative of the Secretary upon an agent of the Respondent.

Jt. Ex. 1; Tr. 12-15.

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<sup>1</sup> 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.

### III. Findings of Fact

On August 14, 2012, Drummond's Shoal Creek Mine experienced a rock fall in the #1 tailgate entry on the I-1 longwall panel, at cross-cut 35, which impeded travel. The rock fall damaged a piece of drainage pipe used to pump water. Tr. 322-23, 326-29.<sup>2</sup> Water began to accumulate in the area. Tr. 49-50, 56, 106-07, 335-37, 412. The pipe needed repair, once the roof was re-supported, to maintain ventilation and prevent flooding. Tr. 324-26, 356.

On August 16, 2012, MSHA field office supervisor, Edward Boylen, and coal mine inspector, Greg Willis, arrived at the Shoal Creek Mine to inspect the reported roof fall. Tr. 47-48.<sup>3</sup> Boylen testified that Shoal Creek is a gassy mine because it liberates 2.9 million cubic feet of methane ("cfm") every 24 hours. Tr. 46.

On his way to break #35 to investigate the rock fall, Boylen walked past break #34 and noticed that several miners were in the area, a scoop was parked in the number 2 (middle) entry, and Drisco pipe, which was several hundred feet long and 14 inches in diameter, was lying through the mandoor located between the number 1 and 2 entries, about two and one-half blocks from the longwall face. Tr. 51, 56-57, 63, 67. The mandoor was 30 inches by 30 inches and had a 6.25 square-foot opening. Tr. 92.

When Boylen asked miners present about the drainage pipe in the mandoor, they said that the mandoor had been propped open for about an hour and one-half so that Respondent could push the pipe through the door to replace the damaged drain pipe at the roof fall area. Tr. 63, 67. A loader was being used to push the large pipe through the mandoor. Tr. 328-29, 344, 346-47; P. Exs. 4-5.

Boylen told superintendent Scott Meadows that the mandoor could not be left open because it would disrupt ventilation inby and it must be closed as soon as possible. Tr. 94-95. Under MSHA's direction, miners put a can bag over the mandoor opening to mitigate ventilation disruption. Tr. 356-58.

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<sup>2</sup> Every 24 hours, 20 million gallons of water are pumped from the Shoal Creek Mine. Tr. 325.

<sup>3</sup> Boylen worked as a coal mine inspector for MSHA from 2008 until 2012, when he became a field officer supervisor for the Bessemer field office. Tr. 43. Boylen earned a degree in Industrial Management at West Virginia University, and has 20 years of experience in the mining industry. Tr. 33. Boylen served in various capacities in the mining industry, including foreman, fire boss, long wall coordinator, and mine superintendent. Tr. 33, 35, 37. Boylen had worked at Drummond's Shoal Creek Mine for four years and oversaw the completion of the mine's slope, portal, and ventilation shafts and the installation of two longwalls. Tr. 40. Boylen was discharged by Drummond, but credibly testified that he does not harbor any resentment toward the company. Tr. 163-65.

Boylen issued Citation No. 4481323 for a violation of 30 C.F.R. § 75.333(h). Tr. 51-52. Boylen determined that the mandoor was a ventilation control designed to separate the number 1 entry (return air) from the number 2 entry (intake air) to prevent air from moving along the wrong course or through the wrong entry. Tr. 64-65. Boylen testified that the mandoor was designed to allow miners to travel between air courses and hand carry supplies. Tr. 64.

Based on experience, Boylen testified that the air pressure flowing through the mandoor was excessive, although he did not take an air measurement. Tr. 69, 71. Boylen explained that he did not take a measurement because while the pipe was being removed from the door, miners cut the pipe in half and a piece of pipe swung to the right, striking Meadows and pinning him against the mine rib. Tr. 69-71. Boylen did, however, take an air reading outside break # 34. That reading measured 130,000 cubic feet per minute (cfm), with the mandoor closed. Tr. 73, 89.

Boylen testified that he was concerned about the effect that a propped-open mandoor would have on the ventilation system. Specifically, Boylen testified:

All right. By experience I know the network of this longwall ventilation system. I know that this entire area is being ventilated with multiple intakes and only one return. The pressure from intake to the return was excessive simply because the design of this system. And with the mandoor open it allowed a great amount of air to go from the intake to the return and in my opinion disrupted the entire ventilation schematic of the longwall, which includes the entries over on the headgate, which are the main intake entries, which includes the longwall face and also includes the bleeder network behind the longwall face.

....

Air will take the path of least resistance. The network of ventilation controls throughout this entire longwall panel is designed purposely so that the flow of air can be controlled and can be controlled continuously allowing normal mining to continue. And with this door open, that entire schematic, that entire scheme of ventilation was put in jeopardy.

....

[F]or this personnel door that was part of the ventilation control to be open for an hour and a half, to be open normally in any condition based on the air flow disrupted the air of that entire longwall network to where one couldn't predict now where methane's going to exist or where there's a potential for problems such as ignitions and/or explosions.

....

Because of the blue creek coal seam the methane is being liberated continuously. Greater amounts occur up on the longwall mining face area and greater amounts are in the bleeders because that's designed to maintain the ventilation to take care of methane.

Tr. 66-68. Boylen further testified that the greatest risk of methane accumulation in this gassy mine occurs on the longwall face and in the bleeder section. Tr. 68.

Boylen reviewed production reports from August 16, 2012. Those reports indicated that miners were changing out a trapping shoe on the tailgate side between 7:30 a.m. and 11:00 a.m., an interval during which the pipe had propped open the mandoor. Tr. 103. Boylen testified that this task normally requires cutting and welding, and that such maintenance on mine equipment has resulted in numerous face ignitions in the district. Tr. 103-04.

On August 20, 2012, four days after the citation was written, Boylen sent inspector Willis to Shoal Creek Mine to take an air-pressure reading at the mandoor. Tr. 74. Willis took a Magnehelic pressure reading at 1.4 pounds per mercury. Tr. 75. Ventilation specialist, Brandon Russell, was consulted. Based on Willis's reading, Russell concluded that 28,093 cfm of air was travelling through the mandoor. Tr. 76. On cross examination, Boylen testified that the airflow through the mandoor on August 16, 2012 was lower than 28,093 cfm because the pipe was lodged through the mandoor. Tr. 141. The pipe was approximately 1.2 square feet in diameter and the door was 6.25 square feet in diameter. Tr. 92, 141. Taking this differential into account, Boylen testified that the airflow would have been closer to 23,000 cfm on August 16. Tr. 141-142.

Ventilation specialist, Steven Harrison, also testified for MSHA regarding the ventilation at Shoal Creek Mine. Tr. 170-71.<sup>4</sup> Harrison testified that air was travelling at about 14,500 to 24,500 cfm through the open mandoor at the time of the citation. Tr. 229-31. To make his calculations, Harrison used two formulas, one published and one unpublished. Tr. 197, 229-30, 294-95, 312. Harrison ruled out the possibility that less than 9,000 cfm was travelling through the propped-open mandoor on August 16. Tr. 205. Harrison emphasized that the August 20 reading was taken after water had been pumped down. Therefore, according to Harrison, that reading reflected higher pressure and less air flow than what was present on August 16. Tr. 205, 243.

A weekly examination from August 15, 2012 indicated that the water levels at various breaks were over boot level or waist deep. Tr. 243. Harrison opined that this amount of water would have obstructed airflow in the number 1 entry on the upwind side, and increased the

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<sup>4</sup> Harrison evaluates ventilation plans and conducts mine ventilation examinations for MSHA. Tr. 177. Harrison was assigned to review the ventilation plan and conduct inspections of the Shoal Creek Mine. Tr. 178. Before joining MSHA, Harrison was a mining engineer for 26 years. Tr. 171. For 23 years, Harrison worked in the ventilation department at Consolidation Coal Company. Tr. 171. Harrison worked for Drummond at the Shoal Creek Mine for 14 months, assessing ventilation issues until he was laid off. Tr. 174. Harrison has published three papers on ventilation. Tr. 176-77.

pressure drop across the mandoor. Tr. 205. Harrison also reviewed the mine's weekly examination reports and found that on August 15 and 16, the air readings showed a 30,000 to 40,000 cfm spike on the intake and return entries. Tr. 228. Harrison attributed this significant increase to a short in the ventilation system, which was likely caused by the mandoor being left opened as early as August 15 to transport roof supplies. Tr. 229. In fact, Superintendent Meadows testified that between 800 to 1000 crib blocks were carried through the man door between August 14 and August 16. Tr. 377, 378.

At the time the citation was issued, the Shoal Creek Mine utilized a "wraparound bleeder system" in which intake air enters the longwall face and travels across the three headgate entries. Tr. 182, 184. Some air is lost as it travels back toward the gob. Tr. 186. This system required that the mine have a t-split, allowing some air to travel back to the caved area to allow attraction of air on the face toward the back. Tr. 187. Harrison explained that the pull of air toward the back of the section allows the mine to control the accumulation of methane and to maintain oxygen levels at the face. Tr. 187, 189, 190-93. Under this system, there must be a relative vacuum at the tail gate number three corner to pull the air. Tr. 190. Without this pull, air will become stagnant or reverse flow, allowing methane from the gob to go toward the active face. Tr. 195. Harrison testified that since Shoal Creek has a single air course to pull three splits, if a ventilation change affects a single return entry, the other air splits are also affected. Tr. 192, 195.

Harrison further testified that the conditions in the mine and the duration of the alleged violation made it reasonably likely that methane in the area would migrate toward the active face, and, if an ignition source was present, an explosion could result. Tr. 198-99. Harrison testified that power on the longwall face would present potential ignition sources that could ignite the methane that was migrating to the active face because of the open mandoor. Tr. 201. Harrison further testified that even if the longwall had been shut down, miners repairing or replacing parts, and welding with a torch, would create an ignition source. Tr. 252.

#### **IV. Legal Analysis**

##### **A. Respondent Violated Section 75.333(h) by Propping Open a Mandoor with a Large Pipe for at least 90 Minutes on August 16**

Section 75.333 sets forth mandatory health and safety standards for underground coal mine ventilation controls. 30 C.F.R. §75.333. As noted, the standard mandates that "[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built." 30 C.F.R. § 75.333(h). The standard lists personnel doors (or manddoors) as a type of ventilation control, and directs that they "shall be constructed on noncombustible material and shall be of sufficient strength to serve their intended purpose of maintaining separation and permitting travel between air courses. . . ." 30 C.F.R. § 75.333(c).

Neither party disputes that the cited mandoor is a ventilation control that separates intake air from return air. R. Br. 10; P. Br. 16. The parties dispute whether, by leaving the mandoor open for an hour and a half and pushing a drainage pipe through it, the mandoor was being maintained for the purpose for which it was built. The Respondent argues that because the mandoor was not damaged or in disrepair, it was being maintained properly. R. Br. 10. The Secretary contends, however, that because the door was propped open with a pipe, the mandoor could not serve its intended purpose of separating air courses. P. Br. 19.

The term “maintained” is not defined in the standard or in 30 C.F.R. Part 75. The Commission applies the ordinary meaning of the term “maintain,” in absence of a technical usage. *Sedgman*, 28 FMSHRC 322, 329 (June 2006). The Commission has held that the term “maintain” means “to keep in a state of repair, efficiency or validity.” *Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1765-66 (Nov. 1997), quoting *Webster's Third New International Dictionary* (unabridged) 1362 (1986)). Elsewhere, the Commission has found that “maintain” means “uphold,” “keep up,” “continue,” or “preserve from failure or decline.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-08 (July 2001).

The Commission has held that an operator fails to maintain equipment if the equipment is not capable of “producing the appropriate or designed effect,” or is used in a manner that defeats its intended purpose. *Jim Walter Resources, Inc.*, 19 FMSHRC 1761, 1766 (Nov. 1997). The Commission has further explained that “[i]nclusion of the word ‘maintain’ in a standard makes it clear that equipment ‘shall be capable of performing on an uninterrupted basis and at all times.’” *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759 (Aug. 2011).

By propping open the mandoor for over an hour and a half, and using it as a passageway to transport a very large pipe with a loader, Drummond did not maintain the mandoor to serve the purpose for which it was built as contemplated by the cited standard. The mandoor was not being maintained in a state of efficiency because it was propped open for an extended period of time thereby preventing it from fulfilling its intended purpose of separating air courses and allowing the brief passage of personnel between air courses. Rather, the mandoor was being used *in a manner that defeated its intended purpose* and the door was not able to *produce its designed effect* of separating return and intake air. On August 16, if not before, the mandoor was left open for an extended period of time, which meant that it was not *capable of performing ventilation control on an uninterrupted basis*.

Respondent argues that it did not fail to maintain the mandoor in violation of 75.333(h) because “[t]he mandoor was not damaged, in disrepair, or in a state of decline,” and was “fully functional and useable.” R. Br. 10. I reject this argument as the mandoor *was not* functioning as intended when it was propped open and blocked with a drainage pipe. The Respondent proffered several cases where Commission judges held that holes or leaks in ventilation control are indicative of improper maintenance. R. Br. 10; *Twentymile Coal Co.*, 34 FMSHRC 2293 (Aug. 2012) (ALJ); *Twentymile Coal Co.*, 33 FMSHRC 1885, 1892-93 (Aug. 2011) (ALJ). Respondent’s reliance on these judges’ decisions is not binding or persuasive because the term “maintain” can and does require more diligence on the part of the operator than simply ensuring that there are no holes or leaks in a ventilation control.

Respondent further argues that the mandoor may be open while it is in use because the ventilation control standard dictates that “when not in use, personnel doors shall be closed.” R. Br. 11, citing 30 C.F.R. § 75.333(c)(3). This argument is also unpersuasive. The mandoor by its very nature must open to allow personnel through. See *ICG Knott Co.*, KENT 2009-872 (Aug. 2013) (ALJ) (“[m]andoors are for egress but remain closed otherwise.”). Although the standard is silent about the exact duration that a mandoor may be open, leaving it open for an extended period of time, such as 90 minutes, would prevent the mandoor from controlling ventilation.

An operator is tasked with ensuring that the mandoor is in a constant state of efficiency, i.e., it must be closed when it is not being used for its intended purpose as a means of brief ingress or egress, without disrupting ventilation. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-08 (July 2001) (holding that the word “maintain” in a standard incorporates an ongoing responsibility on the part of the operator). Section 75.333(c)(3) dictates that a mandoor must be closed when not in use. Section 75.333(h) requires that a mandoor, as a ventilation control, be maintained to serve its intended purpose. Even though the two safety standards impose separate requirements, both can be applicable to the conduct at issue. *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1084 (10th Cir. 1998). Here, both standards are relevant to the facts surrounding the citation and Drummond must comply with both simultaneously.

The parties disagree about the intended purpose of the mandoor. Respondent contends that it should be allowed to transport a drainage pipe through the mandoor to fix the damaged pipe near the roof fall. R. Br. 11. The Secretary argues that the mandoor is intended to allow personnel to pass through. The Secretary concedes that the personnel door can be used to transport supplies, but only those that can be carried by hand as a miner passes through the mandoor, not large equipment that requires the door to remain propped open. P. Br. 18; Tr. 64, 110, 111-12, 117, 364-65. The Respondent counters that distinguishing hand-held supplies from larger equipment is too confusing, and that a loader pushing a large drainage pipe through a mandoor should be acceptable because the pipe is a type of supply. R. Br. 12.

I conclude that allowing the mandoor to be propped open for 90 minutes to transport a large pipe with a loader would stretch the purpose of the standard beyond the bounds of reasonableness. The context and wording of the regulation make the Secretary’s interpretation of the mandoor’s intended purpose more reasonable and self-evident. The term personnel door (or colloquially “mandoor”) itself makes clear that it is to be used for personnel ingress and egress. The personnel door is listed as a ventilation control, and is to be closed when not in use, which suggests that it should not to be propped open to transport large equipment. *Cf., Wolf Run Mining Company*, 32 FMSHRC 1669, 1682 (2010) (holding that the Secretary’s interpretation is practically self-evident given the context of the regulation.)

The Respondent argues that they were not given fair notice of the standard before receiving the citation. R. Br. 13. The Respondent further argues that the Secretary has provided no explanation why it is impermissible to transport the drainage pipe through the mandoor with a loader. The Respondent also contends that because the pipe was too heavy to be cut into pieces and hand carried through the mandoor without injury, the Secretary’s interpretation of the regulation is contrary to the Mine Act and unreasonable. R. Br. 12.

I do not find the cited regulation to be vague or overly broad, or to provide inadequate notice simply because it does not list every action proscribed, address a specific time period, or mandate what supplies may be carried through the mandoor by a miner travelling between air courses. *See Walker Stone Co.* 156 F.3d 1076, 1084 (10th Cir. 1998)(“regulations cannot specifically address the infinite variety of situations which employees may face and that by requiring regulations to be too specific, we open loopholes, allowing conduct which the regulation is intended to address to remain unregulated.”).

The Commission does not require that the operator receive actual notice of the Secretary's interpretation. Rather, the Commission applies an objective, reasonably-prudent-person test. *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996)(when faced with a challenge that a safety standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (the test “is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.”).

Additionally, the Commission has held that an operator has fair notice so long as the Secretary's interpretation of the standard does not seem “so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the operator] of the agency's perspective.” *Island Creek Coal Co.*, 20 FMSHRC 14, 25 (Jan. 1998). This is particularly true when no evidence is presented that MSHA ever construed the standard in a manner inconsistent with its position in the instant case. *Island Creek Coal Co.*, 20 FMSHRC 14, 25 (Jan. 1998). No evidence was presented in this case that MSHA ever enforced the standard inconsistently.

Applying the Commission's reasonably-prudent-person test, the operator should have recognized that using a loader to transport a large drainage pipe through a mandoor that was propped open for 90 minutes was prohibited by the standard. I find that a reasonably prudent operator would understand that the mandoor is to be used for ventilation control, and that using large equipment to push a pipe through while the manor was propped open would interfere with this use, especially over an extended period.

Perhaps more importantly, Meadows had actual notice that leaving a pipe through a mandoor was prohibited. Meadows testified that he was aware at the time that he was developing the pipe transport plan that the Shoal Creek Mine had received a previous citation for a having a pipe prop open a mandoor in a fixed position for an extended period. Tr. 364-65.

The very purpose of requiring that the mandoor be closed when not in use and maintained for its intended use is to protect miners from the possible effects of accumulation of methane and other toxic or contaminated air at an active working face through disruption of the ventilation control. The Secretary's interpretation of the cited standard is reasonable and promotes this objective, which fosters miner safety and health.

## **B. The Violation was S&S**

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal*, *supra*, 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)). I will address each factor in turn.

### **1. There was a Violation of a Mandatory Safety Standard**

For the reasons set forth above, I have found a violation of a mandatory safety standard, satisfying the first prong of the *Mathies* test. Drummond violated 75.333(h) by propping open a mandoor, which was used to regulated airflow, for an extended period of time, while using a loader to push a large drainage pipe through the mandoor.

### **2. The Violation Contributed to a Discrete Measure of Danger to Safety**

The failure to maintain the mandoor for the purpose for which it was built, by propping open the mandoor for 90 minutes in order to transport a large pipe, contributed to a discrete measure of danger to safety. The violation interrupted mine ventilation, which would likely result in an accumulation of methane in the active working face, near potential ignition sources, which would result in a fire. The hazard contributed to by the violation was a methane-related fire caused by interrupted ventilation which would result in an increased amount of methane at the active working face, where ignition sources were present. As such, I find the second prong of *Mathies* is met.

### **3. The Violation Contributed to a Hazard That Was Reasonably Likely to Result in Injury**

The third *Mathies* factor is typically the most disputed aspect of the S&S analysis, and often the most difficult to apply. The Secretary proves that this element is established if there is “a reasonable “likelihood 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). When analyzing the violation, the Commission has indicated 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.” *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

In examining the third element for violations that involve hazards of ignition, fire, or explosion, the Secretary must prove that such a hazard is reasonably likely to occur, in addition to proving that the hazard is reasonably likely to result in an injury. *Ziegler Coal Co.*, 15 FMSHRC 949, 953 (June 1993). The Commission held in *Ziegler Coal* that a finding that a fire or explosion hazard is reasonably likely to occur is a necessary pre-condition to finding that an

injury is reasonably likely to occur. *Id.*, citing *U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984). When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether the requisite “confluence of factors” is present based on the particular facts surrounding the violation. *Enlow Fork Mining Co.*, 5 FMSHRC 5, 9 (Jan. 1997), citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Stated more succinctly, is there a confluence of factors that make a fire and concomitant injury reasonably likely? *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990). The Commission has held that the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area. *Excel Mining, LLC*, 37 FMSHRC \_\_\_, slip op. at 7, No. KENT 2009-1368 (Mar. 9, 2015); *Utah Power & Light Co.*, 12 FMSHRC at 970-71 (Oct. 1990); *Texasgulf*, 10 FMSHRC at 501-03 (Dec. 1998).

There was a unique ventilation system in place, and according to MSHA ventilation specialist Harrison, any interruption, such as a mandoor propped open for an extended period, would affect the ventilation system. Tr. 192, 195. When the ventilation system is uninterrupted, the pull of air toward the back of the section allows the mine to control the accumulation of methane and maintain oxygen levels at the face. Tr. 187, 189, 190-93. The Shoal Creek mine needed an air pull at the tailgate number three entry corner to bleed methane gas to the back end of the section, away from the face, to avoid a methane ignition. Tr. 187, 189-90. This is especially important because the Shoal Creek Mine is a gassy mine that was on a five-day spot inspection at the time of the violation. Tr. 46. The Commission has held that if a mine liberates high levels of methane there may be an even greater potential for methane ignition to occur and that this may be considered in a confluence-of-factors analysis. *Excel Mining, LLC*, 37 FMSHRC \_\_\_, slip op. at 7, KENT 2009-1368 (Mar. 9, 2015); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1134 (May 2014).

As MSHA supervisory inspector Boylen testified, the greatest risk of methane accumulation occurs on the longwall face and in the bleeder section. Tr. 68. There were numerous potential ignition sources present at the face. At the time of the violation, the longwall was energized. Tr. 80, 82. Harrison testified that power on the longwall face created potential ignition sources that would ignite methane. Tr. 201. Harrison further testified that even if the longwall had been shut down, miners repairing or replacing parts, and welding with a torch, would create an ignition source. Tr. 252. As noted, Boylen reviewed production reports from the date the citation was written. They showed that between 7:30 a.m. and 11:00 a.m., during the time interval when the pipe had propped open the mandoor, miners were changing out a trapping shoe on the tailgate side. Tr. 103. This task required cutting and welding, which created sources of ignition. Tr. 104. Boylen testified that in his experience in the district, such maintenance of mine equipment has resulted in ignitions at the face on various occasions. Tr. 104.

The Respondent argues that because an air measurement was not taken on the date of the violation, the Secretary has not met his burden of proving a reasonable likelihood of a disruption in ventilation and a subsequent methane ignition under the third prong of the *Mathies* test. R. Br. 14. Boylen credibly explained that he did not take readings at the time the citation was issued because the pipe was in the way, and Meadows was eventually pinned to the wall by the pipe and injured during the transport operation. Tr. 69-70. The Secretary presented convincing

testimonial evidence based on several calculation methods used by ventilation specialist Harrison that air pressure was affected by the violation. Tr. 197, 229-30, 294-95, 312. Further, the records from the days in between the rock fall and the issuance of the citation show a change in the ventilation, supporting the testimony of Boylen and Harrison. Tr. 228. The Commission has held that an inspector's judgment is an important element in an S&S determination and may be relied upon as part of the S&S analysis. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *Mathies*, 6 FMSHRC at 5 (Jan. 1984) (citing *National Gypsum*, 3 FMSHRC at 825-26 (Apr. 1981); see also *Buck Creek Coal*, 52 F.3d at 135-36 (7th Cir. 1995)(ALJ did not abuse discretion in crediting opinion of experienced inspector).

The conditions at the mine at the time the citation was written and the duration of the violation for 90 minutes made it reasonably likely that as ventilation was interrupted, methane would migrate to the active face, where ignitions sources were present, and result in a methane ignition, fire or explosion. Tr. 198-99. Methane liberation from this gassy mine and the unique ventilation system described herein, made it reasonably likely that as the open mandoor disrupted ventilation, methane or other toxic or contaminated air would accumulate at the face. There were ignition source present at the face, including the energized longwall and welding equipment that was in use to make repairs. Given the oxygen present in the atmosphere, the requisite confluence of factors was present to make it reasonably likely that a methane ignition, fire, or explosion would occur causing injury to miners working there. Tr. 82, 103, 252.

#### **4. There Was a Reasonable Likelihood That the Injury in Question Will Be of a Reasonably Serious Nature**

With regard to the fourth *Mathies* factor, the record establishes that a methane-related fire or explosion contributed to by the violation was reasonably likely to result in serious injury or illness to miners working at the face, who would suffer burns or inhalation of toxic chemicals, primarily carbon dioxide. Tr. 82.

In sum, considering all the relevant factors, I find the violation was properly designated as S&S.

#### **C. The Citation's Remaining Gravity Determinations were Appropriate**

Boylen reasonably determined that "10 persons" were affected by the violation given the number of miners working inby the mandoor when the pipe was being transported. Tr. 83, 351-52. According to Boylen, at the time the citation was written, ten miners were working at the mandoor, and four to eight miners were working on the longwall. Tr. 83. I also find that the designation of "lost workdays or restricted duty" was appropriate for this violation. Boylen credibly testified that if a methane-related fire, ignition or explosion occurred as a result of the interruption in ventilation, miners would suffer burns or inhale smoke or toxic chemicals, primarily carbon dioxide. Tr. 82.<sup>5</sup>

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<sup>5</sup> It is noteworthy that although no evidence or testimony was offered on the subject, the return air being sent to the longwall as a result of ventilation interruption could have contained (continued...)

#### **D. Respondent Acted with Moderate Rather Than High Negligence by Using the Mandoor to Facilitate Transport of the Large Drainage Pipe**

The parties disagree as to whether the violation was properly attributed to Respondent's high negligence. P. Br. 22; R. Br. 16. Although not binding on the Commission, MSHA defines negligence by regulation in the civil penalty context as "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." Negligence is further defined as "the failure to exercise a high standard of care." 30 C.F.R. § 100.3. A high negligence designation is appropriate when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3 Table X. A moderate negligence designation is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

I emphasize that the Mine Act imposes a high standard of care on foremen and supervisors, like superintendent Meadows. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman ... is held to a high standard of care"); *see also Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction," quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

The Respondent argues that its level of negligence should be reduced from high to moderate because the Secretary did not present a history of violations of the cited standard. R. Br. 17. I find that argument unpersuasive. As noted above, Superintendent Meadows testified that he knew that the Shoal Creek Mine had been cited under similar circumstances in the past. Such knowledge put him on notice that a large pipe propping open a mandoor for an extended period of time was a violation. Meadows conceded:

There's a lot of instances where we have got citations at Shoal Creek, I'm almost embarrassed to say, but even the same situation with the pipe going through a man door, but the difference being someone had installed the pipe through a man door and left it there in a fixed position. That is a violation.

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<sup>5</sup> (...continued)

respirable dust and increased the level of respirable dust at the face, where miners were working. The Commission has held that overexposure to respirable dust can result in chronic bronchitis and pneumoconiosis in miners. *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987). The Commission further held with regard to the fourth *Mathies* factor that "there is a reasonable likelihood that illness resulting from overexposure of respirable dust will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987).

Tr. 364. Meadows was aware that the reason why propping open a personnel door was a violation was because of the lasting disruptive effect on the ventilation system. See Tr. 365. For example, Meadows recalled that in one past citation at Shoal Creek Mine, a “pumper would run a flexible hose through a man door that wouldn't allow the man door to close completely.” Tr. 365.

Meadows developed the plan to use the loader equipment to drive the 300-foot piece of pipe through the mandoor. Tr. 328. Meadows stated that the actual length of pipe that he needed was “[p]robably 70 to 80 feet,” rather than the several-hundred-foot portion that was pushed through the mandoor. Tr. 327. Meadows never measured the pipe to determine the length necessary. Tr. 328. Had Meadows cut a much smaller portion of pipe, this action would have at least limited the time that the mandoor was propped open.

While developing and executing the plan, Meadows failed to mitigate the risks presented by the open mandoor. The longwall operation was not shut down or informed of the open mandoor and potential for ventilation disruption. Respondent took no air readings while moving the pipe through the mandoor. Tr. 81-82, 104-05, 386. Meadows testified that he knew a portion of air would go through the mandoor if it was propped open. Nevertheless, Meadows did not consult with any of Drummond’s ventilation engineers, or with MSHA ventilation specialists present that day to examine the roof fall. Tr. 329, 384-85. MSHA witnesses presented several alternatives for transporting the drainage pipe to the rock fall, such as using a Kennedy stopping or equipment doors and an airlock curtain, which would minimize ventilation disruption. Tr. 24, 97, 99-101, 241. Thus, Meadows’s plan was not the only option available. Furthermore, Meadows did not take steps to mitigate any ventilation impact. As a result, MSHA inspectors had to direct miners to place a can bag over part of the mandoor aperture. When the can bag was displaced during the pipe-transport operation, miner Andy Martin had to search abruptly for a curtain. Tr. 358-59.

Respondent argues that because MSHA supervisor Boylen presented conflicting ways to transport the pipe at his deposition and at the hearing, Respondent’s negligence should be reduced. Respondent further argues that Boylen did not offer Meadows an alternative prior to issuing the citation on August 16. R. Br. 17. I note, however, that Respondent has the primary responsibility to ensure mine safety and health, and that had superintendent Meadows asked for input from MSHA or conferred with his own ventilation specialists or engineers prior to implementing his large pipe-transport plan, he would have likely developed a better and safer solution to his conundrum.

Despite the foregoing, I find some mitigating circumstances present and conclude that Meadow’s negligence falls closer to moderate than high negligence. Although Meadows did not select the safest method for transporting the drainage pipe, he did attempt to do so safely. Meadows checked the regulators when the mandoor was open to ensure that positive air was flowing through them. Tr. 361. He communicated his pipe-transport plan to supervisors and held a briefing with the transport crew. Tr. 387-88. He considered other ideas, such as using a bleeder entry, but determined that there were significant hazards with such options. Tr. 355-56, 406-08.

In addition, the damaged drainage pipe near the roof fall needed to be repaired expeditiously because the flooding would significantly affect ventilation. Tr. 374. Meadows

credibly testified that he and his team were operating with urgency. Tr. 323. As noted, a roof fall had occurred on August 14 and damaged a drain pipe at the roof fall area. Tr. 63-67. From August 14 to August 16, work was done to improve roof support so that the damaged pipe could be repaired. Tr. 323-25. Meadows needed to ensure that the non-functioning water pumps would be restored to functional status to prevent water from filling the mine, which would create a host of additional problems. The applicable weekly examination report stated that there was “water over boots” at crosscut 38 and “water waist deep” at crosscut 47. Tr. 243.

Thus, while Meadows knew or should have known of the violation and acted negligently in developing and executing his plan to transport the drainage pipe through the propped-open mandoor, some mitigating factors were present. Accordingly, I reduce the level of Respondent’s negligence from high to moderate on these facts.

### **E. Penalty Assessment**

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: 1) the operator’s history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator’s negligence; 4) the operator’s ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary’s assessment formula as a reference point when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm.

The parties stipulated that Respondent is a large operator and that the originally proposed penalty of \$8,893 would not affect Respondent’s ability to remain in business. MSHA recognized Respondent’s good-faith compliance in abating the citation. I have reduced Respondent’s negligence from high to moderate. The violation was serious and properly designated as S&S. Accordingly, I assess a \$2,678 civil penalty against the Respondent.

## V. ORDER

For the reasons set forth above, Citation No. 4481323 is **MODIFIED** to reduce the level of negligence from “high” to “moderate.” Within 30 days of the date of this decision, Respondent, Drummond Company, Inc. is **ORDERED TO PAY** a civil penalty of \$2,678 for the S&S violation found herein.

/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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June 4, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

Drummond Company, Inc.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE-2014-0197  
A.C. No. 01-02901-344208

Mine: Shoal Creek Mine

**DECISION AND ORDER AFFIRMING BENCH DECISION  
AND APPROVING SETTLEMENT**

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

Noelle Holladay True, 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 Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

Docket No. SE 2014-0197 involves two citations, Citation Nos. 8527643 and 8527576. The parties submitted a joint motion to approve settlement of Citation No. 8527643. Citation No. 8527576 remains in dispute.

On January 15, 2014, MSHA inspector Timothy Fisher issued section 104(a) Citation No. 857576 to Drummond's Shoal Creek Mine. P. Ex. 1. The citation alleged a violation of 30

C.F.R. § 75.1506(a)(1), which sets forth standards for underground coal mine refuge alternative components.<sup>1</sup> Specifically, the citation states:

The operator has not installed components approved pursuant to 30 CFR part 7 in its 24 person Mine Arc refuge alternative serial No. MAA-110 located on the West Main (MMU-001-0) section at survey spad no. 87 + 82 (crosscut no. 103) in the crosscut between no. 3 and the no. 4 entry. After December 31, 2013, all refuge alternatives used in underground coal mines must be equipped with Part 7 approved breathable air, harmful gas removal and air-monitoring components. This refuge alternative was not equipped with these Part 7 approved components. This refuge alternative is a critical part of MMU-001-0.

P. Ex. 1. The citation was designated as unlikely to result in a fatal injury, with 24 persons affected, as a result of low negligence. P. Ex. 1. A \$946 civil penalty was proposed. Tr. 138.

The Respondent argues that the citation should be vacated because it had installed or ordered all components as they were approved by MSHA. Further, the Respondent asserts that it has a “valid, bona fide, written purchase order” for the last component MSHA approved, which is consistent with the preamble to the final rule (73 Fed. Reg. 80657) and with MSHA’s Published Guidance, “Q&A on Refuge Alternatives Requirements.” R. Br. 3.<sup>2</sup> Respondent also argues that if a violation is found, the fatal designation was incorrect, and that the Respondent acted with no negligence, rather than low negligence. R. Br. 3.

The Secretary contends that Drummond’s approval plate was not in a conspicuous position on its refuge chamber and that the plate did not indicate whether the required components were installed. Tr. 14. The Secretary also argues that Part 7 approved components were available and that the installation in a mine depended on the interaction between manufacturers and operators. Tr. 15.

The issues presented are whether Respondent violated 30 C.F.R. § 75.1506(a)(1), whether any such violation could have reasonably been expected to result in fatality, and whether negligence was properly designated as “low.”

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<sup>1</sup> 30 C.F.R. § 75.1506 (a)(1) states that “[e]ach operator shall provide refuge alternatives and components as follows: (1) Pre-fabricated self-contained units, including the structural, breathable air, air monitoring, and harmful gas removal components of the unit, shall be approved under 30 CFR Part 7 . . . .”

<sup>2</sup> The purchase order was received into evidence as Respondent’s Exhibit 1. R. Ex. 1; Tr. 9. The List of Part 7 approvals was received into evidence as Respondent’s Exhibit 2. R. 2; Tr. 9.

A hearing was held in Birmingham, Alabama on April 7, 2015. Witnesses were sequestered. At hearing, the parties stipulated to the following:

1. Drummond Company, Inc., is subject to the Federal Mine Safety and Health Act of 1977.
2. Drummond Company, Inc., mines and produces coal which enters into and which has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Drummond Company, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Further, the administrative law judge has the authority to hear this case and issue a decision.
4. A reasonable penalty will not affect Drummond Company, Inc.'s ability to remain in business.
5. Drummond Company, Inc. is a large-sized operator.
6. A true copy of Citation No. 8527576 was served on Drummond Company, Inc. as required by the Mine Act.
7. Drummond Company, Inc. did abate Citation No. 8527576 in good faith.

Jt. Ex. 1; Tr. 7.

After hearing witness testimony and considering record evidence and opening and closing statements from both parties, I issued a bench decision vacating Citation No. 8527576.<sup>3</sup> Having carefully reviewed the record, I affirm my bench decision, as set forth below.

## **II. Bench Decision and Affirmation**

The standard that was cited by Inspector Foster on 1/15/2014 states that each operator shall provide refuge alternatives and components as follows:

Paragraph 1, prefabricated self-contained units including the structural breathable air, air-monitoring, and harmful gas removal components of the unit shall be approved under 30 CFR Part 7.

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<sup>3</sup> 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.

I find that the Respondent, Drummond, was in compliance with the standard because the air-monitoring component was approved by MSHA on 9/11/2013. When Drummond was unable to obtain from a long-time provider of similar components, MineARC, the equipment, by late December, Mr. Clements, according to his credited testimony, felt that he was being given the runaround by Mr. Rau, and he took prudent steps to contact the MSHA-approved provider, Industrial Scientific Corp., through one of their distributors. Respondent had submitted a purchase order, Respondent's Exhibit 1, which is dated November 26, 2013 with a confirmed delivery date or due date of 12/27/2013, which would have met the 12/31/2013 deadline. The original question and answers dated July 9th, 2013 from MSHA's Refuge Alternative Requirements, and from April 29th, 2009 concerning the Final Rule on Refuge Alternatives provides that a purchase order with a firm delivery date may be accepted by the district manager.

Mr. Clements credibly testified that [he has] a past practice of dealing with the District, through purchase orders, and when he was -- when he has presented a purchase order, MSHA has dealt with him favorably or leniently. In this case, they failed to do so based on instructions from the inspector that if they did not see the approval tag when they went underground, they were to issue a citation.

I find under those circumstances that this citation is an abuse of discretion and that the Respondent was in compliance with the standard.

Tr. 140-41.

Based upon further reflection and review of the transcript, I find that MSHA's failure to approve the MineArc air-monitoring component by the December 31, 2013 deadline or to accept the purchase order for the MSHA-approved Industrial Scientific air monitoring component left Drummond in a position amounting to impossibility of performance due to factors outside its control, despite its good-faith efforts at compliance. Furthermore, additional facts support my conclusion that it was arbitrary and capricious and an abuse of discretion for MSHA to issue Citation No. 8527576. In these circumstances, the citation is appropriately vacated.

The following facts are instructive. It is undisputed that by December 31, 2013, all underground mine operators were required to install three MSHA-approved components in their refuge chambers, a breathable air component, a harmful gas removal component, and an air monitoring component. Tr. 27. Drummond had the MSHA-approved component for breathable air and harmful gas. Tr. 122. Drummond had an air monitoring component on the cited refuge chamber, but it was not the approved version required by MSHA. Tr. 104, 122.

Initially, Drummond attempted to order the air-monitoring component from MineArc, who had manufactured the refuge chamber itself. In early 2013 through November 2013, Clement was in contact with a sales manager from MineArc to order the air-monitoring component. Tr. 90-93, 130. Thereafter, toward late November 2013, Clements determined that MineArc was giving him the runaround, especially since MSHA had not yet approved MineArc's air-monitoring component, and that Drummond was running out of time to meet the December 31, 2013 deadline. Tr. 113, 131. Clements also discovered that the MSHA-approved Industrial Scientific air-monitoring component was the same as the MineArc version. Tr. 114.

Accordingly, toward late November 2013, Drummond ordered an MSHA-approved air-monitoring component from Industrial Scientific based on its determination that the MineArc component would not meet the deadline. Tr. 113-14, 131; R. Ex. 1. The Industrial Scientific air-monitoring component had been approved by MSHA on September 11, 2013, a few months prior to MSHA's own December 31, 2013 deadline. R. Ex. 2.

Despite the proximity of the impending deadline, Industrial Scientific was the first manufacturer to have its air-monitoring component approved by MSHA. Tr. 110. The Industrial Scientific purchase order was dispatched on December 2, 2013 and scheduled to arrive on December 27, 2013, four days before the deadline. Tr. 115. United Central, the distributor for Industrial Scientific, did not meet the purchase order deadline. 113, 115.

In the meantime, the instant MSHA inspection took place on January 13, 2014. When inspector Foster arrived to check for the required refuge alternative components, Clements told Foster that he had ordered the MSHA-approved air monitoring component from Industrial Scientific, but it had not yet been delivered by distributor United Central. Tr. 94. Clements gave Foster a purchase order for the component. Tr. 102. Foster went back to his supervisor armed with this information, but was directed to issue the citation anyway and told how to write it. Foster returned to the mine and issued said citation on January 15, 2014. Tr. 31, 79; P. Ex. 1. The January 15, 2014 citation gave Drummond two weeks to abate, with no explanation for the time period chosen, and no rationale given at hearing. Tr. 118.

The MSHA-approved Industrial Scientific air monitoring component was received and installed by Drummond on January 16, 2014, just one day after the citation issued. Tr. 115. The MineArc component that Drummond initially sought to order was eventually approved by MSHA on January 17, 2014, two days after the citation issued. Tr. 112. Thus, despite its best efforts to comply with the cited standard by installing an MSHA-approved air-monitoring component in the cited refuge chamber, Drummond was unable to do so as a practical matter until MSHA issued the requisite MineArc approval for the air-monitoring component (Tr. 122) or the Industrial Scientific purchase order was delivered. *See generally Climax Molybdenum Co.*, 2 FMSHRC 1884, 1886 (July 1980) (ALJ) (vacating a citation based on respondent's defense of impossibility of compliance). *See also Jim Walter Resources, Inc.*, 25 FMSHRC 435, n. 11 (July 2003) (ALJ) ("It is not accurate to state . . . that an operator is always liable for a violative condition. There are exceptions, impossibility of compliance being one."); *Buffalo Mining Co.*, 2 IBMA 226, 259 (Sept. 1973) (holding that under the 1969 Coal Act, Congress did not intend that a civil penalty be assessed "where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians.")

Based on these facts, I find that Drummond has established a valid defense of impossibility of performance.<sup>4</sup>

In addition, the facts establish that MSHA's issuance of the citation was arbitrary and capricious and an abuse of discretion because contrary to its past practice of relying on purchase orders with a confirmed delivery date for refuge alternatives or components. Concededly, when analyzing MSHA's action, the Commission may not substitute its own judgment for that of the agency, but must consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See e.g., Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48-49 (1983). Expert discretion is said to be the lifeblood of the administrative process, but there must be a cogent explanation for agency action, including a rational connection between facts and judgment to pass muster under arbitrary and capricious analysis. *Id.* Consistency with past practice is pertinent in examining whether an agency's action is arbitrary and capricious. *Puerto Rico Sun Oil Co. v. U.S. E.P.A.*, 8 F.3d 73, 77 (1st Cir. 1993). I find that issuance of the instant citation was arbitrary and capricious and amounted to an abuse of discretion.

The record establishes that MSHA's past practice led Drummond to believe that it could rely on a purchase order for the MSHA-approved component that arrived a day after the citation issued. Tr. 102, 121. For example, when new refuge alternatives were required in underground mines, parts were often on back order with manufacturers because the entire industry needed them. Tr. 121. Thus, during prior inspections of refuge alternatives, MSHA accepted purchase orders from Drummond as proof of compliance with the new refuge alternative standard. Tr. 93, 121. In this case, Clements credibly testified that he gave inspector Foster an Industrial Scientific purchase order for the MSHA-approved air-monitoring component on the day of the inspection based upon his reliance on this past practice. Tr. 102.

Further, the issuance of this citation appears to be an abuse of discretion on the part of MSHA. The Commission has found an abuse of discretion when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985); *see also Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996). In particular, the Commission has held that an inspector abuses his discretion when he uses no independent judgment in issuing an order, but rather indiscriminately complies with a

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<sup>4</sup> Although air-monitoring component models from other manufacturers were approved by MSHA after Industrial Scientific, they were approved shortly before MSHA's deadline of December 31, 2013. Strata Safety Product's air-monitoring component was approved by MSHA on November 22, 2013; ChemBio Shelter's component was approved by MSHA on December 12, 2013; A.L. Lee's component was approved by MSHA on December 23, 2013; and Mine Shield's component was approved by MSHA on December 26, 2013. R. Ex. 2. These air-monitoring components, if ordered, would likely encounter the same delays in shipment, or simply not arrive at the mine by the deadline, even if dispatched on the day of approval. In any event, I find that Drummond was justified in relying on a purchase order from Industrial Scientific, which had a confirmed delivery date that fell within the MSHA deadline. I further find that the subsequent MSHA approvals were issued so close to the deadline that it made it practically impossible for an operator to comply with the standard.

directive to issue based solely on a single criterion. *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-58 (Aug. 2006) (holding there was an abuse of discretion where inspector was given instructions to issue an order based on a single criterion and thus had no discretion to make a reasonable investigation or use independent judgment).

In this case, inspector Foster was instructed by his superiors to issue a citation to the operator if there was no approval tag on the outside of the refuge alternative. Tr. 24. Foster was not directed to check for the requisite components, and he was not aware if the components were installed, only that there was no approval tag affixed to the refuge chamber. Tr. 26. According to Foster, inspectors were told how to write citations for refuge alternative components, including the format and verbiage to be used in the citation. Tr. 31. In fact, during a pre-inspection conference, Foster indicated to safety superintendent Clements that he was going to issue a citation for the absent component even before he saw the chamber or went underground. Tr. 96. Foster did not use his own judgment with regard to gravity designations, and MSHA did not take surrounding circumstances into account, including the purchase order with confirmed delivery date for the MSHA-approved Industrial Scientific air monitoring component. Tr. 31.

For all of the foregoing reasons, Citation No. 8527576 is vacated.

## **II. Joint Motion to Approve Settlement**

I have reviewed the parties' Joint Motion to Approve Partial Settlement. A reduction in penalty from \$1,203 to \$963 is proposed under the Settlement Agreement. The parties request that Citation No. 8527643 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the "significant and substantial" designation.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.<sup>5</sup>

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<sup>5</sup> Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four of the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

### III. Order

For the reasons set forth above, Citation No. 8527576 is **VACATED**.

The motion for approval of settlement of Citation No. 8527643 is **GRANTED**.

It is **ORDERED** that Citation No. 8527643 be **MODIFIED** to reduce the likelihood of injury or illness from “reasonably likely” to “unlikely,” and to delete the “significant and substantial” designation.

To the extent Respondent has not already done so, within 30 days of the date of this decision, Respondent, Drummond Company, Inc., is **ORDERED TO PAY** a total civil penalty of \$963.00 for the settled citation.<sup>6</sup>

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

Distribution:

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Latasha Thomas, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

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<sup>6</sup> 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**

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

June 5, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

NORTHERN ILLINOIS SERVICE CO.,  
Respondent.

CIVIL PENALTY PROCEEDINGS:

Docket No. LAKE 2013-616-M  
A.C. No. 11-02963-327093

Docket No. LAKE 2014-147-M  
A.C. No. 11-02963-338844

Mine: Portable #1

Docket No. LAKE 2014-2-M  
A.C. No. 11-03104-332298

Mine: Portable #2

**DECISION**

Appearances: Lauren Polk, Esq., U.S. Department of Labor, Office of the Solicitor,  
Denver, Colorado for Petitioner

Peter DeBruyne, Esq., Peter DeBruyne, P.C., Rockford, Illinois for  
Respondent

Before: Judge Barbour

In these consolidated civil penalty cases arising under the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), the Secretary of Labor (“Secretary”), on behalf of his Mine Safety and Health Administration (“MSHA”), petitions for the assessment of civil penalties for eight alleged violations of various mandatory safety standards for the nation’s surface metal and nonmetal mines (30 C.F.R. Part 56) and for one alleged violation of the training regulations for the nation’s surface nonmetal mines (30 C.F.R. Part 46). The allegations are the result of the inspection of two quarries, each owned and operated by Northern Illinois Service Co. (“the company”).<sup>1</sup> The Secretary asserts each alleged violation was caused by the

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<sup>1</sup> The company is headquartered in Rockford, Illinois. In addition to owning and operating several quarries, the company provides a wide range of demolition, earthwork, and design and build services. [www.nothernillinoiservice.com](http://www.nothernillinoiservice.com), (last visited May 12, 2015).

company's negligence as specified by MSHA's inspector, was of the degree of gravity specified, and that each alleged violation warrants a civil penalty of \$100.

After the petitions were filed, the company answered denying its liability. The matter was assigned to the court which ordered the parties to engage in settlement discussions. Shortly thereafter, the parties advised the court that they could not settle any issues, and the matter was heard in Rockford.<sup>2</sup> The Secretary offered the testimony of two witnesses, both MSHA inspectors, and the company called one management official.

**LAKE 2014-147-M**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>
8747007	11/13/2013	56.16005

Robert Bauman, who was the Secretary's only witness in Docket No. LAKE 2014-147-M, has been employed by MSHA as an inspector for over three years (Tr. 20), prior to which he had extensive experience working in the sand and gravel industry. Tr. 18-19. Bauman testified that on November 13, 2013, he traveled to one of the company's quarries to conduct an inspection. At the quarry, which measures approximately one half mile long by one half mile wide, stone is extracted by blasting and is crushed to different sizes to serve various purposes.<sup>3</sup> Tr. 39, 53-54. According to Brian Russell, the quarry foreman, the mine operates intermittently, and in 2013 there were only 52 days when stone was processed. Tr. 55.

After arriving at the mine Bauman went to the scale house trailer where he met Joyce Dagnon, the "scale person." Tr. 22, 41. Bauman also spoke on the telephone with Russell. *Id.* Russell, who described his duties as "[i]nspecting equipment . . . and oversee[ing the] crushing process and [the] load[ing of] trucks" (Tr. 61), told Bauman that he could not be at the quarry during Bauman's inspection because of duties at another facility. Tr. 41. Bauman asked Russell about the condition of the quarry and whether management was repairing or replacing any equipment. Bauman felt it was important to have the information so he would not cite the company for a violation involving equipment that was in the process of being repaired or

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<sup>2</sup> At the beginning of the hearing, the court entertained arguments on the Secretary's motion to plead alternatively alleged violations of 30 C.F.R. §56.12006 and 30 C.F.R. §56.12018 with regard to Citation No. 8741689 (Docket No. LAKE 2013-616-M). Tr. 14-16. The court granted the motion. Tr. 16-17.

<sup>3</sup> The principal features of the quarry are the scale house trailer, the shop, and the plant area. *See* Resp. Exh. 1; Tr. 52-53. The stone is crushed in the plant area which is near the bottom of the quarry. The primary crusher is located in the plant area along with a feed hopper and a feed conveyor. In addition to being crushed, the stone is screened and sized in the plant area. Then, it is transported by conveyor to where it is stockpiled and loaded onto customers' trucks. The loaded trucks are driven to the scale house trailer and weighed before they are driven from the mine. Tr. 44-45. When Bauman visited the plant area none of the plant equipment was operating. Tr. 41, 45. However, there was a front end loader loading stockpiled product into customers' trucks. Tr. 45.

replaced. Tr. 23-24. According to Bauman, Russell indicated that everything was the same as when the plant last operated on November 1.<sup>4</sup>

Bauman then traveled to the shop. Tr. 25, 30. There, the first person Bauman encountered was a loader operator. Bauman noticed two front end loaders parked on either side of two compressed gas cylinders. Tr. 30-31, 42. The cylinders, each of which was approximately four feet tall, were standing upright on the shop's level concrete floor. Tr. 44; Gov't Exh. 2 (LAKE 2014-147-M); *see* Gov't Exh. 3A (LAKE 2014-147-M). Neither cylinder was "secured."<sup>5</sup> Bauman noticed a bungee cord on the floor next to the cylinders. Bauman speculated the cylinders were "probably secured at one point and then someone . . . used them and moved them and forgot to tie them back up." Tr. 27. After Bauman mentioned the cylinders to the loader operator, the operator checked to see if they retained any gas. Both did. Tr. 27-28. Bauman concluded that the unsecured, pressurized cylinders constituted a violation of section 30 C.F.R. §56.16005, which requires compressed gas cylinders to "be secured in a safe manner." Bauman issued a citation to the company. Gov't Exh. 1 (LAKE 2014-147-M).

Bauman found that the unsecured cylinders could result in one person suffering a fatal injury. Gov't Exh. 1(LAKE 2014-147-M); Tr. 37. He stated if a cylinder "tipped over, the cap could come off, and the valve could get injured; and with the release of all that high pressure gas, [the cylinder] could turn . . . into a missile." Tr. 28. However, he did not think such a scenario was likely because there was nothing above the cylinders that might fall and knock them over and/or damage their caps and valves. In addition, the floor upon which the cylinders stood was smooth.<sup>6</sup> Tr. 29

Bauman also concluded that the failure to secure the cylinders was the result of the company's low negligence. He noted that Dagnon said the plant had been shut down since November 1.<sup>7</sup> Because the plant had not operated for almost two weeks, there had been no work place examinations of the shop. In Bauman's opinion management personnel simply "did not realize that [the cylinders] weren't secured." Tr. 30.

The condition was corrected when the loader operator tied up the cylinders. Tr. 27; *See* Gov't Exh. 3B (Lake 2014-147-m).

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<sup>4</sup> Bauman understood that operation of the plant depended on whether the company had orders for its products. Tr. 40-41.

<sup>5</sup> By "secured," Bauman meant that the cylinders were "tied up [and] attached to the wall . . . so they could not fall over." Tr. 26.

<sup>6</sup> By mentioning the smooth nature of the floor Bauman presumably meant that the cylinders were less likely to fall than if they were standing on an uneven floor.

<sup>7</sup> In his contemporaneous notes Bauman reiterated what Dagnon told him. Gov't Exh. 2 (Lake 2014-147-m). Bauman's notes were admitted over the objection of counsel for the company, who lodged continuing objections to the admission of all such notes. Tr. 33-34. The objections were overruled.

Brian Russell testified that although he recalled seeing the cylinders, he had no memory of using them or of seeing any one else use them. Tr. 57. Russell did not know why the cylinders were unsecured. *Id.* He added that he was uncertain why the cylinders were at the mine in the first place, and he did not know what they contained. Tr. 59

### **THE VIOLATION**

Section 56.16005 requires “[c]ompressed and liquid gas cylinders [to] be secured in a safe manner.” The cited cylinders were not secured in any manner, safe or otherwise. Inspector Bauman’s testimony that he found them standing unsecured and upright was not refuted. Tr.25-26, 44. In fact, Russell essentially agreed that the cylinders were in the condition described and photographed (Gov’t Exh. 3A(Lake 2014-147-M)) by Bauman. Tr. 57, 59. Because the cylinders were standing upright without restraints to hold them in place, they were in danger of falling if they were accidentally bumped by equipment or by miners working near the cylinders. The court finds that the violation existed as charged.<sup>8</sup>

### **GRAVITY**

The company did not challenge Bauman’s testimony that the unsecured cylinders could result in a fatal injury. Tr. 28, 37. Bauman described how one or both of the cylinders could tip over, how a cap over the top of the gas valve could come off, how a gas valve could be damaged and how a cylinder or cylinders could be propelled missile-like around the shop causing severe damage to anything and anyone it struck. Tr. 28. As Bauman noted, one loader operator was present when he conducted the inspection, and as mining continued from time to time other loader operators would park their equipment in the shop. Tr. 28-29, 37. However, Bauman did not think such an accident was likely and neither does the court. Operation of the plant was infrequent and neither equipment nor miners visited the shop on a regular basis. The court agrees with the inspector that the violation was not serious. Tr. 29.

### **NEGLIGENCE**

Bauman found that the violation was due to the company’s low negligence, and the court agrees. All of the testimony confirms that the shop was infrequently visited, that the mine had not functioned in almost two weeks and that, as the inspector noted, work place examinations had not been conducted because no recent work had been undertaken in the shop. Tr. 30. Moreover, it is reasonable to infer, as Bauman did, that the bungee cord on the floor near the cylinders indicates that the cylinders had been secured and that the cause of the violation was inadvertent, not purposeful. Tr. 25.

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<sup>8</sup> The court rejects the company’s assertion that the Secretary did not meet his burden because he failed to show that the unsecured cylinders were used in mine work. Co. Br. 9. The cylinders were located in the shop. The shop was indisputably a part of the mine. The cylinders were required to conform to standards applicable to the mine. Section 56.16005 is one of those standards.

**LAKE 2013-616-M**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>
8741687	6/5/2013	46.8(a)(2)

MSHA Inspector Wayne Crum testified with regard to the violations alleged in Docket No. LAKE 2013-616-M. On June 5, 2013, at 11:30 a.m., Crum visited the quarry. Tr. 68. Rock was not being crushed, but the plant's equipment was ready to start.<sup>9</sup> Tr. 101. As Bauman had done, Crum first traveled to the scale house trailer where he spoke with Dagnon. Tr. 68. Crum asked Dagnon who else was at the mine, and she told him that the only other person was Kent Winshop. Winshop was loading customers' trucks. Tr. 68-69, 136. Dagnon also told Crum that the mine had last operated in April. Tr. 70. Further, she told him that during the winter all of the employees had been laid off. Tr. 78, 97.

Crum reviewed the quarry's training records. They indicated that refresher training had been given to miners on January 31, 2012. Section 46.8(a) requires refresher training to be given annually. According to Bauman, this meant that the refresher training for 2013 had to be given on or before January 31, 2013. The records indicated that the required refresher training for 2013 was not given until February 19, 2013, 19 days late. This appeared to Crum to be a violation of section 46.8(a). However, there was a caveat. Crum thought if the quarry's miners had not worked in the first quarter of 2013, then management would not have had to give the refresher training by January 31.<sup>10</sup> Tr. 76-77. Therefore, Crum visited MSHA's web site and retrieved the quarry's production report for the first quarter of 2013. It showed that the company logged 35 hours of quarry work and 11 hours of office work. Tr. 77; Gov't Exh 3D (LAKE 2013-616-M). Although the production report did not indicate when the work was done (Tr. 90-91), the company's Job Labor Journal recorded hours worked at the quarry in January and February and the names of those who worked. The Journal indicated that Dagnon, Russell, and another miner worked at the quarry in January and February. Tr. 104-107; Gov't Exh 12 (LAKE 2013-616-M). Because work was done in January and because refresher training was not given by January 31, 2013, Crum concluded the company violated section 46.8(a)(2). Gov't Exh. 1 (LAKE 2013-616-M).

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<sup>9</sup> Crum explained that when rock is crushed and sorted depends upon when orders are received. Crum stated, "They produced what they need for the customers, customers come in and get loaded up. If they don't have any more orders, [production] shuts down." Tr. 103.

<sup>10</sup> Crum stated:

I believe[d] that if they had actually done no work at that mine site during that quarter and no hours were reported . . . they were not required to have . . . annual refresher training by the 31<sup>st</sup> of the next year if nobody was there.

Tr. 76-77.

Crum agreed that the violation was technical. It was just a matter of being 19 days late. Tr. 101. He did not think that the violation was likely to cause an injury. He noted that the miners had been trained by the time he found the violation. Tr. 80. It was, he stated, “a paperwork violation.” *Id.*

Further, Crum believed the company was only minimally negligent. It had contracted with an outside company to conduct the training, and Northern Illinois had to dance to its contractor’s tune.<sup>11</sup>*Id.*

### **THE VIOLATION**

The record supports finding that the violation occurred as charged. Crum’s testimony that refresher training was given on January 31, 2012, (Tr. 76-77) and not again until February 19, 2013, and the company’s records that miners worked at the quarry in January 2013 (*see* Gov’t Exh. 12 (LAKE 2013-616-M)) establish the violation. Section 46.8(a)(2) states that once refresher training is given, it must be provided for each miner “no later than 12 months after the previous annual refresher training was completed.” As Crum rightly noted, this did not happen. The training should have been given on or before January 31, 2013, not on February 19.

### **GRAVITY**

The inspector believed the violation was “technical,” and the court agrees. The court infers from what Dagnon told Crum that the miners were trained as soon as the contractor could schedule the class, that is, on February 19. Tr. 81. The miners went without the refresher training for a short period. Moreover, the mine was operating on a very limited basis in January and February. Gov’t Exh. 12.

### **NEGLIGENCE**

The court finds that the company was only marginally culpable. As a small company with few employees, it had to rely on a contractor to provide training, and the court infers from the testimony that the contractor could not give the training in time to comply with the standard. Tr. 81. Crum’s “low” negligence finding accurately reflects these facts.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>
8741688	6/5/2013	56.12032

Crum traveled to the mine’s shop where he found a voltage box with three holes in its bottom. Tr. 110, 139. Crum explained how he found the holes. Upon seeing the box he put his camera under it and took photographs. Tr. 130. When he looked at the photographs he noticed the openings. *Id.* Two of the holes were an inch in diameter and one was 1.75 inches in diameter. Tr. 110. The wires inside the box were energized, and some of the energized wires were located “just inside [the] open holes.” Tr. 112; Gov’t Exh. 6A (LAKE 2013-616-M), 6B (LAKE 2013-616-M) and 6D (LAKE 2013-616-M). The holes were 39 inches above the shop floor. Tr. 110,

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<sup>11</sup> Crum recalled Dagnon stating that the company had to send its miners for training, “when the trainer can schedule it.” Tr. 89.

112; *See* Gov't Exh. 5 (LAKE 2013-616-M). The circuits inside the box carried 120 and 480 volts of electricity. 112-113. Crum believed the condition of the box violated section 56.12032 which requires that "inspection and cover plates" on electrical equipment and junction boxes "be kept in place at all times except during testing or repairs." Gov't Exh. 4 (LAKE 2013-616-M). Crum stated:

Under [section] 56.12032, we are taught at the Mine Academy that the knock-out plugs are considered a cover plate. And if they're large enough and wires are present, they can be touched, [and] that . . . is a violation.

Tr. 123.

Asked if he determined whether any testing or repairs were ongoing, Crum replied:

Based on the fact the only two persons there were the scale house attendant [(Dagnon)] and the guy loading trucks, I think it's pretty safe to assume there wasn't any testing or repairs going on at the time.

Tr. 125.

As for the company's liability Crum stated, "[M]ine management is the one who is responsible for everything that is on their mine site." Tr. 135, *see also* Tr. 136.

Because the holes were located on the bottom of the box, Crum found the openings were unlikely to lead to an injury. Tr. 113. He could not think of a reason why a miner would put his finger or fingers into the box through the holes. Tr. 129. However, if a miner somehow reached into the box and contacted the box's live circuits, the miner was likely to suffer a permanently disabling electrical injury. *Id.* Crum testified, "[I]f . . . a miner were to be shocked . . . there's potential for second [or] third degree burns to the skin, permanent nerve damage, [and] permanent muscle damage." Tr. 113. He explained that the inner wires were not protectively insulated, that although they had plastic around them, the plastic was not designed to protect a person from shock. Tr. 114. He further observed that only one person at a time would be near enough to the box to contact it. *Id.*

Russell testified that the circuits in the breaker box fed electricity to the shop's garage door openers and electrical outlets. Tr. 140. He explained that a few miners worked in the shop in the vicinity of the box. "There [are] oil canisters and an antifreeze station and an air compressor [approximately six feet from] . . . the . . . box." Tr. 139. But in Russell's opinion, there was no reason for a miner to place his hands close to the holes in the box. In addition, Russell had no knowledge of any company employee creating the holes. Tr. 140, 141.

Crum found that the company was moderately negligent. He stated, “You can’t walk by [the box] and see . . . [the holes]. You’ve actually got to bend down and see that.” Tr. 114-115. Nonetheless, in his opinion the company was responsible for carrying out workplace examinations and the holes should have been found and closed. Tr. 115; *see also* Tr. 223.

To abate the condition, the company covered the holes with washers and bolted the washers in place. Tr. 121, Gov’t Exh. 6E (LAKE 2013-616-M) , 6F (LAKE 2013-616-M).

### **THE VIOLATION**

The court finds that the violation existed as charged. As the court has previously noted:

[C]ircumstances can arise in which a cover is technically ‘kept in place,’ . . . but defects in the plate (e.g. holes due to corrosion or other causes) render the cover functionally equivalent to an open cover and hence result in a violation of the standard. *See e.g., TM Incorporated – Knife River Materials*, 33 FMSHRC 1210, 1238-40 (ALJ Zielinski).

*National Cement Company of Alabama*, 36 FMSHRC \_\_\_\_, Docket No SE 2014-71-M (February 23, 2015) at 10 n.10.

There is no doubt that the box covering the electrical connections was defective. The photographic evidence offered by the Secretary (Gov’t Exhs. 6A (LAKE 2013-616-M), 6B (LAKE 2013-616-M), 6D (LAKE 2013-616-M)) corroborates the inspector’s testimony regarding the existence of the holes. Tr. 110, 112. The box’s outer covering was equivalent to a cover plate and the holes in the box were equivalent to an open cover plate. Since there is no basis to conclude testing or repair of the circuits inside the box was underway or that the box itself was being repaired, the court finds that the presence of the holes violated section 56.12032.<sup>12</sup>

### **GRAVITY**

The inspector correctly concluded the violation was not serious. The location of the holes made it extremely unlikely that the violation would result in injury to a miner. Tr. 113. Crum could not think of a reason why a miner would contact the conductors inside the box through the holes (Tr. 129), and even though miners occasionally worked within six feet of the box, neither could Russell. Tr. 139-140. Based on the record, the court too is unable to conjure a scenario in which a miner would be injured because his finger or fingers found their way through the holes.

### **NEGLIGENCE**

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<sup>12</sup> The court does not agree with the company’s statement that in order to “assert a violation” the Secretary should have established when the holes were made in the box. Co. Br. 14. It is the existence of the holes, not when they were made, that is crucial to the violation.

While it may well be that the company had no idea who knocked out the three small plates in the bottom of the box, the company bears the ultimate responsibility for violations occurring at its work sites. *See* Tr. 115. Miners occasionally worked in the shop, and the shop was subject to the company's work place examinations. Tr. 139. As Crum stated, the holes should have been detected and closed. Tr. 115. However, the location of the holes rendered them out of sight and made it unlikely they would be found during a usual work place examination. Crum only found them because he used a camera and held it under the box. Therefore, the court concludes that the location of the violation mitigated the company's negligence, and that the company's lack of care was low.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8741689	6/5/2013	56.12006

Crum testified that he issued Citation 8741689 when he found that the No. 1 and No. 3 circuit breakers in a 120/280 volt breaker box were not labeled.<sup>13</sup> Tr. 143; Gov't Exh. 9A (Lake 2013-616-M), 9B (Lake 2013-616-M), 9C (Lake 2013-616-M). The box was located in the shop. Tr. 143 The breakers controlled the power to electrical outlets located to the right of the box. Crum testified that the breakers for the outlets were closed, which meant that the outlets were energized. *Id* In addition to the breakers for the outlets, the box also contained two separate sets of breakers, each set consisting of three breakers fused together by a bar. One of the sets controlled a band saw. This set was labeled "band saw." Gov't Exh. 9B (LAKE 2013-616-M). The other set controlled all of the breakers in the box. This set was labeled "Main." Gov't Exhs. 9A (LAKE 2013-616-M), 9B (LAKE 2013-616-M).

Crum stated that by looking at the unlabeled breakers there was no way to know which circuits the breakers controlled. Tr. 144, *see* Gov't Exhs. 9A, 9B. Therefore, he cited the company for a violation of section 56.12006 because the standard requires "[d]istribution boxes . . . [to] be labeled to show which circuit each device controls." 30 C.F.R. §56.12006. According to Crum the cited breaker box was a "distribution box" because "it has a main source of power coming into it; and from that point, it distributes the power to various different pieces of equipment and outlets." Tr. 145. Despite the fact that a "distribution box" is defined in the regulations as "a portable apparatus" (30 C.F. R. §56.2) and despite the fact that the cited breaker box was not portable, Crum cited the box anyway under section 56.12006. He stated, "[T]hat's what our office management informs us to do when we find unlabeled breaker boxes." Tr. 155.

Crum did not believe the failure to label the breakers was likely to result in an injury. Tr. 147. He understood from Dagnon and Wishop that electrical work at the mine was usually done by certified electrical contractors who were trained to work on such circuits. In addition, the contractors wore protective equipment. Tr. 147. Given the expertise of the contractors, Crum did not feel that a contract employee "would become electrocuted by the situation." Tr. 148. Further reducing the likelihood of an injury was the fact that miners who used the shop in which the breaker box was located did not normally travel or work near the box. Tr. 160, 161. Crum noted that although two front end loaders were parked in the shop, they were both parked 30 feet from

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<sup>13</sup> A list for labeling the circuits appeared on the inside of the circuit breaker box door. The list was not completed for the No. 1 and No. 3 breakers. Tr. 152-153; Gov't Exh 9B (Lake 2013-616-M), 9C (Lake 2013-616-M).

the box. Tr. 160. However, Crum was adamant that if there was a malfunction that required a circuit to be locked out, a miner would not know which of the unlabeled breakers to open in order to disrupt power to the affected circuit. Tr. 157. This could lead to a serious shock injury and second and third degree burn injuries. Tr. 148. Disabling neuro-muscular injuries also could result. *Id.*

Crum found that the company's negligence was moderate. The lack of labels should have been found and corrected during a work place examination or during the yearly continuity resistance test. Tr. 149. Crum examined company records to determine when the company last checked the continuity and resistance of the electrical circuits. The records indicated that the last examination before Crum's inspection took place on May 6, 2013. The examination was conducted by Russell. Tr. 151-152. *See also* Gov't Exh. 10 (LAKE 2013-616-M) at 3. Russell agreed he should have realized the circuits were not labeled. He stated that when he conducted the continuity examination he did not open the box door. Tr. 165. However, he emphasized that the hazard resulting from failing to label the breakers was minimal. To his knowledge the outlets had not been used in the company's mining operations for seven years. Tr. 160-161, 163-164.

### **THE VIOLATION**

The company argues, the court thinks correctly, that the record does not support finding a violation. Co. Br. 17-18. It is true that there were two breakers in the cited box which were "not labeled to show which circuit each device control[led]." 30 C.F.R. § 56.12006. But it is also true that section 56.12006 applies to "distribution boxes" and that the Secretary has chosen to define a "distribution box" as

[A] portable apparatus with an enclosure through which an electric circuit is carried to one or more cables from a single incoming feed line, each cable circuit being protected through individual overcurrent protective devices.

30 C.F.R. §56.2

The cited box does not come within the definition. Crum agreed that the box was not portable. Tr. 144, 155. "Portable" is defined as "capable of being carried or moved with ease" (*The American Heritage Dictionary of the English Language*, Fourth Edition (2009) at 1367), and in addition to Crum's admission, there is nothing in the record to indicate the cited box was "capable of being carried or moved with ease."

No doubt sensing that the citation as initially written was in trouble, the Secretary moved for and was granted permission to amend the citation to allege alternatively a violation of 30 C.F.R. §56.12018, a standard requiring that "[p]rincipal power switches . . . be labeled to show which units they control unless identification can be made readily by location." Tr. 14-17; *see* n.2. *infra*. But here too the record does not support finding a violation.

Counsel for the company: [C]ould this violation also be listed under [Section] 56.12018?

Inspector Crum: I don't believe so.  
Counsel for the company: And why don't you believe so?  
Inspector Crum: [Section] 12018 states . . . the principal power switches shall be labeled. If you look at [Gov't Exh. 9A,] on the upper side of the main breaker box, those three breakers are connected. That is the principal power switch, and it is labeled.

Tr. 146.

Later in his testimony, Inspector Crum reiterated his position.

Counsel for the company: And you don't consider it a violation [of section 56.12018] because this thing was labeled?  
Inspector Crum: Yes. The principal power switch . . . in that box was labeled.

Tr. 156.

Everyone agreed that the two breakers for the electrical outlets were unlabeled power switches. The only question is whether the switches were "principal power switches" within the meaning of the standard. Crum did not think so (Tr. 156), and neither does the court. Part 56 of the Secretary's regulations does not contain a definition for the term "principal power switch." However, when used as an adjective, the word "principal" connotes something that is "chief" or "leading." *See* Houghton Mifflin Harcourt, *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1395. Clearly, as Crum, recognized, the chief or leading power switch in the box was the switch composed of the three fused breakers that could be thrown to turn off the power to all of the switches in the box, and, as Crum noted, it was labeled, "Main." Tr. 146; Gov't Exh. 9A (LAKE 2013-616-M). The citation will be vacated at the close of this decision.

**LAKE 2014-2-M**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>
8741713	7/30/13	56.12004

On July 30, 2013, Crum traveled to another of the company's quarries. Tr. 169. He arrived at 8:00 a.m. and went directly to the scale house trailer where he introduced himself to the scale house attendant, Ann Black. Tr. 170. He also spoke with Russell by telephone. Russell, who served as the foreman of the quarry, told Crum he could not join Crum for the inspection. As a result, Crum was accompanied by front end loader operator, Timothy Thistle. Tr. 170-171. Crum began his inspection at the crushing plant. The conveyors were not running (Tr. 171), but the plant was "set up [and] ready to go." Tr. 172. Crum asked Thistle if everything at the plant was the same as when it last ran, and Thistle replied that the only change was that the generator had broken and parts to repair it were on order. *Id.* Because the generator was "out," the conveyor belts were not energized. *Id.*

While looking at electrical cords that ran beside the conveyor belt, Crum saw that one of the cords, a cord carrying 480 volts, had a three and seven eighths inch long cut in its protective cover.<sup>14</sup> Inside the cord were four insulated copper conductors. Tr.177. The cut in the cover exposed the cable's white inner insulation.<sup>15</sup> Tr. 174-175; Gov't Exhs. 3A (LAKE 2014-2-M), 3B (LAKE 2014-2-M), 3C (LAKE 2014-2-M).

Crum asked Thistle if he knew how the cord had been damaged. Thistle did not know. Tr. 193. Based on his mining experience Crum speculated that the damage could have been caused by rocks falling off the conveyor and hitting the cord, by a front end loader hitting the cord as the loader cleaned up spilled material along the side of the conveyor,<sup>16</sup> or by the cord being dragged across rocks when the cable first was installed or later was moved. Tr. 183-184, 200.

Russell did not think mechanical equipment was a likely cause. He testified that such equipment worked either near the head pulley or the tail pulley, and the cut was in the center of the conveyor, about 30 to 40 feet from either pulley. The closest any equipment came to the damaged area of the cord was 10 feet. Tr. 205. He also maintained that rocks were unlikely to fall off of the conveyor at its center. Tr. 204, 212. In Russell's opinion the cut most likely occurred on July 18, 12 days before the citation was issued, when the conveyor belt ripped and was replaced. At that time the electrical cords were dropped on the ground and dragged. Russell stated that it was "more than likely" that the cut occurred during the process. Tr. 205-206, 209-210. Russell added that between July 18 and July 30, the belt was not operating because no mining was done at the quarry. Tr. 207, 209.

Section 56.12004 requires "[e]lectrical conductors exposed to mechanical damage [to] be protected." The cut in the cord indicated to Crum that "mechanical damage had taken place . . . and damaged the outer insulation." Tr. 200. Crum therefore issued a citation charging the company with violating the regulation. Tr. 174; Gov't Exh. 2 (LAKE 2014-2-M).

Crum stated that numerous electrical accidents are associated with damaged electrical cords, and that he pays particular attention to such cords during his inspections. Tr. 175. However, Crum did not think that the violation was serious. He determined that when the conveyor was operating no miners were on foot near the damaged cord. He testified, "When [the conveyor] . . . run[s], everybody's in a piece of machinery like a loader, so there's really not a high degree of risk or exposure in and around that plant." Tr. 175. In addition, the copper of the cord's interior conductors was not showing, and the area around the damaged cord was not wet. Tr. 177. Nonetheless, if a miner was injured as a result of the exposed interior conductors, the result was likely to be permanently disabling, even fatal. *Id.*

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<sup>14</sup> Crum knew the precise length of the cut because he measured it. Tr. 182.

<sup>15</sup> The record is not clear concerning what the inner white insulation protected. Although Crum initially stated that he believed the white material insulated one of the cable's inner copper conductors, he agreed that the white material could have insulated all of the inner conductors. Tr. 189, 190, 195. Russell held the latter view. Tr. 202-203.

<sup>16</sup> Crum agreed, however, that no cleanup equipment was in the area of the conveyor. Tr. 192-193.

Crum found that condition of the cable was due to the company's moderate negligence. The damage should have been noticed and corrected during a required workplace examination. Tr. 179.

The condition was abated by taping the cable. Tr. 181; Gov't Exh 3D (Lake 2014-2-M).

### THE VIOLATION

The court concludes the violation occurred as charged. Section 56.12004 mandates in part that, "Electrical conductors exposed to mechanical damage shall be protected." Tr. 190-191. There is no dispute the outer insulation of the cited electrical cord was damaged. Both the testimony and the demonstrative evidence support finding that the cord had a nearly four inch long gash in its cover and that the paper or fiber insulation protecting at least one if not all of the cord's four interior conductors was visible through the tear. Tr. 174-175, 189, 190, 195, 202-203; Gov't Exhs. 3A (LAKE 2014-2-M), 3C (LAKE 2014-2-M). The breach lessened the protection afforded the cord's inner conductors by eliminating part of the protective covering between the conductors and the surrounding mining environment. This loss of protection "exposed" the inner conductors within the meaning of the standard. The company's contention that the actual copper wires had to be exposed misreads the standard. Co. Br. 21. Lessening protection of the inner conductors through damage to the cord's outer jacket means that the inner conductors were "exposed" within the meaning of the standard whether or not copper wire was visible.

A more fundamental question is whether the inner conductors were "exposed to **mechanical** [(emphasis supplied)] damage," and the court finds that they were. 30 C.F.R. § 56.12004. First, the court notes that Russell did not testify rocks **never** (emphasis supplied) fell from the belt in the area where the cut occurred, and in fact the court concludes that spillage from the belt in the area of the defect was inevitable. It is simply in the nature of a conveyor belt that some spillage occurs along the entire length of the belt. As mining continues and the spillage reaches a point where it has to be cleaned, the cleanup is accomplished either by a machine or by hand, and these methods subject the conductors to potential "mechanical damage" within the meaning of the standard. This is because although "mechanical damage" means damage produced by a machine, it also means damage produced by physical forces, which can include damage produced by hand. *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1087. Further, as Russell testified, the cord was subject to mechanical damage when the belt was replaced. Tr. 205-206, 209-210. Dropping the cord to the ground and dragging it, whether by machine or manually, subjected the cord to forces and conditions (e.g., rocks) that could damage the cord's conductors. For these reasons, the court concludes Crum was right in citing the company for a violation of section 56.12004.

### GRAVITY

The court also concludes that Crum was right in finding that the violation was unlikely to cause an injury. The court accepts Russell's testimony that the cord was dropped to the floor on July 18, 12 days before the citation was issued, and that the mine did not operate between then and the date of the inspection. Tr. 206, 207, 209. Therefore, miners were not exposed to the violation between the time it most likely occurred and when it was cited. Further, as Crum

testified, miners did not frequently access the area where the torn cord was located (Tr. 175), and when mining continued there would have been little exposure to the violation. In addition, the interior copper wires of the conductors were not laid bare. Tr. 177. For these reasons the court finds that the likelihood the violation could result in the electrocution or the serious injury of a miner was very remote. The court agrees with Crum that the violation was not serious.

### NEGLIGENCE

Crum found that the company was moderately negligent. While the court accepts that the company was under a duty to find and repair the tear in the cord, the court is persuaded that the numerous cords adjacent to the defective cord, the small length of the tear, and the distance from which the tear would most likely be viewed by any passing management official or agent made the tear very difficult to find. In this regard, the court finds Government Exhibit 3B (Lake 2014-2-M) to be persuasive. The photograph shows that the cited cord was one of a number of cords (the court counts at least seven) hung together along the conveyor. In the photograph, which was taken 15 feet from the cited cord - a reasonable distance from which to assume a work place examination of the cords would be conducted - it is nearly impossible to see the torn area of the cable. The violation was easy to overlook, and the court finds that the company's negligence was low. Moreover, since the court believes that the tear most likely occurred on July 18, 12 days before the citation was issued, and since it accepts Russell's testimony that the mine did not operate between then and the date of the inspection (Tr. 206, 207, 209), the court notes that there would have been no required work place examinations after the violation occurred that would have revealed the violation, a condition that further reduces the company's culpability.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8741714	7/30/2013	56.12032

Crum testified that as the inspection continued, he examined the start/stop box for the primary crusher. He found the box had a hole in its bottom. In addition, one of the box's interior cords was located about two inches from the hole. Tr. 215, 219, 220; Gov't Exhs 6A (LAKE 2014-2-M), 6B (LAKE 2014-2-M). Crum believed that the cord was a component of the start/stop switch and that it carried 480 volts of electricity. Tr. 216, 220. The bottom of the box was 35 inches off the ground. Tr. 227. Crum explained that the plant's primary crusher is powered by electricity coming from a generator that is located at the quarry. After the generator is activated someone goes to the start/stop box to throw the switch and start the primary crusher. *Id.* The box is outside. Tr. 218.

Although Crum believed the presence of the hole violated section 56.12032, which requires "[i]nspection and cover plates [to] be kept in place at all times except during inspection and repairs," he did not think the violation was likely to injure a miner. He noted that the hole was small in size and was inaccessibly located. He stated, "I felt that it was very unlikely for a miner to get inside that open hole with any part of [his] body to contact the inner conductor." Tr. 217. In fact, Crum could think of no reason why a miner would stick his finger in the hole Tr. 227-228. Although Crum noted that the hole could allow corrosive elements into the box and that this could cause the protective insulation around the inner conductors to crack (Tr. 222), Crum found that all of the cables inside the box were properly insulated. Tr. 228. There were no bare

conductors. Finally Crum observed that the closest any mechanical equipment operators got to the box was 10 to 12 feet. Tr. 231. He also explained that only one person at a time would be exposed to the hazard. Tr. 218. Despite these factors, Crum recognized that if contact occurred, a miner could suffer second or third degree burns and/or disabling nerve and muscle damage. Tr. 217.

Because the hole was in the bottom of the box, because the hole was small, and because the box was located in an area few miners visited, Crum believed the negligence of the company in failing to detect and close the hole was “low.” Tr. 218, 223. In addition, he noted that the crusher was operated infrequently. Tr. 224.

### **THE VIOLATION**

The court concludes that the violation occurred as charged. The company did not dispute that the hole described and photographed by Crum existed at the bottom of the crusher’s start/stop box. Tr. 215, 219, 220 Gov’t Exhs. 6A (LAKE 2014-2-M), 6B (LAKE 2014-2-M). The court finds that the Secretary established the box covering the electrical components to the primary crusher’s start/stop switch was defective. The box was “functionally equivalent to an open cover” and therefore was in violation of section 56.12032. *See National Cement*, 36 FMSHRC \_\_\_, Docket No. SE 2014-71-M (February 23, 2015) at 10 n.10.

### **GRAVITY**

All of the evidence points to the conclusion that Crum’s gravity findings were proper. Given the small size of the hole, the hole’s location (on the underside of the box, 35 inches above the ground), and the fact that few miners accessed the area where the box was located (Tr. 227, 230-231), the court agrees with Crum that it was indeed unlikely that a miner would contact any of the box’s interior conductors. Tr. 217. Even if a miner somehow contacted a conductor, the record establishes that at the time the violation was cited, all of the interior cords were properly insulated. Tr. 228. Therefore, while it is possible, as Crum testified, that the violation could have resulted in a miner suffering serious burns or disabling neuro-muscular damage (Tr. 217), the likelihood of such injuries was so remote the court concludes that the violation was not serious.

### **NEGLIGENCE**

The court further concludes that Crum correctly found that the company’s negligence was low. Unless a person purposefully looked for the hole, it was entirely out of sight and, as noted, the box was located in an area visited by few miners. Tr. 218, 223-224. Moreover, use of the start/stop box was intermittent because mining was intermittent, which means that the box was not examined on a regular basis by management. Tr. 224. These mitigating factors minimize the level of the company’s negligence.

**CITATION NO.**  
8741715

**DATE**  
7/30/2013

**30 C.F.R. §**  
56.12018

As the inspection continued, Crum and Thistle entered a trailer housing one of the quarry's generators. Tr. 235, 256. On the wall of the trailer Crum saw at least eight boxes each of which contained a power switch.<sup>17</sup> Tr. 239. Crum testified that although seven of the switches were properly labeled, one was not. Tr. 235, 237, 239; *see* Gov't Exh. 9A (LAKE 2014-2-M). Crum believed that without a label miners could not know the equipment the unlabeled switch controlled. Tr. 239. Crum also noted the presence of a pipe that contained the unlabeled switch's electrical conductors and that ran from the bottom of the box either through the floor or through the wall of the trailer; Crum could not recall which. There was no way to tell where the pipe led. Tr. 248-249. However, Crum subsequently determined that the unlabeled switch was used to start the under screen conveyor. Tr. 236, 258.

Section 56.12018 requires "[p]rincipal power switches to be labeled to show which units they control unless identification can be made readily by location." In Crum's opinion the location of the box and its conduit did not indicate what the switch controlled. Tr. 248-249. Further, Crum believed the switch was a "principal power switch" within the meaning of the standard because it was the only switch that "power[ed] up" the under screen conveyor. Tr. 259. He described the switch as, "the first principal power switch" for the conveyor.<sup>18</sup> *Id.* He therefore concluded that as a "principal power switch" that could not be identified by location, the switch should have been labeled. Because it was not, Crum charged the company with a violation of section 56.12018.<sup>19</sup> The company quickly corrected the condition by labeling the switch. Tr. 237, 245 Gov't 9B (LAKE 2014-2-M), *see also* Gov't Exh. 7 at 2 (LAKE 2014-2-M).

Crum recalled that the power to the box was off when he conducted the inspection (Tr. 255), and he concluded the fact that the switch was not labeled was unlikely to cause an injury. He noted that all of the other power switches were properly labeled, and he stated, "The people . . . at the mine . . . had a pretty good . . . understanding . . . [as to] what that switch controlled even though you couldn't make identification readily by being inside the trailer." Tr. 242. However, he believed that it was at least theoretically possible for a miner to suffer a

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<sup>17</sup> Russell maintained that there are actually 12 to 15 power switch boxes on the wall. Tr. 267.

<sup>18</sup> On cross examination it became clear that Crum's understanding of the term "principal power switch" was less than precise. When asked if there was a difference between a "principal power switch" and a "power switch," he stated that he had "no idea." Tr. 251. When asked about the difference between a "principal power switch" and a "circuit breaker," he replied, "I don't know. [It d]epends on who you talk to." Tr. 253. Although he stated he was "sure" the National Electrical Code ("NEC.") defined the term "principal power switch," he agreed that he did not consult the NEC definition before he issued Citation No. 8741714 (Tr. 254), and neither party pointed the court to a NEC definition of "principal power switch."

<sup>19</sup> Crum stated that before he cited the company he and Thistle looked on the ground to determine if a label had been attached to the box but had fallen off. Tr. 240. No label was found. At first Crum mistakenly cited the company for a violation of 30 C.F.R. §56.12008, a standard pertaining to the insulation of power wires and cables. Gov't Exh. 7at 1 (LAKE 2014-2-M). The citation subsequently was modified to allege a violation of section 56.12018, the standard he originally intended to cite. Tr. 236-249; *see also* Gov't Exh. 7at 2 (LAKE 2014-2-M).

serious shock injury because the switch was not labeled, an injury that could include second and third degree burns and nerve and/or muscle damage. He envisioned such an accident happening if work was done on the circuit or on the equipment the switch controlled and the power to the circuit was left on by mistake. If that happened, a miner who contacted the energized parts of the circuit or equipment could be seriously injured or killed.<sup>20</sup> Tr. 243.

Crum found the violation was due to the company's "moderate" negligence. Tr. 243. He stated:

[O]nce you walked inside the trailer, it [was] pretty obvious . . . [the switch] was not labeled. All of the other ones were labeled very well, [and they were] very easy to read. So I couldn't make it low [negligence,] and I didn't feel it was . . . high negligence.

Tr. 244.

He further observed that the condition had not been noted on the workplace examination reports. Tr. 244.

Russell agreed that the cited switch controlled power to the under screen conveyor, but he stated that the conveyor had not been used for three or four years before Crum's inspection because the company had discontinued making the particular product the conveyor transported. Tr. 262. As a result, the switch had been in an "off" position for three or four years although power continued to flow to the box. *Id.* He also testified that when work was done on equipment controlled by switches in the trailer, the company hired an electrical contractor. Tr. 263.

Russell noted the presence of a single switch, a main switch, that controlled power to all of the boxes on the wall. The main switch was located inside the trailer, 10 to 15 feet from the boxes. Tr. 263-264. If a miner wanted to cut power to all of the boxes, the miner used the single or main switch. Tr. 264. This switch was used every morning to direct power to the individual boxes and to shut off power every night. Tr. 264-265, 269. In Russell's opinion the main switch was the "principal power switch." Tr. 266. Russell was asked if MSHA's inspectors had previously cited the subject box because the switch lacked a label, and he replied, "Not to my knowledge." Tr. 265.

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<sup>20</sup> Crum put it this way:

The only situation that I believe . . . could happen is if they were going to work on whatever the switch controlled; and not being labeled, they inadvertently locked out the wrong piece of equipment and then went out there . . . and got electrocuted.

Tr. 243.

## THE VIOLATION

The court finds a violation. There is no question the location of the switch did not identify the recipient of its power, the under screen conveyor. The court notes Crum's testimony that the conduit from the box disappeared either through the floor or through the wall of the trailer was not challenged by the company. Tr. 248-249. Therefore, the court agrees with Crum and concludes there was no way to tell visually where the switch's conduits led, and no way to determine visually the units the switches controlled. The standard requires principal power switches to be labeled.<sup>21</sup> Everyone agrees that the cited equipment was a "power switch" that turned power on and off to the under screen conveyor. Everyone also agrees that the switch was not labeled. The only unresolved question is whether the cited switch was a "principal power switch" within the meaning of the standard, and the court finds that it was. As the court noted above, Part 56 of the Secretary's regulations does not contain a definition for the term "principal power switch." None the less, the commonly accepted meaning of the word "principal" when used as an adjective connotes something that is "chief" or "leading." (See discussion regarding Citation No. 8741689 *infra*.) Here, the unlabeled switch was the box's only switch. See Gov't Exh. 9A (LAKE 2014-2-M). It was a unit unto itself. When looking at the box there was no question but that the single switch was the principal power switch of the unit. As such, it should have been labeled. It was not, and the court finds that the company violated section 56.12018.

The court hastens to note that the existence of one principal power switch in an electrical system does not foreclose the existence of others. For example, had the main switch for all of the boxes been cited for lacking a label, the court in all likelihood would have found an additional violation of the standard because the main switch was the leading or chief switch for all of the electrical components served by all of the boxes.

## GRAVITY

Crum found that the violation was unlikely to lead to a permanently disabling injury, and the court agrees. Gov't Exh. 7 (Lake 2014-2-M). The danger was that miners or contractors working on the circuit to the under screen conveyor or working on the conveyor itself would think that electricity to the circuit or the conveyor was disconnected when in fact it was not. Crum believed if such a mistake happened, it could result in a serious shock injury to a miner. Tr. 242-243. The court goes further and finds it also could lead to dismemberment if the conveyor was started by mistake while a miner was working on it. However, the court concludes the chance of such injuries was so remote that the violation was not serious. The court accepts Crum's testimony that miners "had a pretty good" understanding of what the switches controlled. Tr. 255. The court also accepts Russell's testimony that the company contracted out work on the circuits to a professional electrical firm. Both factors reduced the possibility of an injury causing

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<sup>21</sup> The standard is written in the plural -- i.e., "switches" and "units." The company finds significance in the choice of the word "units" and argues that a "principal power switch" must control more than one "unit." The court does not agree. The court finds the drafters' choice of the word "units" to be the grammatical result of writing the standard in the plural rather than the singular, and it concludes the drafters' syntax does not foreclose application of the standard to a "unit," that is to a switch that controls power to a single circuit and/or to a single piece of equipment. Co. Br. 27.

mistake. More to the point, Russell's testimony established the conveyor belt that the switch controlled had not been in service for three or four years, and although power continued to flow to the box during those years, the chance of the switch being used was negligible and would remain so until the company again produced product conveyed by the under screen belt. Tr. 262.

### NEGLIGENCE

Crum found that the company's negligence was moderate. Gov't Exh. 7 (LAKE 2014-2-M). The court finds that it was low. Granted, as Crum testified, it was "pretty . . . obvious" the switch was not labeled. Tr. 244. Granted too, the condition was not noted on the examination forms for the trailer. Tr. 244. The fact that the company knew the switch was not in use and had not been for three or four years and the fact that the chance of any injury arising from the lack of labeling was very low understandably diminished the urgency of the company finding and correcting the violation and, in the court's view, significantly mitigated the company's negligence.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8741716	7/30/2013	56.12002

Shortly after citing the company for the violation at the generator trailer, Crum traveled again to the scale house trailer. Outside the trailer and along one of its sides Crum noticed two 110 volt electrical GFCI (Ground Fault Circuit Interrupter) outlets.<sup>22</sup> Tr. 287. The GFCI outlets were designed to de-energize equipment if a fault occurred in the electrical circuit to the equipment. Tr. 274. Crum determined the GFCI systems were working and power was flowing to the outlets. Tr. 274. However, Crum could see by looking at the outlets that each was missing a waterproof cover. Tr. 278; *See* Gov't Exh. 12A (LAKE 2014-2-M), 12B (LAKE 2014-2-M), 12E (LAKE 2014-2-M). Thinking the covers might have fallen off, Crum looked for, but found no covers. Tr. 298. Because section 56.12002 requires electrical equipment and circuits to be of "approved design and construction and [to be] properly installed" and because the outlets lacked waterproof covers, Crum believed the outlets violated section 56.12002. Tr. 175 Crum also believed the outlets originally had waterproof covers. He noted hinges to which the waterproof covers could have been attached and flanges over which the covers could have closed. Tr. 279; Gov't Exh. 12E (LAKE 2014-2-M). Crum acknowledged that section 56.12002 does not specifically require outdoor outlets to have covers, but he stated the regulation "says [the outlets] must be maintained and installed correctly." Tr. 282. He testified that he relied on the fact that the NEC "indicates that all outdoor, outside outlets must have a weatherproof cover." Tr. 281.

The following day the conditions were remedied when covers were placed on the outlets so that the outlets were no longer open to the elements. Tr. 276, 277; Gov't Exhs. 12 C (Lake 2014-2-M), 12D (Lake 2014-2-M).

In Crum's opinion, the lack of covers was unlikely to cause injuries. Each outlet was designed to trip if a fault occurred in its circuit, and the GFIC devices were functioning properly.

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<sup>22</sup> GFCI outlets are outlets for circuits containing GFCI devices. A GFCI device shuts off an electrical circuit when it detects that current is flowing along an unintended path. GFCI outlets are used to reduce the risk of shock and fire.

Tr. 297. As a result, Crum did not believe that “person[s] would . . . [be] electrocuted” due to the lack of proper covers. Tr. 285. In addition, he noted that the outlets were not used during normal mining operations. Tr. 285-286. However, if the GFIC devices failed, an injury in the form of first or second degree burns was possible, and the injured miner most likely would miss workdays and/or have his duties restricted. Tr. 287.

Crum found that the company was moderately negligent in allowing the conditions to exist. Tr. 287; Gov’t Exh . 10 at 1. The lack of covers was “open and obvious,” and the fact the covers were missing was not noted on the trailer’s workplace examination forms. Tr. 287.

On cross examination Crum clarified the basis for citing the condition under section 56.12002. He stated that he considered each outlet to be both “electric equipment” and a “circuit.” A circuit, he said, is “anything that carries electricity.” Tr. 290. He acknowledged the standard requires equipment and circuits to be provided with “switches or other controls,” and he stated that the “outside outlet was not provided with all the controls that are required by the [NEC,] which include the weatherproof cover.” Tr. 291-292. Thus, the lack of waterproof covers violated the standard. Tr. 292. He reiterated that in order to determine whether there is a violation of section 56.12002, an inspector must “reference [the NEC] to determine what’s approved design and construction.” Tr. 293.

Although Russell acknowledged the existence of the outlets alongside the trailer, he maintained the outlets had not been used in “[he did not] know how long.” Tr. 299. He felt certain that in the past six or seven years he never used the outlets. Tr. 299. He further testified that the closest a miner got to the outlets was 10 feet, and that to his knowledge the company never was cited for the lack of waterproof covers. Tr. 300.

### **THE VIOLATION**

In pertinent part section 56.12002 requires “[e]lectric equipment and circuits [to] be provided with properly installed switches or other controls . . . of approved design and construction.” The first question is whether the cited outlets constituted “electric equipment” and/or electric “circuits” within the meaning of the standard. Crum believed that the outlets constituted both equipment and circuits (Tr. 290), and the court concludes that he was right. The outlets were components of an electrical network that formed a looping path for electricity to travel to and from equipment that was plugged into the outlets. As such they were electric “equipment” and parts of a “circuit,” that is, parts of the loop giving a closed path to electricity. Under the standard, such equipment and circuits are required to be provided with “switches or other controls.” An electric switch is a component that can break an electric circuit. The outlets were not switches. The term “other controls” when used in the standard, refers to components other than switches that can interrupt or regulate the flow of electric current. The outlets controlled the flow of current, in that electric equipment had to be plugged into the outlets to complete the circuit. In that sense the outlets were “controls” other than switches. Thus, the outlets came within the standard.

The parties agree the outlets themselves were “properly installed,” so the only other question is whether the outlets were “of approved design and construction.” The definitions for

Part 56 do not include the phrase “of approved design and construction” and section 56.12002 does not specify what the phrase means. The court concludes that like many generally worded standards, section 56.12002 is subject to a “reasonably prudent person” test, which means that the court must determine “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific . . . requirement[s] [(i.e. the need for waterproof covers)] of the standard.” *Ideal Cement*, 22 FMSHRC 1342, 1345 (Aug. 1996). Here the Secretary’s case fails.

The reasonably prudent person standard is objective. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1966). It can be met in numerous ways, but the sum total of the evidence must lead to the conclusion a reasonably prudent person given all of the surrounding circumstances would have recognized the need for waterproof covers. There was no testimony offered by the Secretary as to the practice in the mining industry or in any other industry with regard to requiring waterproof covers on outdoor GFCI outlets. Crum’s identification of hinges and flanges where covers might once have been attached can be inferred as evidence of a practice to provide outside outlets with covers, but it equally can be inferred as evidence of a practice to remove them. The record does not indicate which, if either, is correct. Further, there was no documentary evidence offered regarding MSHA’s instructions to operators and/or inspectors concerning the covers. Rather, Crum testified that when determining whether waterproof covers are required he “[had] to reference” the NEC. Tr. 293. Certainly, in considering whether the reasonably prudent person test is met, accepted safety standards in the field may be considered. However, the inspector never identified the provision of the code that “indicates” the covers are required, nor did the Secretary either at trial or in his brief. The inspector’s assertion alone does not constitute relevant evidence as to what a reasonably prudent person would conclude. Thus, in the end, the only objective factor the court has before it when determining whether the reasonably prudent person test has been met is the inspector’s testimony that the lack of covers posed a hazard. Tr. 286-287. Such testimony is relevant when considering whether a reasonable prudent person would have recognized the need for waterproof covers, but it alone is not sufficient to meet the reasonably prudent person test. Many things at a mine may pose a hazard but not necessarily come within a particular standard.

The court will vacate the citation at the close of this decision.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8741717	7/30/2013	56.12018

Shortly after inspecting the outdoor outlets, Crum entered the scale house trailer and inspected an electrical box that housed several circuit breakers.<sup>23</sup> Crum noted that two of the breakers in the box, breaker No. 11 and breaker No. 12, were not labeled. Tr. 302. Using an outlet tester, Crum determined the two unlabeled breakers controlled the flow of electricity to the two outside outlets that he cited for lacking waterproof covers. Tr. 306. The wall of the trailer

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<sup>23</sup> The box contained two panels of six breakers and at the top in the middle of the box and separate and distinct from the two panels was a single breaker. Russell called it “the main breaker.” Tr. 321. The main breaker controlled all of the other breakers in the box. Tr. 307; see Gov’t Exhs. 15A (LAKE 2014-2-M), 15B (LAKE 2014-2-M).

separated the outside outlets from the breaker box. The electric line to the outlets ran from the breaker box through the wall and to the outlets. Therefore, according to Crum, there was no way to tell by looking at the unlabeled breakers the circuits they controlled. Tr. 307. In addition, the unlabeled breakers were not locked out. Tr. 311.

Crum believed the lack of labels on the two breakers violated the requirement of section 56.12018 that “principal power switches . . . be labeled to show which units they control, unless identification can be made readily by location.”<sup>24</sup> Crum agreed that the term “principal power switches” is not defined in Part 56 or elsewhere in the regulations. Tr. 316. However, in Crum’s opinion, breakers No. 11 and No. 12 were “principal power switches” because they were “the only thing that controlled the power to [the] two outlets.” Tr. 308. Crum agreed that there was a main breaker at the top of the box that controlled all of the breakers. As he recalled, the main breaker was labeled “main switch,” but it was not specifically labeled to show that it controlled the circuits to the outlets. Tr. 311.

Russell testified that it was reasonable to think that the main breaker controlled power to all of the box’s circuits. Tr. 321. He noted, as had Crum, that the main breaker was labeled to show it controlled all of the breakers in box. Tr. 323. Further, to his knowledge the company never had been cited for anything relating to the subject breaker box. Tr. 322.

Crum did not think the lack of labeling was likely to lead to an injury because the GFCI systems were operating properly. He stated, “Even if a ground fault . . . occur[red] or somebody were to get into that circuit, the GFCI would trip.” Tr. 310. However, if the system failed, a miner could receive a 110-volt shock and first or second degree burns were possible, as well as muscle sprains and joint contractions. *Id.*

Crum found that the company’s negligence was “low.” He stated that the condition had existed for a long time, that the box had been subject to several MSHA inspections, and that the lack of labeling never had been cited. Because the condition had not been cited, he did not think the miners or mine management recognized the condition as a hazard. Tr. 310-311.

### **THE VIOLATION**

There is no question that the breakers controlling power to the outdoor outlets were not labeled. Crum’s testimony to this effect (Tr. 302) was not challenged by the company. Indeed, Russell agreed with Crum. Tr. 307. The fundamental question is whether the unlabeled switches

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<sup>24</sup> Contrary to his usual practice, Crum did not take photographs of the unlabeled breakers. Tr. 313. He stated:

I forgot. . . . I should have; I know that. But we were trying to figure out exactly [what] those [breakers] controlled; and by the time I figured it out, they went ahead and labeled them, and I failed to take pictures of the condition.

Tr. 313.

were “[p]rincipal power switches” within the meaning of section 56.12018. As the court noted *infra* the word “principal” connotes a chief or leading power switch. Here, the unlabeled breakers were the leading switches to turn power on and off to the outlets. Tr. 311. However, like the breaker box in Citation No. 8741689 (Gov’t Exh. 8 (LAKE 2014-616-M)) the cited breaker box was a single unit and the unit’s chief or leading switch was its main switch, a switch everyone agrees was labeled. The court cannot logically distinguish the breaker box cited in Citation No. 8741689, a box the inspector agreed did not violate section 56.12018, from the subject breaker box. Both boxes had a chief or leading main switch that was labeled. Yet in one instance (Citation No. 8741689) the inspector found the box came within the standard (Tr. 156) while in the subject instance he found the box did not. Tr. 311. The agency cannot have it both ways. Its position with regard to the subject box would require all breakers in a breaker box to be labeled, something the standard decidedly does not mandate. In the court’s opinion both boxes were units whose principal power switches were labeled. Therefore, the court will vacate Citation No. 8741717 at the close of this decision.

**OTHER CIVIL PENALTY CRITERIA**

The company abated the violations within the time set by the inspector and in so doing it exhibited its good faith. The company agrees that any penalties assessed for the violations will not affect its ability to continue in business. Tr. 325. The Secretary agrees that the mine has a “very small” history of previous violations (Tr. 35; Gov’t Exh. 18) and that the mine is “relatively small.” Tr. 35.

**ASSESSMENT OF PENALTIES**

**LAKE 2014-147-M**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8747007	11/13/13	56.16005	\$100	\$100

The court finds that the violation was not serious and that it was due to the company’s low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

**LAKE 2013-616-M**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8741687	06/05/13	46.8(a)(2)	\$100	\$100

The court finds that the violation was not serious and that it was due to the company’s low negligence. Given these findings and other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8741688	06/05/13	56.12032	\$100	\$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741689	06/05/13	56.12006	\$100	\$0

The court finds that the Secretary did not prove the violation. The citation will be vacated.

**LAKE 2014-2-M**

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741713	07/30/13	56.12004	\$100	\$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741714	07/30/13	56.12032	\$100	\$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741715	07/30/13	56.12018	\$100	\$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of \$100 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741716	07/30/13	56.12002	\$100	\$0

The court finds that the Secretary did not prove the violation. The citation will be vacated.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8741717	07/30/13	56.12018	\$100	\$0

The court finds that the Secretary did not prove the violation. The citation will be vacated.

**ORDER**

In view of the findings and conclusions set forth above Citation No. 8741688, Citation No. 8741713, and Citation No. 8741715 **ARE MODIFIED** to reflect the company's low negligence. In addition, Citation No. 8741689, Citation No. 8741716 and Citation No. 8741717 **ARE VACATED**. Within 30 days of the date of this decision the company **SHALL PAY** civil penalties in the amount of \$600.<sup>25</sup> Upon payment of the penalties, these proceedings are **DISMISSED**.

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

Distribution: (Certified Mail)

Lauren Polk, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3516

Peter DeBruyne, Esq., Peter DeBruyne, P.C., 838 North Main Street, Rockford, IL 61103

/db

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<sup>25</sup> Payment shall 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**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 8, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

Petitioner,

v.

PEABODY MIDWEST MINING LLC,

Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-302

A.C. No. 12-02010-242576

Mine: Air Quality #1 Mine

DAILY CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-856

A.C. No. 12-02010

Mine: Air Quality #1 Mine

**DECISION APPROVING SETTLEMENT**  
**ORDER TO MODIFY**  
**ORDER TO PAY**

Before: Judge Harner

These cases are before me upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act”). A Joint Motion for approval of a settlement agreement on these cases has been submitted to me.

**Docket No. LAKE 2011-856** concerns a proposed daily civil penalty issued pursuant to Section 110(b) of the Mine Act for a continuing violation. The underlying Section 104(a) citation (No. 6670852) for a violation of 30 C.F.R. § 50.41 was issued on November 9, 2010. The Respondent, Peabody Midwest Mining, contested the citation (Docket No. LAKE 2011-118-R) before the Federal Mine Safety and Health Review Commission (“Commission”). On June 23, 2011, the Secretary issued a notification of the proposed assessment of penalty to Peabody pursuant to 30 C.F.R. § 100.5(c), and proposed a daily penalty of \$4,000.00 until Peabody abated the citation. Contest proceedings related to the underlying citations continued before the Commission and the United States Court of Appeals for the Seventh Circuit. The underlying citation was affirmed by the Seventh Circuit on April 26, 2013. 715 F.3d 631. On May 15, 2013, Peabody provided notice to the Secretary that although it disagreed with the Court’s decision it would comply with it, and the proposed daily penalty stopped accruing.

The total penalty that accrued until Respondent notified the Secretary that it would comply with the Court’s decision and the penalty stopped accruing was approximately

\$2,760,000. By order dated December 18, 2014, this Court appointed Thomas Stock and Mark Malecki as settlement attorneys. The proposed settlement amount agreed to by the parties is \$642,000.00, payable in two installments as set forth below.

For the reasons that follow I approve the parties' joint motion to settle this docket. Under the guidance of the appointed settlement attorneys, the parties were able to fully discuss and confer on their respective positions with respect to this docket. In addition, I note that although the Act provides for a daily civil penalty in response "to operator recalcitrance in situations where ... [a] violation is not abated in a timely manner"<sup>1</sup>, the Secretary's decision to propose a daily civil penalty is discretionary as is the dollar amount of such daily civil penalty. Further, the issues and defenses raised in the contest proceeding were substantial and involved, inter alia, the interpretation of other federal statutes and their relationship to the Mine Act. Finally, the Respondent's failure to provide the requested Part 50 information did not affect the health and safety of miners while performing ongoing mining operations at the mine.

With regards to Citation No. 6670852 contained in **Docket No. LAKE 2011-302**, the Respondent has agreed to pay the originally assessed amount of \$196.00, and the parties agree that the negligence designation will be modified from "High" to "Moderate."

Having considered the above, the Joint Motion and the other documentation, I find that the modifications are reasonable as set forth in the motion to approve settlement and conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**, and the modifications are accepted as set forth in the motion.

With regards to **Docket No. LAKE 2011-856**, Peabody Midwest Mining LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$642,000.00. The penalty will be payable in two installments, with \$321,000.00 being due within 30 days of this decision, and \$321,000.00 being due within 120 days of this decision.<sup>2</sup> Upon receipt of the two payment, Docket No. LAKE 2011-856 is **DISMISSED**.

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<sup>1</sup> See *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

<sup>2</sup> <sup>1</sup>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

With regards to **Docket No. LAKE 2011-302**, Peabody Midwest Mining LLC is hereby **ORDERED** to pay the Secretary of Labor \$196.00 within 30 days of the date of this decision. Upon receipt of the payment, Docket No. LAKE 2011-302 is **DISMISSED**.

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

Distribution:

Samuel Lord, Esq., U.S. Dept. of Labor, 1100 Wilson Blvd. Suite 2200, Arlington, VA 22209

Dan Wolff, Esq., Crowell & Moring LLP, 1001 Pennsylvania Ave., NW, Washington, DC 20004

/mzm

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 11, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

MIZE GRANITE QUARRIES, INC.,  
Respondent

CIVIL PENALTY PROCEEDINGS:

Docket No. SE 2014-407-M  
A.C. No. 09-01036-353316

Docket No. SE 2014-408-M  
A.C. No. 09-01036-353316

Mine: Mize Granite Quarries

## DECISION

Appearances: Charna Hollingsworth-Malone, Esq., Office of the Solicitor,  
U.S. Department of Labor, Atlanta, GA, for Petitioner

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

Before: Judge David Barbour

In Docket No. SE 2014-407-M, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (2012) the Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA) alleges that Mize Granite Quarries, Inc., (Mize Granite or the company) violated mandatory safety standard 30 C.F.R. 56.15005, at a granite quarry owned and operated by the company.<sup>1</sup> The standard requires in pertinent part that [“s]afety belts and lines shall be worn when persons work where there is danger of falling.” 30 C.F.R. § 56.15005. The Secretary asserts that on January 14, 2014, MSHA Inspector John Mayer observed that a miner working on a ledge in the quarry was not wearing fall protection while drilling within 6 feet of the ledge’s edge. Gov’t Exh. 1. The ledge slopes downward towards the edge and the edge is more than 20 feet from the floor of the quarry. *Id.* The inspector cited Mize Granite for the alleged violation. He found that the violation was highly likely to cause a fatality, that the violation was a significant and substantial contribution to a mine safety hazard and that Mize Granite was highly negligent in allowing the condition to exist. The Secretary petitioned for the assessment of a civil penalty of \$45,000 for the alleged violation.

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<sup>1</sup> The quarry is located in Elberton, Georgia.

After the petition was filed, the company answered, conceding the violation, but asserting that the penalty would adversely impact its ability to continue in business. 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 the parties reported they remained at loggerheads, the undersigned scheduled the matter for hearing.

The parties agreed to go forward on May 5 - 6, 2015, in Athens, Georgia. The hearing convened as scheduled on the morning of May 5. At the conclusion of the hearing, the undersigned again urged the parties to engage in settlement discussions. Tr. 77. After conferring, the parties reached a settlement.<sup>2</sup> *Id.* 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>
8811725	1/14/14	56.15005	\$45,000	\$27,250

Counsel stated that there are no changes to the citation. Tr. 78. She also stated that the parties agree a total penalty of \$27,250 is warranted and that they request it be paid with an initial payment of \$2,250, the remainder to be paid over a three-year period at monthly intervals. *Id.*

### **ORDER**

The settlement **IS APPROVED**. Mize Granite **IS ORDERED** to pay a total penalty of \$27,250.00 for the violation in question. On August 3, 2015, Mize Granite shall make an initial payment of \$2,250. On the first business day of the next 34 months, Mize Granite shall pay \$714.30, and on the first business day of July, 2018, Mize Granite shall pay \$713.80. Should Mize Granite fail to make a scheduled payment the entire balance due will be payable.<sup>3</sup> Upon payment of the full penalty of \$27,250.00 this proceeding **IS DISMISSED**.

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

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<sup>2</sup> The parties had already submitted a written settlement for Docket No. SE 2014-408-M, which the court approved on June 9, 2015. In the decision approving the settlement, the court effectively dismissed Docket No. SE 2014-408-M.

<sup>3</sup> 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.

Distribution (Certified Mail):

Charna Hollingsworth-Malone, Esq., Office of the Solicitor, U.S. Department of Labor, 61  
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Robert W. Mize, III, President, Mize Granite Quarries, Inc., P.O. Box 299, Elberton, GA 30636

/db

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE NW, SUITE 520N  
WASHINGTON, D.C. 20004

June 11, 2015

SCOTT D. MCGLOTHLIN,  
Complainant,

v.

DOMINION COAL CORPORATION,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D  
NORT-CD-2013-04

Mine: Dominion No. 7  
Mine ID: 44-06499

**DECISION GRANTING COMPLAINANT'S  
MOTION FOR SUMMARY DECISION  
AND  
DECISION ON LIABILITY**

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation (“Dominion”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (“Mine Act” or “the Act”).<sup>1</sup> Under 30 C.F.R Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without a loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air (“mg/m<sup>3</sup>”). 30 C.F.R. §§ 90.1, 90.3; *Goff v. Youghioghney & Ohio Coal Co.*, 8 FMSHRC 1860 (Dec. 1986). The issue in this proceeding is whether Dominion violated section 105(c)(1) by preempting McGlothlin’s statutory right to Part 90 protection.

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<sup>1</sup> McGlothlin’s complaint, which serves as the jurisdictional basis for this matter, was filed with the Secretary of Labor (the “Secretary”) on August 5, 2013, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). McGlothlin’s complaint was investigated by the Mine Safety and Health Administration (“MSHA”). On November 14, 2013, MSHA advised McGlothlin that it did not believe that there was sufficient evidence to establish, by a preponderance of the evidence, that a violation of section 105(c) had occurred. On April 2, 2014, McGlothlin filed his discrimination complaint with this Commission, which is the subject of this proceeding.

Section 105(c)(1) provides, in relevant part:

No person shall . . . in any manner discriminate . . . or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 . . . .*

30 U.S.C. § 815(c)(1) (emphasis added).

McGlothlin, who remains employed at Dominion's No. 7 mine, was permanently reassigned on June 3, 2013, from his position as a continuous miner operator at a rate of pay of \$35.00 per hour to a position as a scoop operator in less-dusty outby areas of the mine at a pay rate of \$25.67 per hour. McGlothlin's complaint alleges that Dominion violated section 105(c)(1) of the Act by interfering with the safe pay protection afforded to him under 30 C.F.R. Part 90 of the Secretary's regulations as a miner afflicted with pneumoconiosis pursuing Part 90 protection. Dominion denied McGlothlin the opportunity to work in a less-dusty area of the mine without suffering a loss in pay. Dominion, in effect, asserts that it unwittingly, but permissibly, circumvented McGlothlin's Part 90 safe pay protection rights when it transferred him to work as a scoop operator at a lower rate of pay before McGlothlin could exercise his Part 90 option because a determination of his eligibility under Part 90 was still pending.

The parties have filed cross-motions for summary decision. For the reasons that follow, construing the facts in a light most favorable to Dominion, McGlothlin's motion for summary decision and discrimination complaint shall be granted.

## **I. Background**

### *a. Statutory and Regulatory Framework*

Section 203(b)(1) of the Act provides:

[A]ny miner who, in the judgment of the Secretary of Health and Human Services based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 2.0 milligrams of dust per cubic meter of air.

30 U.S.C. § 843(b)(1). Section 203(b)(3) provides that a miner transferred based upon his development of pneumoconiosis shall be paid his regular rate of pay immediately received by him prior to his transfer. 30 U.S.C. § 843(b)(1).

Section 101(a) of the Act, 30 U.S.C. § 811(a), delegates the Secretary with the authority to promulgate regulations implementing the protections afforded to miners afflicted with

pneumoconiosis under section 203(b) of the Act. In this regard, section 101(a) provides, in pertinent part:

The Secretary shall by rule in accordance with procedures set forth in [the Administrative Procedure Act] develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

30 U.S.C. § 811(a).

Consistent with this statutory authority, the Secretary promulgated Part 90 of his regulations to supersede section 203(b) of the Act to provide miners suffering with pneumoconiosis the opportunity to transfer to a less-dusty occupation without a loss in pay. 30 C.F.R. § 90.1. As such, the Secretary promulgated section 90.103(a), essentially repeating the statutory language in section 203(b)(3) of the Act. Section 90.103(a) states:

The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner *immediately before* exercising [his rights under Part 90].

30 C.F.R. § 90.103(a) (emphasis added).

b. *Part 90 Application Procedure*

Eligibility for Part 90 pay protection rights requires the National Institute for Occupational Safety and Health (“NIOSH”), a component of the Department of Health and Human Services (“HHS”), to determine that an applicant miner has pneumoconiosis. According to HHS regulations, a qualifying diagnosis of pneumoconiosis must be made by at least two physicians certified by NIOSH based on objective clinical x-ray findings. 42 C.F.R. §§ 37.52, 37.53, 37.102. If the first two physicians disagree about the presence or classification of pneumoconiosis, NIOSH will obtain a third opinion. 42 C.F.R. § 37.53. If two of the three physicians agree on a pneumoconiosis diagnosis, their agreement constitutes a “final determination” for the purposes of Part 90 eligibility. *Id.*

After obtaining a “final determination,” NIOSH will notify the applicant miner of his eligibility to exercise his Part 90 transfer and safe pay protection rights. A miner electing Part 90 protection exercises his option “by signing and dating the Exercise of Option Form and mailing the form to [MSHA].” 30 C.F.R. § 90.3(d). A miner does not have to immediately exercise his Part 90 option after being informed of his eligibility. *See Rochester & Pittsburgh Coal Co.*, 10 FMSHRC 1313 (Sept. 1988) (ALJ), (affirming a delay in a miner’s exercise of his Part 90 rights that occurred March 1988, although the miner was initially notified of his Part 90 eligibility in August 1979), *aff’d* 12 FMSHRC 189 (Feb. 1990). Rather, a miner qualified for Part 90

eligibility retains the option to exercise his rights under Part 90 unless he waives his right to Part 90 protection.<sup>2</sup>

## **II. Findings of Fact**

McGlothlin began working for Dominion on August 16, 2001, as a continuous miner operator in Dominion's No. 36 mine. *Complainant's Mot. for Summ. Dec.*, at 2 ("Comp. Mot."). While employed at the No. 36 mine, on January 21, 2013, McGlothlin sought treatment from Dr. Christopher Morris for a persistent cough. *Id.*, Ex. A. On January 22, 2013, Dr. Perry D. Jerrigan interpreted a chest x-ray taken by Dr. Morris as consistent with pneumoconiosis. *Comp. Mot.* at 2.

On February 11, 2013, following the closure of the No. 36 mine, McGlothlin was transferred to Dominion's No. 7 mine in Buchanan County, Virginia, at which time McGlothlin continued to work as a continuous miner operator earning \$35.00 per hour. *Id.*; *Dominion's Resp. and Cross-Mot. for Summ. Dec.*, at 3 ("Dom. Resp."). On March 7, 2013, during his continued tenure as a continuous miner operator at the No. 7 mine, McGlothlin underwent a follow-up CT scan, which confirmed that McGlothlin had interstitial lung disease, as evidenced by progressive massive fibrosis, a serious form of pneumoconiosis. *Comp. Mot.* at 2, Ex. B.

Following his pneumoconiosis diagnosis, beginning on May 1, 2013, McGlothlin began pursuing his Part 90 eligibility by seeking a NIOSH determination of his respiratory condition based on an evaluation of his chest x-ray findings. *Id.* at 3-4, Exs. C, D, E. During the pendency of McGlothlin's NIOSH evaluation process, beginning June 3, 2013, McGlothlin was reassigned to an outby scoop operator position at a rate of pay of \$25.67 per hour, a reduction from the \$35.00 hourly pay rate he had been receiving as a continuous miner operator.<sup>3</sup> *Dom. Resp.* at 4.

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<sup>2</sup> A miner can waive his Part 90 protection: by filing a written waiver with MSHA; by accepting a position that exposes him to higher dust concentrations; or by rejecting an offer to transfer to work in a less dusty environment. 30 C.F.R. §90.104(a).

<sup>3</sup> Upon being transferred to the No. 7 mine, McGlothlin worked as a continuous miner from February 11 until March 31, 2013, when he was temporarily reassigned to outby duties in areas of the mine where there was less concentration of coal dust. *Dom. Resp.* at 3. Despite his reassignment, Dominion's employment records reflect that McGlothlin maintained the job title "miner operator" and continued to receive the continuous miner operator hourly pay of \$35.00 per hour until June 1, 2013. *Id.* at 4. On June 7, 2013, McGlothlin's received his regular \$35.00 hourly pay rate for the pay period from May 19 to June 1, 2013. *Comp. Mot.* at 4, Ex. F. However, Dominion did not inform McGlothlin that he was permanently reassigned as a scoop operator until a June 10, 2013, meeting between McGlothlin and Dominion management. *Id.* at 4-5; *Dom. Resp.* at 4-5. Dominion asserts that McGlothlin was advised that his rate of pay had been reduced from \$35.00 to \$25.67 per hour at the June 10, 2013, meeting. *Comp. Mot.* at 5. On June 20, 2013, McGlothlin again met with Dominion management to discuss his reduction in pay. *Id.* at 6-7; *Dom. Resp.* at 5-6. As a concession for failing to inform McGlothlin of his (fn. 3 cont'd) reassignment until June 10, 2013, Dominion management agreed to retroactively  
(continued...)

Dominion agrees that June 3, 2013, is the first date that Dominion's employment records reflect McGlothlin's reduction in pay. *Dominion's Reply*, at 6-7 ("*Dom. Reply*").

NIOSH's evaluation of McGlothlin culminated on June 6, 2013, three days after McGlothlin's formal pay reduction, when NIOSH made a "final determination" that McGlothlin's condition constituted category one pneumoconiosis. *Comp. Mot.* at 6, Ex. E. On June 12, 2013, NIOSH sent McGlothlin a blank Exercise of Option to Transfer Form ("Exercise Form") with instructions that McGlothlin was to "sign and date the enclosed form ... [and m]ail the signed form in the enclosed postage-paid envelope" to MSHA to exercise his Part 90 rights. *Comp. Mot.* at 5, Ex. H; see 30 C.F.R. § 90.3(d). McGlothlin received the Exercise Form in the mail on June 14, 2013. *Comp. Mot.* at 5. McGlothlin alleges that an executed Exercise Form was mailed to MSHA on the same day, on June 14, 2013.<sup>4</sup> *Id.*, Ex. I.

On June 19, 2013, McGlothlin's wife accessed McGlothlin's online pay stub for the pay period from June 2 to June 15, 2013. *Id.* at 5-6. This pay stub reflected an hourly rate of \$25.67 for the entire pay period. *Id.*, Ex. J. Apparently concerned about the reduction in pay for work performed during the pay period ending June 15, 2013, upon learning of the reduction, Mrs. McGlothlin's emailed MSHA on June 19, 2013, to inquire about the Exercise Form that was allegedly mailed to MSHA on June 14, 2013. *Id.* at 6, Ex. K. The following day, on June 20, 2013, an MSHA representative, responding to Mrs. McGlothlin's email, informed her that the Exercise Form she allegedly mailed to MSHA on June 14, 2013, had not been received. *Id.* The MSHA representative suggested that McGlothlin could email MSHA a signed form to expedite the process of notifying Dominion of McGlothlin's exercise of his Part 90 rights. *Comp. Mot.* at 6, Ex. K. She did so and an Exercise Form executed by McGlothlin was, in effect, received by MSHA on June 21, 2013.<sup>5</sup> *Id.* at 7, Ex. K. Dominion asserts that June 21, 2013, is the earliest controlling date of record of McGlothlin's exercise of his Part 90 rights. *Dom. Resp.* at 10.

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<sup>3</sup> (...continued)

equitably adjust McGlothlin's pay to \$35.00 per hour for the pay period from June 2 to June 15, 2013. *Dom. Resp.* at 5-6; *Comp. Mot.*, Ex. L. Thereafter, beginning on June 16, 2013, McGlothlin was regularly paid the lower scoop operator rate of \$25.67 per hour. See *Comp. Mot.*, Ex. Q.

<sup>4</sup> The evidence of record does not support McGlothlin's assertion that an executed Exercise Form was mailed to MSHA on June 14, 2013. Rather, the evidence reflects that McGlothlin's executed Exercise Form was initially received by MSHA through regular mail on August 14, 2013. *Comp. Mot.* at 9, Ex. I. Regardless, as discussed *infra*, the operative date of McGlothlin's Part 90 exercise is June 21, 2013, the date McGlothlin's wife emailed an executed Exercise Form to MSHA. *Id.* at 7, Ex. K.

<sup>5</sup> The email containing McGlothlin's Exercise Form was not opened by MSHA until June 24, 2013. *Comp. Mot.* at 7, Ex. J. However, Dominion concedes that the Exercise Form was effectively received by MSHA on June 21, 2013. *Dom. Resp.* at 10.

Thereafter, on June 24, 2013, MSHA sent a letter to Dominion, informing it that McGlothlin had executed his Part 90 rights. *Comp. Mot.* at 8, Ex. N. The letter stated:

Among other specified requirements, Part 90 requires that each Part 90 miner be compensated at not less than the regular rate of pay received by that miner immediately before exercising his or her option, or when transferred, at not less than the regular rate of pay before the transfer.

*Id.* On June 26, 2013, Dominion received MSHA's letter notifying it that McGlothlin had executed his Part 90 rights. *Id.* Dominion alleges it did not have knowledge of McGlothlin's medical status or Part 90 application prior to June 26, 2013. *Dom. Resp.* at 21. Therefore, Dominion relies on its assertion that it transferred and reduced McGlothlin's pay on June 3, 2013, before McGlothlin exercised his Part 90 option by email on June 21, 2013.

### III. Operative Dates

As a preliminary matter, there are three dates that are dispositive of the outcome of this case: **(1)** The period during which McGlothlin was "the subject of medical evaluations [by NIOSH] and potential transfer under [Part 90]" (30 U.S.C. § 815(c)(1)); **(2)** the effective date that McGlothlin's pay was reduced from \$35.00 to \$25.67 per hour; and **(3)** the date McGlothlin exercised his Part 90 option.

#### 1. *The period during which McGlothlin was the subject of medical evaluations by NIOSH and potential transfer under Part 90*

The undisputed documentary evidence demonstrates that McGlothlin's chest x-rays were undergoing NIOSH evaluation during the period April 30 to June 6, 2013. *See Comp. Mot.*, Exs. C, D, E.

#### 2. *Operative pay reduction date*

McGlothlin asserts that his hourly rate of pay was reduced from \$35.00 to \$25.67 per hour effective June 16, 2013, after he received an equitable retroactive pay adjustment for the pay period June 2 to June 15, 2013. *Id.* at 15-18. Despite the retroactive equitable pay adjustment, Dominion asserts that the effective date that McGlothlin's hourly pay was reduced was June 3, 2013, when Dominion's payroll records reflect that McGlothlin was permanently reassigned to a scoop operator position. *Dom. Reply* at 6-7.

Here, the dispositive issue is the effective date of the reduction of McGlothlin's hourly rate of pay. Dominion contends that the equitable adjustment was not paid to McGlothlin for services rendered or as a "regular rate of pay," but rather as an equitable concession for its failure to timely notify McGlothlin of his reassignment and reduction in pay. *Dom. Resp.* at 15-16. "Regular rate of pay," as contemplated by Part 90, "is the dollar rate—the rate at which the miner was actually remunerated for the work he did—irrespective of his job classification." *Mullins v. Andrus*, 664 F.2d 297, 299 (D.C. Cir. 1980). Thus, the term "regular rate of pay" in Part 90 contemplates payment for services rendered, not equitable compensation.

Dominion's payroll records reflect that he was formally assigned to a scoop operator position and would thereafter be paid at the scoop operator rate effective June 3, 2013. *Dom. Resp.* at 4, Ex. J. The equitable adjustment to McGlothlin's paycheck for the period June 2 to June 15, 2013, does not govern because it was neither a "regular" rate of pay, nor remuneration for work performed. In any event, whether the pay reduction was effective June 3, 2013, or June 15, 2013, is not material because in either case it was made during McGlothlin's Part 90 application process.<sup>6</sup>

### 3. *Operative Part 90 Exercise Date*

Although McGlothlin alleges that an Exercise Form was initially mailed to MSHA on June 14, 2013, the first documented evidence of McGlothlin's election having been received by MSHA is June 21, 2013, when McGlothlin emailed his Exercise Form to MSHA.<sup>7</sup> *Comp. Mot.* at 7, Ex. K. Consequently, the record supports June 21, 2013, as the effective date of McGlothlin's exercise of his Part 90 rights. In this regard, Dominion also asserts that the record reflects that June 21, 2013, is the date that McGlothlin exercised his Part 90 rights. *Dom. Resp.* at 10.

## IV. Analysis

### a. *Extension of Safe Pay Protection During Part 90 Application Process*

As a threshold matter, the parties' focus on section 90.103(a) is misplaced. As previously noted, section 90.103(a) provides:

The operator shall compensate each Part 90 miner at not less than the *regular rate of pay* received by that miner *immediately before* exercising [his rights under Part 90].

30 C.F.R. § 90.103(a) (emphasis added).

Thus, section 90.103(a) applies only to transfers and reductions in pay of miners who have *both* been qualified by NIOSH for Part 90 protection *and* who have exercised their Part 90 rights, neither of which applies in this case. The record reflects, as Dominion asserts, that McGlothlin's transfer to a scoop operator and resultant reduction in his hourly rate of pay from \$35.00 to \$25.67 was effective June 3, 2013. NIOSH determined that McGlothlin was eligible for Part 90 status on June 6, 2013, and McGlothlin received notice of his eligibility on June 14,

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<sup>6</sup> The Part 90 application process consists of the period during which McGlothlin was subject to medical evaluation by NIOSH and a reasonable period of time thereafter during which time McGlothlin can exercise his Part 90 option.

<sup>7</sup> The parties disagree over whether Part 90 rights vest when an eligible miner signs, dates, and mails his Exercise Form to MSHA, as McGlothlin argues, or whether Part 90 rights vest when MSHA receives the executed Exercise Form, as Dominion argues. For the purposes of this case, this distinction is irrelevant, for McGlothlin's pay protection rights vested on April 30, 2013, when McGlothlin submitted his x-ray findings for NIOSH evaluation, well before his exercise of his Part 90 option.

2013. The documented evidence also reflects, as Dominion asserts, that McGlothlin exercised his Part 90 option on June 21, 2013. Thus, this case concerns McGlothlin's transfer and reduction in pay *before* he was approved by NIOSH and, most importantly, *before* he exercised his Part 90 option.

It is section 105(c)(1) of the Act, the basis for this discrimination proceeding, that addresses the propriety of a transfer and reduction in pay made between the time a miner initiates the NIOSH approval process for his Part 90 eligibility and his timely exercise of his Part 90 option thereafter. The anti-interference provisions of section 105(c)(1) provide, in relevant part:

No person shall . . . in any manner discriminate . . . or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 . . . .*

30 U.S.C. § 815(c)(1) (emphasis added).<sup>8</sup>

The plain language of section 105(c)(1) protects the rights of prospective Part 90 miners whose x-ray findings are subject to medical evaluation by NIOSH during the period required to determine whether such miners are eligible for Part 90 status. To protect a miner's statutory right to the safe pay provisions of section 90.103, Part 90 miners must be protected from pay reductions during the application process provided in section 90.3 to avoid rendering Part 90 pay protection meaningless. When Congress drafted section 105(c)(1) to include protections for miners who are "the subject of medical evaluations and potential transfer," surely they intended to provide rights for miners—like McGlothlin—who were in the process of seeking Part 90 eligibility. Concluding otherwise would permit mine operators to evade their Part 90 obligations with impunity by circumventing Part 90 through transfers and pay reductions during a prospective Part 90 miner's application process, preempting a meaningful exercise of a miner's Part 90 option.

Thus, in the present case, the operable time period during which time NIOSH was evaluating McGlothlin's x-rays is between April 30 and June 6, 2013. McGlothlin's Part 90 protection extends until June 21, 2013, when McGlothlin exercised his Part 90 option shortly after NIOSH notified him of his eligibility for Part 90 benefits on June 14, 2013.<sup>9</sup> During this period, Dominion was precluded by section 105(c)(1) from any preemptory transfer of McGlothlin that circumvented its obligation to provide McGlothlin with Part 90 protection. Having transferred McGlothlin with a reduction in his hourly rate of pay during this period, effective June 3, 2013, Dominion violated section 105(c)(1).

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<sup>8</sup> Part 90 was promulgated pursuant to section 101 of the Act. 30 C.F.R. § 90.1.

<sup>9</sup> As Part 90 protects miners during the period of time they are subject to medical evaluation by NIOSH, the protection must be extended for a reasonable period of time to enable a miner to exercise his Part 90 option after NIOSH's notification of the miner's Part 90 eligibility. Here, McGlothlin exercised his Part 90 option on June 21, 2013, within reasonable period of time after he received notification of his Part 90 eligibility on June 14, 2013.

b. *Section 105(c)(1) Interference*

The evidence reflects that McGlothlin was an experienced continuous miner operator, having previously been employed as such beginning in August 2001 at Dominion's No. 36 mine. *Comp. Mot.* at 2. McGlothlin continued to work as a continuous miner operator when he was transferred to Dominion's No. 7 mine in February 2013, until March 31, 2013, when McGlothlin's continuous miner duties were assigned to Josh Robinette. *Id.*; *Dom. Resp.* at 3. At that time, McGlothlin was reassigned to outby duties in areas of the mine where there was less concentration of coal dust, although McGlothlin continued to retain the job title and pay rate of a continuous miner operator. *Dom. Resp.* at 3-4. Dominion contends that Robinette was a superior continuous miner operator in that he was capable of achieving greater coal production. *Dom. Reply* at 15-16.

Dominion seeks to escape liability by asserting that it had no knowledge that McGlothlin was undergoing NIOSH evaluation when it selected Robinette as its permanent continuous miner operator and ultimately reduced McGlothlin's pay, effective June 3, 2013. As noted, Dominion claims that the first time it received notice of McGlothlin's Part 90 application was June 26, 2013, when MSHA notified it of McGlothlin's Part 90 status. *Dom. Resp.* at 21.

The Commission has noted that direct evidence of a discriminatory motive is rare. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Consequently, Dominion's asserted lack of knowledge of McGlothlin's Part 90 application, particularly in view of the coincidence in time and preemptory nature of Dominion's reduction in McGlothlin's pay during the application process, is entitled to little weight. However, irrespective of Dominion's self-serving characterization of its lack of knowledge of McGlothlin's Part 90 application, a miner may demonstrate interference under section 105(c)(1) *without* the need to demonstrate proof of a discriminatory motive. *UMWA ex rel. Franks v. Emerald Coal Res. LP*, 36 FMSHRC 2088, 2107, 2113 (Aug. 2014) (separate opinion) (citing *Sec'y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (2005)).<sup>10</sup> Therefore, whether Dominion had knowledge of McGlothlin's Part 90 application is immaterial.

In distinguishing the interference analysis from the routine discrimination analysis in *Pasula-Robinette* and its progeny, the Commission has adopted a two-prong test for section 105(c)(1) interference cases:

- (1) Whether a mine operator's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and;

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<sup>10</sup> *Emerald Coal* involved discrimination complaints regarding miners' rights to confidentiality. Four Commissioners affirmed the complaints, two of which were expressed in a separate opinion. The separate opinion held that a miner may prevail in a complaint of unjustified interference with the exercise of a protected right, separate and apart from intentional discrimination claims adjudicated under the traditional *Pasula-Robinette* framework. *Emerald Coal*, 36 FMSRHC at 2105 (separate opinion).

- (2) Whether the person fails to justify the action with a legitimate and *substantial reason whose importance outweighs the harm* caused to the exercise of protected rights.

See *Emerald Coal*, 36 FMSHRC at 2108 (separate opinion) (emphasis added).

Obviously, with respect to the first criteria, McGlothlin is a member of the protected class of prospective Part 90 miners that section 105(c)(1) seeks to protect. To give effect to Dominion's pay reduction during the period when McGlothlin was undergoing medical evaluation to determine his eligibility for Part 90 would eviscerate, contrary to legislative intent, the protections afforded to miners with pneumoconiosis under Part 90.

With respect to the second criteria, absent a discriminatory motive, a mine operator is always free to exercise its business judgment with respect to the reassignment of miners to different occupations within any area of the mine. However, when the reassigned miner is entitled to Part 90 pay protection, a mine operator is absolutely liable to compensate that miner at no less than the regular rate of pay received by that miner immediately before his Part 90 pay protection rights vested. In this case, McGlothlin's Part 90 pay protection became effective as of April 30, 2013, when NIOSH began its x-ray evaluation to determine the extent of McGlothlin's respiratory condition.

Commission Rule 67(b) provides that a motion for summary decision shall be granted if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); see also *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion for summary decision should be granted, the court must construe the undisputed material facts in a light most favorable to the opposing party. *Hanson*, 29 FMSRHC at 9.

Construing the evidence in a light most favorable to Dominion by adopting Dominion's assertion that June 3, 2013, is the date of McGlothlin's pay reduction, and that June 21, 2013, is the date of McGlothlin's exercise of his Part 90 rights, does not alter the inescapable conclusion that McGlothlin's pay was reduced during the period between NIOSH's evaluation of his respiratory condition and McGlothlin's exercise of Part 90 status shortly thereafter. Consequently, McGlothlin's motion for summary decision, seeking the grant of his 105(c) discrimination complaint based on Dominion's *interference* with the rights afforded to him under Part 90, shall be granted.

### **ORDER**

In view of the above **IT IS ORDERED** that Scott D. McGlothlin's motion for summary decision and discrimination complaint **ARE GRANTED**.

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer in an attempt to reach an agreement on the specific relief to be awarded. Consideration should be given to the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, reasonable attorney's fees, and

reimbursement for any other relevant incidental expenditures. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before July 29, 2015**. An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before August 19, 2015**, Proposals for Relief specifying the appropriate relief to be awarded. If the parties cannot reach a joint stipulation, the parties should furnish documentation, such as payroll records, pay stubs or tax returns, to support their relief calculation. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Finally, Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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/acp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

THE AMERICAN COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. LAKE 2011-589  
A.C. No. 11-02752-250608

Mine: New Era Mine

## DECISION

Appearances: Ryan L. Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Petitioner;

Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of his Mine Safety and Health Administration (“MSHA”), against The American Coal Company (“American Coal”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Act” or “Mine Act”), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of \$57,300.00 for four alleged violations of his mandatory safety standards.

A hearing was held in Henderson, Kentucky. The parties’ Post-hearing Briefs are of record. For the reasons set forth below, I **AFFIRM** two citations, as issued, and two citations as amended, and assess penalties against Respondent.

### **I. Stipulations**

The parties stipulated as follows:

1. American Coal is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

2. Prior to September 24, 2010, American Coal was owner and operator of the Galatia mine, MSHA ID Number 11-02752, which encompassed multiple operations and mines: New Era, New Future, and Galatia North mines. On September 24, 2010, the New Future mine began

operating under Mine ID Number 11-03232, and the New Era mine continued operating under Mine ID Number 11-02752. American Coal remained the owner and operator of both mines.

3. American Coal is subject to the jurisdiction of the Mine Act.

4. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

5. The citations at issue herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of American Coal on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein or for any other purpose other than establishing their issuance.

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

7. American Coal demonstrated good faith in abating the violations.

Tr. 14-15.

## **II. Background**

American Coal operates the New Era mine, an underground bituminous coal mine, in Saline County, Illinois. The New Era mine employs approximately 400 workers, and produced 4,963,211 tons of coal in 2011. Tr. 19; MSHA, *Mine Quarterly Production Information*, <http://www.msha.gov/drs/ASP/MineAction70002.asp> (last visited June 4, 2015).

During September of 2010, MSHA coal mine inspector James D. Rusher, employed by MSHA for 33 years primarily as a mine inspector, conducted an inspection of the New Era mine. Tr. 88. At the time of the hearing, Rusher was retired from MSHA. Tr. 87. At issue in these proceedings are four citations that Rusher issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Three citations involve allegations that areas of the mine roof were inadequately supported, and one alleges that an accumulation of coal occurred along a conveyor belt in the mine.

## **III. Findings of Fact and Conclusions of Law**

### **A. Roof Control Violations**

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

In three of the four citations at issue, the Secretary alleges that American Coal violated section 75.202(a) of his regulations.<sup>1</sup> The citations were issued during September of 2010 by Inspector Rusher, who determined that the gravity of the violations was “significant and substantial” (“S&S”). The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). 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 of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause an injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014).

Inspector Rusher also found that the violations occurred as a result of American Coal’s moderate negligence. The Secretary defines moderate negligence with reference to his Part 100 civil penalty criteria, which state that a mine operator is moderately negligent when it “knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d).

American Coal’s geologist, Gary Vancil, testified as to the geologic roof composition in the mine. Tr. 22-43. Vancil explained that the roof control citations were issued in the Number 6 coal seam, which is five to six feet thick, and that the mine floor consists of fire clay. Tr. 23-24. There are three types of roof rock in the seam: gray shale, black shale, and limestone. Tr. 28-33. According to Vancil, gray shale is the least competent roof material, i.e., most likely to fall; he stated that “most of the time you cut it out. You can’t do [anything] with it.” Tr. 33. Although black shale is “more competent than gray shale, he explained, “humidity will cause it to flake

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<sup>1</sup> 30 C.F.R. § 75.202(a) states 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.”

off.” Tr. 33. Vancil also testified that a limestone roof is “very competent,” and described it as “hard. I mean really hard. The best roof you can have. You don’t get [any] scaling. You don’t have to worry about your top panel.” Tr. 28-29. According to him, and without contradiction by the Secretary, no roof falls have occurred in areas of the New Era mine where the roof consists of limestone. Tr. 33, 73.

## **1. Citation No. 8427425**

### **a. Fact of Violation**

On September 8, 2010, Rusher issued section 104(a) Citation No. 8427425, alleging an S&S violation of section 75.202(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by American Coal’s “moderate” negligence. The “Condition or Practice” is described as follows:

The roof where persons normally work or travel was no longer adequately supported to protect persons from the hazards associated with the fall of the roof. The roof between the air locks in the Main East Return air course had numerous bearing plates that have deteriorated and are no longer capable of supporting the roof. The area is approximately 50 ft. in length and 20 ft. wide. The ribs are rashed out into the entry.

Ex. P-1. The Citation was terminated after the roof was adequately supported by installation of steel sand props.

Rusher explained that bearing plates are used “to help support the immediate roof to keep it from delaminating.” Tr. 93. He testified that eight such plates “in the center part of the entry” of the cited area “had been there for so long that they had rusted to paper thin, and some of them fell to the floor.” Tr. 91, 95-96. In fact, without conceding the fact of violation, American Coal stipulated that several bearing plates in the cited area were rusted. Tr. 65-66.

The operator argues that although several bearing plates were damaged, the integrity of the roof control had not been compromised because of the stability of the limestone roof. Resp’t Br. at 11-15. Vancil testified that the limestone in this area is 24 to 28 inches thick, characterizing it as “good limestone,” and opined that a roof fall was “not likely.” Tr. 50-51. Even Rusher acknowledged that “the roof, itself, was solid limestone.” Tr. 92.

Section 75.202(a), however, broadly requires mine operators to “protect persons from hazards related to falls of the roof.” Rusher testified that “some of the area had . . . fragments of loose roof . . . . It could fall on a person, maybe cut you or scratch you, possibly break a collarbone . . . .” Tr. 100-01. Vancil also testified credibly that installing roof bolts in solid limestone can actually weaken the rock surrounding the bolts. Tr. 30. In this regard, notwithstanding the fact that the roof in the cited area is solid limestone, I credit Rusher’s evaluation that the effectiveness of the roof control was compromised by deteriorated bearing

plates, posing a hazard to persons traveling through the area. Therefore, I conclude that American Coal violated section 75.202(a).

### **b. Significant and Substantial**

The fact of violation has been established. Applying the remaining *Mathies* criteria to this violative condition, I find that the compromised bearing plates contributed to fragments of roof or the bearing plates, themselves, falling, and that a roof fall of this nature would be reasonably likely to result in serious injuries such as lacerations and musculo-skeletal injuries such as broken bones and contusions. Therefore, I find that the Secretary has established that the violation was S&S.

### **c. Negligence**

Rusher concluded that American Coal was moderately negligent in allowing the bearing plates to deteriorate. Tr. 106. He noted, in particular, that the conditions were obvious and had taken years to develop. Tr. 104. Again, noting American Coal's concession that the bearing plates were rusted, it is reasonable to conclude that the operator knew or should have known from visual inspection alone that the bearing plates had deteriorated over time. However, insofar as the roof consisted of very competent limestone and a catastrophic failure was unlikely, American Coal's reliance on the inherent stability of the roof somewhat mitigates its negligence. Therefore, I conclude that American Coal was moderately negligent in violating the standard.

## **2. Citation No. 8427427**

### **a. Fact of Violation**

On September 8, 2010, Rusher issued Citation No. 8427427, alleging an S&S violation of section 75.202(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence. The "Condition or Practice" is described as follows:

The roof where persons normally work or travel was not adequately supported to protect persons from the hazards associated [with] falls of the roof. Three pattern roof bolts were loose from the deterioration of the roof, leaving the bearing plates and roof bolt shanks protruding from three to six inches from the mine roof. The area of unsupported roof was measured at 10 ft. by 10 ft. The surrounding roof was in good condition and no cracks were found. This condition was located at cross cut #50 of the #4 entry, just off of the Main North #2 Travelway.

Ex. P-2. The Citation was terminated after the roof was adequately supported by installation of steel sand props.

Rusher testified that the roof “had taken weight, apparently, and broken up and fractured and fell away,” which, “[e]ft about two to three inches or more of the shank of the roof bolt hanging loose.” Tr. 163. The two-to-three inch measurement, rather than the three-to-six inches noted in the Citation, was corroborated by his inspection notes. Tr. 182. He added that the affected area was one crosscut off the main travelway, a crosscut where “[l]ots of times they’ll store pallets, loads of rock dust and roof bolts in there, and I think that was . . . the reason I was in there looking that area over.” Tr. 172. Rusher noted that this crosscut was also used by vehicles as a pull-over to avoid passing vehicles. Tr. 179.

Rusher initially testified that the roof consisted of coal and shale, and that “over time the coal deteriorated from around these roof bolts and the shale came down.” Tr. 161. However, he later acknowledged that the roof was, in fact, composed of solid limestone, and that his notes did not reflect that the roof was coal or shale. Tr. 184. Likewise, Vancil opined that the roof was “really good, thick limestone,” and that any shale had been cut down during mining. Tr. 58-59.

I find that the dislodged bearing plates and roof bolts demonstrated that the roof was inadequately supported and posed a hazard to miners; it is worth reiterating here that installing roof bolts in solid limestone can weaken the rock and increase the likelihood of the roof falling. Therefore, I conclude that American Coal violated section 75.202(a).

### **b. Significant and Substantial**

The fact of violation has been established, and partially dislodged bearing plates and roof bolts contributed to the hazard of roof falls. Rusher testified that miners in the crosscut would be exposed to injuries such as facial lacerations, and that such injuries had occurred, in fact, at least two times in the past, once in a location similar to the cited area. Tr. 163-64. In this case, the likelihood of injury was even greater, in Rusher’s opinion, because the type of vehicles used in the mine are “like golf carts essentially . . . [and] do not have a canopy or any type of top on them. So there’s nothing that would prevent falling material from striking a miner.” Tr. 164.

I find that when miners accessed the crosscut, a reasonably serious injury, such as lacerations and musculo-skeletal injuries such as broken bones and contusions, would be reasonably likely to occur were pieces of limestone to fall from around the dislodged plates and bolts. Therefore, I find that the violation was S&S.

### **c. Negligence**

Rusher ascribed this violation to American Coal’s moderate negligence, testifying that the cited area was “not the main travel road.” Tr. 194. He explained further:

I really feel like this particular situation hadn’t been there all that long. How long, I cannot fix a time. And so mine management maybe didn’t know about it, but people pulling in those crosscuts not only include the miners . . . it also includes mine managers and other supervisors that needed to pull off to let somebody by. . . . So

I think that somebody should have maybe seen it if it existed before we got in there.

Tr. 194-95. He also testified to the obviousness of the dislodged plates and bolts by stating that “[w]hen we pulled up in there with our ride, the headlights . . . shined right on it before we even got to it. And it lit up very well.” Tr. 194.

I find that the condition was obvious and that management knew or should have known of its existence. However, I also find that considerable mitigating circumstances existed. The extensiveness of the condition was limited to three units of bearing plates with roof bolts protruding just two to three inches from the roof. The Secretary did not introduce any evidence that the affected area had been accessed recently; indeed, Rusher noted no tire tracks. Tr. 166, 185. Furthermore, the area was not required to be examined in a pre-shift, on-shift, or weekly examination, but only in the event that work was scheduled. Tr. 180. In light of this evidence, combined with the general competence of the limestone, I find that the violation occurred as a result of American Coal’s low, rather than moderate, negligence.

### **3. Citation No. 8427431**

#### **a. Fact of Violation**

On September 14, 2010, Rusher issued Citation No. 8427431, alleging an S&S violation of section 75.202(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by American Coal’s “moderate” negligence. The “Condition or Practice” is described as follows:

There is an area of unsupported roof between No. 48 and 49 cross cuts of the Main North travel way. Approximately five pattern installed roof bolts had been knocked loose and another one had been sheared off by being struck by mobile equipment passing through this area. Nothing would prevent a person from being injured from hazards related to falls of the roof.

Ex. P-6. The Citation was terminated after additional roof bolts were installed.

Rusher testified that although the bearing plates were still attached to the damaged roof bolts, “they were not firm against the roof at all because the bolt[s] had been damaged and twisted.” Tr. 201. He also stated that the “condition appeared fresh,” and that he had not seen it the day before when he went through the area. Tr. 214-15. American Coal stipulated to the damaged bolts, without conceding the fact of violation. Tr. 65. Pointing to the inherent stability of the immediate roof, the operator argued that no violation of section 75.202(a) occurred because, although some bolts were damaged, the roof “nonetheless remained supported and controlled by the natural strength, competency and beam effect of the massive limestone.” Resp’t Br. at 25.

The affected area is a main travelway for mobile equipment. In light of the uncontroverted evidence that the bolts had been severely damaged, for the same reasons articulated respecting the rusted bearing plates and protruding bolts in the previously discussed citations, I conclude that American Coal violated section 75.202(a).

### **b. Significant and Substantial**

The fact of violation has been established, and partially dislodged, mangled, and sheared-off roof bolts contributed to the hazard of roof falls. Rusher testified credibly that miners often traveled through the cited area in mobile equipment without the overhead protection of canopies. Tr. 205. In the event of material falling as a result of compromised roof bolts, Rusher opined that miners would be exposed to lacerations, broken bones, and crushing injuries. Tr. 205. Based on the record, including the fact that installing bolts can weaken an otherwise competent limestone roof, I find that miners traveling between the crosscuts were in danger of sustaining reasonably serious injuries as a result of limestone fragments breaking away from the roof. Therefore, I find that the violation was S&S.

### **c. Negligence**

American Coal is not challenging the Secretary's moderate negligence allegation. Resp't Br. at 28 n.15. Therefore, considering evidence that miners frequented the area in uncovered mobile equipment, but the probability that the condition had existed for less than a day, I find that American Coal was moderately negligent in violating the standard.

## **B. Coal Accumulation Violation**

### **1. Citation No. 8427430**

#### **a. Fact of Violation**

On September 12, 2010, Rusher issued Citation No. 8427430, alleging an S&S violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by American Coal's "moderate" negligence.<sup>2</sup> In a subsequent action, Rusher's finding was modified to "high" negligence. The "Condition or Practice" is described as follows:

There is an accumulation of combustible material in the form of dry spilled loose coal and coal dust under the back side of the No. 1 North belt at the tail piece area. This spillage begins at the outby end of the belt tail roller and extends outby for a distance of about 80 feet. The spillage was about 1 inch to 14 inches deep and was

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<sup>2</sup> 30 C.F.R. § 75.400 states that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, 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."

coming in contact with the bottom side of the conveyor belt. No miners were observed anywhere cleaning this material up from the mine floor. The belt was in motion at the time of the citation.

Ex. P-4. The Citation was terminated after the combustible material had been cleaned up and removed from the mine, and the area had been heavily rock dusted.

Rusher testified as to all the allegations set forth in the Citation. Tr. 220-36. He stated that the feeder at the tail piece was being overwhelmed by coal being loaded from coal haulage vehicles. Tr. 224-25. After reviewing his notes, however, he conceded that the cited accumulation was not near the working section, but approximately three miles out by the working section at a ninety-degree belt-to-belt transfer point between the Main North No. 1 belt and the Main East No. 1 belt. Tr. 245-48, 283-86; Ex. P-5 at 5. Although he explained that he “was thinking about another situation,” he did have a clear recollection of the accumulation. Tr. 259, 286. He opined that overloading the section belts ultimately overloaded the main belts, and caused coal spillage at the cited transfer point between the main beltways. Tr. 281-85, 293-94, 311-12. Rusher believed that the accumulation, which he described as “very obvious,” amounted to more than normal spillage because “of the depth of it and the length of it, and continually being added to by material falling off the belt in the form of additional loose coal and coal dust and coal fines.” Tr. 338-39.

Rusher opined, from his visual observation, that the accumulation was 95 percent coal. Tr. 322-25. He also described the accumulation as dry, stating that he “didn’t see any wet [conditions], but it was dry where the belt was contacting it and compacting it under where that belt would slide over the accumulations . . . creating friction.” Tr. 321. Rusher identified the belt, which was running at 600 feet per minute, as a potential ignition source, and opined that although “there was no smoke or heat being generated,” “most likely left unattended, [the accumulation could] create a fire hazard there and then spread . . . and increase to a large fire, and then spread out to the other adjacent entries.” Tr. 227-29, 326, 330.

At the time that Rusher discovered the accumulation, American Coal’s safety director, Matt Mortis, was accompanying him, and no other miners were present in the area. Tr. 286. According to Rusher, only mine examiners and miners performing such tasks as belt maintenance, shoveling, or rock dusting would have been in the area and, had miners been cleaning up the accumulation, he would not have issued the citation. Tr. 286-87, 338. As to how long the accumulation had existed, Rusher testified as follows:

I can’t specify or nail down an exact time, but I don’t believe it had been there like a whole shift or even a half a shift, which is about four hours maximum. Matter of fact, in my honest opinion, you have mine examiners that check those belts [each shift], and since it wasn’t written up on the books that he . . . might have found something, I believe it was not there. And then it had to have spilled, in my opinion, after the examiner had walked through that area. So that’s a couple of hours or so before they’re into their shift.

Tr. 335-36. He further stated that the accumulation looked fresh, and that an examiner would have had no trouble seeing it because “[y]ou could . . . easily see it from the walk side.” Tr. 313, 339. It is reasonable to infer, therefore, that Rusher and Mortis may well have been the first individuals to have discovered the accumulation.

A violation of section 75.400 occurs “where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) (“Old Ben II”) (footnote omitted). This judgment is viewed through the objective standard of whether a “reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 968 (May 1990), *aff’d*, 951 F.2d 292 (10th Cir. 1991) (“UP&L”). While the Commission has held that a violation of section 75.400 occurs when an accumulation of combustible materials exists, it has recognized that “some spillage of combustible materials may be inevitable in mining operations” and that “[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount.” *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) (“Old Ben I”). In addition to being combustible, the material cited must be of a sufficient quantity to cause or propagate a fire or explosion. *UP&L*, 12 FMSHRC at 968 (quoting *Old Ben II*, 2 FMSHRC at 2808). Although spills can occur quickly, accumulations of combustible material substantial enough to cause or propagate a fire are prohibited, even if recent. *See Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 703 F.3d 553, 558–59 & n.6 (D.C. Cir. 2012) (rejecting operator’s argument regarding recentness of a spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of a spill).

American Coal argues that Rusher’s testimony was at odds with the description of the violative condition on the face of the Citation and, therefore, should be disregarded. Resp’t Br. at 29. However, despite the inaccuracy in the citation and Rusher’s initial confusion when he testified as to location, he was clear as to the other particulars of the accumulation and its cause. Moreover, the fact that Mortis observed the accumulation along with Rusher, despite his inability to recall anything about it when he testified, is a clear indication that American Coal was on notice of its location and the charges against the company. Tr. 352. Overall, I determined Rusher’s testimony to be quite credible and supported by his notes. Therefore, having considered the evidence in its entirety, I conclude that American Coal violated section 75.400.

### **b. Significant and Substantial**

The fact of violation has been established, and the accumulation of combustible coal contacting the belt contributed to the hazard of a mine fire. The focus here is the reasonable likelihood of injury and whether the injury would be serious. The evidence establishes that the belt was running through the accumulation at a very high speed that had dried out the coal and created friction, and smoke or fire propagation was reasonably likely to occur, leading to respiratory complications or burns of a very serious nature. Respecting the combustibility of the material on the belt coming out of the mine that day, referencing the Daily Mine Performance Report for September 12, 2010, Mortis testified that over 50 percent was rock and rejected coal, a significant departure from Rusher’s opinion that 95 percent coal was being transported. Tr.

342-47; Ex. R-32. The Commission, however, has not only observed that damp coal remains combustible, but that excluding coal mixtures, including coal mixed with fireclay, would defeat Congress' intent to remove fuel sources from mines and prohibit potentially dangerous conditions. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985). Therefore, given the hazards associated with smoke inundation and fire in underground coal mines, I conclude that the violation was S&S.

### c. Negligence

Approximately seven hours after issuing Citation No. 8247430, Rusher modified the negligence designation from "moderate" to "high." Tr. 237-38; Ex. P-4. The modification states the following:

In that with the increasing 75.400 type citations and that Mine Management has previously been counseled [a]bout this issue on several [occasions], this citation is being elevated from moderate to high negligence.

Ex. P-4. Rusher testified that his contemporaneous notes on this Citation were heavily soiled and that when he returned to the field office, his supervisor, Mike Rennie, transcribed them. Tr. 248-54. However, the transcribed notes differ from Rusher's originals in that the negligence designation is raised from moderate to high. Tr. 261-63. Rusher was unable to explain the heightened charge, testifying that he could not remember the circumstances related to the modification:

JUDGE: His original notes would have said moderate. The transcription of them says high and reflects the modification. And the inspector doesn't know whether that's a mistake because he knows . . . when he wrote that citation that he wrote it according to his notes. And his citation says moderate. So either the inspector had a change of heart or his supervisor told him he wanted him to raise the negligence. But from what I understand, Inspector, you don't remember?

RUSHER: I don't.

Tr. 272. Upon further questioning, Rusher testified that he believed the moderate negligence designation to be more appropriate:

JUDGE: Today as you sit here and you've gone through your testimony and whatever recollection you have for the condition, do you believe today that this was more reasonably moderate negligence or high?

RUSHER: Your Honor, I believe it was more moderate.

JUDGE: Okay. Can you tell me why?

RUSHER: Based on my findings of my notes, and these kind of stirred up my recollection somewhat. It's been a couple and a half years. The area . . . here, the Main East belt and the Main North Number 1 belt was well rock dusted. It was the only spillage that I had seen, and it did look fresh. But it did exist. That's why I'm leaning more toward the moderate to be accurate.

Tr. 313. Indeed, Rusher's notes on conferencing the Citation state that "the cited area was well rock dusted and this condition looked like it had not been there all that long." Ex. P-5 at 7; Tr. 289.

Pointing to this testimony, the short duration of the accumulation, and the lack of knowledge on the operator's part that it existed, American Coal argues that the Citation should be modified to "no" or, at most, "low" negligence. Resp't Br. at 31-32. I find this argument unpersuasive because, as Rusher pointed out, the accumulation was still growing at the time that it was discovered. Tr. 289, 338-39. The evidence establishes that this accumulation occurred because too much coal was being dumped onto belts at various locations in the mine.<sup>3</sup> The operator has an obligation to regulate production so as to avoid overloading the mine's belt system. I find, therefore, in light of the short duration that the accumulation had existed, and the fact that it was not discovered until Rusher and Mortis happened upon it, that American Coal's negligence was moderate, rather than high, in violating the standard.

#### **IV. Penalty**

##### **A. Special Assessments**

The Secretary proposed penalties for the four citations at issue pursuant to the Secretary's Part 100 Regulations, which state in relevant part that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). Although the Secretary has wide discretion in proposing penalties under Part 100, I am not bound by the Secretary's proposed assessment. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678-679 (Apr. 1987). When the Secretary departs from the penalty tables of Part 100 and proposes significantly enhanced penalties, he must justify such departures. The U.S. Court of Appeals for the District of Columbia Circuit has held that:

The special assessment . . . is designed for particularly serious or egregious violations. MSHA "may elect" to apply the special assessment in a number of situations, including violations involving fatalities or serious injuries, an imminent danger, or an operator's "[u]nwarrantable failure to comply with mandatory health and safety standards."

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<sup>3</sup> On the day of inspection, three sections were producing coal: the Six West Longwall, and the Seventh and Eighth Headgate continuous miner sections. Ex. R-32; Tr. 343-44.

*Coal Employment Project v. Dole*, 889 F.2d 1127, 1129-30 (D.C. Cir. 1989) (quoting the version of 30 C.F.R. § 100.5 then in effect). Although the Secretary's Regulation pertaining to special assessments was revised in 2007 to remove any reference to particular circumstances that would trigger special assessment reviews, the Commission remains bound by the D.C. Circuit's holding that special assessments are reserved for "particularly serious or egregious violations." *Id.* at 1129.

American Coal argues that the special assessments proposed by the Secretary are "arbitrary, excessive and deserve no deference," and that the trial "[t]o a large degree . . . resulted from, and concern[ed] the propriety of the Secretary's four proposed special assessments."<sup>4</sup> Resp't Br. at 1. The operator further contends that, although "the Secretary must prove the reasoning or justification behind the proposed special assessment(s) . . . [he] has been and remains extremely guarded about why and how he proposes special assessments." Resp't Br. at 3.

Rusher testified as to why he recommended that the penalties be proposed under the Secretary's special assessment formula. Respecting Citation No. 8427425, he noted an increase in the number of roof control violations, and the length of time that the condition had existed. Tr. 131-32. As to Citation No. 8427427, he stated that "more emphasis must be put on this company to stop the increasing number of [75.]202(a) citations and subjecting miners to hazards created by instances just like this." Tr. 193. As to Citation No. 8427431, he stated that he did not "see any real improvements in the two or three days between those dates [when Citation Nos. 8427425 and 8427427 were issued] by mine management being more proactive than what they are to reduce the number of [75.]202(a)s for the number of people you specified earlier, 400 men in that mine." Tr. 217. Finally, respecting Citation No. 8427430, he expressed his belief that the coal accumulation "would most likely, [if] left unattended, create a fire hazard there and then spread possibly to a larger fire . . . and then spread out to the other adjacent entries. And then based on the number of [75.]400 citations in the mine that started to increase the past three months before I got there, I felt like more attention needed to be given." Tr. 330.

All four violations are serious and had the potential, if left unabated, to lead to serious injuries. However, the Secretary's referencing of prior violations falls short in explaining the reasons why these violations are particularly serious or egregious. Therefore, I find that the Secretary has not adequately justified his enhanced penalty proposals.

## **B. Section 110(i) Criteria**

While the Secretary has proposed a total civil penalty of \$57,300.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg*

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<sup>4</sup> The operator compared the special assessments to what regular assessments would be under Part 100: Citation Nos. 8427425 and 8427427 from \$7,700.00 to \$2,282.00; Citation No. 8427431 from \$9,100.00 to \$2,473.00; and Citation No. 8427430 from \$32,800.00 to \$9,635.00. Resp't Br. at 1; Ex. R-9.

*Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984). These criteria are 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 operator in achieving rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Applying the penalty criteria, I find that American Coal is a large operator. Tr. 19. In reviewing American Coal's Assessed Violation History Report for the fifteen-month period preceding the subject inspection, 76 violations of section 75.202(a), and 153 violations of section 75.400 had become final orders of the Commission. Ex. P-8. The Secretary's contention, that roof control and coal accumulation violations had been on the rise in the New Era mine, was unchallenged, and is supported by the data. Ex. R-36. Therefore, I find American Coal's violations history to be an aggravating factor in assessing appropriate penalties. In the absence of a showing by American Coal that the proposed penalties will have a negative financial impact on the company, I find that the total proposed penalty will not affect its ability to continue in business. As stipulated by the parties, the operator demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 7. The remaining criteria involve consideration of the gravity of the violations and American Coal's negligence in committing them. These factors have been discussed fully respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

### **C. Assessment**

#### **1. Citation No. 8427425**

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately negligent, and that it was timely abated. The Secretary has proposed a penalty of \$7,700.00. In consideration of my finding that a special assessment was unwarranted, I find that a penalty of \$4,000.00 is appropriate.

#### **2. Citation No. 8427427**

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal's negligence was low, rather than moderate, and that it was timely abated. The Secretary has proposed a penalty of \$7,700.00. In consideration of my findings of low negligence and that a special assessment was unwarranted, I find that a penalty of \$2,500.00 is appropriate.

#### **3. Citation No. 8427431**

It has been established that this S&S violation of 30 C.F.R. § 75.202(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately negligent, and that it was timely abated. The Secretary

has proposed a penalty of \$9,100.00. In consideration of my finding that a special assessment was unwarranted, I find that a penalty of \$4,000.00 is appropriate.

#### **4. Citation No. 8427430**

It has been established that this S&S violation of 30 C.F.R. § 75.400 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that American Coal was moderately, rather than highly, negligent, and that it was timely abated. The Secretary has proposed a penalty of \$32,800.00. In consideration of my findings of moderate negligence and that a special assessment was unwarranted, I find that a penalty of \$8,000.00 is appropriate.

#### **ORDER**

**WHEREFORE**, it is **ORDERED** that Citation Nos. 8427425 and 8427431 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 8427427 to reduce the degree of negligence to “low,” and Citation No. 8427430 to reduce the degree of negligence to “moderate;” and that The American Coal Company **PAY** a civil penalty of \$18,500.00 within 30 days of the date of this Decision.<sup>5</sup>

/s/ Jacqueline R. Bulluck  
Jacqueline R. Bulluck  
Administrative Law Judge

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<sup>5</sup> 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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June 19, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of GARY BROOKS,  
Complainant,

v.

KINGSTON MINING INC.,  
Respondent.

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEVA 2015-784-D  
MSHA Case No.: HOPE-CD-2015-07

Mine: Kingston No. 2 Mine  
Mine ID: 46-08932

**DECISION AND ORDER**  
**REINSTATING GARY BROOKS**

Appearances: Anh T. LyJordan, Esq., Office of the Solicitor, U.S. Department of Labor,  
Arlington, VA, Representing the Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, PA, Representing  
Respondent

Before: Judge Andrews

On May 29, 2015, 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 an Application for Temporary Reinstatement of miner Gary Brooks (“Brooks” or “Complainant”) to his former position with Kingston Mining Inc., (“Kingston” or “Respondent”) at Kingston No. 2 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Brooks on April 20, 2015, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Brooks to his former position as a fireboss/supplyman.

Respondent filed a motion requesting a hearing regarding this application on June 5, 2015. On June 11, 2015, Respondent submitted a Pre-Hearing Memorandum of Law addressing its legal arguments in this matter. A hearing was held in South Charleston, WV on June 16,

2015.<sup>1</sup> The Secretary presented the testimony of the Complainant. Respondent had the opportunity to cross-examine the Complainant and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Brooks.

### **Discussion of Relevant Law**

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., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

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 on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.<sup>2</sup> *Sec’y of Labor on behalf of 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.,

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<sup>1</sup> Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator’s request. 29 C.F.R. §2700.45(c). During a conference call, the parties agreed to waive this limitation and allow the hearing to be held one day late.

<sup>2</sup> “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)).

*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). "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 on behalf of 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 on behalf of 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 of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and Brooks 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 on behalf of 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 on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

### **Contentions of the Parties**

On April 20, 2015, Brooks executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

I was laid off and feel it was in retaliation due to my brother filing a complaint against the company.

*Application for Temporary Reinstatement* at Exhibit B, p. 2.

The Secretary also submitted the May 27, 2015 Affidavit of James R. Humphrey, a Special Investigator employed by the Mine Safety and Health Administration with the

Application. Humphrey wrote that he investigated Brooks' discrimination claim against Respondent. Humphrey laid out his findings of fact based on his investigation. *Id.* at Exhibit A, p. 1-3. He concluded:

3. There is reasonable cause to believe that the Complainant was discharged because he engaged in protected activities. Brooks engaged in protected activity when he expressed concern about unsafe working conditions at the Kingston No. 2 Mine and when he provided running right cards to be used in a Commission proceeding. Brooks suffered an adverse action when he was discharged on April 10, 2015.
4. Based on my investigation to this date, I have concluded that there is a reasonable cause to believe that Brooks was discharged because he engaged in protected activities by complaining about unsafe practices at the mine and providing running right cards to be used in a Commission proceeding. I have concluded that the complaint filed by Brooks was not frivolous.

*Id.* at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 4.

In its pre-hearing submission, Respondent argued that Brooks did not engage in any protected activity. (*Respondent's Memorandum* at 11-12). Further, it argued that even if Brooks engaged in protected activity, there was no nexus between that protected activity and the adverse employment action. (*Id.* at 15-18).

### **Summary of Testimony**

Gary Edward Brooks was present at the hearing and testified. (Tr. 17). At that time he was unemployed, last working as a supply man and fire boss for Respondent. (Tr. 18). He had worked at the instant mine for nine years and had a total of 22 years of experience, mostly underground. (Tr. 22). As a fireboss, Brooks conducted an exam two hours before an oncoming shift. (Tr. 18). As a supply man, he would take supplies to production crews at two underground sections. (Tr. 18-19). Brooks could operate all of Respondent's equipment both above and below ground. (Tr. 19-20). He could fill in for anyone who was out. (Tr. 21-22). Brooks estimated there were around 168 miners at the mine when he worked there and he did not believe anyone else could run all of the equipment. (Tr. 20-21). He had extensive surface and underground certifications. (Tr. 22-23).

The issues in this matter began when Brooks attended an Employee Involvement Group ("EIG") meeting held on August 15, 2014. (Tr. 24, 31, 89-90). Those meetings occurred once a month and served to gather information from employees regarding violations or hazards that needed to be corrected. (Tr. 24-26, 88). The information came in the form of anonymous complaints called "Running Right" cards that dealt with violations or hazards in the mine. (Tr. 27-28, 49, 88). Pads of the cards were located throughout the mine and 100 to 2,300 a month were submitted. (Tr. 49, 103). Only Brooks and the superintendent, Daniel Helmandollar, had a

key for the lock box.<sup>3</sup> (Tr. 28, 105-106). Brooks retrieved these cards from a lock box each morning and then categorized them by importance to distribute the appropriate management official. (Tr. 27-29, 50, 105). Helmandollar would then review all the cards and triage the issues raised in them. (Tr. 100, 103, 114). Brooks then received the cards back at the EIG meeting and if the condition was corrected or addressed it would be noted on the card. (Tr. 29, 52, 115). The goal of the meeting was to explain to the miners that their concerns were being addressed. (Tr. 29, 88-89). Cards were regularly destroyed approximately four to six weeks after the meeting, but Brooks did not know if that was mandatory. (Tr. 55, 115).

Brooks attended those meetings in his capacity as “Running Right Champ.” (Tr. 38). Running Right Champ was a voluntary, unpaid position that required work at home a couple of times a month. (Tr. 38, 102). Brooks had been asked to become Running Right Champ by Helmandollar when the program was first implemented because Brooks knew the mine well and Helmandollar believed he was a good candidate. (Tr. 30-31, 101). As Running Right Champ, Brooks chaired the meetings. (Tr. 26). In addition to Brooks, the meetings contained a rotating selection of six to eight hourly employees who brought different perspectives to the meeting. (Tr. 25-26, 47-48). There were also a number of management personnel who attended every meeting including Helmandollar, Mine Foreman Kenny Martin<sup>4</sup>, human resources employee and Running Right Coordinator Justin McMillion, General Manager Robert Gordon<sup>5</sup>, chief electrician Jerry Birchfield, and safety director John Murphy. (Tr. 25-26, 47-48).

After the EIG meetings, Brooks would also attend large Performance Group (“PG”) meetings. (Tr. 27, 30). The PG meeting was attended by the champs, the hourly employees, and most of management. (Tr. 30). All Alpha Natural Resources mines had Running Right Champs and conducted EIG meetings before reaching the PG meetings. (Tr. 51-52). Those meetings were run by Justin McMillion. (Tr. 30).

At the end of the August 2014 EIG meeting, after most people had left, Gordon asked Brooks why morale was low at the mine. (Tr. 31, 53, 89-90). Gordon testified he asked if there were any rumors or if anything was bothering anyone. (Tr. 90, 93). While initially reticent, Brooks eventually told Gordon he believed morale was low because of a safety issue related to

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<sup>3</sup> Daniel Helmandollar was present for the hearing and testified. (Tr. 98). At the time of the hearing Helmandollar was retired but previously worked as the Superintendent of the mine at issue. (Tr. 98-99). In that capacity he was responsible for all matters at the coal mine, including safety. (Tr. 98). He had 40 years of mining experience, 25 years as a supervisor. (Tr. 99).

<sup>4</sup> Kenny Ray Martin was present at hearing and testified. (Tr. 117). At the time of the hearing Martin was a general Mine Foreman and Kingston No.2 but had previously held the same position at the instant mine for two years. (Tr. 117).

<sup>5</sup> Robert C. Gordon was present at hearing and testified. (Tr. 85). At the time of the hearing, Gordon was a general manager at Mammoth Coal Company and previously held the same position at Kingston. (Tr. 85-86). He had previously worked for several operators at several management-level positions through the years. (Tr. 86-87). Gordon had been instrumental in implementing the Running Right Program at Alpha. (Tr. 86-87).

dust, because mantrips ran too fast, and because miners were kept late without pay. (Tr. 31-32, 90-91). Brooks believed his complaint implicated management and was reluctant to speak, even though most of management was not present. (Tr. 32). The complaints came from miners and Running Right cards, though he had never discussed these bolting in dust issues in his presentation. (Tr. 36, 52). He had no personal knowledge of the dust issue. (Tr. 54).

Brooks then left the mine but was called back to the mine site on his way home to talk to Martin and Helmandollar about the issue. (Tr. 32-33). When he arrived back at the mine Gordon, Martin, Helmandollar, and perhaps Jerry Birchfield and/or Shad West from human resources were present.<sup>6</sup> (Tr. 33, 91-92). Brooks told the group that one of the safety foremen had told him that the bolter was not staying on the cut cycles and that he was tired of getting “jumped onto for low production.” (Tr. 33, 53). Brooks explained the evening shift was getting off the cut cycle and hindering the day shift. (Tr. 33-34, 53, 90-91). The cut cycle was in place so that the bolter did not in the dust. (Tr. 34). According to the ventilation plan, miners were only allowed to work in the dust one time per shift because of the volume of rock and coal dust in the air. (Tr. 34-35). Brooks testified the complaint here arose because miners either had to bolt in the dust or wait and lose production. (Tr. 35-36, 53). Waiting was expensive and miners had to stay for overtime. (Tr. 35). Brooks believed he was raising a safety issue. (Tr. 35). Brooks recalled Martin said that he did not understand the cut cycle. (Tr. 36).

Gordon believed that Brooks was complaining about morale being low because of delays in the mining process. (Tr. 89-91, 94). The miners were frustrated because they wanted to run coal and do a good job and did not want to wait. (Tr. 94-95). Gordon told Brooks that regardless of the cut cycle and delays, they had to obey the plan. (Tr. 91). Gordon asked Helmandollar and Martin to explain to everyone that they would try to work the cut cycle but that there would be times when they would have to wait. (Tr. 92, 96). Gordon did not believe Brooks was making a safety complaint; they were discussing the mentality of the mine. (Tr. 92-93). Gordon never heard, from Brooks or anyone else, that bolters were being made to bolt more than once in the dust until management discovered it in September. (Tr. 95-97, 103). Bolting twice downwind of a continuous miner would be a violation of the plan and a safety hazard. (Tr. 97).

About a month-and-a-half after this meeting Brooks’ brother, Dallas Brooks, who worked as a bolter operator on the section Brooks complained about, was suspended and discharged from the mine. (Tr. 36-37). Brooks believed his safety complaint led to his brother’s discharge. (Tr. 42). Everyone knew they were brothers. (Tr. 37). Helmandollar testified that Dallas Brooks was suspended and discharged for a serious safety violation that had nothing to do with Gary Brooks. (Tr. 114).

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<sup>6</sup> Shad Allen West was present at the hearing and testified. (Tr. 125). At the time of the hearing West worked as the Human Resource Manager for Kingston Mine, a position he held since October 2011. (Tr. 125). He had worked at other mines and had four and a half years of experience in human resources. (Tr. 125).

Dallas later filed a request for temporary reinstatement.<sup>7</sup> (Tr. 42, 99). Dallas never asked Brooks to help prepare for the reinstatement hearing. (Tr. 42). Brooks' only participation in the investigation into his brother's claim was providing two Running Right Cards that discussed working in the dust. (Tr. 43). The cards indicated that the issue raised had been addressed; Brooks believed one card was stamped "addressed." (Tr. 53, 56). Brooks had these cards at home because he had used them to prepare a presentation. (Tr. 43). Brooks was sure Respondent knew he provided the Running Right Cards because he was the Champ, had access to the cards, and his brother had them. (Tr. 43, 56). He did not know for sure if Respondent knew, but it was obvious. (Tr. 43, 56). No one said they believed Brooks provided the cards. (Tr. 56).

Helmandollar testified at Dallas' temporary reinstatement hearing in February of 2015. (Tr. 99). Those two Running Right cards were discussed at that hearing. (Tr. 99-100, 127). However, Helmandollar did not recognize the cards, he did not know who filled them out, and did not know who gave them to the Secretary of Labor. (Tr. 100). In fact, Helmandollar could not recall ever seeing those cards before the hearing. (Tr. 101-104). Despite the high number of cards, Helmandollar testified that he read and remembered them all. (Tr. 104).

Helmandollar did not assume or conclude Brooks had given the cards to his brother; he was not sure where they came from. (Tr. 101, 104). West testified there were too many people with access to cards to make that assumption. (Tr. 127). Blank cards were available everywhere and just because they were filled out did not mean they were turned in. (Tr. 56, 127-128). However, Helmandollar conceded that no other workers had access to the physical running right cards. (Tr. 105-106). Other miners could only get the card by asking for it. (Tr. 106, 116). Miners were not supposed to keep the cards but they could. (Tr. 116). No one from management would have reason to give the Solicitor the card. (Tr. 107).

Two days after Dallas was suspended from the mine, Helmandollar asked Brooks to step down as Running Right Champion. (Tr. 40). Helmandollar said it was because he wanted to cycle other employees through the Running Right process and that Gordon and McMillion agreed. (Tr. 40, 107-110). Helmandollar believed this would provide different perspectives for the position. (Tr. 48). Management had never before suggested rotating the position. (Tr. 41). After he resigned as Champ, Brooks spoke with Respondent's other Running Right Champs and none of them were rotated off of the position or asked to do so. (Tr. 41). He also spoke with McMillion, who said he had never spoken with Helmandollar about the issue and that it was solely up to Helmandollar. (Tr. 41). Brooks was not replaced as Running Right Champ for 1.5-2 months because they had trouble filling the position. (Tr. 41-42). Brooks believed he was removed from the Running Right Champ position because his brother worked at the mine and Respondent believed he had an interest in the case. (Tr. 42).

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<sup>7</sup> On February 25, 2015, a hearing was held regarding that claim. On March 3, 2015, Judge Rae issued a decision finding Dallas' claim that he encountered discrimination for complaining about bolting multiple times downwind of the miner was not frivolously brought. *Sec'y of Labor on Behalf of Dallas Brooks v. Kingston Mining, Inc.*, 37 FMSHRC 531 (Mar. 2015). As a result, judge Rae ordered his temporary reinstatement to the mine. *Id.*

However, Brooks conceded at hearing that at one time he had asked to step down as Running Right Champion because of the burden the task was placing on his home life and his relationship with other employees (who called him “snitch”). (Tr. 38-39, 50, 102, 107). Helmandollar was not surprised but asked him not to step down because he was good at the job and they needed him. (Tr. 39, 50). Brooks testified that Helmandollar did not bring up finding a replacement; he just talked Brooks into staying. (Tr. 39). Neither Brooks nor management raised this issue again for another six to eight months, until Helmandollar asked him to step down. (Tr. 39-40, 107).

Helmandollar testified that he only asked Brooks to stay while he found a replacement. (Tr. 108). In fact, Helmandollar said that Brooks offered to stay until that time. (Tr. 108). Helmandollar would have let him stop at any time. (Tr. 108). Helmandollar testified that it took some time after the request to find a suitable replacement. (Tr. 102, 109). He began the search as soon as he and Brooks spoke. (Tr. 109). He testified he did not remove Brooks from the position because of issues concerning bolting in the dust. (Tr. 102).

Adam Williams took over for Brooks as Running Right Champion. (Tr. 57). Helmandollar testified that he waited until Williams was in place before asking Brooks to step down. (Tr. 110). He also testified that there was no significance to the fact that Brooks was asked to stand down within days of Dallas’ suspension. (Tr. 113). There was a small gap in time between the two champs so that Williams could be trained. (Tr. 111). John Murphy trained Williams and made the first presentation for Williams because he was not yet ready. (Tr. 57-58, 111). Even after that presentation, Williams needed Brooks’ help because he could not run the computer. (Tr. 57-58, 111). Murphy covered some of the other duties for Williams. (Tr. 111-112). Williams ran the EIG meetings and sorted the cards for handing out. (Tr. 58, 112). There was no particular reason Respondent did not train Williams before he took over. (Tr. 112). Brooks did not train Williams because they were on different shifts. (Tr. 112-113). Brooks may have been willing to train Williams outside of his shift but Helmandollar did not ask. (Tr. 113).

In January 2015, Respondent had concerns about adverse conditions in the number one section of the instant mine. (Tr. 61-62). The area was producing mostly rock, little coal, and the costs were high. (Tr. 62). The mine was then closely monitored to see if conditions improved so they could keep all the sections running. (Tr. 62). Despite hoping the section could be profitable, Respondent conducted a training section with supervisors on an evaluation process in the event a reduction in force was necessary. (Tr. 62). Kyle Bane conducted the training with a PowerPoint presentation. (RX-3)<sup>8</sup> (Tr. 63). The training was conducted so employees would know how the evaluation form looked and so they would conduct fair, consistent and honest evaluations. (Tr. 63-64, 76-77, 80-81). Page 5 of the PowerPoint contained the grading system: a list of 15 questions with a rating of one to five. (Tr. 63-64, 76). The ratings were to cover the miners’ entire work history. (Tr. 77). There was also a section for areas the miner needed to improve and

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<sup>8</sup> Kyle Bane was present at hearing and testified. (Tr. 60). He was Human Resources Director for Brooks Run North Region at Alpha Natural Resources and had held that position since June 2011. (Tr. 60). In that capacity he oversaw human resources at several mines including the instant mine. (Tr. 61). He had previously worked in HR for Massey Coal Services. (Tr. 61).

for other comments by the evaluator. (Tr. 64-65). Additionally, there was a place for supervisors to fill in whether employees could run several pieces of equipment. (Tr. 65).

The evaluations were conducted at the end of January and beginning of February. (Tr. 71). The supervisors used the evaluation forms then returned them to human resources, and West made a spreadsheet of the findings (RX-4). (Tr. 65-67, 84, 127, 130, 138-139). Bane and West were not present when the supervisors conducted the evaluation. (Tr. 80-81, 130). A column on the spreadsheet showed the subtotal of all of the 15 questions in the evaluation for each miner. (Tr. 67-68). Two of the evaluation categories were “attitude” and “right thing.” (Tr. 78). Page seven, third question states that attitude means, “demonstrates support of company’s missions, vision, values by exemplifying a strong sense of teamwork.” (Tr. 79). “Right thing” was on page seven, fourth question and means “adheres to high ethical standards, treats others with dignity and respect.” (Tr. 80). All evaluators were trained to use these questions in the evaluation. (Tr. 79-80). Another column showed the total score, which included scores for “bonus point questions” for being a certified foreman, an EMT, or anything else. (Tr. 68). The bonus points were used as a tie breaker in the evaluation process when two people had the same subtotal. (Tr. 68). West reviewed some of the fields where he had personal knowledge to ensure they were accurate. (Tr. 130-131). For instance, if a miner was listed as having good attendance and West knew it was not true, he would correct it. (Tr. 131).

The spreadsheets included both Kingston mines so that the most talented employees from both mines would be retained. (Tr. 70). In the interest of that goal, Respondent also did not consider seniority. (Tr. 69-70). Certification, performance, attitude, job efficiency, and keeping the best people possible were the reasons certain people were selected. (Tr. 74). Brooks later believed seniority was considered but no one told him that was the case. (Tr. 56-57).

Respondent attempted to control quality by using two people at all times for evaluations. (Tr. 77-78, 82-83). The training and guidelines were meant to ensure that each numerical ranking was consistent between various members of management. (Tr. 78). However, if a supervisor had a personal problem with a miner, the presence of the other evaluator would ensure the miner did not receive an artificially low score. (Tr. 82). West testified that he did not have a system for determining the dependability of the other categories beyond checking against personnel records. (Tr. 131-134). Bane conceded that if they both had problems with the miner, it was possible a miner could be given a score that did not accurately reflect his professional abilities. (Tr. 82). West conceded it was “possible for someone to enter scores that make [someone] the lowest coal miner in the ranking system.” (Tr. 133). However, West did not believe anyone deliberately under-evaluated Brooks, in fact he believed they went out of their way to be fair. (Tr. 139).

Pages 43-44 of the spreadsheet, number 241 showed Gary Brooks’ score, a subtotal of 35. (Tr. 69). West recalled that it was the lowest score of any supply man at either mine. (Tr. 126). In addition to the score, Brooks’ evaluation sheet stated he admitted to spreading rumors. (Tr. 128, 134). At one time, another Alpha mine had a bonus program that was experimental. (Tr. 128). Brooks asked about the bonus and when asked where he had heard about it explained that he had heard about it from a few people. (Tr. 128). When asked if he had specific knowledge of the bonus he demurred. (Tr. 128). Then he said it was a rumor that he had created, and that he sometimes did that just to see what people would say. (Tr. 128). West and Helmandollar

discussed the incident before including it in the comments. (Tr. 135-136). Every employee had some comment, though West did not discuss all of them. (Tr. 135-136). It was possible for Helmandollar to put in a comment that was not true, but West was present for Brooks admission regarding the rumor so he knew the comment was true. (Tr. 137, 139).

In the following months conditions did not improve and drill samples showed that the conditions would get worse on the section. (Tr. 72). As a result, Respondent decided to discontinue the section. (Tr. 72). The decision to layoff was made at the end of March or beginning of April. (Tr. 71). To conduct the layoffs, local mine management was given a list of remaining positions and asked who should fill them. (Tr. 72-73). After that, West and Gordon cross-referenced those determinations with the evaluations to make no one who stayed had a lower subtotal score than someone who left. (Tr. 73, 125-126). Bane reviewed the decisions as well. (Tr. 73).

On April 10, 2014, 23 of the 167 miners at the mine were laid off and one miner quit.<sup>9</sup> (Tr. 44, 72). Ten contractors were also released. (Tr. 72). That day all of the miners were assembled in the basket room and several miners, including Brooks, heard their names called. (Tr. 44). These miners were taken to a different location and told they were being laid off. (Tr. 44). Bane testified he was present and explained that conditions had driven the decision. (Tr. 73-74). Brooks recalled one miner asked how they chose who got laid off and management explained it was due to qualifications and experience. (Tr. 44). Brooks told them he felt this was a lie because he had every certification and qualification at the mine but he got no response. (Tr. 45). However it had been some time since he operated a miner, three years since he operated a bolter, and eight months since he acted as boss. (Tr. 46). His EMT certification was current (though he was not on the mine rescue team) and he had operated the backhoe a week earlier. (Tr. 46-47). Bane recalled Brooks saying that the layoff was in retaliation for his brother. (Tr. 74). Bane said he did not know who Brooks' brother was and that it did not have anything to do with it. (Tr. 74-75).

There were several miners who were kept that had fewer certifications, fewer qualifications, and who had been suspended and missed work. (Tr. 45). Brooks had never been formally or informally disciplined by Respondent, and had never been late or had an unexcused absence. (Tr. 23-24). Martin testified that Brooks often had trouble getting along with others. (Tr. 118). Brooks had lots of ongoing problems with other motormen. (Tr. 119). Martin testified about an instance in which Brooks swore at another miner and refused to make up and shake hands. (Tr. 118-119). He also testified that Brooks was merely an adequate worker who did the minimum. (Tr. 119-121). He did his job, but if asked to cover for others he would get upset. (Tr. 119-120). His partner could get more done when he did not work with Brooks. (Tr. 121). He would often find Brooks outside when there was work to be done. (Tr. 120). However he conceded that Brooks was the only motorman he dealt with regularly. (Tr. 120, 123-124). Further, he testified that Brooks had never been disciplined for swearing, bad behavior, productivity, or anything else. (Tr. 121-122). Brooks' altercations never became physical. (Tr.

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<sup>9</sup> Everyone shown in red on the spreadsheet was laid off on April 10 (RX-4), (Tr. 70). People highlighted in yellow were demoted from salaried to hourly employees. (Tr. 70-71).

122-123). Swearing and altercations occurred occasionally at the mine, but were not common. (Tr. 122). Discipline could occur, depending on severity. (Tr. 123).

Brooks believed he was laid because of the issues he raised at the EIG meeting and because of his brother's suspension with intent to discharge and the resulting 105(c) case. (Tr. 45, 54-55). Bane and West denied that Brooks was laid off because of his brother's 105(c) case or because of the August meeting about bolting in dust. (Tr. 75, 127).

Brooks received 354 hours of overtime from April 11, 2014 to April 10, 2015, which is about 6.8 hours a week, or roughly 14 hours a pay period. (Tr. 128-129).

## **Findings and conclusions**

### *Protected Activity and Adverse Employment Action*

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action. The initial issue here is whether Brooks engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See* 30 U.S.C. § 815(c)(1); *See also Sec'y of Labor on behalf of 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). According to the legislative history:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection... or the participation in mine inspections... but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

(S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (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* (1978). Further, "the listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive." *Id.*

In this matter, Brooks testified to an ongoing course of protected activity starting in August of 2014 and extending through his brother's hearing in February 2015. Specifically, Brooks testified that following a EIG meeting on August 15, 2014, he informed a member of management, Gordon, that he believed that miners had low morale because of an issue involving bolting in a dusty environment. (Tr. 31-32, 90-91). He testified that miners felt that pressure was put on them to increase production and that the only way to achieve this goal was to bolt twice

downwind of the miner during a single shift. (Tr. 33, 35-36, 53). Gordon testified that this action would be a violation of the ventilation plan and a hazard. (Tr. 97). Brooks believed he was making safety complaint. (Tr. 35). Making a safety complaint is quintessential protected activity under the Mine Act.

At hearing and in its brief, Respondent's counsel argued that Brooks' complaint was not protected activity. (*Respondent's Memo* at 13-14, Tr. 142). Specifically, Respondent argued that Brooks was complaining about having to wait because they were not roof bolting in the dust more than once a shift. (Tr. 142). Essentially, it argued that Brooks was complaining because Respondent was *not* being unsafe.

The exact nature of Brooks' complaint after the EIG meeting is somewhat unclear from the record. It is possible that at the time Brooks was complaining about the delay and was pushing Respondent to bolt in the dust more frequently. However, I believe it is at least equally likely that he was complaining because production demands were squeezing the foremen in the area and pushing them to bolt in the dust more than once per shift. In light of the low standard of proof in a temporary reinstatement proceeding, discussed *supra*, I find that Brooks has raised a non-frivolous issue as to whether he engaged in protected activity by complaining about a legitimate safety issue.

Following this instance of protected activity, Brooks' brother, who worked in the section he complained about, was suspended and discharged. Respondent's witnesses testified that this action was for serious breach of company rules. (Tr. 114). Brooks believed his complaint about bolting in dust was related to his brother's discharge. (Tr. 42). Brooks' brother filed a 105(c) action and a temporary reinstatement hearing was held. (Tr. 42, 99). Brooks testified that he assisted his brother in his temporary reinstatement case by providing him with two Running Right cards. (Tr. 43).

In light of the broad interpretation of Section 105(c) suggested by the legislative history, I find that Brooks' action in providing assistance to his brother, a fellow miner, could constitute participation in an administrative proceeding under the Act. While Brooks did not testify or appear at hearing, he did provide evidence to the Secretary for use in preparing for the hearing. (Tr. 43). That evidence was related to safety complaints and possible safety issues at the mine. (Tr. 43). Providing information for use by MSHA and participating, in whatever way, in proceedings related to the health and safety of miners is the primary purpose of the discrimination protections of the Act. The Mine Act ensures that miners like Brooks are able to bring information to MSHA and assist in Commission proceedings without fear of reprisal. Therefore, Brooks' claim that he was engaged protected activity with respect to his brothers' hearing is not frivolous.

Respondent also asserted that even if Brooks' claim was true, it could not support a 105(c) claim. (*Respondent's Memo* at 12). Respondent argued, "[i]t is axiomatic that a complainant's 105(c) claim must be based on conduct by that complainant..." and that in this matter, the claim was based on another person's activity, Brooks' brother. (*Id. citing* 30 U.S.C. § 815(c)(1)).

As noted *supra*, Brooks' claim does not rely solely on the actions of his brother. Brooks raised a non-frivolous issue as to whether he personally engaged in protected activity. Specifically, Brooks raised the issue that he provided his brother with Running Right cards to assist in the prosecution of a claim under Section 105(c) of the Act.

However, beyond Brooks' actions, "[t]here is decisional support for the proposition that a miner is protected under 105(c) from retaliation based on the protected activity of a relative." *Sec'y of Labor on behalf of Kizziah v. C&H Company, Inc.*, 14 FMSHRC 1362, 1366 (Aug. 1992)(ALJ Melick) *citing Mackey and Clegg v. Consolidation Coal Co.*, 7 FMSHRC 977 (Jun. 1985)(ALJ Broderick); *See also Sec'y of Labor on Behalf of Flener v. Armstrong Coal Co.*, 34 FMSHRC 1658, 1665-1666 (Jul. 2012)(ALJ Simonton)(rejecting a strict reading and interpretation of 105(c) that would "require that the complaining miner be the only individual who is protected from reprisal for complaining about a health and safety concern.")

In one particularly well-reasoned instance, Judge Zielinski faced a substantially similar situation: "[t]he central issue raised... is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity." *Sec'y of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill v. Leeco, Inc. and Blue Diamond Coal Co.*, 24 FMSHRC 589, 590 (May 2002). In that case, Respondent argued from the plain meaning of the statute that "the protected activity prompting the unlawful motive must be that of the miner complaining of adverse action, not that of a third party." *Id.* at 591. Judge Zielinski found ambiguity in Section 105 and granted deference to the Secretary's interpretation; namely that a discrimination claim based on the protected activity of a relative is permitted. *Id.* at 591-593. In fact, he noted that the Secretary's position was not only reasonable, but "far more consistent with the statute's purpose than the contrary interpretation urged by Respondents." *Id.* at 593. He concluded that, "refusing to allow Jimmy Caudill's claim of retaliation based upon protected activity by his father would nullify some of the most important protections intended by Congress."<sup>10</sup> *Id.* at 591.

In short, Respondent's assertion is incorrect: a 105(c) claim can, under the circumstances present here, be based on the protected activity of a relative. There is a non-frivolous issue as it relates to the instant matter whether Dallas engaged in protected activity by complaining about roof bolting. There is also non-frivolous issue as to whether Brooks faced retaliation as a result of his brother's actions. While the evidence shows some reason to believe Brooks personally engaged in protected activity, even if he had never done so, he was protected from retaliation as a result of his brother's actions.

The next issue is whether Brooks suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse

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<sup>10</sup> Judge Zielinski also noted several comparable statutory provisions have also been held to allow such causes of action. *Id.* at 594 *citing EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543-44, n.1 (6th Cir. 1993) (Title VII, 42 U.S.C. § 2000e-3(a)); *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (Equal Pay Act, 29 U.S.C. § 215(a)(3)); and *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c))(footnote omitted).

employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). It is uncontested that Brooks was laid off on April 10, 2015. (Tr. 10). Therefore, Brooks' claim that he suffered an adverse employment action is not frivolous.

#### *Nexus between the protected activity and the alleged discrimination*

Having concluded that Brooks engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the April 10, 2015 lay-off. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

#### Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge to meet the evidentiary threshold. Specifically, Brooks made his initial safety complaint at an EIG meeting in front of several members of management. (Tr. 33, 91-92). There is no question Respondent was aware of that complaint. Further, with respect to Brooks' participation in his brother's temporary reinstatement proceeding, Brooks testified that his assistance was "obvious." (Tr. 43, 56). The Secretary of Labor had two Running Right cards at hearing which discussed dust. (Tr. 43, 99-100, 127). According to Respondent's practices, those cards should have been destroyed. (Tr. 55, 115). Brooks was the only hourly miner who had access to the Running Right cards. (Tr. 28, 43, 56, 105-106, 116). Everyone knew that the two miners were related. (Tr. 37). Therefore a reasonable person would be lead to the conclusion that Brooks provided the running right cards. Thus, I find that Complainant and the Secretary have raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity.

Respondent also argued that the Running Right cards at issue were declared privileged by the Judge in Dallas' temporary reinstatement hearing and that Brooks was not named. (Tr. 142). In fact, several of Respondent's employees testified that they did not assume that Brooks provided the cards. (Tr. 101, 104, 127). Some even argued that the cards may never have been submitted. (Tr. 127-128). However, Respondent's testimony ultimately raises a question of

credibility that is inappropriate at this time. Brooks raised a non-frivolous issue of knowledge and therefore the Secretary has met the evidentiary burden.

#### Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *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). The Commission has stated "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 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In the present matter, Brooks made his safety complaint approximately six months before his adverse employment action. (Tr. 31-32, 44, 89-91). In isolation, such a delay may prove problematic in supporting a finding of a nexus. However, it would be a mistake to consider the instant matter as a series of discrete protected activities. As with *All American Asphalt*, the long term consequences of a safety complaint can serve to tie an earlier safety complaint into a later adverse action. Brooks testified that his complaint ultimately led to his brother's suspension and discharge. (Tr. 42). His brother's discharge led Brooks to participate in a proceeding under the Act. That final action occurred just a few weeks before Brooks was laid off and, in fact, was right around the same time his evaluation was being made. All of these events are, arguably, tied together in this instance. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

#### Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Brooks testified that when he made his initial safety complaint, management told him that he did not understand the cut cycle, essentially dismissing his safety complaint. (Tr. 36). Perhaps more importantly, following Dallas' suspension, Helmandollar told Brooks to stand down as Running Right Champ. (Tr. 40).

The evidence regarding this action is contradictory and unclear. Brooks testified that he at one time he wished to quit the position and was convinced to stay. (Tr. 38-39, 50, 102, 107). Helmandollar testified that this action had nothing to do with Brooks' protected activity. (Tr.

102). What exactly happened is unclear and making a determination would require credibility assessments.

However, the decision to ask Brooks to step down in the context of the other events at issue is troublesome. Specifically, Brooks requested to be released from the position but nothing was done with the request for half a year. (Tr. 38-40, 50, 102, 107). Then, just a few days after Brooks' brother was suspended, Brooks was removed from the position and replaced with someone who was not named. (Tr. 40, 57-58, 110-113). This raises a non-frivolous issue with respect to animus. There is reason to believe that Respondent was punishing Brooks after firing his brother for an alleged instance of protected activity. Therefore, I find sufficient animus to meet the evidentiary bar at issue here.

### Disparate Treatment

“Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

In the instant matter, Brooks testified that other miners with less experience and more problematic work records were not laid-off. (Tr. 45). Therefore there is reason to believe that Brooks suffered from disparate treatment with respect to other miners.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, coincidence in time, and disparate treatment. Therefore, I find that the Secretary has established a nexus between Brooks' protected activity and the Respondent's subsequent adverse action.

### *Affirmative Defense*

At hearing Respondent presented extensive evidence showing that it created an objective method for determining the lay-offs. Specifically, it created an evaluation form, reviewed by two or three members of management, to rank employees based on objective measures. (Tr. 63-64, 7677, 80-81). Those rankings were then used to determine layoffs. (Tr. 73, 125-126).

Ultimately, I am unconvinced by the evidence showing that the layoffs were conducted in an objective manner. Both Bane and West admitted under cross examination that values could be subjectively assigned to a miner to ensure that he received a low ranking. (Tr. 82, 133). The extent to which Brooks' scores, particularly for “attitude” and “right thing,” were low because of his protected activity, rather than work performance, is not clear. Similarly, Respondent's impression that Brooks did not get along with others may have been related to his service in a safety capacity and consequently being considered a “snitch” by other employees. (Tr. 39). There is reason to believe that that Brooks' layoff occurred, at least in part, because of his safety complaint and his decision to participate in a Commission proceeding. Under Commission case

law, an ALJ is permitted to review an operator's proffered objective lay-off procedure to ensure that it is not a rationalization of a discriminatory action. *See Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394 (Feb. 2013).

However, the persuasiveness of Respondent's argument is largely academic in this matter. The question here is whether there is a non-frivolous issue as to discrimination. For the reasons given above, such an issue exists in this case. Any consideration of affirmative defenses goes beyond the scope of that inquiry. *CAM Mining, LLC*, 31 FMSHRC at 1091. Therefore, to the extent the evidence regarding the lay-off procedure constitutes an alternative, non-discriminatory reason for the discharge, it must, at this time, be disregarded.

### **Conclusion**

In concluding that Brooks' complaint herein was not frivolously brought, I find that there is reason to believe that Brooks' made safety complaints in August 2014, that those complaints were related to his brother's discharge, that he subsequently participated in his brother's temporary reinstatement proceeding, and that this participation led to his lay-off. I also conclude that there were non-frivolous issues as to whether Respondent was aware of Brooks' actions, that Respondent showed animus toward Brooks' alleged protected activities, that there was a close enough connection in time between his alleged protected activity and layoff, and that Brooks was treated disparately relative to other miners.

### **ORDER**

For the reasons set forth above, it is **ORDERED** that Complainant Gary Brooks be reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision. The parties may elect to economically reinstate Mr. Brooks if they so agree.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary SHALL complete the investigation of the underlying discrimination complaint *as soon as possible* but no later than 90 DAYS following the receipt of the complaint of discrimination. 30 U.S.C. § 815(c)(3). Immediately upon completion of the investigation, the Secretary SHALL notify counsel for Respondent and my office, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.* If, upon expiration of the statutory period a decision has not been made, I will entertain a motion to issue an order to show cause why the reinstatement should not be terminated.

/s/ Kenneth R. Andrews  
Kenneth R. Andrews  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 23, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Petitioner,

v.

THE DOE RUN COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-49  
A.C. No. 23-00458-362943

Mine: Sweetwater Mine/Mill

**DECISION**

Appearances: Leigh Burleson, United States Department of Labor, Office of the Solicitor, Kansas City, Missouri, for Petitioner;

R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Miller

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). This docket involves two 104(a) citations with a total proposed penalty of \$14,711.00. Prior to the hearing, the Secretary notified the court that he had elected to vacate Citation No. 8768882. Accordingly, only Citation No. 8768883, with a proposed penalty of \$3,405.00, remained for hearing. The parties presented testimony and evidence regarding the single remaining citation at a hearing held in Saint Louis, Missouri.

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

The Doe Run Company’s Sweetwater Mine/Mill is an underground lead and zinc mine in Reynolds County, Missouri. The parties have stipulated to the jurisdiction of MSHA and the Commission. Jt. Stip. ¶¶ 3, 4.

Citation No. 8768883 was issued by Inspector Nicholas Dunne on August 26, 2014 pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 57.5002. The citation alleges that five miners were overexposed to nitrogen dioxide and that, while gas levels had been monitored prior to work beginning on the shift, they had not been monitored since that

time and a gas meter was not available to conduct gas monitoring. Dunne determined that the condition was reasonably likely to result in a permanently disabling injury, was S&S, affected five persons, and was a result of high negligence on the part of the operator.

On September 10, 2014, Dunne, based on information he obtained regarding the training on the proper use of gas monitoring equipment, modified the alleged negligence from “high” to “moderate.” Further, on September 15, 2014, Dunne modified the citation to remove any reference to the issuance of an imminent danger order after the imminent danger order, which was issued alongside the citation, was vacated. The Secretary has proposed a civil penalty in the amount of \$3,405.00 for this alleged violation.

The parties have stipulated that, following the inspection, the imminent danger order was vacated and the inspector’s gas reading was invalidated because the gas detector used by the inspector was not properly calibrated. Further, the parties agree that the Secretary relied on the same information when agreeing to vacate Citation No. 8768882, the other citation at issue in the docket before me. For the reasons set forth below, I also vacate Citation No. 8768883 and dismiss this proceeding.

### *The Violation*

On August 26, 2014 MSHA Inspector Nicholas Dunne traveled to the Sweetwater Mine/Mill to conduct a regularly scheduled inspection. During his inspection, Dunne took a nitrogen dioxide gas reading which showed elevated levels of the gas in the 7Y1 working section. While Dunne was not aware at the time, the gas reading would later be shown to be inaccurate. In addition to taking the reading, Dunne learned that, while gas levels had been monitored in development area 7Y1 prior to work beginning on the shift, no monitoring had taken place since the beginning of the shift and, at the time of the inspection, there was no gas monitoring device in the area. Dunne observed diesel equipment being operated in the area and determined that, even without an adequate gas reading, the exhaust that was likely present would have exposed miners in the area to unsafe levels of nitrogen dioxide. Based on his observations, Dunne issued Citation No. 8768883 for a violation of section 57.5002 of the Secretary’s regulations.

The Secretary argues that, because diesel equipment was being operated near miners in the cited area, and no gas monitoring devices were present, the mine violated section 57.5002. Doe Run, conversely, argues that the citation should be vacated because the standard requires gas surveys only when “necessary,” and, here, based on the mine’s experience and gas testing, surveys were not needed because there was no expectation that there would be excessive levels of nitrogen dioxide where only one piece of diesel equipment was being operated in a fairly open area.

Inspector Dunne has been with MSHA since August 2011. He has worked in the mining industry since 1990, first in an underground mine and next as an employee of an explosives company. He explained that the Sweetwater mine is an underground metal mine that primarily focuses on the mining of lead, with some ancillary metals.

Inspector Dunne explained the normal process for blasting and loading material at this mine. Generally, miners will enter an area, drill holes, place blasting material and then, at the end of the shift, blast the area. Following the blast, prior to the next shift, the mine monitors the air and, when it is safe, miners re-enter the area to scale down and load out the material. Dunne testified that the mine has headers approximately 20 feet tall and the roadways and travelways are 20 to 25 feet wide.

At the time of Dunne's inspection of the 7Y1 development area, three miners were loading blasting materials into drilled holes. The blasting materials were being loaded from a diesel blast truck, which was the only piece of diesel equipment operating at the time and, accordingly, the only source of nitrogen dioxide in the area. At some point two additional miners, who had completed work in another area, arrived and assisted the three miners with the loading of the blasting materials. Dunne testified that there was a ventilation tube about 300 feet back from the area where the five miners were working. While Dunne was told that miners were instructed to extend the ventilation tube another one hundred feet, they had failed to do so. Dunne did not say if he could feel the air movement or if he checked for any air movement. No other evidence was presented that miners, or the area in which they were working, were receiving inadequate air or ventilation. As Pratt, the mine manager, explained in his testimony, the ventilation tube is sometimes 800 feet from the working area and the ventilation remains adequate.

Based upon his observations, Dunne believed that, because the ventilation tube had not been moved and a piece of diesel equipment was running as the blasting material was being loaded, it was necessary for the mine to check for nitrogen dioxide, a gas emitted from diesel equipment. He explained that since the blasting area sloped downhill approximately 30 feet in elevation, he would expect nitrogen dioxide from the diesel equipment to be in the air. There were no gas meters in the work area to monitor the air quality and Dunne believed that there should have been at least one monitor present. While Dunne was told that the air was monitored prior to the shift and the gas detectors were taken to be re-calibrated, he stated that the air should be continuously monitored and the removal of the air meters made that impossible. Dunne did not explain why constant monitoring was "necessary," as required by the standard he cited. Additionally, since Dunne's gas detector was not functioning properly, there is no evidence that the area contained nitrogen dioxide in levels that would raise concerns.

Shawn Pratt, the mine manager, has worked for Doe Run for 18 years and is familiar with gas detectors and the practices for monitoring air at the mine. He explained that there were gas monitors available at the mine, including in underground locations, and stated that a reading had been taken before the shift and there was no evidence of anything out of the ordinary.

Pratt explained that haul crews, along with any other employee who has a concern, can take one of six gas detectors from the foreman's office underground or at the surface. Normally, miners assigned to load a shot do not take a detector because, based on the experience of the mine, nitrogen dioxide is not found at that point in the mining process and, therefore, it is not necessary to take continuous readings. Further, he stated that many, but not all, employees regularly carry a monitor. Pratt testified that he carries a gas detector underground but has never seen high levels of gas while a shot is being loaded.

Pratt said that based on the way this mine operates and its history, the mine has not seen high nitrogen dioxide levels during the blasting part of the mining process, given that one piece of diesel equipment is in use during that process. He explained that one of the miners loading explosives when the inspector arrived, told him that he experienced no problems with the air during the shift. At hearing, Pratt acknowledged that there are times when it is necessary to take air readings during the mining cycle when the diesel equipment is in operation, but that is normally after the blasting phase when material is removed from the area by diesel equipment. During that phase, he explained, there may be several trucks and a loader in the work area, and it is important to monitor the gas levels. However, in Pratt's experience, taking the additional readings is not needed during the part of the mining cycle when blasting material is being loaded into the drill holes. Rather, during that phase, the air is monitored prior to miners entering into a working area, which, in this case, was done prior to the start of the shift.

Pratt maintained that, in addition, diesel has a distinct odor that would be an indication that the air may require additional monitoring. In his experience, you can smell diesel at about 2 to 3 ppm of nitrogen dioxide. He asserted that, here, no miner indicated that the odor of diesel was present. If an odor had been present, miners would have been able to stop and request that an air reading be taken. While Dunne testified that it is the mine's policy to remove workers when 5 ppm of nitrogen dioxide is found to exist, Pratt's experience has been if anyone smells diesel, they will immediately check the air to determine if nitrogen dioxide is present and at what levels. If a miner observes an area is smoky or detects the smell of diesel or unusual odors, the workers will be pulled back until an air reading can be taken.

Section 57.5002 of the Secretary's regulations requires that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." 30 C.F.R. § 57.5002. Commission judges have found violations of this standard where the operator did not have devices to test the mine atmosphere and where the operator failed to take any surveys despite knowledge that miners were working with a material that was an airborne hazard. In *AT&E Enterprises, Inc.*, 17 FMSHRC 739 (May 1995) (ALJ), a violation of 57.5002 was found where a mine had no devices to test the mine atmosphere. There, the mine "violated the standard because it did not, and could not, test the air as frequently as necessary to determine the adequacy of its air control measures." *Id.* at 742. In *FMC Wyoming Corp.*, 10 FMSHRC 822 (June 1988) (ALJ), *rev'd on other grounds*, 11 FMSHRC 1622 (Sept. 1989), the judge applied the reasonably prudent person standard and found that a violation of section 57.5002 existed where a mine operator failed to take dust surveys during the overhaul of a turbine, which included the removal of insulation containing asbestos.

In *Newmont Gold Co.*, 18 FMSHRC 668, 673 (Apr. 1996) (ALJ), a judge, when addressing the identically worded standard applicable to surface metal non-metal mines, reasoned that the regulatory language requiring surveys "as frequently as necessary to determine the adequacy of control measures" seems to make clear that the pivotal issue in an analysis under the standard is whether previous surveys were made and, if so, whether one could reasonably conclude that they were made as frequently as necessary given the conditions and circumstances at the time of the alleged violation.

I agree that the “reasonably prudent person” standard applies in reviewing this citation. In *Lafarge North America*, 35 FMSHRC 3497, 3500-3501 (Dec. 2013), the Commission explained that it will apply the “reasonably prudent person” test to determine if a condition or practice violates a broadly worded mine safety standard. Here, the cited standard uses the phrase “as necessary” to describe when surveys shall be conducted. The use of that phrase evidences a broadly worded standard. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2415-2416 (Nov. 1990). Under the reasonably prudent person test, “the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar *with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.*” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (emphasis added). Here, in order to sustain the violation, the Secretary must show that a person with knowledge of the mining industry would realize that in this situation, it was necessary to take gas surveys given the circumstances described by the two witnesses.

I find that the Secretary has not shown that a reasonably prudent person would have known to take the gas surveys. “In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).” Here, the testimony of the inspector demonstrates only that the air tube was not as close to the working area as he would have liked it to have been. The air movement and ventilation effectiveness were not addressed by the inspector. Moreover, while his testimony indicates that there were no gas meters in the area, there was no discussion of when they were removed, where they could be found, or how quickly they could be found and used. Most importantly, there was no evidence from the Secretary about when it is necessary to take a gas survey in the circumstances observed by the inspector. While the inspector testified that monitoring should be continuous, he did not explain why continuous monitoring was “necessary” under these circumstances, which is part of the Secretary’s burden for this particular standard. I find that the fact that the ventilation tube was not extended closer to the working area, along with the fact that one piece of diesel equipment was operating in this fairly open area, is not enough to demonstrate a violation.

Even though the absence of monitors may in some cases be enough to show that the air was not monitored “as necessary”, the Secretary has not met the burden of proof to show that monitoring was necessary in this instance. The standard does not require constant monitoring. Rather, it limits monitoring to when it is necessary. While it may be a good practice for miners to carry an air monitor that will alarm if nitrogen dioxide reaches an unhealthy level, the Secretary has not shown that it was necessary under these particular circumstances.

In addition, the Respondent presented evidence as to why it was not necessary to take an air reading at the time in question. Pratt is an experienced miner, with knowledge of the mining process, and particularly the processes at this mine. He also understands when high levels of gas may be present during the course of the production cycle. Consequently, he is aware of when it is necessary to take a reading at this mine. Pratt did not believe it was necessary to check the levels

of NO2 during the process of loading blasts , after the initial test at the beginning of the shift. He would find it necessary in the event one of the miners had reason to believe there was a problem with the air quality while loading of the blasts, which would have been unusual in his estimation. I find that a reasonably prudent person, with knowledge of this mine, would not have found it necessary to take a gas survey at the time.

The Secretary did not overcome the evidence presented by the mine operator, did not meet his burden of proof and, therefore, did not demonstrate that a violation occurred as cited. Therefore, the citation is **VACATED**.

## II. ORDER

At hearing, and on the record, the Secretary gave notice that he had vacated Citation No. 8768882. Given my above findings, Citation No. 8768883 is **VACATED**. Since both citations in this docket have been vacated, this penalty proceeding is **DISMISSED**.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

June 25, 2015

BLACK BEAUTY COAL COMPANY,  
Contestant,

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent,

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

BLACK BEAUTY COAL COMPANY,  
Respondent.

CONTEST PROCEEDINGS

Docket No. LAKE 2008-378-R  
Order No. 6672656; 04/05/2008

Docket No. LAKE 2008-379-R  
Citation No. 6672658; 04/08/2008

Docket No. LAKE 2008-380-R  
Citation No. 6672659; 04/08/2008

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2008-643  
A.C. No. 12-02010-160151

Docket No. LAKE 2009-72  
A.C. No. 12-02010-165822

Mine: Air Quality No. 1

**DECISION ON REMAND APPROVING SETTLEMENT<sup>1</sup>**  
**AND**  
**ORDER TO PAY**

Before: Judge Feldman

Section 50.2 of the Secretary of Labor’s (“Secretary”) regulations defines, in pertinent part, an “accident” as “[a]n injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2. Section 50.10 of the regulations requires a mine operator to notify the Mine Safety and Health Administration (“MSHA”) within 15 minutes of the occurrence of an “accident” that can potentially result in death. 30 C.F.R. § 50.10. Following such notification, MSHA routinely verbally issues a section 103(k) order prohibiting a mine operator from resuming operations at an accident site before MSHA can determine that mining operations can be safely resumed. 30 U.S.C. § 813(k). Additionally, section 50.12 of the

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<sup>1</sup> This Remand Decision concerns only Citation No. 6672658 in Docket No. LAKE 2008-643.

regulations, the cited mandatory safety standard in issue in this Remand Decision, requires the preservation of evidence at an accident site. Specifically, section 50.12 provides:

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

30 C.F.R. § 50.12.

This remand matter concerns an alleged violation by Black Beauty Coal Company (“Black Beauty”) of section 50.12, which was cited in Citation No. 6672658. The Secretary attributed the violation to a high degree of negligence and initially sought to impose a penalty of \$2,678.00.

The undisputed evidence presented at the hearing reflects that at approximately 8:05 p.m. on April 5, 2008, a roof bolter was struck in the head and torso by a fallen slab of roof material. The victim remained ambulatory after the accident, walked to a mantrip, and was taken to the surface where he was transported to a hospital via ambulance. Shortly thereafter, at approximately 8:23 p.m., Black Beauty reported the event to MSHA pursuant to the requirements of section 50.10, which resulted in MSHA’s issuance of a verbal 103(k) order communicated via telephone at approximately 9:41 p.m. *See, e.g., Black Beauty Coal Co., 37 FMSHRC \_\_\_, slip op. at 2-3 (Apr. 7, 2015).*

An MSHA inspector arrived at the accident site at approximately 10:50 p.m. At that time, normal mining operations at the site of the roof fall had resumed after Black Beauty’s management reportedly received information from the hospital emergency room that the roof bolter was not seriously injured. This information is consistent with, and supported by, the roof bolter’s emergency room medical records, which were proffered by the Secretary at the hearing, reflecting that the victim sustained contusions and abrasions to the shoulder and rib cage. *See Gov. Exs. 45, 46.* Although the roof bolter was initially cleared to return to work two days after the accident without significant physical restrictions, the record also reflects that three weeks later, on April 28, 2008, the roof bolter’s physician advised that he refrain from roof bolting for two weeks due to significant right shoulder pain and inflammation that was treated with anti-inflammatory medication. *37 FMSHRC \_\_\_, slip op. at 2-3.*

The Secretary moved for summary decision with respect to Citation No. 6672658 at the conclusion of his direct case. Tr. 278-79. The Secretary does not contend that the injuries sustained by roof bolter were life threatening. However, the Secretary asserts:

The Secretary believes that this is a straightforward application of the 50.12 regulation to the operative facts in this case. And that is, again, as Your Honor has stated, 50.12 states that unless granted permission by an MSHA district manager, no operator may alter an accident cite, et cetera, the rest of what the regulation says. The facts are undisputed that the mine never received permission by an

MSHA district manager to continue operations. And thus, there is no dispute that the accident site was modified.

Tr. 283.

Based on the above undisputed medical evidence presented at the hearing, following the Secretary's request for a summary decision, I issued a bench decision, which was formalized in a written decision, holding that the April 5, 2008, incident did not constitute an "accident" because the *injuries sustained* did not present "a reasonable potential to cause death." *Black Beauty Coal Co.*, 34 FMSHRC 436, 439 (Feb. 2012) (ALJ). Nevertheless, having reported the incident as an "accident," albeit erroneously, I concluded that Black Beauty was precluded from resuming normal mining operations without MSHA's approval. *Id.* Consequently, I affirmed the violation of section 50.12 in Citation No. 6672658, reduced the negligence attributable to the violation from "high" to "low," and reduced the civil penalty from \$2,678.00 to \$500.00. *Id.*

As the Secretary's motion for summary decision with respect to Citation No. 6672658 was summarily granted in a bench decision based on the undisputed medical reports, after presentation of the Secretary's direct case, the Commission, in essence, concluded that I prematurely terminated the hearing without providing Black Beauty with the opportunity to further clarify the "nature and extent of the injuries suffered."<sup>2</sup> 37 FMSHRC \_\_\_, slip op. at 4-5. Consequently, the Commission vacated my affirmance of the cited violation in Citation No. 6672658 with remand instructions to reopen the record for the purpose of receiving additional evidence. *Id.* at 5. In this regard, the Commission concluded that if the roof bolter's injuries did not have a reasonable potential to cause death, Black Beauty was permitted to resume operations without MSHA's approval because the site of the roof fall could not be deemed an "accident site." *Id.* at 4. Specifically, the Commission held that "it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one." *Id.*

The Commission's remand was followed by a telephone conference with the parties on May 12, 2015, during which I sought to determine if the parties could agree on whether the injuries sustained by the roof bolter presented "a reasonable potential to cause death." The parties have now filed a joint motion to approve settlement of Citation No. 6672658. The parties have agreed on a reduction of the proposed civil penalty for Citation No. 6672658 from \$2,678.00 to \$500.00. The parties' settlement terms include lowering the degree of negligence attributable to Black Beauty's alleged violation of section 50.12 from "high" to "low."

Given Black Beauty's acquiescence to the fact of the violation, I believe the reduction in penalty based on a substantial reduction in the degree of Black Beauty's negligence is amply supported by the record, which reflects rather insignificant injuries sustained by the roof bolter. Thus, Black Beauty's resumption of mining operations at the roof fall site, a questionable "accident" site at best, without MSHA's prior approval, supports the parties' agreement that the violation was attributable to low negligence. In the absence of any aggravating circumstances,

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<sup>2</sup> At the hearing, counsel for Black Beauty represented that the roof bolter victim was prepared to testify that he did not sustain serious injuries. Tr. 296.

the penalty reduction is consistent with the penalty criteria in section 110(i) of the Act. 30 U.S.C. § 820(i). Consequently, the parties' motion to approve settlement **IS GRANTED**.

### **ORDER**

In view of the above, **IT IS ORDERED** that the parties' settlement of Citation No. 6672658 **IS AFFIRMED**. **IT IS FURTHER ORDERED** that the degree of negligence attributable to Black Beauty for the violative condition is modified from "high" to "low."

Finally, **IT IS FURTHER ORDERED** that Black Beauty Coal Company shall pay the \$500.00 civil penalty in satisfaction of Citation No. 6672658 in Docket No. LAKE 2008-643.

**IT IS FURTHER ORDERED** that consistent with the parties' settlement terms, Black Beauty Coal Company shall pay the \$143,493.00 civil penalty in satisfaction of 19 other citations and orders at issue in Docket No. LAKE 2008-643.<sup>3</sup>

Consequently, **IT IS ORDERED** that Black Beauty Coal Company shall pay a total civil penalty of \$143,993.00 in satisfaction of 20 citations and orders at issue in Docket No. LAKE 2008-643.

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<sup>3</sup> Prior to the hearing, the parties settled 18 of the 20 citations and orders at issue in Docket No. LAKE 2008-643. During the hearing, prior to the close of the record, the Secretary agreed to vacate Citation No. 6672659. While I approved of the settlement of the 18 citations settled prior to the hearing in my February 10, 2012, initial decision, the settlement terms were officially memorialized in the Commission's April 7, 2015, remand. 37 FMSHRC \_\_, slip op. at 9-11. Black Beauty has agreed to pay \$143,493.00 in satisfaction of these 19 settled citations and orders.

**IT IS FURTHER ORDERED** that consistent with the parties' settlement terms, Black Beauty Coal Company shall pay the \$80,862.00 civil penalty in satisfaction of 14 citations and orders at issue in Docket No. LAKE 2009-72.<sup>4</sup>

Upon receipt of timely payment of the total \$224,855.00 civil penalty within 45 days of this Remand Decision, the captioned civil penalty and contest proceedings **ARE DISMISSED**.<sup>5</sup>

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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/acp

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<sup>4</sup> Prior to the hearing, the parties settled 11 of the 14 citations and orders at issue in Docket No. LAKE 2009-72. During the hearing, prior to the close of the record, the Secretary agreed to settle two additional citations (Citation Nos. 6672674 and 6676919). While I approved of the settlement of the 11 citations settled prior to the hearing in my February 10, 2012, initial decision, the settlement terms were officially memorialized in the Commission's April 7, 2015, remand. 37 FMSHRC \_\_\_, slip op. at 9-11. Black Beauty has agreed to pay \$80,862.00 in satisfaction of these 13 settled citations and orders.

<sup>5</sup> 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.

# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

June 1, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

OAK GROVE RESOURCES, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-301  
A.C. No. 01-00851-315187-01

Docket No. SE 2013-352  
A.C. No. 01-00851-317727

Docket No. SE 2013-368  
A.C. No. 01-00851-319550

Docket No. SE 2013-399  
A.C. No. 01-00851-320606-01

Mine: Oak Grove Mine

**ORDER DELETING FLAGRANT DESIGNATION**

Appearances: Stephen D. Turow, Esq., U.S. Department of Labor, Office of the Solicitor,  
Arlington, Virginia, on behalf of the Petitioner;  
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania,  
on behalf of the Respondent.

Before: Judge Feldman

This Order addresses the evidentiary criteria that must be demonstrated to support the imposition of enhanced civil penalties provided in the flagrant provisions of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Mine Act” or “the Act”), 30 U.S.C. § 820(b)(2). Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000 [adjusted for inflation]. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard *that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

Viewing the facts in a light most favorable to the Secretary, in order to determine whether the cited accumulations in the subject order state a cause of action for a repeated flagrant violation as contemplated by section 110(b)(2) of the Act, an oral argument was held on March 4, 2015, in Washington, DC.<sup>1</sup> The parties filed post-oral argument briefs, which have been considered in this matter.

## **I. Background and Statutory Scheme**

Specifically, this matter concerns a section 104(d) order alleging a repeated flagrant violation of 30 C.F.R. § 75.400 of the Secretary's mandatory safety regulations, attributable to an unwarrantable failure, that prohibits the accumulation of combustible coal materials along and under conveyor belt structures.<sup>2</sup> The cited condition was attributable to a high degree of negligence, rather than to reckless conduct. The subject order, Order No. 8520664 in Docket No. SE 2013-368, was issued on October 3, 2012, and states:

Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. The hard packed coal fines were in contact with moving roller[s] on the belt line in multiple locations along the belt entry. The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Violations of Section 75.400, like that cited in Order No. 8520664, are the most frequently cited violations of mandatory safety standards in underground coal mines.<sup>3</sup> I emphasize—I repeat, I emphasize—that prohibited coal dust accumulations violating section

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<sup>1</sup> “Tr.” references refer to the transcript of the oral argument.

<sup>2</sup> 30 C.F.R. § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, 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.

<sup>3</sup> Citations concerning section 75.400 violations constituted approximately 10 percent of all citations issued in 2013 and 11 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, [www.msha.gov/stats/top20viols/top20viols.asp](http://www.msha.gov/stats/top20viols/top20viols.asp) (accessed January 28, 2015).

75.400 pose a significant safety hazard, which must not be trivialized. Such violations can proximately cause an explosion through combustion of coal dust accumulations when such accumulations come in contact with an ignition source such as a defective roller. In addition, such accumulations may contribute to the extensiveness of an explosion through propagation. However, the issue is not whether the cited accumulations are potentially hazardous, but rather whether they have been properly designated as flagrant.

Although Order No. 8520664 was designated as a repeated flagrant designation, the Secretary agrees that an operator's past history of violations cannot provide a basis for a flagrant designation if the cited violative condition does not otherwise satisfy the statutory definition in section 110(b)(2). In this regard, the Secretary stated at oral argument:

COUNSEL: Let me first start by saying that the Secretary agrees unequivocally with what [the Court] just said with respect to history. We absolutely agree that history alone cannot elevate a violation to a flagrant violation. There is no dispute about that from the Secretary's perspective.

And I think as [the Court] read yourself from the Secretary's response to your briefing order, the Secretary has noted that both reckless and repeated flagrant designations require violations that substantially and proximately caused or reasonably could have been expected to cause, death or serious bodily injury.

Tr. 29-30.<sup>4</sup>

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<sup>4</sup> The Commission has not concluded that a history of violations can elevate a violation, not otherwise meeting the statutory criteria for a flagrant designation, to a repeated flagrant violation. Rather, the Commission has held that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013). Of course, a history of violations is *always* relevant in the unwarrantable failure analysis and in the penalty assessment process. *See* 30 U.S.C. § 820(i). The maximum enhanced statutory penalty for a flagrant violation is \$220,000.00 (adjusted for inflation). 30 U.S.C. § 820(b)(2). An aggravated history of violations may warrant the imposition of this maximum penalty, rather than a lower penalty in the enhanced penalty range. With regard to notice based on an aggravated violation history, I note that inexcusable (unwarrantable) conduct and the degree of gravity of a violation are mutually exclusive concepts. In other words, a violation can be attributable to unwarrantable conduct even though it is determined to be non-significant and substantial ("S&S") in nature. *See, e.g., Manalapan Mining Co., Inc.*, 36 FMSHRC 849 (Apr. 2014) (remanding Order No. 7511478 (Belt No. 2) for re-analysis of the unwarrantable issue with respect to a violation that was deemed to be non-S&S in nature). In the final analysis, it is the facts surrounding the violation that determines the degree of gravity irrespective of the degree of negligence. Predicate violations *arbitrarily selected* by the Secretary during an *arbitrarily designated* time period preceding the subject alleged flagrant violation are irrelevant to the issue of whether the cited condition satisfies the statutory criteria for a flagrant violation.

Rather, relying on the language of the statute, which he must, **the Secretary poses the issue as whether the cited accumulations “reasonably could have been expected to cause death[,] or serious [bodily] injury.”** *Sec’y of Labor’s Response to Briefing Order*, at 1 (May 4, 2015) (“Sec’y Resp.”) (emphasis added). However, the Secretary begs the question by oversimplifying the issue. At the risk of stating the obvious, the vast majority of all violations of the Secretary’s mandatory safety standards can be reasonably expected to cause serious injury, given continuing mining operations. Rather, resolution of whether there is a sufficient causal relationship to justify a flagrant designation requires distinguishing between whether the violation alleged to be flagrant can be reasonably expected to be the *proximate* cause of death or serious bodily injury, and, whether the violation can be the *contributing* cause of death or serious bodily injury. By oversimplifying this issue, the Secretary conflates the requirements for an S&S designation with the requirements for enhanced penalties under the flagrant provisions of section 110(b)(2).

Consistent with the Mine Act’s statutory scheme, the enhanced civil penalty provisions of section 110(b)(2) were promulgated to “provide[] for the use of increasingly severe sanctions for increasingly serious violations or [increasingly serious] operator behavior.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). Thus, the Mine Act provides a scheme of increasingly severe sanctions: for S&S violations cited under 104(a); for violations attributable to unwarrantable failures cited under section 104(d), which subject operators to a maximum penalty of \$70,000.00; and for flagrant violations under section 110(b)(2), which subject operators to a maximum penalty of \$220,000.00 (adjusted for inflation). Obviously, all flagrant violations are S&S in nature. However, it is only the most egregious S&S violations—because of their direct causal relationship to death or serious bodily injury, or the threat thereof—that can be properly designated as flagrant.

It is well-settled that a violation is S&S when there is a “reasonable likelihood that the hazard *contributed to* by the violation will result in an event in which there is an injury [of a reasonably serious nature].” *U.S. Steele Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). In clarifying the contributing nature of a hazard created by an S&S violation, the Commission held in *Musser Eng’g, Inc.*:

The test under the third element [of *Mathies*] is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. *The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.*

32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added). Thus, *Musser* stands for the proposition that the hallmark of the most serious S&S violations is that the hazards created by the violations, in and of themselves, will *directly* cause injury. It follows, consistent with the

Mine Act's statutory scheme, that it is only these most serious S&S violations that can properly be designated as flagrant.<sup>5</sup>

## II. Elements of Section 110(b)(2)

### a. *Causation*

We start, as we must, with the statutory definition for a flagrant violation provided by Congress in section 110(b)(2). Congress defined a flagrant violation as one “that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” 30 U.S.C. § 820(b)(2)

As a threshold matter, it is necessary to distinguish the terms proximate cause, as used in section 110(b)(2), from contributory cause. A proximate cause is “a cause that directly produces an event and without which the event would not have occurred.” *Black's Law Dictionary* 213 (7<sup>th</sup> ed. 1999). Synonyms for proximate cause include “direct cause,” “primary cause,” and “legal cause.” *Id.* On the other hand, a contributing cause is “a factor that—though not the primary cause—plays a part in producing a result.” *Id.* at 212.

The Secretary, in essence, argues that the definition of a flagrant violation provided by Congress is ambiguous. As his proffered interpretation, the Secretary asserts that a violation is flagrant if it was the *proximate cause* of death or serious bodily injury that has already occurred. With regard to accidents that have not yet occurred, the Secretary argues, in essence, that violations can be properly designated as flagrant if the violation can be reasonably expected to be the *contributing cause* of death or serious bodily injury. Assuming for the sake of argument that section 110(b)(2) is ambiguous, the Secretary's two-tiered approach with regard to levels of causation under section 110(b)(2) is not entitled to *Chevron* deference<sup>6</sup> in that it is unreasonable because it cannot be reconciled with long-standing and generally-accepted principles of statutory interpretation.

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<sup>5</sup> Judge Paez has similarly noted that the “significantly and substantially contribute to a hazard” language in section 104(d)(1) that provides a basis for an S&S designation is notably different from the provisions of section 110(b)(2) that provide a basis for the gravity element of a flagrant designation. *Stillhouse Mining, LLC*, 33 FMSHRC 778, 800 (Mar. 2011) (ALJ).

<sup>6</sup> The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. However, if the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Id.* at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Keystone Coal Mining Co.*, 16 FMSHRC 13 (Jan. 1994). Deference is accorded to “an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

In this regard, as discussed below, the principles of statutory interpretation dictate that the operative phrase in section 110(b)(2) should be read as: A violation can be properly designated as flagrant if it “substantially and proximately caused, or reasonably could have been expected to [substantially and proximately] cause, death or serious bodily injury.” In short, to properly designate a violation as flagrant, the Secretary must always demonstrate that the cited condition could *proximately cause* death or serious bodily injury.

I reach this inescapable conclusion based on several tenets of statutory construction. Namely, when a general clause follows a specific clause, the words in the general clause must be construed to embrace the specific words in the preceding clause. *2A Sutherland Statutory Construction* § 47:17 (7th ed.). Moreover, each part or section of a statute should be construed relative to every other part of a statute to produce a harmonious whole. *Id.* at § 46.5. Thus, general words may not be given an abstract meaning that is inconsistent with preceding specific words, such that the general words would render the specific words superfluous. *Id.* at § 47.17.

In applying the aforementioned principles it is helpful to enumerate the three relevant clauses in section 110(b)(2). The relevant clauses are:

- (1) “that substantially and proximately caused”;
- (2) “or reasonably could have been expected to cause”; and
- (3) “death or serious bodily injury”.

It is clear that the term proximate cause in the first clause defines the level of causation in the second clause. For to hold that violations that only *contribute* to death or serious bodily injury, rather than those that *proximately (directly) cause* death or serious bodily injury, can be properly designated as flagrant would render the term “proximate cause” in the first clause superfluous. Furthermore, limiting enhanced civil penalties only to flagrant violations that can proximately (directly) cause death or serious bodily injury is harmonious with the statutory scheme of the Mine Act that imposes higher penalties for more serious violations.

b. *Analogy to Imminent Danger*

Well-settled “principles of statutory construction require us to construe identical words used in different parts of the same statute . . . to have the same meaning.” *IBP Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (citations omitted). To further support the proposition that it is only the most serious violations that can be reasonably expected to proximately (directly) cause death or serious injury that can be designated as flagrant, one need only look to the statutory definition of imminent danger in section 3(j) of the Mine Act, which contains, essentially verbatim, the

language of the second and third clauses in section 110(b)(2) discussed above.<sup>7</sup> Section 3(j) of the Mine Act defines “imminent danger” as “the existence of any condition or practice in a coal or other mine which could *reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated.” 30 U.S.C. § 802(j) (emphasis added).

The Commission addressed the definition of the term “imminent” in adjudicating an imminent danger order issued pursuant to section 107(a) of the Mine Act in *Utah Power & Light Co.*, 13 FMSHRC 1617 (Oct. 1991). The Commission defined “imminent” as “ready to take place: near at hand: impending. . . : hanging threateningly over one’s head: menacingly near. *Id.* at 1621 (citing *Webster’s Third New Int’l Dictionary* at 1130 (1986)). The Commission opined that “[t]he language of the Act and its legislative history make clear that Congress intended that there must be some degree of imminence to support a section 107(a) order.” *Id.*

It is particularly noteworthy that the Commission has articulated the importance of distinguishing serious violations that pose an extremely high degree of danger, such as imminent danger conditions, from routine S&S violations that could contribute to an injury based on future continued mining operations. In this regard, the Commission has stated:

If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger and a violative condition that “is of such nature as could significantly and substantially contribute to the cause and effect” of a mine safety hazard. Section 104(d)(1); 30 U.S.C. § 814(d)(1). . . . [T]he Commission held that to be of an S&S nature, a cited condition “need not be so grave as to constitute an imminent danger.” [*Cement Division, National Gypsum Company*, 3 FMSHRC 822] at 828 [Apr. 1981.]

*Utah Power & Light*, 13 FMSHRC at 1622.

Thus, it is significant that Congress, in its recent promulgation of the flagrant provisions of section 110(b)(2), chose to use the identical language that it used in section 3(j) to define an imminent danger—that is, a condition that “could reasonably be expected to cause death or serious [injury].” It is eminently clear that Congress used the “reasonably expected to cause death or serious injury” language in both sections 3(j) and 110(b)(2) to apply only to conditions that are extremely dangerous because they can directly (proximately) cause death or serious bodily injury without any intervening events that depend on continuing mining operations. As

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<sup>7</sup> Imminent danger orders and flagrant violations do not conflict with, nor are they substitutes for, each other. While both require remedial urgency, an imminent danger requires a miner’s actual exposure to the danger posed by the hazardous condition. Moreover, unlike a flagrant violation, an imminent danger order may be issued regardless of the obviousness of the hazard, and without regard to whether the hazard is attributable to the negligence of the mine operator. In addition, an imminent danger order may be issued even if the hazardous condition does not constitute a violation of a safety standard.

such, the Secretary's assertion that violations that can only contribute to death or serious bodily injury can provide a basis for a flagrant designation, must be rejected as unreasonable.

### III. Flagrant Designation in Order No. 8520664

Having concluded that a violation must be capable of proximately (directly) causing death or serious bodily injury to justify a flagrant designation, we turn to whether the undisputed material facts, as construed in a light most favorable to the Secretary, support the Secretary's flagrant designation in Order No. 8520664. Coal dust accumulations in the presence of an actual (present) ignition source, not present in the current case, can be the proximate cause of death or serious bodily injury. However, characterizing an accumulations violation as "flagrant," i.e., a condition that is extremely dangerous and cannot escape notice, is descriptive of present circumstances without regard to past history or continued mining operations.

While the cited accumulations may have been exposed to future ignition sources based on conveyor belt defects that may occur during the course of continued mining operations, the undisputed material facts demonstrate that the cited accumulations were *not* in proximity to any identifiable ignition source, such as a misaligned belt or defective roller on October 3, 2012, the date Order No. 8520664 was issued. In this regard, the Secretary forthrightly conceded during oral argument:

COURT: Was there any evidence of any heat? . . .

COUNSEL: And the simple answer I'd like to give you . . . is at the time the violation was issued, *there is no evidence of heat sufficient to ignite coal at the time the violation was issued.*

Tr. 129-130 (emphasis added).

Moreover, the cited accumulations were remotely located where they could not be exposed to ignition sources at the mine face. In this regard, at oral argument, the parties stipulated that the location of the cited accumulations was approximately .58 miles from the zero-gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active long wall mining face. Tr. 139-40; Oral Arg. Jt. Ex. 1. Rather, the Secretary repeatedly relies on speculation that there will be future sources of heat that will arise during the course continued mining operations, as a basis for asserting that the cited accumulations could reasonably be expected to cause death or serious bodily injury. *Sec'y Resp.*, at 6-10. In his brief, the Secretary also repeatedly proposes that the "the rationale for presuming 'continued mining operations' applies equally to 'flagrant' and [S&S] determinations." *Id.* at 18-22. Consistent with this proposition, at oral argument the Secretary stated:

COUNSEL: If the Court doesn't agree that the concept of continued normal mining operations applies in a flagrant violation, then the Court should rule that way, we would lose this case.

Tr. 151-52. Precisely.

Fundamentally, the Secretary must not be permitted to use interchangeably the term “actual (present) ignition source” with the term “potential ignition source” that may occur as a consequence of a future defect in the conveyor belt system during continued mining operations. In the present case, in the absence of ignition sources, the cited accumulations themselves are not capable of combustion and, as such, cannot be the proximate cause of serious bodily injury or death, as contemplated by section 75.400. Consideration of potential exposure to a future ignition source based on continued mining operations in the context of a traditional S&S analysis goes beyond scope a flagrant analysis.

Rather, whether the facts surrounding a violation support a flagrant designation is determined by the facts as they existed at the time the citation was issued. Coal dust accumulations *not in the presence of ignition sources* can be a *contributing cause* of injury if they propagate an explosion. However, such accumulations cannot be the *proximate cause* of injury. To conclude otherwise, would be to render the vast majority of prohibited accumulations under section 75.400 flagrant violations. This is consistent with the Commission’s admonition that the distinction between imminent danger hazards and hazards created by the vast majority of S&S violations should be preserved. *See Utah Power & Light*, 13 FMSHRC at 1622. Simply put—if everything is flagrant, nothing is flagrant. Nor does the Secretary have the prosecutorial discretion to arbitrarily and capriciously label violations as flagrant.<sup>8</sup>

#### **IV. Constraints on Prosecutorial Discretion**

I am cognizant of the broad prosecutorial discretion that should be accorded to the Secretary. In this regard, I routinely approve reasonable settlement terms proffered by the Secretary that delete S&S and unwarrantable designations based on prosecutorial discretion. Yet, however well-intentioned, the Secretary’s enforcement discretion is not unfettered and may not be arbitrarily and capriciously exercised. In this regard, the Secretary’s assertion that the cited condition is extraordinary and warrants a flagrant designation is belied by his own prosecutorial history.

Order No. 8520664 specifies that citations for violations of section 75.400 were issued 92 times in the previous two years at the Oak Grove Mine. At oral argument, the parties were requested to submit copies of all of these citations or orders that were designated as S&S. Consistent with this request, the parties provided copies of 30 citations and orders. Of these 30 citations and orders, approximately ten involved extensive accumulations, some of which were in contact with moving rollers. It is significant that the Secretary did not designate any of these 30 citations and orders as flagrant violations. While the Secretary may lack the necessary

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<sup>8</sup> Presently before the Commission is Judge McCarthy’s decision in *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ), which affirmed flagrant designations for routine coal dust accumulations in violation of section 75.400 that were not in proximity to any ignition sources. The flagrant designations were affirmed primarily because the violative accumulations were ignored in that they were noted in the pre-shift examination book but went unabated. *Id.* at 2236. However, the specific issue of the requisite degree of causation for a flagrant finding, in the context of the propriety of considering continued mining operations, is not currently before the Commission.

information to compare the gravity of the 30 previously-issued S&S accumulation violations with the gravity of the accumulation violation in Order No. 8520664, the Secretary's attempt to explain his history of arbitrary enforcement is regrettable. The Secretary stated:

It is conceivable, but highly unlikely, that one of the previous violations was the result of the exact same levels of gravity and negligence, and had the same history of violations as Order No. 8520664, yet MSHA determined that it was not 'flagrant.'

*Sec'y Resp.*, at 27. As previously noted, the subject accumulations in Order No. 8520664 were located between .56 and 2.3 miles from the working faces. It is probable that a significant number of these 30 accumulation violations were located in closer proximity to working faces, thus reflecting a higher degree of gravity.

I share the Secretary's apparent frustration over Oak Grove's repeated history of section 75.400 accumulation violations. However, as previously discussed, the Secretary has conceded that a previous history of violations does not provide an adequate basis for designating a violation as flagrant that does not otherwise satisfy the statutory criteria.

It is worth noting that I am constrained to apply the applicable statutory provisions that I have, not the provisions that I wish I had. Congress defined a flagrant violation as one "that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." I would have preferred Congress to have articulated a timeline for the imposition of enhanced civil penalties for flagrant violations, as they did for withdrawal orders under section 104(d)(1) of the Mine Act. For example, Congress could have articulated that the fourth unwarrantable failure violation of the same mandatory safety standard within a two year period constitutes a flagrant violation. However, Congress declined to do so. It is inappropriate for me, or for the Secretary, to utilize our adjudicative or enforcement functions as a substitute for the legislative will of Congress.

As a final note, narrowly construing section 110(b)(2) to only apply to the most dangerous violations that can proximately cause serious bodily injury or death will not adversely affect deterrence. The most effective means of achieving compliance is the deterrent effect of 104(d)(1) withdrawal orders issued under the Mine Act that explicitly require stoppages of production until abatement is achieved. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC \_\_\_, slip op. at 13 (May 2014) (dissenting), citing *Amax Lead Co.*, 4 FMSHRC 975, 978-79 (June 1982) (holding that unwarrantable failure withdrawal sanctions are among the strongest compliance incentives provided by the Act's enforcement scheme); *see also Brody Mining, LLC*, 36 FMSHRC 2027, 2042 (Aug. 2014). A significant loss of production is a far greater economic loss, particularly for moderate and large operators, than civil penalties proposed under the Act.

Although the deterrent effect of civil penalties must not be trivialized, the more important role of a flagrant violation charge is that it hopefully will shock the conscience of, if not disgrace, a recalcitrant mine operator. Such designations may also expose operators to greater civil liabilities for the death or serious injuries that such violations may cause.

## ORDER

The Commission and its judges are guided, as far as practicable, by the Federal Rules of Civil Procedure, with respect to any procedural matter not addressed by the Mine Act or the Commission's procedural rules. 29 C.F.R. § 2700.1(b). Federal Rule of Civil Procedure 56(f) provides that a judge may, on his own, dispose of a matter by summary decision in favor of a nonmovant, in this case, Oak Grove, after providing the parties a reasonable time to respond and determining that there are no outstanding material facts that are genuinely in dispute. Fed. R. of Civ. P. 56(f). The parties have had an opportunity to participate in oral argument and submit briefs in this matter.

Viewing the evidence in a light most favorable to the Secretary, **IT IS ORDERED THAT** the flagrant designation in Order No. 8520664 **IS DELETED** as the undisputed evidence fails to demonstrate that the cited violative coal dust accumulations reasonably could have been expected to proximately cause death or serious bodily injury.

**IT IS FURTHER ORDERED** that the Secretary file, within 45 days of the date of this Order, a relevant amended petition for assessment of civil penalty for Order No. 8520664 consistent with this Order.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

June 1, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

OAK GROVE RESOURCES, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-301  
A.C. No. 01-00851-315187-01

Docket No. SE 2013-352  
A.C. No. 01-00851-317727

Docket No. SE 2013-368  
A.C. No. 01-00851-319550

Docket No. SE 2013-399  
A.C. No. 01-00851-320606-01

Mine: Oak Grove Mine

**CERTIFICATION FOR INTERLOCUTORY REVIEW**

Before: Judge Feldman

This matter concerns the certification for interlocutory review, pursuant to Commission Rule 76(a)(1)(i), of the Order Deleting Flagrant Designation (“Order”), in the above-captioned proceedings, which was issued contemporaneously with this Certification on June 1, 2015. 29 C.F.R. § 2700.76(a)(1)(i). The Order deleted a section 110(b)(2) flagrant designation of an alleged violation of section 75.400 for prohibited coal dust accumulations.<sup>1</sup>

In *Utah Power & Light Co.*, 13 FMSHRC 1617 (Oct. 1991), the Commission addressed the fact that extremely hazardous conditions identified by provisions of the Mine Act for special enforcement should not be “interpreted to include any hazard that has the potential to cause a serious accident at some future time” to ensure the integrity of the distinction between such extremely hazardous conditions and routine safety S&S violations. 13 FMSHRC at 1622.

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<sup>1</sup> 30 C.F.R. § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, 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.

Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000 [adjusted for inflation]. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard *that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added). In this matter, the Secretary asserts, in essence, that a flagrant designation only requires that the violation could reasonably be expected to contribute to serious bodily injury or death, in the context of the unabated violation continuing to exist during the course of continued mining operations. This assertion blurs the distinction between flagrant violations and S&S violations.

Consistent with *Utah Power & Light*, to preserve the congressional mandate to assess enhanced penalties for only the most serious of violations, thus preserving the distinction between properly-designated flagrant violations and the vast majority of S&S violations, the Secretary’s flagrant designation in Order No. 8520664 was deleted. This deletion was based on the application of relevant principles of statutory construction to the facts surrounding the subject section 75.400 violations cited in Order No. 8520664. The Order held, with respect to violations concerning accidents that have not yet occurred, that it must be reasonably expected that a flagrant violation could proximately cause death or serious bodily injury. Specifically, the Order determined that the subject coal dust accumulations violation could not reasonably be expected to be the proximate cause of death or serious bodily injury because the Secretary admits that the cited accumulations were not then in proximity to any ignition sources.<sup>2</sup>

Commission Rule 76(a)(1)(i) provides that a judge may certify, upon his own motion, that his interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1)(i). The question of whether a flagrant violation must be capable of proximately causing death or serious bodily injury based on the facts surrounding the violation, rather than future intervening events that may occur during the course of continued normal mining operations, is a novel and unresolved question of law.<sup>3</sup> Commission review of this issue hopefully will now materially

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<sup>2</sup> Throughout this proceeding, the Secretary conflates a potential ignition source with an actual (present) ignition source. A potential ignition source requires a traditional S&S analysis with respect to consideration of continued mining operations. In insisting on the relevance of continued mining operations, the Secretary conflates an S&S violation with a flagrant violation.

<sup>3</sup> Currently on appeal before the Commission is *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ McCarthy). Although *American Coal* involves the merits of a repeated flagrant violation, the question of whether a flagrant violation must be reasonably expected to proximately cause death or serious bodily injury without regard to continued mining operations is not before the Commission.

advance the final disposition of these proceedings, as well as other flagrant cases, an issue that has yet to be resolved despite the promulgation of the amended provisions of section 110(b)(2) in 2006. Needless to say, a resolution in this matter that will define the Secretary's burden for demonstrating a flagrant violation will facilitate a judge's responsibility to regulate the course of a hearing and make rulings on the admissibility of relevant evidence, as required by Commission Rule 55. 29 C.F.R. § 2700.55. In addition, resolution of this long-standing unresolved question may result in the settlement of this case, as well as other cases that have been stayed pending a determination of the relevant evidentiary criteria for a flagrant designation.

In certifying this issue for interlocutory review, I am not alone in seeking clarity from the Commission. In this regard, both Judge Barbour and I have certified similar issues to the Commission that ultimately eluded Commission disposition because the Secretary withdrew the subject flagrant designations. *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013); *Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). The Administrative Law Judges' collective need for Commission guidance on this issue is emphasized by Judge Zielinski's opinion in *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), which deleted flagrant designations alleged by the Secretary. In his opinion, Judge Zielinski thoughtfully summarized his consternation, as well as that of several other judges, with the Secretary's unreasonable attempts to broaden the scope of the flagrant provisions of section 110(b)(2). *See id.* at 1356-58.

### **ORDER**

In view of the above, the June 1, 2015, Order Deleting Flagrant Designation in Order No. 8520664 is certified for interlocutory review pursuant to Commission Rule 76(a)(1)(i).

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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303-844-3577 FAX 303-844-5268

June 5, 2015

UTAHAMERICAN ENERGY, INC.,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

CONTEST PROCEEDING

Docket No. WEST 2015-435-R  
Citation No. 7637000; 02/26/2015

Mine ID 42-02241  
Lila Canyon Mine

**ORDER DENYING MOTION FOR SUMMARY DECISION**

Before: Judge Manning

This case is before me upon a notice of contest filed by UtahAmerican Energy, Inc. (“UEI”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the “Mine Act”). UEI filed a motion for summary decision accompanied by a legal memorandum and 10 exhibits in support of its motion.<sup>1</sup> The Secretary filed an opposition to the motion and UEI filed a reply to the Secretary’s opposition. For the reasons set forth below, the motion for summary decision is denied.

**I. BACKGROUND**

UEI operates the Lila Canyon Mine, an underground coal mine in Carbon County, Utah. The cover above the working sections of the mine is greater than 1,200 feet. On August 21, 2014, Russell J. Riley, MSHA’s District Manager for Coal District 9, sent a letter to “Underground Coal Mine Operators” concerning “Roof Control Plan Deficiencies Developing in

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<sup>1</sup> Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact;
- and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

Cover Exceeding 1200 Feet.” (Ex. 1).<sup>2</sup> UEI was a recipient of this letter. The letter stated that roof control plans applicable to development mining where the depth of cover exceeds 1,200 feet “should be amended to include training, monitoring and communication, MSHA notification, and required actions for safety regarding coal or rock outbursts.” *Id.* Over the next few months, UEI and MSHA exchanged proposals and held a meeting to see if they could agree upon an amendment to the mine’s roof control plan in light of Riley’s letter. They were able to agree upon language concerning MSHA’s requested changes with respect to training and with respect to monitoring and communication. They reached an impasse regarding MSHA’s requested changes requiring MSHA notification of outbursts and other actions that must be taken. The language that MSHA wanted to include in the mine’s roof control plan with respect to notifications and actions is as follows:

**Required MSHA Notification and Actions.** Accidents due to outbursts meeting definitions in Part 50.2 will be reported to the MSHA Call Center in accordance with Part 50.10. The MSHA District Manager or designee will be immediately notified with any incident resulting from an outburst that is not otherwise immediately reportable under Part 50.10. These incidents would include any of the following that would be considered abnormally violent or more frequent than those normally encountered:

- a. A forcible ejection of coal or rock that strikes a miner, causing injury.
- b. A forcible ejection of coal or rock that causes damage to mining equipment.
- c. A forcible ejection of coal or rock that impedes passage or impairs ventilation.

In conjunction with the notification of the MSHA District Office, all production in the affected mining section will cease, and all personnel will be removed. Mine personnel will not be allowed to re-enter the mining section until approved by the District Manager. An exception to this would be those individuals who are necessary to restore ventilation if it was damaged by an outburst (without removing coal or rock), under the direction of a certified foreman.

(Ex. 1 at 3).

During the negotiations over this provision, UEI sought to have it modified so that the reportable events were limited to coal or rock outbursts that were already required to be reported as “accidents” under 30 C.F.R. Part 50. (Ex. 4). MSHA rejected that suggestion. (Ex. 5). On January 20, 2015, UEI sent a letter to District Manager Riley again suggesting that MSHA approve UEI’s version of the section on “Notification and Actions” but it also asked that it be issued a technical citation in the event its proposal was again rejected by MSHA so that the issue

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<sup>2</sup> Counsel for UEI filed a declaration in support of the summary decision motion. Attached to the declaration are 10 exhibits. Exhibit references in this order are to the exhibits attached to the declaration.

could be brought before a Commission Administrative Law Judge. (Ex. 6). In the meantime, UEI agreed to abide by a third alternative that it suggested until the matter is resolved by the Commission. (Ex. 6, Attachment A). MSHA agreed to issue a technical citation. In addition, MSHA agreed to accept this third alternative in lieu of its original proposal for inclusion in the mine's roof control plan. (Ex 7 at 9).

This third proposal provides:

**Required MSHA Notification and Actions.** Production in the affected section will cease in the event that an abnormally violent or more frequent than normal forcible ejection of coal or rock strikes a miner and causes a reportable injury; causes damage to mining equipment that disables the equipment from normal operation; impedes passage in a working face or escapeway, or impairs ventilation in the affected section. The MSHA District Manager will be immediately notified of the situation. Only personnel necessary to restore ventilation devices damaged during the event, pump water, mitigate other hazards, or secure the area from further deterioration will be allowed to access the affected working area. These personnel will be under the direction of a certified foreman.

(Ex. 6, Attachment A at 2, numbered as p. 31).

At UEI's request, MSHA issued technical Citation No. 7637000 so that UEI could bring the issue before an administrative law judge. UEI agreed to follow all the roof control plan provisions requested by MSHA, which includes the "third proposal" quoted above attached as Exhibit A to the citation, during the pendency of this contest proceeding. By doing so, UEI did not agree that the Secretary has the authority under the Mine Act or his regulations to include the contested provisions in its roof control plan. UEI filed a notice of contest and the case was assigned to me.

## **II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS**

### **A. UtahAmerican Energy**

UEI's principal argument is that the above provision exceeds the Secretary's authority under the Mine Act. The Secretary seeks the authority to require, through a roof control plan, that UEI cease production, withdraw all personnel, and provide immediate notification to MSHA following outbursts that do not rise to the level of accidents or imminent dangers as those terms are used in the Mine Act. Congress has directly and precisely set forth situations where MSHA may require a mine operator to cease production, withdraw miners, and provide immediate notification. The only possible statutory bases for the Secretary's authority to stop production and withdraw miners are found in sections 103(j) and (k), 104, and 107(a) of the Mine Act. 30 U.S.C. §§ 813(j) and (k), 814, and 817. Section 103(j) requires immediate notification only in the case of accidents and the Secretary has provided guidance with respect to this requirement in 30 C.F.R. § 50.10. This regulation only applies when an "accident" has occurred, as that term is defined in section 50.2(h). There can be no dispute that the triggering events listed in the

provision that the Secretary is seeking to include in the roof control plan do not necessarily rise to the level of an “accident.”<sup>3</sup>

UEI argues that the Secretary’s actions cannot be upheld under the two-step deference analysis set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 827, 842-43 (1984). Under step one, it is clear that Congress did not grant authority for the Secretary to withdraw miners or require immediate notification of outbursts or other events except as enumerated in the Mine Act itself. The Mine Act clearly sets forth those instances where a withdrawal order is authorized. Sections 103(j) and 103(k) delineate situations where Congress required operators to notify MSHA of accidents and authorized MSHA to withdraw miners following such accidents. Section 107(a) grants MSHA the authority to withdraw miners in the event he discovers a condition that creates an imminent danger. Section 104 of the Mine Act sets forth the various types of enforcement orders that MSHA inspectors are authorized to issue for violations of safety and health standards. There is no other provision in the Mine Act that delegates authority to the Secretary to (1) require the immediate notification of events that are not accidents or (2) withdraw miners from a mine or area of a mine in circumstances not set forth in the Mine Act.

Under step two of the *Chevron* analysis, the issue is whether the Secretary’s interpretation is based on a “permissible construction of the statute.” *Chevron*, 467 U.S. at 843. In this instance, the Secretary must establish that her interpretation of the statute is a reasonable one. *Id.* at 844. UEI maintains that the “Secretary’s requirements to cease production, withdraw personnel and provide immediate notification following coal or rock outbursts that are not accidents or imminent dangers result from an impermissible construction of the Mine Act and are not a reasonable interpretation.” (UEI Mem. at 14). In the absence of statutory authority, there is “no permissible construction of the Mine Act that gives the Secretary the power to unleash his hoped-for new regulation” in the guise of a roof control plan provision. *Id.*

UEI argues that the Secretary has not offered a reasonable explanation for his interpretation of the Mine Act or his regulations that would permit a roof control plan to require cessation of production, withdrawal of miners, and immediate notification for outbursts that are not accidents or imminent dangers. The statutory language in section 302 of the Mine Act, “Roof Support,” does not support the Secretary’s interpretation. 30 U.S.C. § 862. In addition, none of the Secretary’s proposed rules, final rules, regulations, or prior interpretations relating to roof control plans have “required, allowed, referenced, discussed, or otherwise mentioned in any way the cessation of production, withdrawal of miners, or immediate notification to the MSHA District Manager in relation to any roof, rib, or other ground control issue.” *Id.* at 17. MSHA’s “Roof Control Approval and Review Procedures Handbook is silent as to the issue. (MSHA Handbook Series, Handbook No. PH13-V-4 (Dec. 2013)). Thus, the “Secretary’s position in this case is inconsistent not only with his own rules and regulations, but also his comprehensive interpretative guidance contained in MSHA’s Roof Control handbook.” *Id.* at 19.

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<sup>3</sup> UEI does not dispute that if a “forcible ejection of coal or other rock” creates a condition that fits into the definition of an “accident” as that term is defined in section 50.2(h), then it would be required to comply with the immediate notification requirements of section 50.10 and that it would also be required to comply with any orders of withdrawal issued by MSHA under sections 103(j) and 103(k) of the Mine Act as a result of such accident.

Finally, UEI argues that the “additional measures” that a district manager may take in roof control plans to protect miners, as specified in 30 C.F.R. §§ 75.220(a)(1) and 75.222(a), cannot be reasonably interpreted to include the contested provision in this case. UEI contends that such “additional measures” must be “similar in scope and nature to those expressly enunciated in Section 302 of the Mine Act or in the Secretary’s existing roof control plan regulations.” *Id.* at 19. The Secretary cannot use these regulations to require additional measures that exceed the scope of his statutory authority.

## **B. Secretary of Labor**

The Secretary maintains that the contested roof control plan provision is “modest, reasonably directed to outburst hazards . . . and [is] consistent with conditions and practices specific to the mine.” (Sec’y Resp. at 1). Indeed, UEI represents that its current roof control plan provisions are sufficient to prevent coal or rock outbursts at the mine. (Ex. 7 pgs. 6-7). If that is the case, then the challenged provisions will have no material effect on the mine’s operations except in unusual circumstances when notification and withdrawal are warranted.

The Secretary emphasizes that it is important to “recognize the limited and precisely-drawn nature of the requested plan modifications, each of which are triggered only in the event of a significantly dangerous roof or pillar event,” that is an “abnormally violent or more frequent than normal forcible ejection of coal or rock” from mine roof or rib. (Sec’y Resp. at 4). With the exception of district manager notification, the challenged provision only requires UEI to take those steps that an operator would be required to take in any event, which are to (1) cease production, (2) assess the current mine conditions, (3) assign only necessary personnel to take the steps necessary to correct any damage resulting from the outburst, and (4) to resume mining operations after determining that it is safe to do so. *Id.* As modified in the “third proposal” during negotiations, the proposed plan amendment does not “contemplate MSHA permission or approval prior to UEI acting to assure the safety of its miners following an outburst and then resuming production.” *Id.* at 5.

The “authority to assure adequate protection against rock and coal outburst hazards is within the Secretary’s broad statutory roof control plan approval authority, as outbursts intricately are connected to roof control measures and practices, which contemplate factors including quantity of supported overburden, as well as geological features associated with the overburden and surrounding strata.” *Id.* at 8. Thus, District Manager Riley properly sought to modify the mine’s roof control plan to “more effectively protect miners against hazards associated with potential coal and rock outbursts.” *Id.* at 9.

District Manager Riley has legal authority to request immediate notice of specific coal or rock outbursts at the Lila Canyon Mine. The Secretary relies upon section 103(h) of the Mine Act to seek information about coal and rock bursts. 30 U.S.C. § 813(h). The Commission recently held that section 103(h) gives the Secretary “authority to request whatever information [he] deems relevant and necessary.” *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012 (May 2012). The Commission quoted, with approval, the administrative law judge’s conclusion that “section 103(h) creates ‘a legitimate basis for enforcement of reporting requirements even without the Part 50 rules.’” *Id.* quoting *Big Ridge, Inc.*, 33 FMSHRC 1306, 1320 (May 2011) (ALJ) (citation

omitted). The Secretary contends that section 103(h) of the Mine Act together with section 302(a) provide District Manager Riley with ample authority to request UEI officials to immediately notify him after one of the enumerated outburst events. Such a reporting requirement furthers Riley's ability to perform his function to continually review roof control plans "taking into consideration any falls of roof or rib or inadequacy of support of roof or ribs" to assure the plan's adequacy given current conditions and practices at an individual mine." (Sec'y Resp. at 11 quoting section 302(a)). A district manager is required to consider such information when analyzing the continuing sufficiency of existing roof control plans.

While it is true that the contested roof control provision requires affirmative action by UEI without a specific request for information from MSHA, District Manager Riley is not privy to the information he is seeking so he would not be in a position to request information about an outburst after it has occurred. The Secretary argues that "given the district manager's significant authority to obtain information necessary to perform his duty to assure the continuing sufficiency of Lila Canyon's roof control plan, as well as his duty to assure that UEI is taking appropriate and timely actions to protect miners from hazards associated with outbursts, [District Manager] Riley's request for personal notification of significant outbursts is reasonable and readily is recognized within the scope of his statutory authority." *Id.* at 17. He seeks notification to help him ensure that the roof control plan remains adequate in light of outbursts as mining progresses. The types of outbursts about which Riley seeks information could be precursors to subsequent, more violent and hazardous outbursts. MSHA's safety standards and other regulations do not limit the district manager's authority to request information about such outbursts.

District Manager Riley also has the legal authority to require UEI to cease production, assess the conditions, and address the hazards before determining whether it is safe to resume mining. This requirement is incorporating UEI's "statutory obligations into the roof control plan to better assure that Lila Canyon personnel recognize and act consistently with their statutory duties following an outburst." *Id.* at 21. This requirement meets the first step of *Chevron* analysis because section 302(f) of the Mine Act requires an operator to assess potential dangers associated with the roof, face, and ribs at the mine before engaging in normal production activities. The proposed roof control plan language merely sets forth "the operator's obligation under section 302(f) to independently undertake the specified actions to assure that roof support hazards associated with an enumerated outburst event are corrected immediately, and to unilaterally determine that the affected area is safe, before allowing miners to resume production activities." *Id.* at 22. Even assuming that there is ambiguity in the statutory language, *Chevron* mandates deference to an interpretation that is reasonable and consistent with other statutory provisions. UEI's focus upon sections 103(j) and (k) and 107(a) is misplaced. Those sections, as well as section 104, are distinguishable because those provisions concern MSHA's unilateral authority to shut down areas of a mine until MSHA determines that the affected area is safe.

### **C. UtahAmerican's Reply**

Section 103(h) in conjunction with section 302(a), section 302(f), and 30 C.F.R. § 75.223(d) do not provide the district manager with the authority to require immediate notification of outbursts. (UEI Reply at 2). The Secretary may reasonably require information from operators from time to time, but he cannot place an affirmative duty on operators to immediately report

events that are not otherwise reportable under the statute or his regulations. *Id.* at 2-3. The Secretary has significantly overstated the district manager’s authority in this regard. *Id.* at 3.

Section 302(f) of the Mine Act does not authorize the Secretary to require the cessation of production and withdrawal of miners. *Id.* at 5. The proposed roof control plan provision is clearly designed to require more than what is already provided for in the Mine Act and in the Secretary’s regulations. *Id.* at 6. The Secretary is “attempting to remove *the mine operator’s discretion* in section 302(f) in ascertaining the existence of a danger by creating a *per se* rule requiring the cessation of production and withdrawal of miners following the occurrence of specific categories of outbursts that the Secretary has pre-determined constitute dangers, regardless of the circumstances actually encountered by the mine operator.” (*Id.* at 6)(emphasis in original)(footnote omitted).

### III. DISCUSSION AND ANALYSIS

The Commission has long recognized that “summary decision is an extraordinary procedure.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). I conclude that, as presented by the parties, there are no genuine issues as to any material fact. For the reasons set forth below, I find that UEI is not entitled to summary decision as a matter of law. Consequently, I deny UEI’s motion for summary decision.

As material here, the Secretary seeks to add two additional requirements in UEI’s roof control plan. First, he wants to require the operator to immediately notify the MSHA district manager whenever there is “an abnormally violent or more frequent than normal forcible ejection of coal or rock,” which:

1. strikes a miner and causes a reportable injury;
2. causes damage to mining equipment that disables the equipment from normal operation;
3. impedes passage in a working face or escapeway; or
4. impairs ventilation in an affected section.

(Sec’y Resp. at 3).<sup>4</sup> Second, in the event that such immediate notification must be provided, the Secretary wants to require the operator to only allow “personnel necessary to restore ventilation devices damaged during the event, pump water, mitigate other hazards, or secure the area from further deterioration” in the affected working area. This work must be conducted under the direction of a “certified foreman.” UEI may resume production only after UEI determines that it is safe to do so. I analyze the two requirements separately below.

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<sup>4</sup> I presume that the term “reportable injury” refers to an “occupational injury” as defined in section 50.2(e) that is required to be reported to MSHA under section 50.20. UEI and the Secretary should clarify this language to avoid any future disputes.

## **A. Proposed Immediate Notification Requirement**

The proposed addition to the roof control plan only comes into play if the forcible ejection is not otherwise immediately reportable under section 50.10 of the Secretary's regulations. Under section 50.10, certain specified events must be immediately reported to MSHA via a toll-free number. On the other hand, the proposed roof control plan provision requires immediate notification to District Manager Riley. The immediate notification provisions of section 50.10 are invoked whenever an "accident" occurs at a mine, as that term is defined at section 50.2(h). The term "accident" is defined to include the death of an individual at a mine, an injury to an individual at a mine which has a reasonable potential to cause death, the entrapment of an individual under certain circumstances, and falls of roof or ribs under certain circumstances. (Sections 50.10, 50.2(h)(3) and 50.2(h)(8)).

The definition of "accident" also includes a "coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour." (Section 50.2(h)(9)). Such an event is currently required to be immediately reported by UEI via the toll-free number so UEI should not be required to contact the district manager under the proposed roof control plan provision.<sup>5</sup>

The Secretary contends that he has legal authority to require UEI to immediately notify the district manager of abnormally violent or more frequent than normal forcible ejection of coal or rock that causes any of the four events listed above. He cites section 103(h) of the Mine Act to support his position. That section states, in part, that every operator of a coal mine "shall establish and maintain such records, make such reports, and provide such information as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

I agree with the Secretary's argument. One of the Secretary's most important functions is to review roof control plans to ensure the safety of miners. The control of outburst hazards is appropriately addressed in an operator's roof control plan. Notification of the types of outbursts set forth in the proposal furthers the district manager's ability to perform his functions under the Mine Act. It will provide the district manager with the opportunity to effectively evaluate the situation because these outbursts may be precursors to more significant roof control problems.<sup>6</sup> The reporting of these outbursts will allow the district manager to offer input and take action where appropriate to more effectively assure that miners are protected from subsequent, more hazardous events. (Ex. 7 at 8).

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<sup>5</sup> In his response, the Secretary implies that UEI would be required to call both the toll-free number and the district manager in such circumstances. (Sec'y Resp. 15-16). I do not believe that the disputed plan provision should require a mine operator to immediately report the same event to MSHA two times.

<sup>6</sup> In his February 20, 2015, response to UEI's objections to the plan provision, District Manager Riley stated: "Unfortunately, the history of coal bursts is replete with examples of significant, "precursor" incidents that were not reported to MSHA, and which were subsequently followed by major events that caused fatalities, serious injuries and/or projectile material capable of resulting in death or serious injury to miners." (Ex. 7 at 8).

I find that section 103(h), when read with section 302, provides sufficient legal basis to sustain the Secretary's request that UEI immediately report the specified outbursts to the district manager. "The language of section 103(h) does not limit the Secretary's access only to records that are specifically required to be maintained or prescribed by regulation, but instead give [him] authority to request whatever information [he] deems relevant and necessary." *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012 (May 2012). Section 103(h) "grants a broad delegation to the Secretary to require mine operators to provide information necessary to enable the Secretary 'to perform his functions'" under the Mine Act. *Energy West Mining Co.*, 40 F.3d 457, 461 (D.C. Cir. 1994). It "contains little limitation on the type of information to be provided." *Id.*

UEI contends that the Secretary cannot use section 103(h) to create a standing, affirmative request for immediate notification of and information about outbursts. I hold that section 103(h) should not be interpreted in such a limited fashion. It is impossible for the district manager to request information about a specific outburst because he would not know about it without being advised of its occurrence by the mine operator. I find that because District Manager Riley has a specific need to obtain information necessary to perform his duty to assure the continuing sufficiency of Lila Canyon's roof control plan, his request for notification of significant outbursts is reasonable and is within the scope of his statutory authority. The other provisions in the Mine Act, including sections 103(j) and (k), do not limit the Secretary's authority to obtain information under section 103(h).<sup>7</sup>

UEI greatly exaggerates the impact of the Secretary's proposal. UEI candidly states that the Lila Canyon Mine has not experienced any coal or rock outbursts and that its existing roof control plan is sufficient to prevent such outbursts at the mine. (Sec'y Resp. at 2; Ex. 6, Jan. 19, 2015 letter of Jared Childs). Thus, UEI will only be required to immediately notify the district manager under this provision on rare occasions. I hold that the contested roof control plan provision requiring immediate notification<sup>8</sup> is "reasonable and neither overly broad nor burdensome." *See Big Ridge*, 34 FMSHRC at 1022.

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<sup>7</sup> UEI also contends that the Secretary's regulation at 30 C.F.R. § 75.223 already addresses how "unplanned roof fall and rib fall and coal or rock burst that occurs in the active workings" must be reported to MSHA. (UEI Reply at 4 quoting section 75.223(b)). That regulation applies to all coal mines whereas the proposed amendment to the roof control plan applies to the Lila Canyon Mine only because of its depth of cover. Roof control plans are designed to take account of conditions applicable to the mine in question. The additional reporting requirement in the roof control plan is consistent with the Secretary's regulation and is an additional requirement imposed due to the depth of the working sections of the mine.

<sup>8</sup> The issue of what is meant by the phrase "immediately notified" is not before me. The notification requirement in section 103(j) of the Mine Act does not automatically apply to the proposed roof control plan provision. Consequently, it does not follow that the roof control plan is necessarily violated if the time between the outburst and the notification is greater than 15 minutes. UEI and the Secretary should attempt to negotiate a workable reporting protocol.

## **B. Proposed Requirement that Production Cease Until Affected Area Restored**

I hold that the Secretary's legal authority to require the cessation of production can be resolved under the first step of *Chevron*. Section 302(f) of the Mine Act requires mine operators to "examine and test the roof, face, and ribs before any work or machine is started" in areas where miners are exposed to dangers from falls or roof, face, and ribs. 30 U.S.C. § 862(f). That section also requires operators to perform such examinations and testing "as frequently thereafter as may be necessary to insure safety." *Id.* Finally, it provides that when dangerous conditions are found, they must be corrected immediately. *Id.* An "abnormally violent or more frequent than normal forcible ejection of coal or rock" certainly qualifies as a dangerous condition if it causes a reportable injury, disables equipment, impedes passage in a working face or escapeway or impairs ventilation. Consequently, the requirement to temporarily cease production and withdraw miners is fully supported by the language of the Mine Act.

The contested provision of the roof control plan recognizes that when there has been a violent outburst or frequent outbursts that meet the requirements stated therein, the conditions in the area must be evaluated. To perform this evaluation, production in the affected area must stop and miners not involved in the evaluation need to be removed from the immediate area. The plan provision allows those miners necessary to (1) restore damaged ventilation devices, (2) pump water, (3) mitigate hazards, and (4) secure the area from further deterioration to access the affected working area under the direction of a certified foreman. Once mine management determines that the area is safe, normal work may continue in the affected area. Unlike the original proposal suggested by the Secretary, the operator independently determines when conditions are safe and normal mining operations may resume.

UEI argues that MSHA is only authorized to withdraw miners in situations covered by sections 103(j) and (k), 107(a), and 104. I agree that MSHA does not have the authority to issue a withdrawal order except as specifically authorized by the Mine Act. The Secretary is not seeking to issue a withdrawal order when one of the specified outbursts occurs. Instead, as stated above, the Secretary is seeking to require the operator to take a few reasonable steps to ensure the safety of the area around an outburst before the area is returned to normal operations. This requirement bears no relationship to the issuance of a withdrawal order by an MSHA inspector. Under the Secretary's proposal, the operator determines what areas are affected by the outburst, what steps need to be taken to ensure the area is safe, and when the area can return to normal operations. The operator's actions can be proportional to the seriousness of the conditions.<sup>9</sup>

I conclude that the language contained in section 302(f) provides the Secretary with the authority to require UEI, through a roof control plan amendment, to cease production in an area affected by an abnormally violent or more frequent than normal forcible ejection of coal or rock

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<sup>9</sup> It is possible that one of the concerns of UEI is that, with the required notification, MSHA may determine that the conditions at the mine merit an order under sections 103(j), 104 or 107(a). I agree that a mine operator may be subject to greater scrutiny by MSHA when it notifies the district manager of an outburst. As discussed above, an abnormally violent or a series of more frequent than normal outbursts may indicate that a more serious problem is present that could endanger the lives of miners.

until it conducts an assessment of the conditions and determines that the area can be safely returned to production.

### **C. Formal Rulemaking Was Not Required For Proposed Roof Control Provision**

UEI also contends that “[e]ven if the Court finds that the Secretary’s proposed requirements are lawful under *Chevron*, the Court should nevertheless hold that the requirements constitute substantive rules subject to formal notice and comment rulemaking requirements of the Administrative Procedure Act (“APA”). (UEI Mem. at 20-21). UEI argues that the disputed provision is a substantive rule that is subject to formal rulemaking under section 4 of the APA. 5 U.S.C. §553.

I reject UEI’s argument. The process of negotiating and adopting a roof control plan “is essentially one of setting standards, not, in many ways, substantially different from setting more lasting and general standards through the rulemaking process.” *Mach Mining LLC v. Sec’y of Labor*, 728 F.3d 643, 650 (7th Cir. 2013). Congress created a special procedure for mine plans and, as a general matter, the Secretary is not required to provide for notice and comment rulemaking when including a new provision in a roof control plan. The process of negotiating a roof control plan provision is a congressionally authorized procedure for setting roof control standards for a mine that is outside the normal notice and comment process.

UEI maintains that the requirement to immediately report certain outburst events is a new substantive rule that must be subjected to notice and comment rulemaking. (UEI Mem. at 25). It argues that the sole statutory basis for immediate notification is section 103(j) of the Mine Act, “which unequivocally does not require immediate notification of coal or rock outbursts that do not rise to the level of accidents.” *Id.* The “Secretary effectively and significantly has added a new provision to Section 103(j) and to the reporting requirements of 30 C.F.R. Part 50[.]” *Id.* This new immediate notification requirement “imposes affirmative obligations requiring the time and effort of the mine operator and also subject[s] the mine operator or its personnel to enforcement actions in the event of a failure to comply with such obligations.” *Id.*

As stated above, section 103(h) together with section 302 provide a legal basis to support the Secretary’s proposed requirement in the roof control plan. The proposed roof control plan provision imposes affirmative responsibilities upon UEI, but the Mine Act supports the imposition of these responsibilities. The Secretary was not required by the APA to engage in notice and comment rulemaking before requiring immediate notification of the specified outburst events. *Id.* at 24-25, 27.

In addition, UEI argues that the requirement in the proposed roof control plan amendment to cease production and withdraw miners cannot be validly enforced by the Secretary without first following the notice and comment requirements of the APA because the provision is a substantive rule.

As discussed above, the Secretary is relying upon section 302(f) of the Mine Act, which provides that if miners are exposed to dangers from falls of roof, face and ribs, then the operator shall examine and test the area “before any work or machine is started and as frequently

thereafter as may be necessary to ensure safety.” 30 U.S.C. §862(f). That section also requires that when dangerous conditions are found, they shall be corrected immediately. As stated previously, an “abnormally violent or more frequent than normal forcible ejection of coal or rock” qualifies as a dangerous condition if it causes a reportable injury, disables equipment, impedes passage in a working face or escapeway or impairs ventilation. Thus, the proposed amendment to the roof control plan does not constitute a new substantive rule requiring notice and comment because a substantially similar requirement is already present in the Mine Act.

#### IV. ORDER

For the reasons set forth above, the motion for summary decision filed by UtahAmerican Energy, Inc., is **DENIED**. I find that UtahAmerican Energy is not entitled to summary decision as a matter of law. This case will proceed to hearing on September 3, 2015, as previously scheduled, unless the parties reach an agreement as to an alternative resolution.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 9, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

AUSTIN POWDER COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-391M  
A.C. No. 40-00106-284412 E24

Mine: Parsons Quarry

**ORDER DENYING RESPONDENT’S AMENDED MOTION FOR SUMMARY  
DECISION AND GRANTING SECRETARY OF LABOR’S AMENDED MOTION FOR  
SUMMARY DECISION**

Appearances: Anthony M. Berry, Esq., Office of the Solicitor, U.S. Department of  
Labor, for the Secretary.

Adele L. Abrams, Esq., CMSP, Law Office of Adele L. Abrams, P.C., for  
Respondent.

Before: Judge Andrews

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) against Austin Powder Company (“Austin Powder” or “Respondent”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the “Mine Act” or “Act”).

Pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67, the parties have submitted cross motions for summary decision. The parties each filed amended motions for summary decision after jointly filing stipulated facts and exhibits and certifying that the stipulated facts included all material facts relevant to the decision.

**I. PROCEDURAL BACKGROUND**

This action arose from the Secretary of Labor’s attempt to assess civil penalties against Austin Powder Company for violations of the Mine Act. On February 8, 2012, MSHA issued two citations to Respondent at its storage facility at the Parsons Quarry

mine. The issue presented is whether MSHA had jurisdiction over Austin Powder's facility at Parsons Quarry.<sup>1</sup> Austin Powder was a contractor that performed blasting services at Parsons Quarry.

On September 11, 2014, the Secretary filed a Motion for Summary Judgment Regarding Jurisdiction. Likewise, the Respondent filed a Motion for Summary Decision on September 15, 2014. The Secretary and Respondent filed replies on September 17, 2014 and September 29, 2014, respectively.

After reviewing the motions and the responses, the undersigned declined to reach the issue of summary decision on the basis that there were additional material facts that needed to be determined in order to make a proper ruling.<sup>2</sup> However, because the parties wished to dispose of the issue through summary decision, and in the interest of judicial economy, the undersigned allowed the parties to renew their motions and to submit joint stipulations of all material facts relevant to the instant proceeding.

On January 23, 2015, the parties submitted 97 joint stipulations, which are enumerated below, and certified that the stipulations represent all of the material facts relevant to the case. The parties also submitted eight exhibits in support of their respective positions.<sup>3</sup>

In its reply brief dated September 29, 2014, Respondent raised a new issue, arguing there was a lack of fair notice when MSHA asserted jurisdiction over the site at Parsons Quarry. By leave of the court, the parties were ordered to address this issue and were provided an opportunity to submit additional stipulated facts. The Secretary addressed this and the jurisdiction issue in its Amended Motion for Summary Decision dated February 27, 2015 and the Respondent addressed both issues in its Amended Motion for Summary Decision also dated February 27, 2015. The parties did not submit any additional stipulated facts.

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<sup>1</sup> Parsons Quarry is a mine operated by Vulcan Construction Materials. JS ¶ 16. Here and hereinafter, the parties' joint stipulations submitted on January 23, 2015, which are contained *infra*, will be abbreviated as "JS."

<sup>2</sup> See Order Denying Respondent's Motion for Summary Decision Order Denying Secretary's Motion for Summary Judgment Regarding Jurisdiction dated December 8, 2014 (unpublished). The undersigned declined to grant the summary decision motions because under Commission Rule 67, in order for there to be a disposition by summary decision, there cannot be any genuine issue as to any material fact.

<sup>3</sup> The parties have stipulated to modifications in the citations and reductions in the proposed assessments; however, a joint motion for approval of settlement with rationale for the modifications must still be filed.

## II. STIPULATED FACTS

The parties jointly submitted the following stipulated facts:

1. Exhibit 1 is an accurate copy of citation 8637491.
2. Exhibit 2 is an accurate copy of citation 8637492.
3. Exhibit 3 is an accurate copy of the lease executed between Austin and Vulcan on February 28, 1996.
4. Exhibit 4 is an accurate aerial image of Parsons Quarry with the Storage Area encircled in red.
5. Exhibit 5 is an accurate collection of the citations that were vacated following the October 2008 inspection of Parsons Quarry.
6. Exhibit 6 is an accurate report of Austin's assessed violation history.
7. Exhibit 7 is an accurate copy of a citation Austin received from the Tennessee Occupational Safety and Health Administration (TOSHA) with subsequent abatement and payment forms.
8. Exhibit 8 is an accurate copy of the Memorandum of Understanding between MSHA and the Bureau of Alcohol, Tobacco, and Firearms issued in June 1980.
9. Austin Powder Company ("Austin") was an "operator," as defined in the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 802(d), at the mine, Parsons Quarry, (Mine Identification No. 40-00106) at which the citations at issue in this proceeding were issued.
10. Austin is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to 30 U.S.C. §§ 815 and 823.
11. Form 1000-179 contained in the Exhibit A attached to the Secretary's petition accurately reflects Austin's size when compared with 30 C.F.R. § 100.3(b)(2011).
12. Form 1000-179 contained in the Exhibit A attached to the Secretary's petition accurately sets forth the total number of inspection days and the total number of assessed violations for the 24-month period preceding the month of issuance for each referenced citation.
13. Austin engaged in 794,443 work hours in 2011.
14. Payment by Austin of the proposed penalty of \$3,218.00 will not affect Austin's ability to remain in business.

15. Austin was performing blasting activities at Parsons Quarry up to the time that citations 8637491 and 8637492 were written.
16. Parsons Quarry was being operated by Vulcan Construction Materials (“Vulcan”) on February 8, 2012.
17. Parsons Quarry is a coal or other mine as that term is defined in Section 3(h)(1) of the Mine Act.
18. At all relevant times, the products of Parsons Quarry entered commerce, or the mine operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
19. Citations 8637491 and 8637492 both allege violations that occurred at the same storage area (hereinafter referred to as the “Storage Area”).
20. The Storage Area is owned by Vulcan.
21. The Storage Area was leased to Austin by Vulcan on February 28, 1996.
22. Austin used the Storage Area to store “explosives and related products,” as described by Exhibit 3.
23. Austin was using the Storage Area to store “explosives and related products” on February 8, 2012.
24. Austin uses the “explosives and related products” stored at the Storage Area for performing blasting services for Vulcan and other customers.
25. The “explosives and related products” stored at the Storage Area included detonators.
26. The “explosives and related products” stored at the Storage Area included oxidizers.
27. CFR §§ 56.6132(b) and 56.12032 are each mandatory health or safety standards as that term is defined in Section 3(l) of the Mine Act.
28. The citations contained in Exhibit A attached to the Secretary's petition are authentic copies of the citations at issue in this proceeding with all appropriate modifications and abatements, if any.
29. Citation 8637491 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Austin Powder Company on 2/8/2012.

30. Citation 8637492 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Austin Powder Company on 2/8/2012.
31. Petitioner's agents conducted five inspections of Mine ID 40-00106 from October 6, 2008 to October 14, 2009. Three of those inspections were E01's and the other two were an E15 and an E30.
32. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068396 to Austin Powder at Mine ID 40-00106.
33. Citation number 6068396 was issued under 30 CFR §47.41(a) for a lack of label on a diesel tank located at the ammonium nitrate storage bin.
34. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068396 because "Austin Powder was not within MSHA's jurisdiction".
35. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068397 to Austin Powder at Mine ID 40-00106.
36. Citation number 6068397 was issued under 30 CFR §56.12032 for a missing cover plate on a transformer located behind the hopper for ammonium nitrate.
37. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068397 because "Austin Powder was not within MSHA's jurisdiction".
38. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068398 to Austin Powder at Mine ID 40-00106.
39. Citation number 6068398 was issued under 30 CFR §56.12006 because the disconnect for the main power was not labeled at the ammonium nitrate storage area.
40. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068398 because "Austin Powder was not within MSHA's jurisdiction".
41. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068399 to Austin Powder at Mine ID 40-00106.
42. Citation number 6068399 was issued under 30 CFR §56.12004 because the conduit housing the 220 volt power cable for the ammonium nitrate bucket elevator was damaged.
43. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068399 because "Austin Powder was not within MSHA's jurisdiction".

44. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507651 to Austin Powder at Mine ID 40-00106.
45. Citation number 6507651 was issued under 30 CFR §56.14112(b) because the guard for the motor on the bucket elevator for the ammonium nitrate was open exposing keyed pulley wheels and a drive belt.
46. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507651 because “Austin Powder was not within MSHA’s jurisdiction”.
47. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068400 to Austin Powder at Mine ID 40-00106.
48. Citation number 6068400 was issued under 30 CFR §56.18002(a) for lack of workplace examinations.
49. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068400 because “Austin Powder was not within MSHA’s jurisdiction”.
50. On October 9, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507664 to Austin Powder at Mine ID 40-00106.
51. Citation number 6507664 was issued under 30 CFR §56.6132(a)(4) because the #1 magazine had signs posted using sparking metal fasteners.
52. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507664 because “Austin Powder was not within MSHA’s jurisdiction”.
53. On October 9, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507665 to Austin Powder at Mine ID 40-00106.
54. Citation number 6507665 was issued under 30 CFR §56.6132(a)(4) because the #2 magazine had signs posted using sparking metal fasteners.
55. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507665 because “Austin Powder was not within MSHA’s jurisdiction”.
56. The materials stored at the Storage Area included blasting caps, cast boosters, and ammonium nitrate prill.
57. Austin stored a truck, hereinafter known as the “Truck”, at the Storage Area that was equipped with the ability to mix ANFO blasting agent for filling blasting holes. The Truck also has the capability to manufacture an emulsion blend product (HEET).
58. The blasting performed by Respondent at Parsons Quarry was performed for the extraction of rock for its minerals on that site.

59. When Austin needs to service one of its customers, the Truck is loaded with the materials stored at the Storage Area and then driven to the customer's jobsite.
60. Once the Truck arrives at the jobsite, it creates a blasting agent mix using the materials stored onboard.
61. Austin uses the blasting agent created by the Truck to perform blasting services.
62. The access road to the Storage Area crosses land owned by Vulcan but does not go to or through the pit area.
63. In February 2012, MSHA Inspector James Hollis conducted a regular "E01" inspection of the Parsons Quarry. In the course of his inspection, he requested access to inspect the explosives storage facility.
64. No one from Austin was on-site at the time of Mr. Hollis' inspection.
65. Inspector Hollis contacted a representative of Austin who sent David Byrd, a truck driver for Austin, to meet Inspector Hollis.
66. David Byrd unlocked the magazines before Inspector Hollis could inspect the area.
67. Prior to conducting the inspection, Inspector Hollis did not check with his supervisor, or anyone else within MSHA, regarding MSHA jurisdiction of the leased property. Inspector Hollis was aware that the leased property had not been inspected during previous inspections of Parsons Quarry.
68. Between March 2008 and July 2014, Robert Knight served as an inspector for the U.S. Department of Labor, Mine Safety and Health Administration out of the Franklin, Tennessee, Macon, Georgia, and Dallas, Texas metal/non-metal offices.
69. In October 2008, Robert Knight conducted an E01 inspection of Parsons Quarry, a Vulcan Materials mine.
70. During the October 2008 E01 inspection, Robert Knight issued 8 citations to Austin, whose operation was located on leased land within the boundaries of the Vulcan mine site.
71. A representative for Austin, Charles Lambert, told Robert Knight that he did not believe that the leased land should be under MSHA jurisdiction because the site was used to process materials and take them to multiple sites.
72. Robert Knight issued the citations but was later informed by MSHA management that the citations were required to be vacated due to the fact that Austin's operation was not technically on the mine site and not in MSHA's jurisdiction.

73. James Croft, who was the Field Office Supervisor for Franklin, Tennessee at that time, told Robert Knight that he did not believe that MSHA had jurisdiction because Austin stored material that was used on other sites besides this Vulcan site.
74. James Croft told Robert Knight that he discussed the citations with Mike Davis, who was the District Manager in the Southeast District office in Birmingham, Alabama at the time.
75. Between 2008 and 2014, James Croft served as the Field Office Supervisor (FOS) for the U.S. Department of Labor, Mine Safety and Health Administration's Franklin, Tennessee metal/non-metal office.
76. During his tenure as FOS, James Croft supervised a number of inspectors whose jobs included conducting E01 inspections on various mine sites in the Franklin, TN district.
77. During James Croft's tenure as FOS, Robert Knight worked as an inspector out of the Franklin, TN office.
78. Shortly after Robert Knight issued 8 citations to Austin in October 2008, he called James Croft to discuss the citations. James Croft told Robert Knight that he did not believe that the functions Austin was performing on their leased area were under MSHA jurisdiction.
79. After speaking to Robert Knight regarding the 8 citations issued in October 2008, James Croft called the Southeast District office in Birmingham, Alabama and conferred with Mike Davis, the District Manager at the time. Mike Davis told James Croft that, in his opinion, Austin's property did not fall under MSHA jurisdiction.
80. James Croft instructed Robert Knight to vacate the 8 citations issued in October 2008 on the grounds that Austin was not within MSHA's jurisdiction.
81. Austin uses approximately, but not more than, 10% of its materials at the Storage Area for performing blasting services at Vulcan's Parsons Quarry.
82. Austin uses the materials stored at the Storage Area for blasting at a variety of nearby sites, which include mines and construction worksites. Most of the construction worksites are for building roads.
83. In addition to the Truck and the "explosives and related products", Austin maintains a storage magazine, a hopper and conveyor for loading and unloading ammonium nitrate, and oxidizing bins on the leased property.
84. Austin does not mix or prepare explosive materials while within the Storage Area.
85. The "Condition or Practice" section of Citation 8637491 is accurate and describes a violation of 30 CFR § 56.6132(b).

86. The “Condition or Practice” section of Citation 8637492 is accurate and describes a violation of 30 CFR § 56.12032.
87. The gravity of Citation 8637491 is correctly assessed as “Unlikely” and “Fatal.”
88. The gravity of Citation 8637492 is correctly assessed as “Unlikely” and “Lost Workdays or Restricted Duty.”
89. The “Number of Persons Affected” section of Citation 8637491 is correctly assessed as affecting one person.
90. The “Number of Persons Affected” section of Citation 8637492 is correctly assessed as affecting one person.
91. Austin’s negligence with regard to Citation 8637491 was “Low.”
92. Austin’s negligence with regard to Citation 8637492 was “Low.”
93. A penalty of \$2,000 is appropriate for the condition alleged in Citation 8637491.
94. A penalty of \$600 is appropriate for the condition alleged in Citation 8637492.
95. Austin is a business entity whose work is properly characterized as that of an independent contractor. With regard to the Storage Area, Austin is a lessee of Vulcan.
96. During the period from 2007 to 2014, MSHA conducted 15 inspections of Parsons Quarry, but inspected the Storage Area only four times: on 10/6/2008 with Robert Knight, on 2/8/2012 with James Hollis, on 6/27/2012 with Jay Gortney, and on 4/1/2014 with Kevin Dycus.
97. During the period from January 1, 2009 to December 31, 2011, MSHA performed 5 inspections of Parsons Quarry but did not inspect the Storage Area.

### III. NARRATIVE OF FACTS

Vulcan Construction Materials owns and operates Parsons Quarry, a “coal or other mine” under the Mine Act, located in Decatur County, Tennessee. JS ¶¶ 16, 17, 20; JE 3.<sup>4</sup> Since 1996, Austin Powder, an independent contractor, and an “operator” as defined by the Mine Act, has leased land owned by Vulcan at the Parsons Quarry site.<sup>5</sup> JS ¶¶ 9, 21, 95; JE 3. Austin Powder used this leased land as an explosives magazine to store explosives and other related materials. JS ¶ 22; JE 3. Specifically, it stored detonators, oxidizers, blasting caps, cast boosters, and ammonium nitrate prill at the storage area. JS ¶¶ 25, 26, 56. The Respondent used these materials

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<sup>4</sup> Here and hereinafter, the parties’ joint exhibits are abbreviated as “JE.”

<sup>5</sup> See 30 U.S.C. § 802(d).

to conduct blasting operations for clients including Vulcan, and at Parsons Quarry the blasting was for the extraction of rocks and minerals at the mine. JS ¶¶ 15, 24, 58, 82.

The storage area itself was located approximately 400 feet, or within a tenth of a mile, from the rest of the mine. JE 4. There was an access road to the storage area which goes over land that is owned by Vulcan; however, the access road does not go to or through the pit area. JS ¶ 62. Austin Powder had a truck at the storage area that was equipped with the ability to mix ANFO blasting agent for filling blasting holes and also had the capability to manufacture an emulsion blend product (HEET). JS ¶ 57. Respondent used this truck to service its customers; it loaded the truck with the materials stored at the area and then drove to the customer's job site where it would create a blasting agent used to perform the blasting services. JS ¶¶ 59, 60, 61. Furthermore, Austin Powder kept a storage magazine, a hopper and conveyor for the loading and unloading of ammonium nitrate, and oxidizing bins at the storage area, but it did not prepare or mix any explosive materials there. JS ¶¶ 83, 84.

Austin Powder uses approximately, but not more than, 10% of the materials stored at the area for blasting services at Parsons Quarry. JS ¶ 81. Respondent uses the remainder of the materials stored there at other mines and construction sites. JS ¶ 82.

From 2007 until 2014, MSHA inspected Parsons Quarry 15 times, but only inspected the storage area four times. JS ¶ 96. MSHA did not inspect the storage area at all in 2007. *Id.* MSHA inspector Robert Knight inspected the storage area on October 6, 2008, inspector James Hollis inspected the storage area on February 8, 2012, inspector Jay Gortney inspected the storage area on June 27, 2012, and inspector Kevin Dycus inspected the storage area on April 1, 2014. *Id.*

Robert Knight was an inspector for MSHA from March 2008 to July 2014. JS ¶ 68. He worked out of the Franklin, Tennessee; the Macon, Georgia; and the Dallas, Texas metal/non-metal offices. *Id.* In October 2008, Knight inspected Parsons Quarry and included the storage site in his inspection. JS ¶ 69. Knight issued eight citations to Respondent. JS ¶ 70. Specifically, on October 7, 2008 he issued Citation No. 6068396, Citation No. 6068397, Citation No. 6068398, Citation No. 6068399, Citation No. 6507651, Citation No. 6068400, Citation No. 6507664, and Citation No. 6507665, which were all issued to Austin Powder during the inspection. JS ¶¶ 32–54.

Charles Lambert of Austin Powder told Knight that he did not believe that the leased land should be under MSHA jurisdiction because the storage area provided service to multiple sites. JS ¶ 71. After Knight issued the citations, he called to speak with James Croft. JS ¶ 78. Croft—who between 2008 and 2014 served as the Field Office Supervisor for MSHA's Franklin, Tennessee office, and who was Knight's supervisor—told Knight that he did not think that MSHA had jurisdiction over the leased area since Austin stored materials that were used on sites other than just Parsons Quarry.<sup>6</sup> JS ¶¶ 73, 75, 78. Croft had also discussed the matter with Mike Davis, who at the time was the District Manager in the Southeast District office located in Birmingham, Alabama. JS ¶ 74. Davis told Croft that in his opinion, Austin's property was not

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<sup>6</sup> Croft supervised a number of inspectors who conducted E01 inspections at various mine sites in the Franklin, TN District. JS ¶ 76.

under MSHA jurisdiction. JS ¶ 79. Croft then told Knight to vacate the eight citations due to the Austin's operation not being under MSHA jurisdiction. JS ¶¶ 72, 80.

Following the back-and-forth discussions between MSHA officials on October 14, 2008, MSHA vacated citation No. 6068396 because "Austin Powder was not within MSHA's jurisdiction." JS ¶ 34. Citation Nos. 6068397, 6068398, 6068399, 6507651, 6068400, 6507664, and 6507665 were all vacated for the same reason. JS ¶¶ 37, 40, 43, 46, 49, 52, 55. Austin Powder received modifications to each of the citations which were vacated. JS ¶ 5, JE 5. The modified condition or practice stated "The fact that Austin Powder was not within MSHA's jurisdiction even though the equipment was accessible by miners within the middle of the mine site was not revealed until after the citations were issued to the contractor." JE 5. The modifications also reference the fact that the area was "leased property" used by Austin Powder. *Id.*

After the citations were vacated, the Tennessee Department of Labor and Workforce Development, Occupational Safety and Health Administration (TN-OSHA), conducted a referral inspection of the storage area. JE 7. TN-OSHA issued one citation to Respondent during the inspection, and Austin Powder accepted the citation and authorized payment of the penalty. *Id.*

From January 1, 2009 to December 21, 2011, MSHA inspectors inspected Parsons Quarry five times, but did not inspect the storage area during those inspections. JS ¶ 97. However, during an "E01" inspection of Parsons Quarry on February 8, 2012, Inspector James Hollis requested to inspect the explosives storage facility. JS ¶ 63. Because no one from Austin Powder was on-site at the time of the inspection, David Byrd, a truck driver, was sent to meet Hollis and unlocked the magazines before the inspection. JS ¶¶ 64, 65, 66. Hollis did not check with his supervisor or anyone else at MSHA in regards to MSHA's jurisdiction over the leased property before inspecting it; however, he was aware that the area had not been inspected during previous inspections at Parsons Quarry. JS ¶ 67.

During the inspection, Hollis issued two citations, 8637491 and 8637492, for violations at the storage area leased by Austin Powder. JS ¶¶ 19, 29, 30; JE 1, 2. The citations were properly served on February 8, 2012 by a duly authorized representative of MSHA upon an agent of Austin Powder. JS ¶¶ 29, 30.

Citation No. 8637491 was issued for a broken ground strap on the door of the #2 magazine, which was used to store detonators. JE 1. The purpose of the ground strap was to provide protection in case the magazine was exposed to electricity, such as from lightning. *Id.* The citation was marked as moderate negligence, unlikely, fatal, non-S&S, and affecting one person. *Id.*

Citation No. 8637492 was issued because the dry transformer at the ANFO storage was missing a cover plate on its bottom. JE 2. The purpose of the cover plate was to help maintain the inner integrity of the box and protected against electrical shock. *Id.* The citation was marked as moderate negligence, unlikely, lost workdays or restricted duty, non-S&S, and affecting one person. *Id.*

#### IV. PARTIES' CONTENTIONS ON JURISDICTION

##### A. Secretary's Contentions

The Secretary contends that MSHA has jurisdiction over both the Respondent and the Storage Area. Secretary's Amended Motion for Summary Decision, 1.<sup>7</sup> Specifically, the Secretary contends that Section 4 of the Mine Act, which states that mines shall be subject to the provisions of the Act, and Section 3(h)(1) of the Act, which defines "coal or other mine," extend Mine Act jurisdiction to the storage area. SAM 1–2. The Secretary cites *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984) and *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981) to further argue that Congress intended the Mine Act and the definition of a "mine" to be interpreted liberally, therefore broadening the Mine Act and MSHA's jurisdiction. SAM 2.

The Secretary cites *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), for the proposition that the Commission has applied the broad definition of a mine to a storage facility in instances when materials were stored that were used in the mining process. SAM 3. The Secretary also notes that the Commission has recognized that materials stored in the storage area could present hazards to miners, just like other hazards associated with mining. *Id.*

In applying the case law to the facts of the present case, the Secretary argues that MSHA may exercise jurisdiction over the storage area because doing so would meet the plain language requirements of the Mine Act and would be consistent with Commission precedent. *Id.*

The Secretary further contends that the fact Respondent leases the area from Vulcan is irrelevant. SAM 4. Rather, the Secretary argues that because Respondent engages in the work of extracting minerals from their natural deposits, and the materials and equipment to do this are stored in the storage area, the storage area should be considered a "coal or other mine" under the Mine Act, and is therefore under MSHA jurisdiction. SAM 5.

The Secretary also contends that MSHA officials' previous determination that it did not have jurisdiction over the storage area is not dispositive of whether it actually had jurisdiction over the site. *Id.* Rather, the Secretary argues that the plain language of the Mine Act and Commission precedent allow MSHA to assert jurisdiction. SAM 5–6.

The Secretary argues that it is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) and that MSHA has a long history of asserting jurisdiction over shops and storage areas that are used in the mining process. SAM 6. To support its position, the Secretary cites *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704 (Apr. 1994), *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning) and *Austin Powder Co.*, 14 FMSHRC 620 (Apr.

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<sup>7</sup> Hereafter, the Secretary's Amended Motion for Summary Decision that was submitted on February 27, 2015 shall be abbreviated SAM. Likewise, Respondent's Amended Motion for Summary Judgment and Argument in Support of its Motion shall be abbreviated RAM.

1992) (ALJ Morris). The Secretary also argues that the fact that MSHA has been inconsistent in its assertion of jurisdiction does not affect the deference it should be afforded, and cites *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 998 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) as support. *Id.*

Finally, the Secretary contends that the Respondent’s use of the storage area for mining purposes is not *de minimis*. SAM 9. The Secretary cites *Northern Illinois Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 848-89, (7th Cir. 2002) in support of its argument. The Secretary contends that the Respondent’s argument that the storage area should not be under MSHA’s jurisdiction since it uses less than 10% of the materials stored at the site for blasting services at Parsons Quarry would be a novel interpretation of Section 3(h)(1). SAM 9.

## B. Respondent’s Contentions

The Respondent contends that MSHA does not have jurisdiction over the storage facility at Parsons Quarry, and that it did not have fair notice of MSHA’s assertion of jurisdiction at the storage site.

First, Respondent argues that the storage site does not fall under Mine Act or MSHA jurisdiction because it is not “an area of land from which minerals are extracted” as part of the definition of “Coal or other mine” under Section (3)(h)(1) of the Mine Act. RAM 5. Likewise, Respondent contends that the storage facility was not a “private way or road appurtenant to” an extraction area, as part of the definition under (3)(h)(1). *Id.*

The Respondent also argues that it would not be covered by the Mine Act because the storage area is not a “service area for mining equipment belonging to and used at the quarry.” *Id.* Rather, it merely stores explosives and related materials, which are used at a variety of sites under the jurisdiction of either MSHA or the Occupational Safety and Health Administration (OSHA), including Parsons Quarry. RAM 5–6; JS ¶ 81. Further, a truck at the site is only used to transport the stored materials to other sites. RAM 6.

Respondent contends that words, unless they are otherwise defined, should be interpreted to mean their “ordinary, contemporary, common meaning.” In support of its argument, Respondent quoted the *Merriam Webster’s Collegiate Dictionary*, 10th Ed., definition of “used,” meaning to be “employed in accomplishing something,” as well as Norman J. Singer, *Sutherland Statutory Construction*, Vol. 2A, § 47.28 (7th ed., Thomson/West, April 2014). RAM 6.

The Respondent argues that the storage area is not “employed in” mining at Parsons Quarry because it is maintained and controlled by a different company—Austin Powder—which leases the site. *Id.* Respondent states that only a small percentage of the material stored at the site is delivered to and used at Parsons Quarry. *Id.*

Next, Respondent cites *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 743 (6th Cir. 2012) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), in support of its argument that this court should only defer to the Secretary’s statutory interpretation insofar as its interpretation is persuasive. RAM 6–7. Respondent also argues that even if the Court were to apply *Chevron*

deference in its interpretation, the Secretary's interpretation should not be accepted because it is not reasonable. RAM 7. Moreover, the Respondent cited *AKM, LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012) as support of its argument that deference should be given to the Secretary's interpretation so long as the legal language is ambiguous and the Secretary's interpretation is reasonable. RAM 7.

In further support of its argument, Respondent cites the various factors listed in *North Fork Coal* that are used to determine the weight that should be placed on the Secretary's interpretation of a statute. *Id.* These factors include the validity of the Secretary's reasoning, the Secretary's consistency with other pronouncements, and other relevant factors. *Id.* The Respondent contends that, in the instant case, MSHA's current interpretation is inconsistent with previous determinations, just as it was in *North Fork Coal*, and *Akzo Nobel Salt v. FMSHRC*, 212 F.3d 1301, 1034 (D.C. Cir. 2000). RAM 7–8. Respondent argues that MSHA was previously *consistent* in its determinations that the storage site was *not* under its jurisdiction. RAM 8. Respondent states that MSHA's continued decision not to inspect the site at Parsons Quarry, even in light of the MOE with BATF and its statutory requirement under the Mine Act to inspect mines at least four times a year, shows an ongoing finding and determination by MSHA that the storage site is not under its jurisdiction. RAM 8.

Respondent cites *Bush & Burchett v. Reich*, 117 F.3d 932, 937 (6th Cir. 1997) for the proposition that the Secretary's assertion of jurisdiction would extend the Mine Act to "unprecedented and absurd lengths," and that the Secretary has not suggested a limiting principle. RAM 9.

Next, Respondent contends that Mine Act jurisdiction has only rarely been extended to sites outside of mine property, and that those situations were factually distinguishable from the present case. *Id.* Respondent distinguishes *U.S. Steel Mining Co.*, 10 FMSHRC 146 (Feb. 1988) and *Jim Walter Resources*, 22 FMSHRC 21, 25 (Jan. 2000), in both of which the Commission found jurisdiction over off-site facilities. *Id.* Respondent argues that in the instant proceeding, the storage facility is on leased property, is operated by a company other than the mine operator, stores materials not owned by the operator, and the materials are used at various sites regulated by either OSHA or MSHA. RAM 10.

## V. ANALYSIS OF JURISDICTION

The first issue presented in this case is whether MSHA has jurisdiction over Austin Powder's leased land used as a storage facility at Parsons Quarry. For the foregoing reasons, the undersigned finds that MSHA is able to assert jurisdiction over this leased property.

MSHA's primary authority to assert jurisdiction over the leased property is derived from the Mine Act:

Each coal or other mine, the products of which enter commerce or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.

30 U.S.C. § 803.

Section 3(h)(1) of the Act defines the term "coal or other mine" as:

(h)(1)(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1). The Third Circuit has held that persons working in these ancillary areas work in "coal or other mines," even if they are not likely to work in the actual production or extraction process. *National Indus. Sand Ass'n v. Marshal*, 601 F.2d 689 (3d Cir. 1979).

The Secretary contends that under the Mine Act, MSHA has jurisdiction over the storage area. In contrast, the Respondent contends that MSHA does not have jurisdiction over the area because it is not "an area of land from which minerals are extracted" and is therefore not a "coal or other mine." 30 U.S.C. § 802(h). When reviewing MSHA's interpretation of its jurisdiction of the area under the Mine Act, the undersigned must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Section 3(d) of the Act defines an "operator" as, "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C § 802(d). By performing services that are of the "work of extracting [] minerals from their natural deposits," Respondent is under the jurisdiction of the Mine Act. 30 U.S.C. § 802(h)(1).

Furthermore, a plain language reading of the Mine Act shows that MSHA has jurisdiction over the Respondent's leased property at Parsons Quarry. The Commission has specified that under the Mine Act, MSHA not only has jurisdiction over mines, but also over "facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Jerry Ike Harless Towing, Inc. v. Sec'y of Labor*, 16 FMSHRC 683, 687 (Apr. 1994). In the present case, the storage area is a facility that stores materials that are used in the extraction of minerals from their natural deposits at both Parsons Quarry and other mines. JS ¶¶ 15, 24, 58, 82. Thus, the storage area, operated by a lessee, is a facility that stores machines, tools and other property such as blasting materials, used the extraction of minerals from their natural deposits. 30 U.S.C § 802(d); 30 U.S.C. § 802(h)(1); *Jerry Ike Harless Towing, Inc.* at 16 FMSHRC 687 (Apr. 1994).

Respondent's contention that the storage area is not "employed in" mining at Parsons Quarry because it is maintained by a different company is misguided. RAM 6. Its similar argument that the explosives and related materials stored at the storage area serve both Parsons Quarry and other customers, is also erroneous. While the Respondent argues the storage area is not "used in" in mining, it is clear that the work of storing, accessing, loading, preparing and using the materials for blasting activities is done in support of mining. In *Jim Walter Resources, Inc. v. Sec'y of Labor*, 22 FMSHRC 21, 27 (Jan. 2000), the Commission held that the employees at a centralized facility should not be treated differently than other employees, and the hazards faced by miners are not limited to the hazards of underground mines.

Moreover, the Courts have found that it was Congress's intent for the Mine Act to have broad jurisdiction over mines and their surrounding areas. Specifically, the Courts have emphasized that Congress intended that the Act's definition of a "mine" to be very broad and to be construed liberally. The Court of Appeals for the District of Columbia stated:

Because the Act was intended to establish a "mine safety and health law, applicable to *all mining activity*," its jurisdictional bases were expanded to reach not only the "areas . . . from which minerals are extracted," but also the "structures . . . which are used or are to be used in . . . the preparation of the extracted minerals."

*Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C. Cir. 1984) citing S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), and U.S.Code Cong. & Admin. News 1977, 3401, 3414. (See also *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979), *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981), and *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 795-96 (4th Cir. 1981). Report No. 181 also stated, "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given broadest possibl[e] interpretation." S.Rep. No. 181, *supra*, at 14.<sup>8</sup>

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<sup>8</sup> The Commission has also cited this Senate Report to support a broad reading of the  
(continued...)

Given that Congress intended for the statute to be interpreted broadly, Respondent's contention that the Secretary's assertion of jurisdiction would extend the Mine Act to "unprecedented and absurd lengths" needs to be addressed. RAM 9; *Bush & Burchett v. Reich*, 117 F.3d 932, 937 (6th Cir. 1997). The contention can be a valid one in the right context; a certain level of contact with mining is needed in order for the business activity to be part of the mining process. As stated by Court of Appeals for the District of Columbia Circuit:

It is clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation.

*Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984). Thus, Respondent's citing of *Bush & Burchett v. Reich*, 117 F.3d 932 (6th Cir. 1997) is distinguishable. In that case, the Sixth Circuit stated that "there could conceivably be no limit to MSHA jurisdiction a result Congress clearly did not intend." *Id.* at 937. However, there is clearly a limit to MSHA's jurisdiction, and that limit is not met in the present case. Thus, Respondent's assertion that suppliers and vendors could possibly be under MSHA jurisdiction because of their selling mining equipment is not valid, as they are clearly outside the scope of milling and preparation. In the instant case, Respondent's work at the storage facility in storing and accessing explosives to be used in the mining process, and specifically to be used at Parsons Quarry, provides sufficient contact with mining for jurisdiction to attach.

The undersigned finds that the language of the statute is clear and unambiguous. Thus, this plain language reading of the statute is sufficient to determine the "unambiguously expressed intent of Congress" and is thus the end of the matter for the court. *Chevron U.S.A. Inc.*, 467 U.S. at 842-43. However, even if the second prong of the Chevron analysis were necessary, MSHA's assertion of jurisdiction over the storage facility would be appropriate. The second prong of Chevron would require this court to inquire "whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843.

"Deference is accorded to 'an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.'" *Secretary of Labor v. Lone Mountain Processing*, 20 FMSHRC 927, 937 (Sept. 1998) (citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994)). Furthermore, the agency's interpretation of the Mine Act is entitled to be affirmed if that interpretation is one of the "permissible interpretations the agency could have selected." *Lone Mountain Processing*, 20 FMSHRC at 937 (citing *Chevron*, 467 U.S.

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<sup>8</sup> (...continued)

definition of a "mine." The Commission used the language to support its opinion that "Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 675-76 (July 2002).

at 843; *Joy Techns., Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997)).

The Secretary has chosen to interpret the statute broadly, stating that the Mine Act’s definition of a mine is expansive and inclusive. This is a reasonable and permissible construction of the statute, given that the legislative history suggests that Congress intended for there to be a broad construction and application of the statute. S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), and U.S.Code Cong. & Admin. News 1977, 3401, 3414.

This interpretation is also compatible with the Mine Act’s purpose. *See Secretary of Labor v. National Cement Co. of Cal.*, 573 F.3d 788, 796 (D.C. Cir. 2009) (“Not only is the Secretary’s interpretation consistent with the statute’s language, it is perfectly aligned with a key objective of the Mine Act. The Secretary must act to ensure the “health and safety of [the mining industry’s] most precious resource—the miner.” (*quoting* 30 U.S.C. § 801(a)).

The Respondent contends that the Secretary’s interpretation is inconsistent with other pronouncements, as was the case in *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Cir. 2012). While various MSHA officials previously believed that the storage facility was not under MSHA jurisdiction, this was not official policy of the entire agency. Furthermore, MSHA had continued to find similar places under its jurisdiction during the period in which the storage facility was not being inspected by MSHA, as was illustrated by the facts and holding of *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning). Thus, the Secretary’s official MSHA-wide interpretation has been consistent, which adds to its reasonableness.

The Commission has previously stated that this definition of “coal or other mine” “is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” *Jerry Ike Harless Towing, Inc. v. Sec’y of Labor*, 16 FMSHRC 683, 687 (Apr. 1994) (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984) and *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5 (Jan. 1982)). The Fourth Circuit similarly held, “[a]s the statutory text makes clear, the coverage of the Mine Act is not limited to extractive activities only.” *Power Fuels, LLC*, 777 F.3d 214, 217 (4th Cir. 2015).

In specific cases, an administration building approximately a quarter of a mile away from a surface mine has been held to be under MSHA jurisdiction as a mine. *See Secretary of Labor v. Cogema Mining, Inc.*, 18 FMSHRC 919, 929 (July 1996). Similarly, the United States District Court for the Middle District of Pennsylvania held that the law “requires that an above-ground structure necessarily be in the immediate area of the mine” to be considered a mine. *Skipper v. Mathews*, 448 F.Supp. 300, 303 (M.D. Pa. 1977). Within reasonable limits, areas that are near the mine are defined as mines by the Act and fall within MSHA’s jurisdiction. The Sixth Circuit has held that a central mine shop for a coal company was not a “coal mine” under the Mine Act because the machine shop was located three-quarters of a mile away from active mines. *Director, Office of Workers’ Compensation Programs, U.S. Department of Labor v. Consolidation Coal*

Co., 884 F.2d 926 (6th Cir. 1989).<sup>9</sup> However, in the instant case, the storage facility is less than a tenth of a mile from the rest of the mine, placing it within the area that could be considered “immediate.” JE 4.

Moreover, the support functions performed in an area of close proximity to a mine also play a role in determining whether an area is considered a mine for Mine Act purposes. For instance, the Commission has stated that this can even be the case when a single facility is used in operations at various mines. In *Jim Walter Resources, Inc.*, the Commission noted that miners are not only exposed to hazards in underground mines, but are also exposed to hazards in other parts of the mining industry, including when encountering equipment and supplies. *Jim Walter Resources, Inc. v. Sec’y of Labor*, 22 FMSHRC 21, 27 (Jan. 2000).

While a broad reading of the statute would certainly support the inclusion of a storage area under MSHA’s jurisdiction, in the present case it is not necessary to rely on such an expansive interpretation. Here, the storage area is a facility actually “used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC at 687. The facility contains explosives used both at Parsons Quarry and at other sites. Furthermore, the area, being roughly one tenth of a mile from the rest of the mine, is clearly close enough to the area where minerals were actually extracted to be included in the statutory definition of a mine. Thus, these materials would expose miners to hazards. See *Jim Walter Resources, Inc.*, 22 FMSHRC at 27 (Jan. 2000).

Respondent also contends that only a small percentage of the material stored at the area was delivered to and used at Parsons Quarry. The Commission has previously held that “not all independent contractors are operators under the Mine Act, and that ‘there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.’” *Otis Elevator Co.*, 11 FMSHRC 1896, 1900–01 (Oct. 1989), quoting *National Indus. Sand Ass’n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979). The Commission later stated, “An independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence.” *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Mar. 1992). For example, in *Northern Illinois Steel Supply Co.*, the Seventh Circuit held that a company’s drivers delivering “truckloads of steel to designated delivery points, loosened the restraints on the loads, and occasionally helped to rig the load” was *de minimis*, even though the steel that was delivered was eventually turned into structures that were critical in the mining process. *Northern Illinois Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 849–50 (7th Cir. 2002).

In the instant case, however, Respondent’s use of the storage area for mining activities at Parsons Quarry is not *de minimis*. Respondent uses “not more than” 10% of the materials from the storage area at Parsons Quarry, which is more than enough to establish that its use is not *de minimis*. JS ¶ 81. Using up to 10% of the stored materials would not signal “that it would be

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<sup>9</sup> In *Director, Office of Workers’ Compensation Programs, U.S. Department of Labor v. Consolidation Coal Co.*, 884 F.2d 926, the Court of Appeals for the Sixth Circuit found that the site was too far away from where coal was actually extracted from the ground, and concluded that because of this geographical component it was not a “coal mine.”

difficult to conclude that services were being performed.” *Otis Elevator Co.*, 11 FMSHRC at 1900–01. Unlike in *Northern Illinois Steel Supply Co.*, the items stored are used directly in the mining process through blasting services performed by Austin Powder. JS ¶ 24.

For the reasons set forth above, I find that MSHA has jurisdiction of Austin Powder Company’s leased storage facility at Vulcan’s Parsons Quarry mine.

## VI. PARTIES’ CONTENTIONS ON FAIR NOTICE

### A. Secretary’s Contentions

The Secretary contends the Respondent had fair notice that the storage area fell within MSHA’s jurisdiction. Citing *Calamat Co. of Az.*, 27 FMSHRC 617, 624 (Sept. 2005) (*citing General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)), the Secretary argues that a party has fair notice of MSHA’s jurisdiction when a regulated party acting in good faith would be able to know how to conform with the agency’s standards by reviewing regulations and other public information. SAM 6.

The Secretary contends that even though MSHA vacated the citations of October 2008, the Respondent had other reasons to know of MSHA’s jurisdiction over the storage area, including the plain language of the Mine Act, previous litigation on the subject of jurisdiction, and from the holding in *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning).<sup>10</sup> SAM 7. The Secretary also contends that Respondent would have had fair notice of its intent to assert jurisdiction based on the public statement made in the Metal and Nonmetal General Inspection Procedures Handbook, MSHA Handbook Series PH09-IV-1 (Oct. 2009). SAM 8. In the handbook, MSHA instructs inspectors to inspect areas storing explosives on behalf of the Bureau of Alcohol, Tobacco, and Firearms (BATF) due to MSHA’s 1980 Memorandum of Understanding (MOU) with BATF. *Id.*

Citing *Mainline Rock and Ballast, Inc. v. Sec’y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012), the Secretary argues that MSHA cannot be estopped from later asserting jurisdiction in an area where it had previously vacated citations, because if it would be estopped from doing so, it would not be able to fulfill its statutory obligations to inspect mine sites due to a previous mistake. *Id.*

### B. Respondent’s Contentions

Citing *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317 (2012), the Respondent contends that fair notice is a fundamental principle in our legal system and that the “requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.” Respondent also cites *Energy West Mining*, 17 FMSHRC 1313 (1995)

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<sup>10</sup> The Secretary argued that because this decision was issued one day prior to the inspection of the storage area in the present case, Respondent would have been on notice of MSHA’s intent to assert jurisdiction over similar places.

(citing *Grayned v. City of Rockford*, 408 U.S. 104, 108) and *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991), arguing that a person of ordinary intelligence must be able to know what is prohibited in order to comply with the law. RAM 10.

Respondent states that the Commission determined, in *Alan Lee Good*, 23 FMSHRC 995, 1009 (Sept. 2001) (Verheggen, C., & Riley, C., separate opinion)<sup>11</sup> and *Calmat Company*, 27 FMSHRC 617, 624 (Sept. 2005), that “a reasonably prudent person” would know that a statute applies because of the language of the Mine Act or from MSHA’s previous enforcement or interpretation. RAM 10.

The Respondent contends that the Supreme Court has stated that when an agency’s interpretation of a statute changes, governed parties must have fair notice of the change. *Fox Television*, 132 S.Ct. at 2318. The Respondent argues that in the present case it was not afforded any notice that MSHA would seek to assert jurisdiction over the storage area. RAM 11. Furthermore, Respondent argues that it was aware of MSHA’s previous interpretation of the Mine Act; that MSHA, in the modifications vacating the citations, stated that Austin Powder was not under its jurisdiction even though its storage area was in the middle of a mine site and had equipment that miners could access. RAM 11; JS ¶¶ 73, 74; JE 5. Respondent also argues that this interpretation was not made by low level officials, but by the MSHA Field Office Supervisor and the District Manager. RAM 11. This determination was reinforced by MSHA not inspecting the area during subsequent inspections. *Id.*

Respondent argues that there have not been any changes to the Mine Act since the vacation of citations and the stopping of the inspections at the leased property, and that there were no other indications that MSHA would seek to change its interpretation from 2008. *Id.*

## VII. ANALYSIS OF FAIR NOTICE

Under Commission precedent, the standard for fair notice is whether a reasonably prudent person familiar with the mining industry, the Mine Act, and the protective purposes of the standard would understand the law, which, in the present case is the law regarding jurisdiction discussed *supra*. For the reasons that follow, the undersigned finds that the Respondent was afforded fair notice.

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317, (2012). Regulatory clarity is vital for the protections provided by the Fifth Amendment’s Due Process Clause. *Id.* at 2317.

If a statute or regulation either requires or forbids action, but the requirement itself is so vague that people of common intelligence must guess at its meaning or apply it differently, it is a

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<sup>11</sup> In *Alan Lee Good*, 23 FMSHRC 995, 1003 (Sept. 2001), the Commission’s vote was evenly split. Chairman Verheggen and Commissioner Riley issued a separate opinion and Commissioners Jordan and Beatty issued a separate opinion. Chairman Verheggen and Commissioner Riley concurred with the result of the other commissioners’ opinions.

violation of due process. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Furthermore, all persons are entitled to be informed of the state's regulations and laws. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). When an agency struggles to provide a definitive reading of its regulatory requirements, a regulated party is not 'on notice' of the agency's interpretation of its regulations, and may not be punished. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995).

The Respondent would have been able to determine the definition of a mine, and also know that the storage facility would be considered a mine under the Mine Act, with a plain reading of the statute. This reading of the statute would also be consistent with previous MSHA determinations and case law on similar matters.<sup>12</sup> Furthermore, the reading would be consistent with MSHA's previous public statements.<sup>13</sup> Moreover, the Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission has previously held that in situations where jurisdiction is not disputed after a plain language reading of the Mine Act, fair notice is provided. *Orica USA, Inc. v. Sec'y of Labor*, 32 FMSHRC 709, 712 (May 2010) (ALJ Lesnick). Judge Lesnick also held that Orica USA, Inc. could have reasonably expected MSHA to assert jurisdiction over its activities that were covered by the Act because of the Act's undisputed language. *Id.*

While a plain language reading of the statute leads to the conclusion that the Respondent would be on notice, it is important to address the fact that various MSHA officials were inconsistent in their assertion of MSHA jurisdiction at the site. However, the MSHA officials' inconsistency is not sufficient to overcome a plain language reading of the statute.

MSHA officials asserted jurisdiction over Austin Powder's site at Parsons Quarry until 2008; however, they did not inspect the site in 2007. JS ¶ 96. From January 1, 2009 to December 31, 2011, the officials no longer asserted MSHA's jurisdiction. JS ¶ 91. Then, officials again asserted jurisdiction, which materialized in new inspections that started in 2012, including the February 8, 2012 inspection during which Inspector James Hollis issued Citation No. 8637491 and Citation No. 8637492.

The Respondent contends that because MSHA had changed its interpretation as to whether it had jurisdiction of the storage facility at Parsons Quarry, it was not afforded fair notice. This point is not valid. First, MSHA did not change its interpretation; even though MSHA officials were not inspecting the storage facility at Parsons Quarry, MSHA was still asserting

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<sup>12</sup> *See, e.g., Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning). In this case, Judge Manning determined that an off-site facility was under MSHA jurisdiction because items kept there were available for use in mining.

<sup>13</sup> *See Metal and Nonmetal General Inspection Procedures Handbook*, MSHA Handbook Series PH09-IV-1, p. 27 (Oct. 2009). This handbook is publicly available through MSHA's website.

jurisdiction at other similar sites.<sup>14</sup> Furthermore, what happened at Austin Powder's site at Parsons Quarry is factually distinguishable from *FCC v. Fox Television Stations*, which Respondent relies upon, since in that case the FCC retroactively applied a new policy that it adopted in an Order to events that took place *before* the Order had been issued. 132 S.Ct. at 2315. In the instant proceeding, MSHA's official policy had never changed; MSHA officials made mistakes in applying its official policy and therefore erred in not asserting jurisdiction.

Thus, while Respondent points out that there had not been any changes to the Mine Act or any indication that MSHA sought to change its interpretation following the vacation of the citations at the storage facility, other information would have alerted Respondent to the fact that MSHA could seek to assert jurisdiction over the site. For instance, MSHA's Metal and Nonmetal General Inspection Procedures Handbook provided public notice that MSHA inspectors could inspect areas like the storage facility at Parsons Quarry. Similarly, MSHA's continued assertion of jurisdiction in other similar locations, such as that in *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning), would have alerted Respondent that MSHA may also do so at its site at Parsons Quarry.

Having determined that the instant situation is distinguishable from *FCC v. Fox Television Stations*, it is helpful to consider Commission precedent regarding interpretation under the Mine Act. When examining the issue of fair notice, "the Commission uses an objective test, i.e., 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'" *Island Creek Coal Co.*, 20 FMSHRC 14, 24 citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying this standard to notice of a regulatory requirement,

the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with 'ascertainable certainty' of its interpretation of the standard in question.

*Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion), citing *Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982).

The Commission laid out various criteria in *Alan Lee Good*, one of which was consistency of an agency's enforcement. The other criteria, including the text of the statute, its placement in the overall regulatory scheme, and public notice, outweigh the fact that some MSHA officials were inconsistent in their application of the statute. *Alan Lee Good*, 23 FMSHRC at 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion). For instance, the text of the statute is plain; a reasonably prudent person that is familiar with the mining industry and

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<sup>14</sup> See, e.g., Metal and Nonmetal General Inspection Procedures Handbook and *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning).

the Mine Act would understand that a site that is being used in the mining process would be defined as a mine under the Mine Act and the case law explaining the Act.<sup>15</sup> Moreover, the Mine Act itself is central to MSHA's regulatory scheme since it is the law from which MSHA derives its authority to regulate the mining industry, and the parameters of the law itself are what bind all case law and regulation. Finally, as was mentioned, MSHA has provided public notice of its intent to regulate sites like the one in question, in both cases and in handbooks such as the Metal and Nonmetal General Inspection Procedures Handbook. Together, these criteria outweigh the fact that MSHA officials were inconsistent in their application of the law in this single instance for limited period of time.

Respondent argues that it had been provided notice of MSHA's previous interpretation of the Mine Act regarding jurisdiction since it had been told that it was not under MSHA's jurisdiction. JS ¶¶ 34, 37, 40, 43, 46, 49, 52, 55. However, the language of the modifications to the citations, which highlights that the storage site is leased property and states that "the equipment was accessible by miners within the middle of the mine site," suggests that the site is under MSHA jurisdiction. JE 5. Again, a reasonably prudent person familiar with the Mine Act would know that an area "within the middle of [a] mine site" and one that has equipment "accessible by miners" would be under MSHA's jurisdiction. Further, in applying the Commission's test from *Island Creek Coal Co.* and *Ideal Cement Co.*, Austin Powder, and its employees, would have been on notice since a reasonably prudent person familiar with the Mine Act and its protective purposes would have understood that MSHA would have been able to assert jurisdiction over the site.

Therefore, under Supreme Court and Commission precedent, MSHA must provide clear notice of its regulations to those who are governed by them, and the notice needs to be conveyed in a manner so that a reasonably prudent person familiar with the mining industry and the protective purposes of the Mine Act would understand what is being conveyed. In the present case, MSHA, through publicly available information and through the enforcement of the Mine Act elsewhere, in fact did provide clear notice of its interpretation of the Mine Act to Austin Powder, an entity that was familiar with the mining industry, the Mine Act, and the protective purposes of it. Thus, Respondent had fair notice that MSHA would assert jurisdiction.

## VIII. ORDER

The undersigned finds that MSHA had jurisdiction over Austin Powder Company's leased storage area at Vulcan's Parsons Quarry mine and that the Respondent had sufficient fair notice of the law. Accordingly:

The Respondent's Amended Motion for Summary Decision is **DENIED**; and

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<sup>15</sup> See analysis concerning jurisdiction, *supra*.

The Secretary's Amended Motion for Summary Decision is **GRANTED**.

It is further **ORDERED** that the parties immediately confer regarding the stipulated settlement<sup>16</sup> and within thirty (30) days of the date of this decision, either file a joint motion for approval or provide a status report to the undersigned.

/s/ Kenneth R. Andrews  
Kenneth R. Andrews  
Administrative Law Judge

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/nsc

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<sup>16</sup> See, JS ¶¶.14, 85-94.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
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June 12, 2015

MARK L. LUJAN,  
Complainant

v.

SIGNAL PEAK ENERGY, LLC,  
Respondent

DISCRIMINATION PROCEEDING:

Docket No. WEST 2015-252-D  
MSHA Case No. DENV-CD 2014-17

Mine: Bull Mountains Mine No. 1  
Mine I.D. 24-01950

**ORDER DENYING THE RESPONDENT’S MOTION FOR SUMMARY DECISION**  
**NOTICE OF HEARING SITE**

Before: Judge Barbour

This case is before the court on a Complaint of Discrimination brought by Mark L. Lujan, on his own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1988, as amended. 30 U.S.C. § 815(c) (the “Mine Act” or “Act”). The Respondent, Signal Peak Energy, LLC (“the company” or “Signal Peak”), has filed a Motion for Summary Decision. For the reasons that follow, the Motion for Summary Decision is **DENIED**.

Procedural Background

On September 23, 2014, Mr. Lujan filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (“MSHA”). On November 24, 2014, MSHA sent Mr. Lujan a letter informing him it did not find sufficient evidence to establish that a violation of section 105(c) occurred. Under section 105(c)(3) of the Act, if MSHA determines the provisions of section 105(c)(1) have not been violated, the complaining miner may file a discrimination complaint on his own behalf. Mr. Lujan filed an “appeal” of MSHA’s determination to the Commission on December 30, 2014. Mr. Lujan’s appeal was docketed by the Commission as a section 105(c)(3) discrimination complaint, and the case was assigned by the Chief Judge to the court. In a March 4, 2015, Notice of Hearing, the court scheduled the case to be heard on June 30, 2015. The court also suspended discovery and the filing of pretrial motions and submissions until April 6, 2015, in order to provide Mr. Lujan time to obtain representation.<sup>1</sup> On May 8,

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<sup>1</sup> As of the date of this order, Mr. Lujan has been unable to secure representation.

2015, Signal Peak filed a motion for summary decision. Mr. Lujan filed a response to the motion on June 4, 2015.<sup>2</sup>

### Summary Decision

Commission Rule 67(b) provides that a “motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission has explained that summary decision is an extraordinary procedure, and, in reviewing the record, the judge should do so in the light most favorable to the non-moving party. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Here, after review of the entire record in the light most favorable to Mr. Lujan, the court finds that there are genuine issues as to material facts and that Signal Peak has not met its burden as the moving party to establish its right to summary decision as a matter of law.

### Facts

Mr. Lujan charges that on June 18, 2013, he was fired by Signal Peak and that his termination was a “direct result of discrimination . . . for [his] medical condition.” Letter of Mark L. Lujan to U.S. Department of Labor, Mine Safety and Health Administration, Colorado District Office (September 23, 2014). The medical condition to which Mr. Lujan refers is gout, a condition he claims Signal Peak knew of when it hired him, and a condition which caused him to miss several days of work. MSHA Discrimination Complaint 1.

Mr. Lujan states that prior to April 19, 2013, he was suspended and given “verbal warnings” because he missed work due to flare ups of gout, and around April 19, he missed another day of work because of his medical condition. As a result, on April 19, 2013, he was suspended again from work for “mismanagement of days.” MSHA Discrimination Complaint 1. Mr. Lujan alleges that his condition was such that he could not walk and he had to take gout and pain medication. Mr. Lujan maintains that he “would have been a safety risk to even enter the mine” and that his then supervisor, Ryan Stahl, likewise was suspended on April 19 for giving him permission to stay home. *Id.* According to Mr. Lujan, Mr. Stahl stated that Mr. Lujan would have been “to [sic] big of a risk to work.” *Id.*

The parties agree that Mr. Lujan’s employment with the company ended on June 18, 2013, during a meeting involving Mr. Lujan and company officials. The company asserts that Mr. Lujan resigned during the meeting after being confronted by company personnel about discrepancies between Mr. Lujan’s time sheets and the company’s employee tracking system. Answer to Pro Se Complaint of Discrimination 2-3. The discrepancies involve several dates when Mr. Lujan claimed to have worked overtime hours. *Id.* Because the company believed that Mr. Lujan falsified his time cards and violated Signal Peak’s Discipline and Time Reporting

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<sup>2</sup> In an email to the parties dated May 20, 2015, the court allowed Mr. Lujan an extension of time to file a response even though the deadline had passed, as the Commission favors giving *pro se* claimants procedural leeway.

Policies, the company asserts that it had a legitimate business reason to take disciplinary action against him. *Id.*, Memorandum of Points and Authorities in Support of Respondent’s Motion for Summary Decision 5. Mr. Lujan responds that the allegations at the June 18 meeting were “false” and that “[he] was terminated but not for the reasons given.” Commission Discrimination Complaint 3. Instead, Mr. Lujan alleges, “Signal Peak ultimately terminated my employment due to my medical condition. I was never reasonably accommodated.” *Id.*

### Issues

Signal Peak argues that Mr. Lujan’s discrimination complaint should be dismissed for his failing to state a claim for relief recognized under section 105(c) of the Mine Act. Specifically, the company argues that Mr. Lujan failed to allege that he engaged in activity protected under the Act, that he did not suffer any adverse action as the result of engaging in protected activity, and that he would have been disciplined for unprotected activity alone. The first two arguments attempt to rebut Mr. Lujan’s *prima facie* case for prohibited discrimination, while the latter argument functions as an affirmative defense. Additionally, the company argues that Mr. Lujan’s complaint is untimely, as it was filed 462 days after his employment ended, and he has failed to allege that he suffered any adverse employment action within 60 days of the date he filed his complaint.

### Analysis

Section 105(c) of the Mine Act protects miners from discrimination motivated by their protected activity. Protected activity includes filing or making complaints under or related to the Act or exercising any other statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). Additionally, while the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, “the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger.” *Dykhoff v U.S. Borax, Inc., Jr.*, 22 FMSHRC 1194, 1198 (Oct. 2000).

In order to establish a *prima facie* case of discrimination, a complainant need only present evidence “sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” *Sec. of Labor obo David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980); *Sec. of Labor obo Donald E. Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 989, (Sept. 1999). Additionally, the Commission has explained that in a *pro se* discrimination proceeding under section 105(c)(3) of the Act, a complainant’s pleadings should be held to a less stringent standard than those prepared by attorneys when ruling on a motion to dismiss. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996); *see also Ribble v. T & M Dev. Co.*, 22 FMSHRC 593 (May 2000). As in a motion to dismiss, the court concludes that a *pro se* complainant should be held to a more lenient standard as the non-moving party in a motion for summary decision. Moreover, the Act’s legislative history provides guidance that section 105(c) is to be “construed expansively” to guarantee miners the ability to exercise their rights under the Mine Act. S. Rep. No. 95-11, at 36 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)).

In reviewing the record, the court views the facts in this case in the light most favorable to the non-moving party, Mr. Lujan. Mr. Lujan alleges that he was terminated due to his work absences resulting from his medical condition and Signal Peak's failure to provide reasonable accommodation instead of the company's alleged reasons regarding falsified timecards and unexcused absences. Since there is a legitimate factual dispute on this material issue, the court cannot grant summary decision on the basis of the company's arguments that Mr. Lujan was or would have been disciplined for unprotected activity.

The more difficult and fundamental question is whether Mr. Lujan has alleged any protected activity. Mr. Lujan is effectively asserting that he engaged in a protected work refusal under section 105(c) of the Mine Act by staying home because his gout flare ups would have made working conditions unsafe and that Signal Peak took adverse actions in suspending him and terminating his employment motivated at least in part by his work refusals.

Signal Peak, in its brief in support of its motion for summary decision, cites several decisions wherein the Commission and its Administrative Law Judges have strongly signaled that work absences based on medical conditions particular to an individual may not be protected by section 105(c). See Memorandum of Points and Authorities in Support of Respondent's Motion for Summary Decision 5-8, citing *Dykhoff*, 22 FMSHRC at 1199; *Perando v. Metiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988); *Price v. Monterey Coal*, 12 FMSHRC 1505 (Aug. 1990); *Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129 (Mar. 2003)(ALJ). However, none of the language that the company cites to from these decisions is binding precedent that compels the court to dismiss Mr. Lujan's complaint as a matter of law.

The court notes that the Commission's holding in *Bjes v Consolidation Coal Co.*, 6 FMSHRC 1411, 1417-18 (Jun. 1984), that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations" has never explicitly been overturned. In *Dykhoff*, a case in which three out of four Commissioners affirmed an Administrative Law Judge's dismissal of a section 105(c) complaint on the basis that the complainant had not alleged a protected work refusal, the Commission nonetheless rejected the ALJ's conclusion that "'idiosyncratic physical impairments' cannot serve as the basis for a protected work refusal" and reaffirmed its holding in *Bjes*. *Dykhoff*, 22 FMSHRC at 1199, 1205. A plurality of Commissioners in *Dykhoff* found error in the ALJ's reliance on Commissioner Doyle's concurrence in *Price v. Monterey Coal*, 12 FMSHRC 1505 (Aug. 1990). *Dykhoff*, 22 FMSHRC at 1201 n.11. In her *Price* concurrence, Commissioner Doyle rejected the notion that "Congress intended to give miners the right to refuse work on the basis of problems that are totally idiosyncratic to the miner and over which the operator has no control" and found no protected activity on that basis. *Price*, 12 FMSHRC at 1519-20 (Doyle concurring).<sup>3</sup> Although Signal Peak has cited Commissioner Doyle's concurrence in *Price* in support of its motion for summary decision, this court may only treat it as persuasive authority at best. Moreover, while Signal Peak quotes language in *Dykhoff* suggesting that medically-related absences cannot be protected work refusals, and that to hold otherwise would "stretch[] the work refusal doctrine far beyond its contours as heretofore recognized by the Commission," 22

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<sup>3</sup> The majority in *Price* found the complainant's work refusal to be unprotected on the narrower grounds that it was unreasonable to believe that a hazard existed under the specific facts of that case. *Id.* at 1515.

FMSHRC at 1200, the language Signal Peak quotes is not dispositive because it is contained in a plurality opinion.<sup>4</sup>

Further, *Perando*, which Signal Peak also cites, was decided on the grounds that the complainant failed to effectively communicate to her employer a refusal to work and had not alleged any other protected activity. 10 FMSHRC at 494-95. Under the relaxed pleading standards afforded to *pro se* litigants in 105(c) cases, there appears to be sufficient evidence in Mr. Lujan's complaints to conclude that he clearly communicated his refusal to work based on health or safety concerns, and although the *Perando* decision contains language suggesting that had the Commission found that the complainant clearly communicated a work refusal based on safety concerns related to her medical condition, it would not have found the refusal to be protected, the court views the language as nonbinding dicta.

The cumulative effect of the referenced decisions is to strongly suggest that medical-related absences cannot form the basis of a protected activity claim. However, the court concludes the issue remains unsettled as a matter of law. Given the Commission's long-standing policy on *pro se* complainants and Congress's intent that section 105(c) be read expansively to protect miners' rights, the court finds that summary dismissal of this proceeding is inappropriate. Mr. Lujan may yet be able to prove a claim of protected activity at hearing. The Commission has explained in regard to the scope of the work refusal doctrine, "The mine is an interactive environment involving human beings, equipment, and the mine's physical setting itself. The human factor cannot be ignored in the evaluation of hazards." *Bjes*, 6 FMSHRC at 1417. This language suggests that a protected work refusal claim involving a miner's own physical conditions or limitations is fact-specific. A hearing is necessary for Mr. Lujan to develop the relevant facts.

At the hearing, Mr. Lujan will have the burden of proving both the good faith and the reasonableness of his belief that a hazard existed, whether due to his condition or to other considerations in his work environment. *See Sec'y of Labor on behalf of Robinette v. U.S. Castle Coal Co.*, 3 FMSHRC 803, 809-12 (Apr. 1981). A good faith belief "simply means honest belief that a hazard exists." *Id.* at 810. The company may then rebut the case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Id.* at 818 n.20. As a final option, the company may affirmatively defend itself by proving that it would have taken the adverse action for unprotected activity alone. *Id.* at 817-18.

Finally, the court rejects Signal Peak's argument that it is entitled to summary judgment as a result of Mr. Lujan's untimely filing. The Commission has stated that in deciding whether to excuse the late filing of a miner's 105(c) complaint, a judge should review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation." *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984). Further, "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). Mr. Lujan

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<sup>4</sup> Commissioner Doyle wrote separately in her concurrence affirming the dismissal of the complaint on the narrower grounds that "Dykhoff's absences did not result from any decision or choice on his part" and that therefore the complainant had not engaged in any activity at all, let alone protected activity. *Dykhoff*, 22 FMSHRC at 1204 (Doyle concurring).

claims he was ignorant of his section 105(c) rights and any applicable time limits until he started to explore his legal options for discrimination and contacted the Equal Employment Opportunity Commission. Letter of Mark L. Lujan to U.S. Department of Labor, Mine Safety and Health Administration, Colorado District Office (September 23, 2014). The company has responded that this is not true, as Signal Peak holds annual refresher training on miners' rights. Memorandum of Points and Authorities in Support of Respondent's Motion for Summary Decision 10-11. Once again, this is a factual dispute on a material issue that must be resolved at hearing. Signal Peak's motion is therefore **DENIED**.

In view of this holding, the parties are advised the hearing will go forward in Denver, Colorado, beginning at 8:30 am on June 30, 2015. The hearing will be held at the following locations:

**June 30**  
**U.S. District Court**  
**Alfred A. Arraj Courthouse**  
**901 19<sup>th</sup> Street**  
**Courtroom No. 702**  
**Denver, Colorado 80294**

**July 1, 2015**  
**U.S. Custom House**  
**721 19<sup>th</sup> Street**  
**Courtroom No. 443, 4<sup>th</sup> Flr.**  
**Denver, Colorado 80202**

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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DENVER, CO 80202-2536  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 18, 2015

POCAHONTAS COAL COMPANY, LLC,  
Contestant,

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Respondent.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Petitioner,

v.

POCAHONTAS COAL COMPANY, LLC,  
Respondent.

CONTEST PROCEEDING

Docket No. WEVA 2014-395-R  
Order No. 3576153; 12/19/2013

Mine: Affinity Mine  
Mine ID: 46-08878

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-1028  
A.C. No. 46-08878-350475

Mine: Affinity Mine

**ORDER DENYING THE SECRETARY’S MOTION TO RECONSIDER &  
ORDER DENYING MOTION TO STAY THE COURT’S MAY 22<sup>nd</sup> ORDER**

These cases are before me on a contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. On June 5, 2015 the Secretary filed a Motion to Reconsider the court’s May 22, 2015 Order Granting in Part & Denying in Part the Secretary’s Motion for a Protective Order. On June 10, 2015 Pocahontas filed a Response in Opposition to the Secretary’s motion. For reasons that follow, the Secretary’s Motion to Reconsider is **DENIED**. The Secretary also filed a Motion to Stay the court’s May 22, 2015 order in light of the Motion to Reconsider. The Motion to Stay is **DENIED**. However, the parties are **ORDERED** to comply with the court’s new discovery timeline set forth below.

On April 13, 2015 the Secretary filed a Motion for Protective Order in which he moved the court to issue a protective order preventing the depositions of attorneys from the Office of the Solicitor. On May 22, 2015 this court issued an Order Granting in Part and Denying in Part the Secretary’s Motion for a Protective Order (the “May 22, 2015 order”) and found that factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions included in the NPOV, as well as facts involving who, what, where and when the selections were made, may be relevant, were discoverable, and were not privileged. On June 5, 2015 the Secretary filed the instant motion to reconsider the court’s order.

The Secretary argues that the court should reconsider its May 22, 2015 order because certain statements made by the court regarding the Secretary's decision about what to include and how to group the 42 enforcement documents listed in the NPOV are not supported by the record. Further, he argues that the deposition testimony of Kevin Stricklin, the Administrator for Coal Mine Safety and Health, makes clear that Stricklin made the ultimate decision whether to issue the NPOV, as well as what citations and orders were included in the NPOV, and that the attorneys from Office of the Solicitor only provided advice in the form of a recommendation to the Administrator.

The Secretary also argues that the court improperly rejected the Secretary's privileges argument. Specifically, the Secretary argues that the order does not adequately comprehend the nature of a NPOV, and that, because the document was issued in anticipation of litigation, the internal deliberations that led to the issuance of the NPOV are privileged. Moreover, the decision to issue the NPOV was an exercise of prosecutorial discretion and is subject to only narrow judicial review of whether MSHA considered the eight factors listed in 30 C.F.R. § 104.2(a) and notified Pocahontas of the basis for the NPOV. The Secretary argues that his submission of the NPOV, district manager's memo, POV panel memo, and the depositions of Jay Mattos and Kevin Stricklin meet this burden, and further review "would cross the line into the Secretary's decision-making process and the exercise of his prosecutorial discretion." Mot. to Reconsider 10.

Finally, the Secretary states that, while he does not concede that he must produce for deposition the field office supervisor involved in the POV process, he has provided a declaration from Sabian Scott VanDyke, the field office supervisor, that "addresses when, where and other factual logistics surrounding the selection of the 42 actions and who was involved in the review of . . . [S&S] violations issued during the POV screening period and what facts were relied upon." Mot. to Reconsider 10-11. As a result, the Secretary argues that he has provided the factual information required by the order.

Pocahontas, in response, argues that the order does not include factual inaccuracies and that the motion for reconsideration should be denied. Specifically, Pocahontas argues that the record, as recognized by the court, clearly demonstrates that Stricklin merely authorized the issuance of the NPOV and was not involved in the selection of the enforcement actions or the patterns. Further, Pocahontas argues that the record shows, as the court stated, that the attorneys from the Solicitor's office played a role in selecting the two categories and the 42 enforcement actions in the NPOV that were recommended to Stricklin. Furthermore, the declaration of Sabian Scott VanDyke confirms that Stricklin did not select the pattern categories or 42 enforcement actions and that, instead, the attorneys from the Solicitor's office were involved.

Pocahontas also argues that the court correctly found that the privileges asserted by the Secretary do not extend to factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement action in the NPOV. Further, The Secretary's argument that the decision to issue the NPOV is subject to only narrow judicial review ignores the issue in this case of whether the action was arbitrary and capricious. Here, the evidence indicates that, even if the court applies the narrow review advocated by the Secretary, the Secretary has not established that MSHA considered the eight factors set forth in 30 C.F.R. §

104.2(a) before issuing the NPOV. Moreover, the failure to consider the factors goes directly to the issue of whether the Secretary has acted in an arbitrary and capricious manner.

Finally, Pocahontas argues that the Secretary failed to comply with an order of the court and, as a result, Pocahontas was precluded from complying with other parts of the order and has been forced to spend unnecessary time and resources to resolve this discovery dispute. Specifically, Pocahontas argues that the Secretary refused to communicate with Pocahontas and, in direct contravention of the court's order, did not provide an individual for deposition. As a result, and based on the information learned from the VanDyke's declaration, Pocahontas argues that it is entitled to depose both VanDyke and Ben Chaykin, the attorney in the Solicitor's office who VanDyke indicated he worked with during their review of the citations and orders included in the NPOV.

I find, just as I have previously found, that, while the internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV are privileged, facts related to what information was considered by MSHA and the Secretary's attorneys when selecting and grouping the 42 enforcement actions in the NPOV may be relevant, are discoverable, and are not privileged. The deposition of Kevin Stricklin does show that he made the final decision to issue the NPOV to Pocahontas, but that does not negate the need on the part of the operator to learn the facts he relied upon in making that decision. A number of matters were reviewed by MSHA personnel and a recommendation was made to Stricklin. As a result, while Stricklin made the ultimate decision, the facts that others relied upon in making recommendations to him are relevant and discoverable.

Nothing that the Secretary raises in his motion changes the court's opinion regarding what is discoverable and not privileged in this matter. The Secretary's argument regarding factual inaccuracies relied upon by the court in issuing the May 22, 2015 order amounts to a semantic distinction that detracts from the court's essential finding; that is, the information provided by the Secretary to date demonstrates that the Secretary's attorneys may have played a role in the selection of the two pattern categories and 42 enforcement actions listed in the NPOV. That role would go beyond simply advising MSHA regarding the pattern and its legal requirements. I note that the Secretary's attorneys have not been particularly forthcoming regarding the entire process. While Stricklin may have been the individual who made the ultimate decision to issue the NPOV, the Secretary continues to be opaque about how he reached that decision. If indeed the attorneys for the Secretary merely had an advisory role, then the mine operator is entitled to learn that as well and focus on the facts relied upon by MSHA.

As Pocahontas argues, and the court has repeatedly pointed out, one of the major issues in this proceeding is whether the Secretary acted in an arbitrary and capricious manner when he issued the NPOV. The court has made clear that, in order for it to decide this issue, it must know what facts MSHA considered when making its determination to issue the NPOV. Again, that means what facts were used and what facts were presented to Stricklin so that he could make the final determination. Moreover, facts regarding who selected and grouped the enforcement actions, what facts those individuals considered, when they considered those facts, and where they considered those facts may be relevant, are discoverable, and are not privileged despite the

Secretary's arguments to the contrary. The same is true even if the court accepts the Secretary's argument that the decision to issue the NPOV is subject only to the narrow judicial review.

I find that VanDyke's declaration provides some relevant facts that Pocahontas seeks to discover. However, the court is not in a position to decide if it answers all of Pocahontas's questions. As a result, I find that Pocahontas should be afforded an opportunity to discover additional facts which VanDyke may be able to contribute and, therefore, Pocahontas may take the deposition of Van Dyke. The parties, prior to the status conference set for June 25, 2015, shall contact each other and agree to a date and place for the deposition. If the parties are unable to agree to a date and time, the court, at the status conference, will set the date and time for the deposition.

VanDyke's declaration also identifies Ben Chaykin as the attorney from the Office of the Solicitor whom VanDyke worked with to review citations and orders issued to the mine as part of the process to determine whether the NPOV would be issued. It is not clear how much involvement Chaykin had in putting together the list that was included in the body of the NPOV, or if other attorneys were also involved. Chaykin is no longer employed by the Department of Labor and, therefore, there is no danger that the Secretary will be deprived of its attorney by involving him in the discovery process.

In the May 22, 2015 order the court indicated that, if Pocahontas was unable to learn the facts it needs from the CLR or field office supervisor, it could submit interrogatories to be answered by an attorney in the Solicitor's office who had direct knowledge of those facts. Given the present circumstances, I find that Pocahontas should be afforded an opportunity to discover facts from an attorney in the Solicitor's office if it cannot discover all of the facts it needs from VanDyke. VanDyke's declaration indicates that his involvement was mostly administrative, including gathering and copying materials for the Secretary's attorneys, primarily Chaykin. Since it appears that VanDyke did not select or categorize the citations and orders that were recommended for inclusion in the NPOV, it stands to reason that the Secretary's attorneys are in the best position to provide at least some of the facts that Pocahontas seeks to discover on that issue. Therefore, Pocahontas should be prepared to submit written interrogatories to the Secretary following the deposition of VanDyke. A date for submission of those interrogatories will be set at the June 25, 2015 status conference.

While the court understands the importance of a case that deals with a new regulation and process, there is nothing about the process that should be hidden and the Secretary should be willing to provide facts about how the process works. This case has dragged on for an inordinate amount of time. The Secretary has been unwilling to provide information in a timely manner so that discovery can be completed and the parties and the Court can understand what went into preparing the NPOV. Therefore, at the status conference, the Secretary must be prepared to address all issues remaining and come up with a reasonable schedule to get all the facts associated with the NPOV before the Court. Similarly, the operator has been overreaching in its demands and arguments, and would be better served to focus on the real issues in the case and what it needs to have a full understanding of the facts. These are important matters, but they are not matters that are subject to drama or secrecy.

Given these findings, the parties are **ORDERED** to talk and set a date for the deposition of Mr. VanDyke to be held on or before July 3, 2015. If the parties cannot agree on a date, the court will provide one at the status conference. If the mine operator is not able to discover all facts it requires from the deposition of VanDyke, it shall, within 7 days of the date of the deposition, submit written interrogatories to the Secretary to be answered under oath by a person with knowledge of the facts sought by the questions. The Secretary may chose an attorney with knowledge of the facts, including Mr. Chaykin if appropriate, to respond to the questions. The Secretary may assert that attorneys merely rendered advice, but they must provide facts to back up that position. The Secretary will have one week in which to respond. No extensions of time will be granted.

The deposition of VanDyke and the follow up questions to the Solicitor shall address the factual issues outlined above and in the earlier order, and should not address matters that VanDyke has already addressed in his declaration. Both parties are **ORDERED** to provide a written status report following the completion of this discovery, detailing the information, if any, the operator has yet to discover and the status of the motions for summary decision.

The parties, as set forth in the June 12, 2015 Notice of Status Conference, are **ORDERED** to attend a status conference on June 25, 2015. The conference will commence at 2:00 pm and each party should be prepared to discuss the status of discovery, dates for depositions and a clear schedule for moving forward in this case. The status conference will be recorded and each party must have a non-attorney client, either in person or by telephone.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 22, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

TRAYLOR MINING, LLC,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-351-M  
A.C. No. 05-00413-341975 X940

Bulldog Mine

**ORDER DENYING MOTION TO COMPEL**

This case is set for hearing in Denver on June 30, 2015. The Secretary is proposing a penalty of \$52,500 for a citation issued under section 104(d)(1) of the Mine Act under his special assessment regulation at 30 C.F.R. § 100.5. The citation was issued as a result of an injury-accident at the Bulldog Mine. On or about June 15, Traylor Mining filed a motion to compel asking that I order the Secretary to produce his special assessment review (“SAR”) form for the citation as it requested during discovery. On June 18, the Secretary filed a response in opposition to the motion claiming that the SAR form is protected by the deliberative process privilege.

Traylor Mining is seeking the SAR form, in part, with respect to its allegation that the Secretary abused his discretion in proposing a special assessment. This issue has been brought before the Commission’s administrative law judges many times in the past. *E.g. CDC Contracting Co.*, 25 FMSHRC 289, 290 (May 2003) (ALJ Manning); *Aggregate Indus.* 25 FMSHRC 88, 89-90 (Feb. 2003) (ALJ Manning); *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ Zielinski); *Hidden Splendor Resources, Inc.*, 33 FMSHRC 2345 (Sept. 2011) (ALJ Rae); *Pocahontas Coal Co.*, 34 FMSHRC 903 (April 2012) (ALJ Feldman). The SAR forms that I have seen do not contain any information that is useful or that is at all deliberative. Typically, the MSHA inspector writes down a few of the facts set forth in his citation or in his inspection notes as justification for his special assessment recommendation and then his supervisor indicates on the form that he agrees with the recommendation. MSHA officials further up the chain of command may provide their initials signifying their agreement. The SAR form typically repeats facts written elsewhere that the inspector would like MSHA to consider when reviewing his recommendation that the penalty be specially assessed. The comments by MSHA supervisors are brief and simply agree with the inspector’s recommendation.

In many cases before me in which the Secretary has proposed a penalty that was specially assessed, the Secretary has attached the SAR form to the petition for assessment of civil penalty, making the form available to the mine operator. The Secretary’s belief that the information in the SAR form should be protected by the deliberative process privilege is applied inconsistently at best and seems to suggest that the Secretary is not particularly concerned about any “deliberations” contained therein.

As noted by the Secretary in his opposition, facts are not protected by the deliberative process privilege. The Secretary alleges that he has provided Traylor Mining with the all the factual information that is contained within the SAR form. Moreover, the Secretary maintains that the privilege applies to “disclosures of factual information when such disclosures ‘would expose the agency’s decision-making process in such a way as to discourage candid discussion with the agency and thereby undermine the agency’s ability to perform its functions.’” Sec’y Opposition at 4 quoting *Consolidation Coal Co.*, 19 FMSHRC 1239, 1247 (July 1997) (internal citations omitted). The Secretary has not demonstrated that providing the SAR form to Traylor Mining would in any way undermine MSHA’s ability to perform its functions in this case or in future cases.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R § 2700.56(b). Facts that are related to the information the Secretary considered in proposing a special assessment may be relevant and are not privileged. *See generally, Pocahontas Coal Co.*, 37 FMSHRC \_\_\_\_\_, slip op. at 6-8, WEVA 2014-1028, 2015 WL 3443490 (May 22, 2015) (ALJ Miller) (reconsideration denied June 18, 2015). As a general matter, the Secretary cannot withhold purely factual portions of the SAR form simply on the basis of his representation that Traylor Mining already received the same information in a different format.<sup>1</sup>

Given the nature of the SAR form, it is difficult to understand why either party believes it is important to the resolution of the issues in this case. If I were to require the Secretary to provide a copy of the SAR form to Traylor Mining, it is unlikely that Traylor would gain any information that it does not already have and the Secretary’s deliberations would not be exposed in any meaningful way. These disputes over the discoverability of the SAR form can be characterized as much ado about nothing.

In several orders discussing this same issue I have stated that because the Commission assesses penalties de novo, the Secretary’s assessment process is “totally irrelevant.” *CDC Contracting Co.*, 25 FMSHRC 289, 290 (May 2003). I was wrong in reaching this conclusion. Clearly, 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). The Commission has consistently held, however, that the Secretary’s penalty proposal must be considered by the judge. The Commission recently summarized this obligation, as follows:

While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the

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<sup>1</sup> The Secretary also states that deposing the inspector “would have provided Respondent the ability to obtain factual information sought from the privileged SAR form through non-privileged means.” Sec’y Objection at 6. While conducting a deposition of the issuing inspector might sometimes be advisable, the Secretary cannot force a mine operator to bear the expense of a deposition to obtain facts that are available by simpler, less expensive means. If these facts may be obtained through the deposition of the inspector, then the Secretary should be able to produce the facts in the SAR and redact any alleged nonfactual portion, if necessary.

Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

*Mize Granite Quarries Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012). Thus, if I decide that the Secretary is unable to justify the \$52,500 proposed penalty, I must explain the basis for any significant deviation from that penalty.

If the Secretary would like me to consider his specially assessed penalty proposal, the Secretary must justify his decision to propose the penalty at the hearing. The Secretary bears the burden of establishing facts to justify the higher than normal penalty in this case. Special assessments are reserved for "particularly serious or egregious violations." *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (DC Cir. 1989).

In light of the above, especially the Secretary's representation that he has provided Traylor Mining with the all the factual information contained in the SAR form, I enter the following **ORDER**:

1. Traylor Mining's motion to compel is **DENIED**; the Secretary is not required to provide a copy of the SAR form to counsel for Traylor Mining. The Secretary will not be permitted to introduce the SAR form at the hearing, but shall bring a copy of the SAR form to the hearing. If the Secretary presents facts at the hearing related to the proposed special assessment and Traylor Mining contends that these facts were not disclosed during discovery, I may ask the Secretary to provide me with a copy of the SAR form for my *in camera* review. If the disputed facts are contained in the SAR form and I am convinced that the information was not otherwise provided by the Secretary during discovery, I may strike from the record the evidence presented by the Secretary concerning the proposed penalty on the basis that the Secretary failed to provide Traylor Mining with these facts during discovery. In the alternative, the Secretary may provide counsel with a PDF copy of the SAR form by no later than 3:00 p.m. Mountain Time on Tuesday, June 23.

2. At the hearing, the Secretary **SHALL** advise me what the penalty would have been if it had been calculated using the Secretary's regular assessment formula at section 100.3.

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

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

721 19<sup>TH</sup> STREET, SUITE 443

DENVER, CO 80202-2500

303-844-3577/FAX 303-844-5268

June 23, 2015

STAR MINE OPERATIONS, LLC,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

STAR MINE OPERATIONS, LLC,  
Respondent

CONTEST PROCEEDING

Docket No. WEST 2014-592-RM  
Order No. 8754779; 04/01/2014

Revenue Mine  
Mine ID 05-03528

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2014-994-M  
A.C. No. 05-03528-359228-01

Docket No. WEST 2014-995-M  
A.C. No. 05-03528-359228-02

Docket No. WEST 2015-023-M  
A.C. No. 05-03528-360911-01

Docket No. WEST 2015-024-M  
A.C. No. 05-03528-360911-02

Docket No. WEST 2015-025-M  
A.C. No. 05-03528-360911-03

Docket No. WEST 2015-030-M  
A.C. No. 05-03528-361952-01

Docket No. WEST 2015-031-M  
A.C. No. 05-03528-361952-02

Docket No. WEST 2015-037-M  
A.C. No. 05-03528-363546-01

Docket No. WEST 2015-038-M  
A.C. No. 05-03528-363546-02

Docket No. WEST 2015-098-M  
A.C. No. 05-03528-365154

Docket No. WEST 2015-127-M  
A.C. No. 05-03528-365446-01

Docket No. WEST 2015-128-M  
A.C. No. 05-03528-365446-02

Docket No. WEST 2015-304-M  
A.C. No. 05-03528-369886-01

Docket No. WEST 2015-305-M  
A.C. No. 05-03528-369886-02

Docket No. WEST 2015-306-M  
A.C. No. 05-03528-369886-03

Docket No. WEST 2015-370-M  
A.C. No. 05-03528-372806

Docket No. WEST 2015-440-M  
A.C. No. 05-03528-375046

Docket No. WEST 2015-462-M  
A.C. No. 05-03528-376084

Docket No. WEST 2015-547-M  
A.C. No. 05-03528-378328

Docket No. WEST 2015-596-M  
A.C. No. 05-03528-379026

Revenue Mine

### **ORDER GRANTING SECRETARY'S MOTION TO STAY PROCEEDINGS**

These cases are before me upon a notice of contest and 20 petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Star Mine Operations, LLC ("Star"), 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 Secretary filed a motion to stay these proceedings due to pending criminal investigation into two accidents that occurred at the Revenue Mine. Star filed a response in which it stated that it does not object to staying the majority of the cases but does object to staying those cases involving citations and orders issued for conditions that existed at the mine after May 8, 2014. Star contends that it no longer owned or operated the mine after May 8, 2014, and it seeks to have the issue of MSHA's jurisdiction over Star after that date adjudicated without respect to the ongoing criminal investigation.

On November 17, 2013, two miners died from exposure to toxic levels of carbon monoxide in an unventilated mine drift. On August 29, 2014, two miners sustained injuries subsequent to a blast. As a result of these accidents and several other MSHA inspections, MSHA issued 171 citations and orders to Star that are pending before the Commission. For the reasons that follow, the Secretary's motion to stay all of the cases is **GRANTED**.

## I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

On May 22, 2015, the Secretary filed a motion to stay ("Sec'y Motion") the above proceedings for an unspecified amount of time. Acting at the request of an Assistant United States Attorney for the District of Colorado ("AUSA") to stay these proceedings, the Secretary argues that concurrent civil and criminal investigations will prejudice any criminal proceedings brought against Star and will otherwise impede the criminal investigation. The Secretary asserts all five factors in the *Buck Creek Coal* test support granting a complete stay. (Sec'y Brief in Support of Motion to Stay ("Sec'y Brief") at 8-15; *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (April 1995)).

On June 4, 2015, Star filed a response brief stating that it does not object to staying those cases concerning charges for conditions that occurred prior to May 8, 2014, but that it objects to staying cases involving charges after that date. Star states that it relinquished control of the mine on May 8, 2014, following a participating interest and asset purchase agreement with Fortune Revenue Silver Mines, Inc. ("Fortune"). (Respondent's Brief in Response to the Secretary of Labor's Motion for Stay of Proceedings ("Star Response") at 6). Furthermore, because Star no longer operated the mine after that date, the issue of MSHA's jurisdiction to issue citations to Star after that date should be resolved as quickly as possible. (*Id.* at 3). Star contends that all five factors in the *Buck Creek Coal* test weigh against granting a complete stay. (*Id.* at 7-10).

On June 15, 2015, the Secretary filed a reply to Star's response ("Sec'y Reply"). First, the Secretary argues that Star offered only conclusory statements concerning its ownership status after May 8, 2014 and failed to provide any dispositive details regarding its exact role after that date. (Sec'y Reply at 3-5). Second, if Star did relinquish control of the mine as it said it did, it violated Mine Act section 109(d) by failing to notify MSHA of such a change. Third, "[a]lthough transactional documents may provide terms referencing the parties' intentions with respect to control, it is also necessary to examine the actions of the parties with respect to the control and operation of the mine throughout the May 8 to October 1 period." (*Id.* at 7). Lastly, the Secretary reiterates that the *Buck Creek Coal* test does not support Star's argument in favor of a partial stay.

## II. RESOLUTION OF THE ISSUES

The Secretary alleges that two miners were killed on November 17, 2013, because Star failed to properly ventilate the Monogahela drift thereby exposing miners to toxic levels of gas following the detonation of explosives. Additionally, the Secretary claims that the concussion from a blast on August 29, 2014, caused a miner to fall to the ground where he was in stuck in the back by a large rock. Between these two incidents, over 150 citations or orders were issued against Star.

Star claims it relinquished operational control over Revenue Mine on May 8, 2014. MSHA was officially notified that Fortune was the operator of the mine effective October 1, 2014. Whether Star was a mine operator after May 8 is a question of fact. The issue whether it maintained some degree of control over the operation of the mine will be an element in the cases on the merits if they proceed to hearing before me; it is not a true jurisdictional issue. *Agapito Associates, Inc.*, 30 FMSHRC 1187, 1189-91(Dec. 2008)(ALJ); *see generally Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (“Employee-numerosity” requirement of Title VII relates to adequacy of the claim for relief, not whether the court has subject matter jurisdiction).

Given the information presented by the Secretary concerning the events at the mine between May 8 and October 1, it will be necessary to examine the actions of the parties with respect to the control and operation during this period and the interactions between Star and MSHA.<sup>1</sup> The Secretary alleges that between June 30 and September 11, 2014, MSHA issued Star 15 citations and orders of which 9 resulted from the August 29 accident. During these inspections, the MSHA inspectors were never advised by mine management that Star was no longer the mine operator. The Secretary alleges that Jeff Harris, Star’s safety manager, submitted an accident report on September 5, 2014, for that accident as required by 30 C.F.R. § 50.20. The Secretary states that Harris filed this report on behalf of “Star Mine Operations, LLC” and not “Fortune Revenue Silver Mines, Inc.” (Sec’y Reply at 3). In addition, the Secretary states that Fortune submitted the required form under 30 C.F.R. Part 41, which indicated that it became the operator of the mine effective October 1, 2014. The Secretary maintains that it is possible that the “contractual transfer of control that occurred in May rendered Fortune an independent contractor of Star’s that was responsible for some unknown degree of operational control that could revert back to Star should Fortune’s purchase of the assets not be completed by the deadlines set by Star and Fortune.” (Sec’y Reply at 4). In essence, the Secretary avers that “the factual basis for Star’s belief and assertion that it was not the ‘operator’ after May [8] is left to speculation.” *Id.*

The parties strongly disagree as to whether Star had any operational control over the mine between May 8, 2014 and October 1, 2014. Consequently, extensive discovery will be required for the parties to obtain the requisite information to analyze this issue and then present it to me for resolution. It will likely be difficult to separate the issue of the degree of Star’s control over the Revenue Mine after May 8, if any, from the merits of the citations and orders.

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<sup>1</sup> On September 25, 2014, MSHA served a pattern of violations notice on Star pursuant to section 104(e)(1). (Sec’y Reply at 3). The Secretary alleges that Star did not advise MSHA upon receipt of this notice that it was no longer the operator of the mine. *Id.* Star did raise this issue when it challenged the pattern notice before the Commission. *Star Mine Operations*, 36 FMSHRC 3326 (Dec. 2015) (ALJ Paez). In that case, Star submitted copies of transactional documents as attachments to its response to the Secretary’s motion to dismiss. (WEST 2015-100-RM). Star alleged that the sales agreement “officially closed on October 1, 2014, after all payments were made” but that “Fortune became the operator of the Fortune Revenue Silver Mine under the agreement, and in fact [was] the operator and controller of the mine starting in early May 2014, pursuant to the agreement.” (Star’s Response to Motion to Dismiss in WEST 2015-100-RM at 3-4). Apparently, all section 104(e) orders have been issued to Fortune not Star.

The AUSA's letter to the Office of the Solicitor states that he is currently conducting a criminal investigation and asks that I stay all of the cases before me. (Sec'y Motion, Ex. B). He states that his office has an "interest in ensuring that the pending civil proceedings do not interfere with the criminal investigation." *Id.* He further states that "liberal civil discovery procedures may provide criminal defendants with access to materials that would not be available under criminal discovery rules." *Id.* (citation omitted).

I find that granting the stay is appropriate because permitting discovery to go forward on these issues would unnecessarily interfere with the criminal investigation. Under the *Buck Creek Coal* test the following factors must be evaluated: (1) the commonality of evidence; (2) the timing of the request; (3) any potential prejudice to litigants; (4) the most efficient use of resources; (5) the public interest. *Buck Creek Coal*, 17 FMSHRC 500, 503 (Apr. 1995).

First, the issue whether Star played any part in the operation of the mine between May 8 and October 1 is common to both these civil penalty cases and the criminal investigation. The evidence the AUSA will need to gather to determine criminal liability may significantly overlap the evidence needed to establish Star's status after May 8 in the present cases. I find the Secretary established an existing commonality of evidence.

Second, the Secretary referred the matter to the AUSA, who has started a criminal investigation and he is concerned with the conflicting boundaries of discovery between civil and criminal litigation. As a consequence, the stay request is not premature.

Third, because Star states that it is no longer in business, I find that it will not be significantly prejudiced by granting the motion to stay. Conversely, the prejudice faced by the AUSA if the stay is not granted includes exposure of his strategy, making available discovery that would not otherwise be available to Star, and interfering with the "integrity of a criminal investigation, *e.g.*, by resulting in witness intimidation, perjury or manufactured evidence." (Sec'y Motion, Ex. B).

Fourth, because the AUSA may wish to conduct an independent investigation with respect to Star's control and operation of the mine after May 8, my ruling on this issue would not be the most efficient use of agency resources. The AUSA may investigate that issue regardless of my ruling on the issue.

Fifth, I believe the public interest is best served by allowing the criminal investigation to proceed without obstacles. The AUSA stated that his "office will assure [the parties and the Commission] that we will expedite our investigation in a manner consistent with our responsibility to investigate federal criminal violations so as to minimize potential prejudice to the litigants and the public in staying the civil proceedings." *Id.*

### III. ORDER

For the foregoing reasons, the Secretary's request to stay all of the proceedings listed in the caption above is **GRANTED**. Counsel for the Secretary shall file a report with me and opposing counsel on the status of the criminal investigation by no later than **September 23, 2015**, and in 90 day increments thereafter.

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

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