

September 2014

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Review was granted in the following cases during the month of September 2014:

Secretary of Labor, MSHA v. Knife River Construction, Docket Nos. WEST 2013-827-RM, WEST 2013-828-RM, WEST 2013-829-RM, WEST 2013-1009-M (Judge Manning, August 7, 2014)

Secretary of Labor, MSHA v. CAM Mining, LLC, Docket Nos. KENT 2013-196-R, KENT 2013-197-R (Judge Andrews, August 19, 2014)

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

Secretary of Labor, MSHA v. Oak Grove Resources, LLC, Docket Nos. SE 2013-301, SE 2013-352, SE 2013-368, SE 2013-399 (Judge Feldman, Certified for Interlocutory Review, August 22, 2014)

Secretary of Labor, MSHA v. Virginia Drilling Co., Docket No. WEVA 2011-287 (Judge Gill, August 11, 2014)

Secretary of Labor, MSHA v. The American Coal Company, Docket Nos. LAKE 2010-408-R, LAKE 2010-409-R, LAKE 2010-759 (Judge Miller, August 13, 2014)

Previously unpublished in FMSHRC Volume 36, No. 8:

Secretary of Labor, MSHA v. The American Coal Company, Docket Nos. LAKE 2010-408-R X, LAKE 2010-409-R X, LAKE 2010-759 (Judge Miller, August 13, 2014)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 10, 2014

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

EMERALD COAL RESOURCES, LP

Docket No. PENN 2011-168

DECISION APPROVING SETTLEMENT

Before: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012), and is before the Commission on review of the Administrative Law Judge's decision upholding Order Nos. 8007973 and 8007974 for alleged violations of 30 C.F.R. § 75.400 and 30 C.F.R. § 75.360(b)(3), respectively. 35 FMSHRC 2645, 2673 (Aug. 2013) (ALJ). The Judge found that Emerald Coal Resources, LP violated section 75.400, that the violation was "significant and substantial," and that it was an unwarrantable failure, when it allowed combustible material to accumulate in the mine, including pushing material to the face as part of its cleanup program. *Id.* at 2661-63. She also found that it violated section 75.360(b)(3) when Emerald failed to record the hazardous accumulations in the pre-shift examination log, and that this violation was also "significant and substantial" and an unwarrantable failure. *Id.* at 2666-67.

The Judge further concluded that because Emerald was a "recidivist operator that [had] chosen to ignore MSHA's § 75.00 standard" and had failed to record the violative conditions, thereby "expos[ing] miners to unknown hazards," it was appropriate to assess an enhanced penalty amount for each order. *Id.* at 2672. Specifically, she increased the penalty for Order No. 8007973 from \$41,500 to \$90,000 and for Order No. 8007974 from \$32,800 to \$40,000. *Id.* at 2672-73.

Emerald petitioned for discretionary review by the Commission challenging the Judge's findings regarding the fact of violations, as well as the "significant and substantial" and unwarrantable failure designations. It also sought review of the Judge's heightened penalty assessment for Order No. 8007973. The Commission granted the petition for review.

On August 28, 2014, the parties filed a Joint Motion to Approve Settlement pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides that “[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.” The parties have agreed that with the exception of a reduction in penalty, Order Nos. 8007973 and 8007974 have been properly adjudicated as set forth in the Judge’s decision. According to the proposed settlement, the penalty amount for Order No. 8007973 shall be modified to reflect a penalty of \$70,000, which is the statutory maximum for a non-flagrant violation. The penalty assessment for Order No. 8007974 shall remain at \$40,000, for a total assessment of \$110,000.

We have considered the representations and documentation submitted in this case, and we conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

Wherefore, the motion for approval of the settlement is GRANTED. It is ordered that the operator pay a penalty of \$110,000 within 30 days of the date of this order. Upon receipt of payment, this case is dismissed.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 2014

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

v.

OAK GROVE RESOURCES, LLC

Docket Nos. SE 2013-301
SE 2013-352
SE 2013-368
SE 2013-399

ORDER

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On August 22, 2014, the Administrative Law Judge certified for interlocutory review his Order Requiring Secretary’s Pre-Hearing Statement, which he issued on June 12, 2014. In that order, the Judge articulated criteria for establishing repeated flagrant violations pursuant to section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), and ordered the Secretary to submit a pre-hearing statement regarding whether the evidence in the case satisfied these criteria. Order at 13-14. The Secretary submitted his pre-hearing order on August 7, 2014, but the Judge determined that this statement failed to clarify a controlling question of law in the case. Certification at 3.

Pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a Judge’s ruling, prior to the Judge’s final decision in the case, only if certain conditions are met. First, pursuant to Rule 76(a)(1), either the Judge must certify that his or her interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding or the Judge must deny a party’s motion for certification of the interlocutory ruling to the Commission and the party must file with the Commission a petition for interlocutory review within 30 days of the Judge’s denial of such motion for certification. This criterion was met by the Judge’s August 22, 2014 certification.

Second, under Rule 76(a)(2), a majority of Commission members must conclude that the Judge’s interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. Here, however, review of the Judge’s June 12, 2014 Order would amount to an advisory opinion on an abstract legal principle. Although the Judge has articulated his view of the legal standard that should be applied in this case, he has done so by ordering the Secretary to submit a pre-hearing statement applying this

standard. Consequently, at this juncture, the only question on review would be whether the Judge abused his discretion in ordering the Secretary to submit the pre-hearing statement. This does not constitute a controlling question of law, nor does it frame, in the proper procedural posture, the legal question on which the Judge seeks interlocutory review.

For the reasons set forth above, we deny interlocutory review.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

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

September 4, 2014

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

v.

LHOIST NORTH AMERICA OF
VIRGINIA, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-169-M
A.C.No. 44-00082-309415

Docket No. VA 2013-191-M
A.C.No. 44-00082-312088

Mine: KIMBALLTON PLANT #1

DECISION AND ORDER

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, Office of the
Solicitor, Nashville, TN for the Petitioner

Charles H. Morgan, Alston & Bird, LLP, Atlanta, GA for the
Respondent

Before: Judge Rae

This case is 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).

A hearing was held in Blacksburg, VA. The parties submitted post-hearing briefs which have been considered. The docket consists of one citation and four orders that arose out of a two-day inspection made by Mine Safety and Health Administration ("MSHA") inspector Billy Joe Ratliff¹ which commenced on October 10, 2012. For the reasons set forth below, I find the Secretary has met his burden of proof on all cited violations as issued.

FACTUAL BACKGROUND

The parties stipulated that: 1) Lhoist was the operator of the Kimballton Plant #I, Mine ID No. 44-00082; 2) The Kimballton Plant #I is a "mine" as that term is defined in

¹ Billy Joe Ratliff has been a certified mine inspector for nine years. He is also a trained accident investigator and spent five years in law enforcement on several police and sheriff's departments. He also has nine years of mining experience including working with explosives. Tr. 12-17. He had been inspecting the Kimballton mine since 2005. Tr. 21.

Section 3(h) of the Federal Mine Safety and Health Act ("Mine Act" or "Act"), 30 U.S.C. § 802(h); 3) The products of the mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Act, 30 U.S.C. § 803; 4) Lhoist is an "operator" as defined in Section 3(d) of the Act, 30 U.S.C. § 802(d); 5) Lhoist's operations and this mine are subject to the jurisdiction of the Act; 6) The hearing of these dockets is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act; 7) Inspector Ratliff was acting in his official capacity and as an authorized representative of the Secretary when he issued the citation and orders; 8) True copies of the citation and orders were served on Lhoist as required by the Mine Act; 9) The total proposed penalty for the dockets herein will not affect Lhoist's ability to continue in business; 10) The Proposed Assessment (Form 1000-179 (MSHA)) contained in Exhibit A attached to the petition accurately sets forth the size of respondent in production tons or hours worked per year, the size of respondent of the mine at which the violations were issued, the total number of assessed violations in the preceding 24 month period, and the total number of production days for the preceding 24 month period; 11) The Secretary's copies of the citation and orders are authentic; 12) The Secretary's exhibits are authentic copies; 13) Respondent's copies of the citation and orders are authentic; and, 14) Respondent's exhibits are authentic. Joint Ex. 1.

The Kimballton mine is the deepest underground limestone mine in the country and has been in operation since 1947. Some areas of the mine are 2300 feet deep and the individual tunnels range between 100 and 125 feet tall. Tr. 188-9. The entries are approximately 45 feet wide and 35 feet in height. The limestone is mined by explosives. The normal blasting cycle begins with loading the blasting rig with ANFO, which is a solid explosive agent consisting of essentially fertilizer and diesel fuel. The rig pulls up under the bulk tank and the ANFO is released into a large steel tank which is also known as the ANFO pot located at the rear of the rig. The blasting rig is then driven to the face that is to be blasted where the ANFO is pumped through a hose from the pot using compressed air into the holes drilled into the face of the stone. The rig is equipped with a boom and a basket which raises the miner up to feed the ANFO into the holes drilled on the upper part of the face. Tr. 43. The rig then moves on to the next face to be loaded for blasting. Once the shot is made, the loose material is then loaded onto haul trucks and brought to an underground crusher. It is then transported by conveyor up the slope and out to an exterior storage area. Tr. 29. At the completion of the cycle, the rig is then brought to a wash-down area for cleaning. The mine operates in two shifts; the evening shift is responsible for drilling and blasting the face in order to provide ample time for dust and gases raised during the blasting to settle before mining continues on the day shift. Tr. 27-35. Typically, this mine uses a Getman blasting rig on which the ANFO pot is welded and bolted on the rear of the vehicle. Tr. 50, 177, 182. At the time these violations were found, the mine was using a different vehicle as a blasting rig.

In response to an anonymous hazard complaint, MSHA Inspector Billy Joe Ratliff went to the Kimballton mine. He did not find any hazards as a result of the complaint; however, while there, he requested a meeting with all miners in the underground I0 East lunchroom to discuss another issue. A rank-and-file miner told Ratliff to take a look at the

truck being used as a blasting rig which was parked directly outside. Tr. 169. What Ratliff found was a Ford F-250 pickup truck that had an ANFO pot rigged in the bed with a compressor hitched behind the truck. Tr. 41-2. He learned upon further investigation that on October 4th the transmission on the Getman blasting rig had given out. Management directed the employees on Monday, October 8th to rig the pickup as a blasting rig. This was accomplished by placing an ANFO pot that had been taken off an old Volvo blasting rig directly behind the cab of the truck and tying a series of climbing ropes, straps, and ratchets around the pot. Tr. 52, 105, 108-12. The pot was a large cylindrical tank positioned in an upright manner with the top extending several feet above the roof of the truck. Ex. S-3 p.3 Photo.

Because the pickup truck was significantly smaller than the Getman rig the manner in which it was used in the blasting sequence was very different from the norm. It was too small to pull under the bulk tank to load the ANFO into the pot. Instead, the truck was being driven to the face that was to be blasted where it was met by a flatbed truck carrying 50 pound bags of ANFO. Tr. 48, 74. The ANFO bags were handed off from one miner standing on the flatbed truck to a miner standing on the rear of the pickup truck and then the miner lifted the bags overhead and poured the ANFO by hand into the pot through a funnel located at the top of the tank. Tr. 48, 63, 74-6. In order to access the funnel, the miners were standing on the side rails of the pickup truck's bed or on the roof of the truck. Tr. 64. The truck was used in this fashion on the night of October 8th. The next morning a miner put in a work ticket for a safe way to load the pot because the tank was too tall and the bags had to be lifted overhead. Tr. 201; Ex. R-5. Mine Manager Luxbacher² called down to the repair shop to ensure this work order was being fulfilled and a small platform was placed in the truck bed before it was used again on the night of the 9th. *Id* The miners informed Ratliff, however, that they continued to stand on the rails and roof of the truck because the platform, or step, would shift and slide under their feet. Tr. 64. They also stood on the side of the truck when the ANFO bags were being transferred from the flatbed to the pickup truck because they could not reach out far enough from the platform. Tr. 74.

Based upon his observations of the pickup truck and the conversations with the miners, Ratliff issued one citation and five orders discussed herein.

LEGAL PRINCIPLES

Significant and Substantial/Gravity

A significant and substantial ("S&S") violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the

² Luxbacher has been mine manager for five years and has been in the mining industry for ten years. He is a graduate of Virginia Polytechnic Institute and State University with a degree in mine engineering. Tr. 187-90.

hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard -that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

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

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

Negligence/Unwarrantable Failure

Negligence is conduct which falls below the standard of care established under the Mine Act. Under the Act an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined as when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." 30 C.F.R. § 100.3 Table X.

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)

("R&P"); see also [*BuckCreek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203,225 (Mar. 1998).

It is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. */o Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8639930

This safe access Section 104(d)³ citation was written in accordance with 30 C.F.R. § 57.11001 which requires that all working places have a safe means of access provided and

³Section 104(d) of the Mine Act states in relevant part, "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health standard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

maintained. It was issued because a safe means of access to load the ANFO pot on the Ford F-250 pickup truck was not provided. The miners were using the roof, side rail or unsecured step without handrails to load the 50 pound bags of ANFO into the top of the tank. Ratliff noted in his citation that the truck had been used in this fashion since October 8, 2012 and that this was not the first time the tank had been used on the back of the truck.

Ratliff assessed the gravity of the violation as reasonably likely to result in a fatal accident to one miner, S&S, and the result of high negligence. He issued the citation as an unwarrantable failure to comply with the standard because Luxbacher was aware of the danger and allowed the pickup truck to be put into service. Ex. S-1. The Secretary has proposed a specially assessed civil penalty in the amount of \$11,900.00.

In addition to the previously stated facts, Ratliff considered several additional facts in issuing this citation. As he testified, the ANFO pot was loaded at the face where lighting was poor. Tr. 61-2. The bed of the truck had a plastic liner which made the unbolted step (or platform) shift easily when a miner stepped on it. An employee told Ratliff because of the way the platform was positioned in the truck bed, the miner on the truck would have one foot on the side rail and one foot on the unsecured shifting platform in order to reach for the bag of ANFO being passed to him from the flatbed truck. Tr. 75. When a miner was lifting bags overhead, this platform became an elevated working place. Neither a handrail nor fall protection was provided. Tr. 60, 72-3. Additionally, because ANFO contains diesel fuel, it can be slippery if spilled. There was residue in the bed of the truck apparently from spillage. Tr. 59-68. All of these factors led to the inspector's determination that the miners did not have safe access to the ANFO pot creating a slip and fall hazard in violation of this standard.

Luxbacher testified that he reviewed the repair ticket submitted by a miner on the morning of October 9th requesting a safe means of accessing the pot. He called the repair shop to ensure the platform would be available on that night shift. Tr. 199-200. It is his position that providing the platform made access to the pot safe at least as of the night of October 9th. *Resp. 's Post-Hearing Br.* He stated that he "believed" that the bags were only lifted to chest height but he was not "positive" of that. Tr. 221. He also testified that before Ratliff arrived at the lunchroom and saw the truck, he (Luxbacher) climbed into the bed of the pickup truck to inspect it for ANFO residue and cleaned ANFO pellets that had spilled around the top of the pot. Tr. 205. Luxbacher also confirmed that he was well aware that this F-250 pickup truck had been used in the same manner as a blasting rig in the past and that he issued the order to the foreman to put the system back on the truck when the Getman rig was taken out of service. Tr. 195.

I reject Lhoist's position that the violation was abated with the installation of the platform. A reasonable person would recognize that the miners still had to lift the bags overhead to load the pot which necessitated standing on an unsecured platform and standing on the side rails and the roof of the truck. The violation has been established.

In Ratliff's opinion, this violation was S&S. The platform was not bolted or otherwise properly secured in the bed of the truck. The bed liner was made of plastic which caused the platform to slip under the weight of the miner's feet. ANFO was spilled creating

a slippery surface as well. The lighting was poor and the bags were heavy. There were straps, ropes, hoses and other material cluttering the area. A miner could easily lose his balance, slip, or trip when stepping on this wobbly platform or the roof or sides of the truck resulting in a head injury from striking the comers of the truck or pieces of equipment in and around it. Tr. 73. Breaks, bruises and sprains were also reasonably likely consequences of a fall. Tr. 74.

An inspector's opinion of an S&S violation is entitled to substantial weight. *Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995). Based upon the circumstances present here, I find the inspector to be credible and his opinion is supported by the evidence. I find this violation to be S&S.

The gravity of this violation is very serious. The hazard created by management put the miner filling the ANFO pot at a substantially likely risk of a fatal injury.

The inspector marked the negligence involved in this violation as high because management directed the miners to rig up the pickup truck in this manner. It had been done before in the same way. This was confirmed by Luxbacher at trial. Tr. 195. Blaster Darrell Haymore testified that he had been the one to rig it in this manner on October 8th and knew how to do it because he had done it the same way before. Tr. 173. Miners Gregory Parcell and Melvin Whitaker also confirmed that it had been in service in this condition during two night shifts before Ratliff issued the violations and it was taken out of service. Tr. 176, 180.

I do not find the installation of the platform a mitigating factor for the reasons set forth above. High negligence is appropriate.

The Secretary has assessed this violation as unwarrantable failure. Lhoist had notice that the transmission on the Getman rig was failing at least as early as October 4th and took no action to procure a rental from any source. Ex. R-4. Indeed, Luxbacher testified that he made no efforts to do so prior to the citation being issued to Lhoist. Tr. 219-20. There were numerous cords, ropes and other items coupled with spillage of ANFO in the bed of the truck which posed an obvious slip and trip hazard that had been uncorrected. In fact, the truck had been used in the same manner in the past and was ordered by Luxbacher to be put back in service without any modifications. Additionally, this was the seventh unsafe access violation issued at this mine putting Lhoist on notice that greater compliance efforts were necessary. Tr. 84.

Lhoist admits that safe access "may have been lacking" on the night of October 8th but having been made aware of the issue on the morning of the 9th it took prompt action to install the step, or platform, after a miner had requested a safe means of access. This prompt response does not rise to the level of aggravated conduct in its opinion. *Resp. 's Br. at 9*. Alternatively, it argues that if access to the pot remained unsafe thereafter, Luxbacher was unaware of it and the violation was not obvious. There were no further complaints from the miners and he used it himself and did not notice any problems with it. Tr. 207; *Resp. 's Br. at 10*. I find this argument troubling. Management is held to a higher standard of care than the

rank-and-file miner. It should not wait for a miner to make a safety complaint or to be injured before it becomes aware of a hazard such as this. Management should be ever vigilant for such hazards and be proactive in eliminating them. It would have been obvious to even a lay person that the manner in which the ANFO pot was set up on this truck posed a serious risk of injury. The pot was filled through a funnel or cone located at the top which was positioned several feet above the roof of the truck. Ex. S-9 p.8 photograph. It was readily apparent that in order for the miners to pour the 50 pound bags of ANFO into the pot they would have to climb on the side and/or roof of the truck to do so. The truck was employed throughout the night shift of October 8th in this condition. Luxbacher was also aware that it had been rigged the same way in the past and he should not have waited until a miner came forward to complain about the unsafe manner in which they were working.

Ronald Munsey⁴ was the night shift foreman at the time of this inspection. It was his responsibility to direct the location of the shots, check readings, and supervise the men. Tr. 88. He should also have been aware of the manner in which the miners were accessing the pot.

Despite Luxbacher's claims that he was unaware that the step failed to eliminate the safe access violation, he admitted that on October 10th, he climbed aboard the pickup truck, inspected the cone, or funnel, at the top of the pot and cleaned spilled ANFO material from it. He therefore had to have been aware that the platform was not bolted or otherwise properly secured to the bed of the truck allowing it to move underfoot. He also would have to have noticed that the platform did not alleviate the miners' need to reach overhead and lean forward to access the funnel. *See* photograph at Ex. S-3 p.3. In fact, on cross-examination he as much as admitted this fact. Tr. 221. Further, he was aware, or should have been, that the bags of ANFO were being brought to the face on a flatbed truck and were being handed across the back of the flatbed to the miner on the pickup. As the miners interviewed by Ratliff described it, this would require the miner loading the pot to perform a balancing act with one foot on the unsecured step and one on the side of the truck to transfer the bags from the flatbed to the pickup truck. They told Ratliff that the platform would wobble and shift as they performed this maneuver. Clearly they were still concerned for their safety as one miner suggested to Ratliff that he take a look at the truck while it was parked by the lunchroom. Tr. 169. The night foreman would have been present during the blasting cycle and would certainly have been aware that the platform was not providing them with safe access to the pot. Tr. 87-8. Luxbacher's claim that management was unaware of the violation and that it was not obvious after the platform was installed is not credible.⁵

Placing the platform in the bed of the truck did not make access to the pot safe. It also was not a reasonable attempt to abate the violation. Having been made aware that the miners were concerned for their safety in loading the ANFO pot, it would have been prudent and

⁴ Munsey was deceased at the time of this hearing.

⁵ In assessing Luxbacher's credibility, I have also considered the fact that at the time of this hearing a Section 110(c) investigation was pending which could result in subjecting him as an individual to civil penalties for knowingly authorizing, ordering, or carrying out a violation under the Mine Act.

reasonable for Luxbacher or the night foreman to have inspected the step on the 9th to insure it was properly installed and secured before the truck was used on the second night. It also would have been reasonable for management to contact one of the companies that leased blasting rigs to obtain another until the Getman was repaired. Ratliff testified that he contacted Austin Powder and Orica and was told a rig with a driver could be rented which would have been a safer option than rigging the ANFO pot on the back of a pickup truck. Tr. 57. Another way to have abated the violation would have been to cease blasting until the repairs could have been made to the Getman rig. In any event, putting an unsecured step that wobbled and shifted underfoot in the back of the pickup truck that did not alleviate the need to lift heavy bags overhead and climb on the side or roof of the pickup truck cannot be considered a reasonable step to abate the violation.

The combination of factors that made this violation obvious also posed a high degree of danger to the miners. In the event a miner should trip on the many obstacles located on and around the tank or slip on the roof or side rails of the truck or lose his balance when stepping on the platform that wobbled and shifted underfoot, there was a very high degree of probability that a serious injury would result. As the inspector testified, there were sharp corners and hard objects in the area such as a toolbox, the tow hitch, the platform itself, and the ground below that could cause fatal head injuries or other serious injuries.

The violation did not exist for a brief period of time as suggested by the Respondent. This was the second time management had put this make-shift rig into service. It had been used this second time on the night of October 8th and 9th in this violative condition. It would have been used again on the 10th and for an untold number of nights thereafter had it not been for Ratliff's intervention. Taking into consideration that this was the second time it was used in this manner without the danger being recognized or remedied coupled with the very short time in which it would take for a miner to lose his balance and fall suffering a serious or fatal injury, the amount of time miners were exposed to the violative condition was excessive. Furthermore, in a situation where the violation existed for a relatively brief period of time, the high degree of danger posed by the hazardous condition and its obvious nature may still lead to an unwarrantable failure determination. This is especially so when management is involved in creating the danger. *SecyofLabor v. Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997); *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999).

The inspector noted on his citation that Lhoist had received seven prior safe access violations, which I deem sufficient to have put them on notice that greater efforts at compliance with this standard were necessary.

For all of the above reasons, I find that this violation is an unwarrantable failure to comply with the safe access standard.

Order No. 8639931

This Section 104(d) order was issued in violation of 30 C.F.R. § 57.13011 which requires all air receiver tanks be equipped with one or more automatic pressure-relief valves and indicating pressure gauges which accurately measure the air pressure in the tank. This

ANFO tank had neither gauge on it although it did when it was on the Volvo rig.

The inspector assessed the gravity as reasonably likely to result in a fatal accident, S&S, affecting two miners with high negligence. Ex. S-4. The Secretary has proposed a civil penalty in the amount of \$4440.00.

Lhoist admits to the violation and contests only the unwarrantable failure designation.

Ratliff testified that the compressor hitched behind the truck sends air into the ANFO pot where it pushes the explosive agent through the tank into the hoses and delivers it to the drilled blast holes. The relief gauge and the indicating gauge are both designed to prevent the receiving tank from rupturing in the event of over pressurization. The former off gasses excess pressure while the latter provides an accurate reading of the amount of pressurized air in the tank. Ratliff was told by a miner that he had asked Luxbacher when transferring the tank from the old Volvo rig to the pickup whether the "pop-off" valve was needed. Luxbacher responded in the negative. Tr. 97. Luxbacher denies any recollection of this. Tr. 208. The tank was equipped with these two gauges when it was on the Volvo rig but they were removed and based upon Luxbacher's direction, were not put back on. Tr. 97, 103.

The compressor itself is equipped with a regulator which shuts the compressor down when it gets up to a certain pressure. It is also equipped with a one-way back pressure relief valve which would prevent any pressure that exceeds the capacity of the compressor from over pressurizing it. Neither protects the ANFO pot from being over pressurized. Tr. 99. The ANFO tank was re-plumbed and reconfigured with different fittings and hoses when it was installed on the pickup. As a result, there would be no way to know what its maximum pressure capacity was. A recertification and rating would be needed to make this determination. Tr. 100-2. Striking the proper balance between the two components was now left up to chance. I find under continued normal mining operations, an over pressurization and rupture of the tank was reasonably likely to occur. Should the tank rupture, it could impale someone or the compression could cause a miner to fall and strike his head or other body part against hard objects in the immediate vicinity causing a fatal or serious injury. Tr. 95-6.

I find the evidence is sufficient to satisfy the *Mathies* criteria.

The gravity of this violation is very serious, affecting two miners.

Negligence/Unwarrantable Failure

Lhoist contests the unwarrantable failure assessment, addressing three points. First, Luxbacher testified that he did not consider the ANFO pot an air receiver tank. He did not know or have reason to know that the tank did not have the gauges or that they were needed. Secondly, the tank was in service for just two days before it was removed from service. Lastly, the Secretary did not meet his burden of proving the elements of an unwarrantable failure. The inspector offered no testimony regarding his reasons for designating this violation as unwarrantable.

The Secretary argues that although the inspector determined that the operator acted with high negligence, the evidence as a whole supports a finding of a complete disregard for the safety of the miners. *Sec'y's Br. n. 6*. In fact, the inspector stated that he felt the negligence was high because the operator was aware of the missing gauges when a miner asked Luxbacher if the pop-off gauge was needed. It was an unreasonable belief on the part of Luxbacher that it was not. Tr. 103. I find no mitigating factors present to reduce the high negligence.

With respect to unwarrantable failure, I find the operator knew or should have known that the ANFO tank was an air tank and that the violation existed. Luxbacher has his mine engineering degree from Virginia Polytechnic Institute and State University. As an engineer, it should come as no surprise to him that a tank that receives air from a compressor is an air receiver subject to this mandatory standard. Additionally, as a mine manager, he is responsible for complying with the mandatory standards of the Act. Section 57.13015 requires that all air receivers be inspected by a qualified inspector with records kept available for the Secretary. The ANFO pot, whether mounted on the pickup truck or on the other blasting rig, would be subject to this inspection and record keeping requirement. The mine manager is charged with having knowledge of this provision and complying with it. This requirement, coupled with the fact that the pot had these gauges on it before it was removed from the Volvo rig, confirms that Luxbacher, at the very least, should have known this piece of equipment was an air receiver requiring the two gauges. His claim that it just didn't occur to him detracts greatly from his credibility. On the other hand, Ratliff's testimony is credible and establishes that management was aware of this violation. I also find that in addition to being known to management this violation was knowingly authorized by management.

The danger posed by not having the pressure relief valve in particular is obvious. It is common knowledge that a contained tank that receives pressurized air, water or gas is subject to explosion if it becomes pressurized beyond its tolerance level. Safety measures are critical to prevent this from occurring. The relief valve performs this function. The indicator gauge would normally also contribute a measure of safety by providing a visual reading of the pressure in the tank. In this case, however, the tank was reconfigured so that there was no way to determine its safe working pressure. Knowing how much pressure was in it would not, by itself, provide sufficient warning of its being over-pressurized, making this violation additionally aggravated. The danger posed by a tank of this size blowing apart requires little elaboration. Ex. S-9 p.1-12. The miner loading the tank would be standing within inches of it during the blasting cycle.

The absence of the gauges was also obvious. Because the two gauges were an integral and critical component of the tank their absence would be readily apparent to one using or inspecting the tank. Their absence certainly became apparent to management when a miner asked management whether the pop-off valve should be put back on.

The violation existed for two night shifts before Ratliff interceded and this rig was taken out of service. An explosion of an over-pressurized tank can happen in an instant. Using this rig for one shift was excessive; two was unfathomable. Had Ratliff not interceded, there is no doubt it would have been used until the transmission work on the Getman rig was

completed. I find the violation, under the specific circumstances of this case, was extensive and existed for an unreasonably long period of time without any action taken to abate the violation.

Absent in the record is any evidence of mitigation by the Respondent. The unwarrantable failure is appropriate.

Order Number 8639932

30 C.F.R. Section 57.14100(b) states "defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." This order was written because the inspector found that the ANFO tank was not properly secured to the truck creating a hazard to persons. Specifically, he recorded that climbing straps, rope, and a ratchet strap were wrapped around the top of the tank and had become loose. There was also a loose fitting at the top of the tank through which 120psi of air was being pushed.

The violation was marked as reasonably likely to result in a permanently disabling injury to one person, S&S, and the result of high negligence. Ratliff also found it to be an unwarrantable failure on the part of Luxbacher. This standard had been cited six times in the preceding two years. Ex. S-7. The Secretary proposes a penalty in the amount of \$16,400.00.

The tank was not welded or bolted to the bed of the truck in the usual fashion as confirmed by Lhoist's witnesses. Tr. 177, 182. It was held in place by a series of climbing ropes, regular rope and tightening ratchets. The ends of the ropes were secured with some fashion of knots which Ratliff described as "granny knots" similarly used to tie shoe laces. One end of the rope was attached to a tool box in the bed of the truck. Tr. 112. The ratchet was wrapped around the top of the tank and hooked into itself. Tr. 105-16; Ex. S-3 and Ex. S-9, photographs. The straps and ropes were loose and the tank moved easily as did the fittings supplying the pressurized air to the tank, according to Ratliff. The straps and ropes were soaked in ANFO which could decrease their load bearing capacity and no one Ratliff spoke at the scene was able to tell him the load rating for the straps and ropes which was of concern to him as well. Tr. 107, 118. The truck is driven inside the mine creating a danger of the tank falling out of the truck during transportation injuring persons in the area, in Ratliff's opinion. Tr. 118-19.

Ratliff reached the conclusion that the condition created a defective piece of equipment which posed a danger to miners in the event it fell off the truck while moving or tipped while a miner was leaning against it. Ratliff was aware that the truck had been used in this manner on the night of the 8th and 9th and was ready to be used again on the 10th had he not interceded. Miners Darrell Haymore, Gregory Parcell, Melvin Whitaker, Jr., and Steven Chandler, all Lhoist witnesses, confirmed this information. Tr. 172-4; 176-8; 180-2; 185.

Lhoist argues that a violation has not been proven. It claims that Ratliff's basis for concluding defects existed was purely speculative because he was not aware of the load rating for the climbing straps or whether they would deteriorate or weaken when exposed to ANFO. He also could not properly identify the type of knot used on the ropes. *Resp. 's Br. at 12-13*. Luxbacher testified that the McMaster-Carr chart lists nylon as resistant to oil and grease and therefore these ropes were capable of holding the tank in place. He admitted on cross-examination that the information given on that website does not say the rope is resistant to ANFO. In fact, the McMaster-Carr chart Luxbacher referred to states that fibrous nylon rope material is resistant to rot and mildew; it says nothing about oil and grease. It also states that all nylon ropes can stretch and lose strength when wet. See *www.Mcmaster.com.fibrous rope material*. Luxbacher described the knots Ratliff called "granny knots" as "water knots" which as a former climber he knows are strong climbing knots. Tr. 212. The water knot, however, is designed to join two pieces of rope together, not to loop around an object and tie back onto itself as was done here. It is also known to slip requiring inspection before each use. In climbing, it is known as the death knot for its fallibility. See *www.Wikipedia.com. water knots*. Luxbacher further admitted that he did not know if the ropes used on the pot were used or new. Tr. 222-3. He was also not aware of their load rating. Tr. 223.

It is not necessary to consult these reference materials, however, to determine that Ratliff's opinion was far more than speculative. The photographs introduced by the Secretary make clear to even a lay person, let alone someone familiar with the mining industry as Ratliff is, that the ANFO pot was rigged up in a make-shift manner. The ropes and straps were wrapped and looped in a haphazard fashion through and around various hoses, the framework of the unsecured platform, the tank and other objects in the truck bed. The ends of the ropes were frayed and damaged. Ex. S-9. Additionally, Ratliff observed first-hand that the ropes and straps were loose from use and the pot was able to be moved easily. Although Luxbacher claimed he did not notice the tank was unstable when he cleaned ANFO off it on the 10th, Steven Chandler, Lhoist's witness, confirmed that the tank had tilted and had some movement. Tr. 212, 185. Miners Gregory Parcell and Melvin Whitaker, Jr., testified that they felt bolting and welding the tank was more secure than tying it with these straps and ropes. Tr. 178, 182. I find Lhoist's argument unpersuasive.

Lhoist also argues that the truck was out of service when Ratliff observed it and there was no evidence that it would not have been corrected prior to use. I find this argument also fails. The truck was in the same condition it had been in since management told Haymore and another miner to rig it up on the 8th. Tr. 172-4. The truck was rigged and ready for use on the 10th as well. In fact, it was not until Ratliff found the violations on the 10th that the afternoon shift foreman called Luxbacher to tell him they would need to take it out of service, as Luxbacher testified. Tr. 206. Based upon these facts, the truck was available for use and was not out of service. A piece of equipment can be inspected and cited as long as it is not tagged out and parked for repairs. *Alan Lee Good, an individual doing business as Good Construction*, 23 FMSHRC 995, 997 (Sept. 2001). As long as a piece of equipment is available for use, it must comply with MSHA safety standards. *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843,844 (Apr. 1981).

Next, Respondent raises the notice requirement. As noted above, this violation would have been apparent to a lay person. The photographs depict a tower of a tank extending far

above the roof of the truck's cab haphazardly looped and tied with frayed ropes and straps tied to unsecured objects in the bed of the truck. It appears to be off balance without being secured in all directions. Lhoist states that each of its miners who appeared as witnesses are competent and experienced and each testified that the tank did not pose a hazard. I recognize that these witnesses were well aware they were called to support the Respondent's position. I also take notice of the fact that each of them on cross-examination admitted that they would have been more comfortable with the tank being welded and bolted to the bed as was done with the other rigs. I find this more telling than their assertions that it was safe. It also bears repeating that a miner told Ratliff to take a look at the truck when it was parked outside the lunchroom. Clearly, the miners had concerns for their safety. The standard to be applied here, as Respondent notes, is whether a reasonably prudent person familiar with the mining industry would have recognized that the manner in which this tank that was loose and tilting was tied up posed a hazard and would have removed it from service. *La Farge North America*, 35 FMSHRC 3497 (Dec. 2013). The answer to that is resoundingly, yes.

S&S

I find this violation was properly marked as S&S. The tank had become visibly loose and tilted after it was used on two shifts. The truck was used throughout each night shift driving to and from the faces and the wash down station. Miners leaned up against it and climbed all around it to pour the ANFO into the top of the pot to ready the shots. Under continued normal mining operations, had it not been for Ratliff's interception, the straps and ropes would have continued to loosen and deteriorate. It was reasonably likely that it would either fall during transportation or fall or tilt when leaned up against or bumped into by a miner filling the pot. This in turn would cause a miner to be struck or pushed off balance causing serious injuries such as head injuries, broken bones, sprains, and cuts.

The gravity is serious and would cause injury to at least one miner.

Negligence/Unwarrantable Failure

The violation was created by management when Luxbacher ordered the pickup truck to be rigged in the same manner in which it had been in the past. He supplied the straps that were used but did not determine their load capacity or ensure that only new ones were used. It was not only apparent to Ratliff that they were loose allowing the tank to move creating an unsafe condition. Lhoist's witnesses were well aware that the tank was tilting and was not secured in place. Management did nothing to ameliorate or mitigate the hazard. It acted with high negligence.

In addition to management creating this obvious and very dangerous hazard to the miners, Lhoist had been cited seven previous times under this standard putting them on notice that greater efforts at compliance were necessary. It existed through two night shifts and was to be used on a third shift. In view of the fact that after two shifts, the ropes and straps had already loosened allowing the tank to tilt and move easily, the condition existed for a significant period of time already. Nothing was done in mitigation of this hazard before the order was issued.

Unwarrantable failure is supported by the evidence.

Order Number 869933

In relevant part, 30 C.F.R. § 57.6202(a)(4) requires that all vehicles containing explosive material have at least two dry-chemical fire extinguishers onboard. This violation was charged because there was one extinguisher located behind the rear seat in the cab of the truck. The order was written as reasonably likely to result in permanently disabling injuries to one miner, S&S with high negligence, and an unwarrantable failure to comply. Ex. S-10. The proposed penalty is \$2,000.00.

The Respondent argues that this standard was not violated because the second extinguisher was located on the compressor trailer which was attached behind the truck. It provides no legal basis for this statement.

The language of the standard speaks for itself. It requires the vehicle containing the explosive material have two extinguishers, not the vehicle including any trailers or other pieces of equipment that may be attached thereto. The purpose of the standard is to provide two readily accessible extinguishers as a means of escape in the event of a fire. Two are required to because there are often two miners operating a blasting rig who may need to evacuate or suppress a fire. *The Safety Standards for Explosives at Metal and Nonmetal Mines*, 56 Fed. Reg. 2070, 2078 (Jan. 18, 1991). At hearing, Luxbacher testified that he "would have thought maybe they would have thrown a second in since they put the ANFO pot on it. It wasn't something I thought to check for." Tr. 230. It is clear from Luxbacher's testimony that he was aware of the requirements of this standard but did not care enough to ensure it was complied with. This violation has been established.

S&S

The Respondent has presented no argument regarding the S&S designation of this violation. I find that the lack of the second fire extinguisher contributed to a discrete hazard of the miners not being able to suppress and escape a fire on or near this vehicle carrying explosive material. Injuries sustained in a fire would be at least permanently disabling. The event of a fire is presumed in this instance. *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013). The S&S nature of the violation has been established.

The gravity is serious and could result in smoke inhalation and burns to the miner loading the ANFO pot and the miner on the flatbed truck delivering the ANFO at the face.

Negligence/Unwarrantable Failure

Luxbacher displayed a complete and reckless disregard for the safety of the miners exemplified by his statement that he didn't even think to check the truck for the fire extinguishers. Clearly, his concern was not for the safety of the miners but was focused on uninterrupted production of stone. Respondent's claim that he was not aware of the violation, that it existed for a short period of time and that it was promptly abated is not supported by

the credible evidence of record. The importance of the fire extinguishers on a vehicle containing blasting materials is critical. Luxbacher ordered this truck to be jury rigged for blasting service. That he did not take it upon himself to make an inspection of the rig before it was used on October 8th to ensure it complied with all relevant safety standards is inexcusable. Monthly inspections for fire extinguishers are mandatory and he was aware that as of the last one this truck had only one onboard. Tr. 225. The danger posed by a fire in the presence of explosive materials is extremely high. Luxbacher stated that he found ANFO pellets in and around the pot when it was parked outside the lunchroom which is an area where smoking allowed. Clearly, Respondent was not enforcing the need to keep the truck clean. There is no doubt that the truck was still in service and was to be used in its present condition again on the night of October 10th. Lhoist did nothing to abate this condition. Ratliff's issuance of the violations is what caused the truck to be taken out of service. Abatement requires the operator take action to eliminate the hazard before the inspector discovers the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989).

Based upon a totality of the circumstances, I find that high negligence and unwarrantable failure to comply with the standard are appropriate.

Order Number 8639934

The pickup truck lacked any warning signs that it contained explosive material, in violation of 30 C.F.R. § 57.6202(a)(5), which requires such warning signs to be visible from each approach. The narrative portion of the violation includes the statement that Luxbacher told employees that the signs were not necessary. The gravity is marked as reasonably likely to result in permanently disabling injuries to one miner, S&S and the result of high negligence and an unwarrantable failure to comply. Ex. S-13. The proposed penalty is \$9,300.00.

The Respondent admits the violation and I find the evidence supports such a finding.

S&S

During the blasting cycle, this truck was brought to the face to load ANFO. Once the holes drilled in the face were filled with ANFO, the truck would be taken to the next face where it would perform the same task. At the end of the shift, it would be taken to the 15 East sump area where the residual explosive material would be washed out. Tr. 39-41. As noted above, however, cleaning the truck properly was not done and it was found to have ANFO pellets around the tank when it was parked by the 14 East lunchroom where miners are permitted to smoke. Tr. 137-8. In Ratliff's opinion, there were sufficient ignition sources present from cigarettes to pieces of machinery, steel fittings and the tank which could produce a spark in the presence of the ANFO. All of the elements required for a fire were present. Tr. 145. Without the placards on the truck to identify its contents as explosive, miners would not be warned to keep burning materials away from it. ANFO is a lower class of explosive material making an ignition more likely to result in a fire rather than an explosion. Tr. 144. Because of this Ratliff opined that injuries to a miner would be burns. *Id.* Contributing to the

likelihood of such an accident was the exposure presented by having had this truck in service for three days. Tr. 143.

I concur with Ratliff's opinion that under continued normal mining conditions it was reasonably likely given the presence of fuel, air, and spark-producing items that a fire would occur and injuries sustained would be very serious if not fatal. The S&S assessment has been established.

I find the gravity of this violation to be serious.

Negligence/Unwarrantable Failure

I find this violation was the result of high negligence and unwarrantable failure for much the same reasons as in the previous violations. Management directed that the truck be rigged as a blasting rig performing the normal routine of carrying ANFO to the faces and then returning to the sump area for cleanup. Tr. 39-41. It had been in service for two shifts when Ratliff interceded preventing it from being used again on the next shift. Two shifts was far too long a time considering the grave danger posed by a fire fueled by explosive materials.

Luxbacher was fully aware that the blasting rig normally used for this task had reflective warning placards on all four sides. He was asked by a miner if the placards should be put on the pickup truck and he said it was not necessary. Tr. 148. He attempted to explain at hearing that he believed the ANFO would be loaded on the truck at the face where it would be parked behind the blast area sign. He later admitted, however, that he was aware the truck would move from face to face with ANFO onboard as well as to the cleanout area which would take it outside the blasting area. Tr. 225-6. He further testified that he considered the miner's question concerning the placards to be an "inquiry." He explained the difference between an inquiry and a complaint as follows, "Maybe the attention I give the matter, maybe give it a little more attention if it is a complaint." Tr. 225. I find his attempts to downplay the degree of negligence he exhibited underscores his reckless disregard for the miners' safety.

I find Luxbacher's assertions that he was unaware that the platform was unstable and unsecured, that the tank was an air receiver necessitating a pressure gauge and relief valve, that the explosive materials warning signs were necessary, that the truck lacked a second fire extinguisher or that the straps around the tank and the tank itself were loose to be self-serving and not credible. This is particularly egregious coming from an individual with a mine engineering degree from Virginia Tech, a leading institute of higher learning. It is apparent that production was a far greater priority than safety for the miners. Management intentionally and knowingly violated each of the mandatory standards herein exhibiting an unconscionable indifference and complete disregard for its employees.

CIVIL PENALTIES

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

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

The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

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

The parties have stipulated that the proposed penalties will not affect the operator's ability to continue in business. They have also stipulated that MSHA Proposed Assessment Form 1000-179 attached to the Secretary's Petition accurately reflects the operator's size, total assessed violations for the 24 months preceding the month the citation and orders herein were issued and the number of inspection days for the same period. The gravity, negligence and unwarrantable failure to comply with the cited standards are stated within the analysis of each of the violations above. I have taken into account the deterrent effect of civil penalties in comparison to the size of the operator and its overall resources in making this decision. *See Sec y v. Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

Having considered the six statutory criteria, I assess the following penalties:

Citation No. 8639930 - \$11,900.00

Order No. 8639931 - \$4,440.00

Order No. 8639932 - \$16,400.00

Order No. 8639933 - \$2,000.00 (This is a single order in Docket No. VA 2013-169)

Order No. 8639934 - \$9,300.00

ORDER

Lhoist is ORDERED to pay a total penalty of \$44,040 within 30 days of the date of this order.⁶

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

Distribution List:

Willow E. Fort, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Ste. 230, Nashville, TN 37219-5321

Charles H. Morgan, Alston & Bird, LLP, One Atlantic Center, 1201 West Peachtree Street,
Atlanta, GA 30309-3424

⁶ 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

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

September 8, 2014

SECRETARY OF LABOR, MSHA,
on behalf of KENNETH P. LEAR, JR.,
Complainant

v.

KENAMERICAN RESOURCES, INC.,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2014-708-D
MADI-CD 2014-22

Mine: Paradise #9
Mine ID 15-17741

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant,
R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, St. Louis, Missouri, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Kenneth P. Lear, Jr., pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Kenamerican Resources, Incorporated, to reinstate Lear as an employee, pending completion of a formal investigation and final order on the complaint of discrimination he has filed with the Secretary's Mine Safety and Health Administration ("MSHA"). A hearing on the application was held in Madisonville, Kentucky, on August 29, 2014.¹ For the reasons set forth below, I grant the application and order Lear's temporary reinstatement.

¹ The hearing was held on the Friday before the Labor Day weekend and the transcript was not received until Tuesday, September 2, 2014, which left limited time within which to issue this decision within the time specified in Commission rules. 29 C.F.R. § 2700.45(e)(1). Under these circumstances, I deem it necessary to extend the time for issuance of the decision one work day.

Findings of Fact and Conclusions of Law

Overview

Kenamerican operates the Paradise #9 mine, a large underground coal mine, located in Muhlenberg County, Kentucky. Lear worked as a belt mechanic, performing maintenance and repairs on conveyor belts and repositioning belts as needed in the development of the mine. He worked the day shift, 7:00 a.m. to 3:00 p.m., and generally worked six days a week, Monday through Saturday. Miners that are scheduled to work are required to appear in time to dress and go underground and, if not, they are to call in to the mine's dispatch office before their scheduled reporting time and report that they will be late or will not be working. If their absence is not excused, they receive an "occurrence" which can lead to disciplinary action. Under Kenamerican policy, as explained in its employee handbook, a miner who does not appear, or call in, for two successive days, is considered to have resigned. A miner who walks off the job is also considered to have resigned.

Lear failed to call in or appear for his shift on Saturday, April 26, 2014. When he reported for work on Monday, April 28, he had a confrontation with Jeffery Todd Mackey, the belt coordinator. Lear claims that Mackey gave him a work assignment that would have created a hazardous condition, disruption of mine ventilation currents, which he refused to perform. Mackey then questioned him about his failure to appear on April 26. The exchange became heated, and Lear eventually left the mine and went home. He did not call in to the mine's dispatcher or report for work on Tuesday, April 29, and did not call in on Wednesday, April 30. He came to the mine on the morning of April 30, spoke to Ron Winebarger, Kenamerican's human resources manager, and was told that his employment had been terminated.

On June 11, 2014, Lear went to MSHA's District 10, Madisonville, Kentucky, field office and filed a complaint alleging that he had been discriminated against when he was discharged. He identified Mackey and Winebarger as the persons responsible for the discriminatory action, which was described in the complaint as follows:

I had been instructed to work in unsafe conditions on numerous occasions, I finally told them no and lost my temper. We had heated words and I was later fired. I am requesting my job back and loss[sic] pay and benefits restored to me.

The Secretary investigated the complaint and, on August 11, 2014, filed an Application for Temporary Reinstatement on Lear's behalf. Kenamerican timely requested a hearing.

The Witnesses

Kenneth Lear

Lear was the sole witness called by the Secretary. He had worked as a belt mechanic at the Paradise #9 mine for five years, and reported to his foreman, Jason Durham. One of the major tasks performed by belt mechanics was moving belt head drives to other locations in the mine. It is a lengthy process that requires breaking down, or disassembling, the major components of the drive, and using a scoop to transport or drag them to the new location. Most of the head drive moves were done by Lear and Durham on the day shift.

Moving a belt head drive often required travel through locations served by different ventilation air currents, i.e., intake, neutral or return. Equipment moves between such areas involved passing through an airlock – two sets of doors that separated the different air flows. The approach set of doors would be opened, the equipment would be driven into the space between the doors, those doors would be closed, the second set of doors would be opened, and the equipment would be driven out into the new area. Lear testified that smaller parts of the head drive could be moved through the airlock successfully. However, the major component could not, because it was too large. The scoop would reach the second set of airlock doors before the towed piece of equipment cleared the first set of doors. Tr. 16. If both sets of doors were opened simultaneously, ventilation air currents would short circuit, disrupting ventilation to the working sections, exposing three crews of miners to respirable dust and potential accumulations of methane. James Nichols, a Kenamerican safety official, was present one day when Lear was about to open a second set of doors while the first set remained open. Nichols told him that “if you value your job, don’t open those doors.” Tr. 17. He added that, if he caught Lear opening both sets of doors, he would be fired. Tr. 17.

Lear confirmed that there were alternative ways to move a belt head drive. It could be pushed into the airlock and pulled out by a different piece of equipment, or it could be dragged all the way out to the bottom mine entrance and then taken in through the intake airway. However, he had been told that he couldn’t drag the drive out and back in the intake, and that when he suggested pushing the drive into the airlock, was told that there was not enough manpower or equipment to do it that way. Tr. 41-42. He testified that, subsequent to the Nichols incident, he had moved drives through an airlock with both sets of doors open, while a foreman monitored the location of safety personnel with his “text pager” to assure that they were not in the area.² Tr. 42-43, 57.

As noted above, miners in the belt department, including Lear, worked six days a week, Monday through Saturday. According to Lear, as an outby worker, he “couldn’t get a weekend off - couldn’t buy one.” Tr. 54. Occasionally, Lear and Durham worked out a “switch,” to allow them to take Saturday off, e.g., by doubling up a weekday shift, or working Sunday. Tr. 53-54. Lear had applied for and been approved to take vacation days on Thursday, April 24, 2014, and Friday, April 25, 2014. He was scheduled to work on Saturday, April 26, but did not report that day, and did not call in to advise that he would not be coming in. Tr. 39, 54.

On Monday, April 28, Lear reported for work at his regular time, a little before 6:00 a.m. He encountered Mackey outside the bathhouse/office building. He testified that the confrontation began when Mackey instructed him to move a belt drive to the #1 unit. Tr. 14. Lear had broken the belt drive down the previous week. Tr. 41. Lear asked him which scoop to use, and Mackey replied “I don’t know, you figure it out.” Tr. 19. They had “other words,” and Lear told Mackey that “federal (an MSHA inspector) is underground, safety (Nichols) is underground, I can’t go

² Underground miners are required to wear a disk-shaped electronic tag that allows their location in the mine to be tracked. Through use of a text pager the location of a particular person can be determined. Tr. 20-21.

through them doors.” Tr. 19-20. Mackey told him to “look them up on your text pager, see where they’re at, and then go do your job.” Tr. 20. After Lear had made clear that he would not move the belt drive. Mackey asked him where he was on Saturday, when he was supposed to have worked. Lear, who was angry, responded that he was “at the f-ing house.” Tr. 21-22. Mackey pressed the issue, and Lear told him to do his job - “give me an [occurrence] and leave me alone.” Tr. 24. In the course of the exchange, Lear told Mackey that they could “settle it right here,” and that he would “kick [Mackey’s] midget m-f-ing ass.” He made numerous threats to get into a fight with Mackey.

Tr. 36.

Lear turned away, stepped into the section foremen’s office briefly, came back out and had another exchange with Mackey, who then left the area. While in the foremen’s office, Lear asked James Pendergraff, a shift foreman, if he had any work for him. Pendergraff told him he couldn’t give him anything, that he had to talk to Jeffrey Rideout, the production coordinator at the time. Tr. 24. Lear asked Rideout if he had work, and told him he wanted to leave the belt department. Rideout, who had heard part of the exchange between Lear and Mackey, responded that Lear couldn’t speak to management that way, and that he had nothing for him. Tr. 25. Lear went back outside and had a few more words with Mackey. Mackey and William Piper, another miner who was in the area, left the scene. Lear, who then had nothing to do, went to the locker room, talked briefly with some miners there, put up his tool belt and hard hat and went home. Tr. 28.

Lear described a heated exchange between he and Mackey, during which Mackey raised his voice, pointed a finger in his face and got in his face. However, he conceded that Mackey, who was a Baptist preacher, did not cuss or swear. Tr. 21, 35. Rather, he described Mackey as a “smartaleck” who had a condescending manner that aggravated him. “He treats you like your stupid when you’re working for him. He’s the smart one, you’re the dumb one, and you’re going to do what he says or you’re going to have a problem with Todd Mackey.” Tr. 53.

Lear stated that there were two persons in the area of the confrontation, and that Rideout stuck his head out the door of the mine foremen’s office briefly. He also stated that Piper was present when Mackey and he discussed the work assignment. He denied that another miner, Jeffery Sullivan, who he considered a friend, was there, stating that he was in the bathhouse. Tr. 37. He spoke with Sullivan when he went to the locker room. Sullivan asked what he was doing and urged him not to leave. Lear replied that he was going home. Tr. 44. Lear denied telling Sullivan or Piper that he was quitting his job. Tr. 44. He also did not recall talking to Pendergraff more than once on the 28th, and did not believe that he told him that he’d had enough, and was quitting. Tr. 43.

Lear did not report for work on Tuesday, April 29, and did not call in to the dispatch office to report that he would not be coming in. Tr. 45, 48, 50. Lear testified that he placed two calls to the mine on April 29, in an effort to speak to Winebarger. He was connected to Winebarger’s phone, but Winebarger did not answer. The calls were transferred to Winebarger’s voicemail, but Lear did not leave a message on either occasion. Tr. 28-29, 49. Lear did not report for his regular shift assignment on Wednesday, April 30, and did not call the dispatcher to so advise. Tr. 29, 48. He did travel to the mine on the morning of April 30, to speak to

Winebarger. He wasn't sure what time it was, but thought it may have been around the time his shift would have started. Tr. 50. As he was walking toward the office, he met Pendergraff, who told him not to take things out of his locker, that he would go with him to talk to Winebarger and try to save his job. Tr. 47. However, he stated that Pendergraff "went his way. I went mine." Tr. 47. When he spoke to Winebarger, he asked about his job, and indicated that he wanted another assignment. Tr. 30. Winebarger told him that the mine superintendent had heard of the conflict and that Lear was to be fired. Tr. 30. Lear apologized for what happened, turned in his tools and safety equipment, took his property, and left the mine. Tr. 30-31.

Lear later filed a claim for unemployment compensation. He testified that he told the State agency that the confrontation with Mackey was about his being absent on that Saturday. Tr. 52. However, he also stated that the work assignment was part of it, but, that the "referee" didn't understand what an airlock door was, said that it didn't pertain to their case, and that they didn't want to hear what he had to say. Tr. 54.

Jeffery Todd Mackey

Mackey is the belt coordinator at Kenamerican, and has worked there for 10 years. The belt mechanics report to belt foremen, who report to him. If the belt foremen aren't around, he tells the men what to do. The belt department works weekends, basically six days per week, including every Saturday. Lear was scheduled to work on Saturday, April 26, but did not appear and did not call in. Tr. 75. On Monday, April 28, he encountered Lear outside the bathhouse/section foremen's office, greeted him, engaged him in general conversation, and asked him where he was on Saturday. Tr. 77. He was getting ready to do time sheets, and wanted to clarify Lear's status on Saturday. He had not yet spoken to Durham, Lear's belt foreman, and did not know whether Durham and Lear had worked out an alternative work schedule. Tr. 77-78. Lear got mad, and responded that he had "told you all a month ago that I ain't working every Saturday." Tr. 79. Mackey said, "OK, I need to know what to put on the time sheet," and started walking toward his office. Lear went toward the bathhouse. When he reached the top step, he stated, "I don't have to put up with this mess – I'll tell you what, I can take care of this right now – I'll stomp your midget [ass] right here." Tr. 80. He went into the building for a minute, then came back out and said, "Let's take care of this right here. I ain't puttin up with this. I'm tired of your f-ing mouth." Tr. 80. Mackey asked him "what's wrong with you?" Lear replied that he "ain't putting up with this," and went into the bathhouse. Tr. 80. Mackey stated that he did not give a work assignment to Lear, and had not gotten to that part of his job yet. Tr. 77, 82. He did his time sheet, and prepared to go underground.

Two miners, Sullivan and Piper came up to him and said, "You need to talk to Kenny – he's quitting." He replied that he couldn't help that, Lear was grown man, and he couldn't stop him. Tr. 82-83. Mackey denied raising his voice during his interaction with Lear, and professed that he was upset at losing him, because he was "probably the best belt man I had." Tr. 87. He had seen Lear get angry before, with other miners, and express frustration with work. He usually got over it pretty quick, and Mackey had been able to talk him out of leaving. Tr. 94-95.

Mackey confirmed that Nichols had caught Lear in the process of opening both sets of doors of an airlock. He also confirmed that opening both sets of doors would probably disrupt

the mine's ventilation system. Tr. 84-85. He denied holding airlock doors open while equipment was driven through, or ordering miners to do so. Tr. 85-86. Mackey testified that, if the head drive was broken down properly, all of the components could be moved through an airlock with a scoop, without requiring that both sets of doors be opened at the same time. He also explained that there were alternative means to move a head drive, it could be pushed into the airlock, and then pulled out the other side by a different piece of equipment. It could also be dragged out to the bottom entrance of the mine and back in the intake air current. Tr. 85-86, 92.

Jeffery Sullivan

Sullivan is a belt mechanic who worked for Mackey. He likes Lear "very much" and considers him a friend. Tr. 59-60. He noticed something going on outside the bathhouse between Lear and Mackey, and walked up to observe. Tr. 64-65. When he was about 10 feet away, he heard Mackey ask Lear where he was on Saturday. Lear said he wasn't working every Saturday, and he was tired of it. Lear asked Rideout if he had another job for him, and Rideout said he didn't. Lear then stated, "If they ain't got nothing else better for me to do, I don't want to be here." Tr. 60. While he wasn't sure of the exact words, he recalled that Lear told Rideout, "I quit," after he said he didn't have any work for him. Tr. 61. He had some conversation with Lear, along the line that he hated to see him go, but did not recall what was said. Tr. 62. He did not see Mackey get into Lear's face or stick a finger in his face, and has never witnessed Mackey yelling or cursing at employees, pointing fingers in their faces or getting into their faces. Tr. 62. He did not overhear any discussion between Lear and Mackey about job assignments. Tr. 61-62.

James Pendergraff

Pendergraff is a shift foreman, who has worked at Kenamerican for over 19 years. He testified that he did not witness the confrontation between Lear and Mackey on April 28. He saw Lear walking toward the parking lot. He was surprised, because he had already checked Lear in as a person working underground that day, and asked him, "What are you doing?" Tr. 109-10. Lear responded, "I've had enough. I quit. I'm out of here. I quit." Tr. 111. Pendergraff did not respond, and Lear left the mine site. He denied talking with Lear earlier on the 28th, or that Lear asked him if he had another job he could do. Tr. 112..

Jeffrey Rideout

Rideout, has worked at Kenamerican for eight years, and was its production coordinator at the time. He was in the section foremen's office on the morning of the 28th, and heard "clamoring" going on, "arguing back and forth." Tr. 67. Lear came in, abruptly turned, and went back out. As he turned, he said, "I'll tell you what I can do. I can kick your midget f-ing ass." Tr. 67. The words were directed at Mackey, and it appeared that he was trying to initiate a fight. Tr. 68. Mackey was outside. He replied, "What, Bud, what are you upset about?" Tr. 68. Mackey did not seem to be upset, and his voice was not raised compared to Lear's. Tr. 70. Rideout thought things were calming down. Lear came into the office a little later, and said to Rideout, "Do you have anything for me? I can't work for that m-f-er." Rideout responded, "No, Kenny, you cannot talk to a manager at this coal mines like that. And, no, I don't have anything for you." Tr. 69. Rideout went about his business, and had no further involvement.

Ronald Winebarger

Winebarger is Kenamerican's human resources manager. He generally comes into work early, and walks around outside the bathhouse/office area, in an effort to make himself available to the men. Tr. 101. He did not witness the April 28th confrontation between Lear and Mackey. He explained that under Kenamerican's policy, as explained in its employee handbook, a person who walks off the job is considered to have resigned. In addition, a person who fails for two consecutive days to report for work, or call in to the mine's dispatcher prior to the start of his shift, is considered to have resigned. Tr. 98-99. He was at work on April 29. There are a number of ways for callers to leave messages for him, including voicemail and paper notes recorded by office staff. Callers can also obtain his cell phone number from the dispatch office. He was not aware of any attempts by Lear to call him, or leave a message, on April 29.

At the beginning of the day on Wednesday, May 30, Winebarger contacted Kenamerican's corporate office and advised that Lear was "terminated." Tr. 107. "Because he was a second day no call, no show. So I immediately - - e-mailed the corporate people and told them that he was no longer employed, he had resigned his position." Tr. 107. Lear came to his office about 8:00 a.m. Winebarger had not seen Lear at the mine earlier that day. Tr. 101. Lear said, "Well, I guess I've messed up, haven't I?" Winebarger replied, "Yeah, Kenny, you know you messed up." He said, "Well, I just wanted to see what I could do as far as, you know, maybe going back to work." Winebarger said, "Well, Kenny, you resigned your job. I mean, you walked off the job. You quit." Tr. 101. Lear "sort of acknowledged" that with his body language. Winebarger asked why Lear waited until Wednesday to come in, and he replied that he was "too mad" and needed "time to cool down." Tr. 102.

The Applicable Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

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

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The “not frivolously brought” standard has been equated to the “reasonable cause to believe” standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity; (2) that he suffered adverse action; and (3) 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*, 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).

Protected Activity

A miner’s ability to complain about safety issues is a fundamental right afforded and protected by the Act. Complaints made to an operator or its agent of “an alleged danger or safety or health violation,” is specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). In addition, the Commission and the courts have recognized that, although not explicitly stated in the Act, a miner’s refusal to work in conditions that he reasonably believes in good faith to be hazardous is also activity protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein.

The Secretary presented evidence, testimony by Lear, that he refused to perform an assigned task that he believed would have created a hazardous condition, i.e., disruption of ventilation on the working sections which would have exposed three crews of miners to excessive dust and the potential accumulation of methane. There does not appear to be a dispute that opening both sets of airlock doors at the same time would disrupt ventilation of the mine. While there is a dispute as to whether it was necessary to simultaneously open both sets of doors to move the belt head drive through the airlock, Mackey confirmed that there had been a prior incident where the safety department had taken issue with Lear’s attempt to do so. There was also evidence, through Lear, that simultaneous opening of both sets of airlock doors was not an infrequent practice associated with movement of belt head drives.

There is a direct conflict in the evidence as to whether or not Lear was given an assignment to move the head drive, prompting his concerns about safety and his exposure to possible disciplinary action. Lear testified that he was given the assignment, and Mackey testified that no such assignment was given. Other witnesses to portions of their exchange did not hear a discussion of work assignments. However, those witnesses did not claim to have

witnessed the entire encounter. Lear identified one individual who he claimed was present when the work assignment was given. However, that person was not called as a witness. Whether or not he had been interviewed in MSHA's preliminary investigation of Lear's complaint is unknown.

It is well-established that the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. "It is 'not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.'" *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC.*, 31 FMSHRC 1085, 1088 (Oct. 2009) (quoting *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). See also *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary's prima facie case, are simply not appropriate at this stage in the proceeding).

The Secretary presented evidence that Lear engaged in protected activity. That evidence is sufficient to establish that this element of Lear's discrimination complaint is not frivolous. Resolving the testimonial conflict in this proceeding would be inappropriate and contrary to established precedent, which counsel for Kenamerican recognized at the close of the hearing. Tr. 118.

Adverse Action

Kenamerican contends that it is clear that Lear resigned, that there is no colorable claim that he was discharged, and that temporary reinstatement must be denied, citing *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000). Whether Bussanich had quit, or had been terminated was hotly contested. However, Bussanich had done several things subsequent to his departure that were consistent with his having quit his job. He deposited his final pay and vacation pay checks; voluntarily participated in a telephonic exit interview; made several calls about obtaining the proceeds of his 401(k) account; signed and returned an exit interview check list without protest; and accepted the proceeds of his 401(k) account which he needed to satisfy outstanding business obligations. On the "unusual facts" of that case, three Commissioners affirmed the ALJ's determination that there was no colorable claim that Bussanich had been discharged, i.e., that he had suffered adverse action. Two Commissioners dissented, believing that evidentiary conflicts on that issue should not have been resolved at the temporary reinstatement stage of proceedings. As discussed below, the facts of this case are significantly different than those in *Bussanich*.

It is not entirely clear how or why Lear's employment with Kenamerican was terminated. Lear testified that Winebarger told him that the mine superintendent had heard about the "conflict" and directed that he be terminated. It would not be unusual for a miner who admittedly cursed and threatened a supervisor to be discharged. While Winebarger did not assert that Lear was discharged for disciplinary reasons, there were no employment records introduced that purported to specify the reason that Lear's employment ended. If Lear was discharged, a host of

issues might have to be explored, including, whether his conduct was provoked by his being directed to perform an unsafe work assignment, and whether his discharge was consistent with company policy and treatment of other similarly situated employees. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924 (Sept. 2001).

Winebarger testified that Lear had been terminated by the time he saw him around 8:00 a.m. on Wednesday, April 30, because, pursuant to the two-day, no call, no show policy, he was considered to have resigned. Lear had not reported for work or timely called in to the dispatch office on Tuesday, the 29th, although he did claim to have placed two calls to Winebarger's office. He did not call the dispatcher's office prior to the start of his shift on April 30. He came to the mine that morning, but wasn't sure of the time. Winebarger did not see him until about 8:00 a.m., one hour after his shift would have started. There was no evidence as to how strictly Kenamerican's aforementioned policy has been applied, or whether its application to Lear was consistent with past practice.³

When Winebarger explained to Lear why he was no longer employed, his primary reference was to the other prong of Kenamerican's "assumed resignation" policy, i.e., that Lear had resigned because he had "walked off the job. You quit." Tr. 101. Winebarger did not explain why, if Lear's employment had been terminated for that reason, he waited two days, until April 30, to "immediately" contact the corporate office. Lear left the mine site on Monday, April 28, and there is no evidence that Kenamerican took any action that indicated that Lear was considered to have resigned as of that time. If so, issues of constructive discharge and provocation might have to be addressed.

Lear is alleged to have told several people that he "quit." He denied using that term, and his actions were arguably inconsistent with an intention to quit. When he left, angrily, on April 28, he returned his tools and other equipment to his locker. He did not return his tools and personal protective equipment to Kenamerican or remove his personal property until after speaking with Winebarger on April 30. His appearance at Winebarger's office to inquire about his job status and see if he could get a different assignment was also arguably inconsistent with an intention to quit, although it could also be construed as evidencing a change of heart.

As with Lear's claim of having engaged in protected activity, there is conflicting evidence on whether he voluntarily left his job, or whether his employment was terminated against his wishes. The evidence establishes a colorable issue that Lear suffered adverse action.

Nexus Between Protected Activity and Adverse Action

The Commission has frequently acknowledged that it is very 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). Consequently, the Commission has held that "(1) knowledge of the protected activity;

³ In *Bussanich*, the ALJ also considered whether Centralia discriminatorily failed to rehire the miner who had quit his job. Winebarger testified that Kenamerican can rehire miners who have resigned. It does not appear that such an option was discussed with Lear.

(2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action” are all circumstantial indications of discriminatory intent. *Id.*

Here, the alleged adverse action, whether it was discharge, constructive discharge, or termination, closely followed Lear’s claimed protected activity. There is a more than ample nexus between the claimed protected activity and the adverse action to raise a colorable issue that it was motivated, at least in part, by the protected activity.

Conclusion

Every element of Lear’s discrimination complaint is contested by Kenamerican. It introduced substantial evidence that Lear did not engage in protected activity, that he did not suffer adverse action, and that his employment was terminated for a legitimate non-discriminatory reason. It may eventually prevail on any or all of those issues. At this stage of the proceedings, however, they cannot be finally resolved.

The legislative history of the Mine Act indicates that section 105(c)’s prohibition against discrimination is to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation, and that Congress clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Congress intended that the benefit of the doubt be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Sec’y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Company*, 35 FMSHRC 811, 814 (Apr. 2013), citing *Jim Walter Resources*, 920 F.2d at 748, n.11.

The U.S. Court of Appeals for the Eleventh Circuit has described the test for whether the Secretary has established that a claim of discrimination was not frivolous as follows:

If the evidence produced by the Secretary viewed in the light most favorable to the claimants, together with all inferences that can be made in favor of claimants, would reasonably support a finding that claimants had established a prima facie case, the claim cannot be said to be frivolous.

Drummond Company, Inc. v. FMSHRC and Secretary of Labor on behalf of Owens, (11th Circuit No. 02-14394, May 9, 2003) (unpublished opinion at 6).

The temporary reinstatement provision of the Mine Act is heavily weighted in favor of the miner, who can be restored to his job, often in areas where employment opportunities are limited, pending the investigation and resolution of his discrimination complaint. If the Secretary determines that the claim lacks merit, an order of temporary reinstatement is promptly vacated. If the Secretary determines to pursue a formal complaint of discrimination before the Commission, the “temporary” relief could extend for years while the discrimination case proceeds through

decision at the ALJ level, and potential appeals to the Commission and/or the courts.⁴

Here the protected activity claimed by Lear, his refusal to perform a task that would have resulted in a hazardous condition, is supported only by his testimony. Substantial evidence, testimony by other witnesses, and excerpts from records of the proceedings on his unemployment compensation claim, weigh against his testimony. There may be, as in *Bussanich*, cases where a claimant's testimony may not be sufficient to establish that the claim is not frivolous. Here, there are "loose ends" that justify granting of the application, although arguably not by a wide margin. Completion of the Secretary's investigation of the complaint should clarify areas of ambiguity and allow an informed determination of whether to initiate a formal claim of discrimination on Lear's behalf. Under section 105(c)(3) of the Act, the Secretary's determination is to be made on or before September 9, 2014.

I find that the Secretary has established that Lear's claim of discrimination is not frivolous.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Kenamerican Resources, Inc., is **ORDERED to reinstate** Lear to the position that he held prior to April 30, 2014, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified and electronic Mail):

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37215

Kenneth P. Lear, Jr., 235 Bruce Lane, Breman, KY 42325

R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, 7700 Bonhomme Avenue, Suite 650, St. Louis, MO 63105

⁴ See, e.g., *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1187 (Sept. 2009) (ALJ) (Application for Temporary Reinstatement denied); *rev'd temporary reinstatement ordered*, 31 FMSHRC 1085 (Oct. 2009); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 33 FMSHRC 1980 (Aug. 2011) (ALJ) (Complaint of Discrimination dismissed).

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

September 8, 2014

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

v.

PICKETT MINING GROUP,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-101-M
A.C. No. 31-02224-270791

Mine: Pickett Mining Group

DECISION AND ORDER

Appearances: Yasmin K. Yanthis-Bailey, Esq. U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for the Petitioner

Jeff Pickett, New London, NC, for the Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act). The Respondent was issued a single citation for an alleged violation of 30 C.F.R. § 56.14107(a) for failure to guard the fan blades and alternator drive belt on a Ford tractor that was allegedly parked on a mine access road. The Secretary of Labor proposed a penalty of \$121. A hearing was held in Charlotte, North Carolina on May 6, 2014. The parties submitted post-hearing briefs, which I have considered in rendering this decision.

For the reasons set forth below, I find that the Mine Safety and Health Administration (MSHA) lacks jurisdiction over the cited Ford tractor, and accordingly I vacate the citation.

Summary of Evidence and Findings of Fact

Jeff and Tina Pickett operate a recreational campground and "pan for gold" business called Cotton Patch Gold Mine on a piece of property in New London, North Carolina. Tr. 5. On the same piece of property, Mr. Pickett runs a commercial gold mining business called Pickett Mining Group. Tr. 5. Pickett Mining Group employs several miners and has operated a single open-pit gold mine on the New London property since about 2008. Tr. 75, 86. The mine formerly was active about three or four months out of the year, but apparently the commercial pit is now abandoned. Tr. 50, 84-5.

The parties do not dispute that Pickett Mining Group is covered under the Mine Act. MSHA regularly inspects Pickett Mining Group's worksite, which includes the commercial pit, the mill site, an explosives magazine, and half of a fuel shed that is shared between Pickett Mining Group and Cotton Patch. By contrast, MSHA does not claim jurisdiction over Cotton Patch or over any part of the recreational side of the New London property. Tr. 18.

The Citation

On September 14, 2011, MSHA Inspector Cecil W. Worrell, Jr.¹ conducted a regular inspection of Pickett Mining Group's mine. Tr. 9-10; Ex. S-1. The mine was idle on the day of the inspection. Tr. 10, 13. The only employee present when Worrell arrived was Ronnie Crook, who identified himself as the lead man and plant operator who was in charge of the mine when Mr. Pickett was away. Tr. 10, 26-7. Mr. Pickett later arrived at the mine site to join the inspection party, which also included Inspector David Nichols of MSHA's Staunton, Virginia field office.² Tr. 11.

During the inspection, Worrell observed a "Ford 8N tractor" with unguarded fan blades and an unguarded alternator drive belt sitting on a road on the New London property near the explosives magazine, where Crook had parked it. Tr. 12-14; Exs. S-1, S-3. A bush hog mower was attached to the tractor. Tr. 17. Inspector Worrell believed that the tractor, which was "rather an old model" without an automatic shutoff mechanism, presented a loss-of-limb hazard to any miner who might come into contact with the unguarded moving parts. Tr. 12. Worrell interviewed Crook about the tractor, took photographs of the unguarded tractor parts, and issued Citation No. 8640280. Tr. 12; Ex. S-1; Photographs S-4, S-5, S-6. The citation alleges a violation of 30 C.F.R. § 56.14107(a) for failure to properly guard moving machine parts. Ex. S-1. After Worrell issued the citation, the tractor was tagged out of service. Ex. S-2.

MSHA Inspector Danny R. Ellis,³ who had inspected Pickett Mining Group several times in the past, terminated the citation about eighteen months later on April 3, 2013 after observing that the tractor "had been removed from mine property." Tr. 32; Ex. S-7. The bush hog mower was still attached to the tractor and the fan blades and belt drives were still

¹ Worrell testified he has worked out of MSHA's Sanford, North Carolina office as a mine safety and health inspector for about six years. Previously, he worked for Arrow Products for nine years, spending his last five years there as a safety director and quality control manager. He attended the Miner Safety and Health Academy in Beckley, West Virginia to receive his training to become a mine inspector. His area of expertise is impoundments. Tr. 8-9.

² Worrell testified that Nichols accompanied him to the mine site because they had heard a rumor that Pickett Mining Group had opened a shaft underground. This rumor proved to be unfounded. Tr. 11, 23.

³ Ellis has worked as a federal mine inspector for 22 years and has worked out of MSHA's Sanford, North Carolina office since 2008. Tr. 30-1.

unguarded. Tr. 32; Ex. S-7. Inspector Ellis was told the tractor had been towed from its former location, but at the hearing he could not recall how far the tractor had been moved. Tr. 32, 34.

Use of the Cited Tractor

When he was interviewed during the inspection, Ronnie Crook averred that he uses the cited Ford tractor to mow grass on the recreational side of the New London property- i.e., the portion of the property used by Cotton Patch campground, not the MSHA-regulated portion. Tr. 17, 25; Ex. S-3. Mrs. Pickett testified that Crook works for her on the recreational side of the property on the weekends. Tr. 57-9. She indicated the Ford tractor is used exclusively to mow the lawn at Cotton Patch, and to her knowledge it has never been used without the bush hog mower attached. Tr. 59-61. The tractor is sometimes parked on the recreational side of the property during the summer and the rainy seasons, but when the grass does not need to be mowed frequently, it is parked on the non-public side of the property in the general area where the citation was issued. Tr. 73-4.

Mr. Pickett testified the tractor has never been used to haul equipment on mine property. Tr. 84. He testified that the bush hog mower has been attached to the tractor for so long, it might not be possible to remove it. Tr. 37, 75. He asserted there is no grass and therefore no use for the tractor and bush hog on the MSHA-regulated portions of the New London property. Tr. 77-8. He cited photographs of the New London property in support of his assertions.⁴ Pictures labeled "mill area" show a gravel-strewn clearing in the woods accessible by a gravel and dirt road and containing a rock crusher, springers, conveyors, a storage shelter, and other equipment. Some sparse weedy undergrowth is visible in this area, but no grass. Photographs R-1 to R-5; Tr. 41-2, 51-2.

The Secretary does not dispute that the Ford tractor is primarily used to mow the grass for Cotton Patch. The narrative portion of the citation alleges that the tractor is used by "[o]ne miner... as needed" for "mowing purposes." Ex. S-1. Inspector Worrell acknowledged at hearing that he would not consider Crook a "miner" when he is on the recreational side of the New London property, but indicated he would begin considering Crook a mine employee as soon as he drove the tractor onto mine property. Tr. 25-7. Worrell further acknowledged that the tractor was not in such a state that it could have been used for mining purposes on the day he issued the citation, as Pickett Mining Group would have had no use at its mine for the attached bush hog mower. Tr. 17. However, he felt that the bush hog could be easily removed and that the tractor could be used to pull stones or equipment if the bush hog were no longer attached. Tr. 18. "I didn't see [the tractor] used that way, and I don't know if it *would* be used that way," he testified, "[b]ut it *could* be used that way." Tr. 18 (emphasis added). However, he later conceded he had no reason except the tractor's location to believe the tractor was ever used on mine property. Tr. 25.

⁴ Mr. Pickett labeled each photograph with a date and location, marked where each was taken on a copy of his hand-drawn map, and numbered them 1 through 14. In this decision, the photographs will be referred to as Photographs R-1 to R-14.

Inspector Ellis also offered his opinion at the hearing on potential uses of the cited tractor. Like Inspector Worrell, he did not believe the tractor could be used for mining operations with the bush hog attached. Tr. 35. However, he testified that a bush hog is easily removed and opined that the cited tractor could be used to haul mining equipment and supplies if the bush hog were removed. Tr. 35-6. He also testified that the tractor had been "used" such that it fell under the jurisdiction of the Mine Act because it had been driven on mine property. Tr. 36-37. On cross-examination, Ellis conceded that he had no special knowledge of how difficult it would be to remove a bush hog from that particular model of tractor, which is a 1942 Model N Ford and an antique, according to Mr. Pickett. Tr. 7, 37. Ellis further conceded that, considering Pickett Mining Group's overall safety record,⁵ he did not believe the operator would actually use a piece of equipment like the cited tractor for mining. Tr. 38.

Location of the Cited Tractor and Layout of the New London Property

At the hearing, Inspector Worrell indicated that his sole ground for asserting jurisdiction over the cited tractor was his belief that the tractor was parked on mine property. Tr. 25. His handwritten notes from the inspection explain his rationale:

This tractor is used to mow the recreation area. However it was in the mine parked alongside the pit access road near the magazine ... The rear pit access road is used to access the pit as well as the magazine. Miner has parked this machine here. Miner could suffer loss of limb type injury due to this condition ... Ronnie Crook stated he thought this machine was exempt as it's used for recreation. However, it was parked in the mine along side the mine road.

Ex. S-3. At the hearing, Worrell testified he could see no reason a dual-usage machine would be parked where the tractor had been located, because the access road where it was parked led to the pit and magazine. Tr. 14. Thus, he apparently believed that the sole purpose of that road was to provide access to the MSHA-regulated pit and magazine. On cross-examination, when questioned as to whether he remembered the access road being used for other purposes, he testified he was unfamiliar with any dual-purpose usage of that road; did not recall a path to the creek branching off of it; and did not recall seeing lumber, railroad ties, trailers, or equipment stored on the side of the road. Tr. 50, 52-5.

When Inspector Ellis conducted an unrelated inspection of the Pickett Mining Group mine in March 2012, about six months after Worrell had issued the citation at issue here, Ellis observed the cited tractor parked in the exact same place it had been when the citation was issued. Tr. 32-3. He opined the tractor was on mine property at that time because it was between the plant and the pit. Tr. 33. Like Inspector Worrell, he saw no reason for anyone other than a miner to come to that location because he "saw no other activity that could occur in that area." Tr. 33-4.

⁵ Inspectors Worrell and Ellis both testified that on a scale of zero to 100, with 100 representing 100% compliance with safety standards, Pickett Mining Group's safety rating is about 90. Tr. 24,37-8.

Mr. Pickett does not dispute that at the time the citation issued, the cited tractor was parked near the explosives magazine on the side of the access road that runs between the pit and mill. However, he characterizes the access road as a dual-purpose road and the area where the tractor was parked as the main storage area for the entire New London property. Tr. 69-70, 72. At the hearing, he explained that the access road "cuts across the piece of property, and we use both sides of the property for recreational and personal storage." Tr. 79. He testified that non-miners are not allowed in the pit and mill areas, but non-miners and employees of the recreational side access the area where the tractor was cited all the time in order to move supplies and equipment to and from the storage area. Tr. 75-6, 81-2.

There are two distinct areas of the New London property, as shown in the hand-drawn map introduced by Mr. Pickett. One is the publicly accessible recreation area and the other is the non-public area. The recreation area includes Cotton Patch's campground and recreational mining pit, along with a public path to the creek. The non-public area is a wooded area at the back of the property with an access road running through it. Map, Ex. R-1.

The fuel shed is the first structure a person walking down the road would encounter when crossing onto the non-public side of the property. Ex. R-1. The fuel shed is used by both Cotton Patch and Pickett Mining Group. Ex. R-1; Tr. 24, 40. A bam, which is used for storage, is located in the same clearing as the fuel shed. Photograph R-9. MSHA apparently considers these two structures to mark the outer boundary of the mine area, with everything beyond them on the non-public side of the property constituting mine property.⁶ This would include Pickett Mining Group's commercial pit, a storage area, an explosives magazine, a path to the creek labeled "upper road to creek area," Pickett Mining Group's milling site, and the access road itself, which eventually loops back onto the recreational side of the property. Ex. R-1.

As noted, at the time the Ford tractor was cited, it was parked along the access road near where the storage area and magazine are located. Ex. R-1; Ex. S-3; Tr. 41, 52. The storage area and magazine are in the woods alongside the access road, on the same side of the road as the commercial pit. Ex. R-1; *see* Photograph R-10 (showing the magazine is just at the edge of the storage area). The magazine is an MSHA-regulated facility used exclusively by Pickett Mining Group. Tr. 41, 80, 87-8. However, the storage area is not. As seen in pictures introduced by Mr. Pickett, the storage area consists of a section of woods where machinery is parked on the side of the road and equipment and supplies are piled up in the

⁶ Inspector Worrell testified he considered everything on the New London property "[b]eyond the fuel shed where there's now an abandoned pit" to be mine property. Tr. 50. Inspector Ellis testified that the mine area included everything on the left side of the road in Photograph R-6 (which would include the pit, storage area, magazine, and, further down the road, the upper creek path and mill area). Tr. 42; Ex. R-1.

woods beside the road. For example, one picture shows a flatbed truck and backhoe parked just off the road at the storage area with boxes, equipment, and tarp-covered piles of supplies visible in the woods beyond. Photograph R-6 (taken in May 2014). Other pictures show various equipment and supplies sitting in the woods at the storage area, including a dumpster-sized blue storage bin, piles of lumber and rail ties, and pallets of building materials. Photographs R-7, R-8, R-11 to R-14 (taken in September 2012 and May 2014). Mrs. Pickett testified the lumber and other items had been stored at that location since she and her husband moved to the New London property, and the storage trailers seen next to the bam in Photograph R-9 used to be parked there as well. Tr. 64-5. Mr. Pickett indicated that the items and equipment kept in the storage area are used on either or both sides of the property. For example, the backhoe is used on the recreational side of the property and the railroad ties are used to build barrier walls on both the recreational and MSHA-regulated sides of the property. Tr. 40, 53. Mr. Pickett testified that the equipment and trailers in the storage area have been there for years and have always been moved back and forth between the recreational and commercial sides of the property, and MSHA has never before attempted to regulate them. Tr. 70-1, 76.

Mr. Pickett's map does not show where the tractor was moved after the issuance of the citation. At the hearing, Mr. Pickett asserted that at the time the citation was terminated, the tractor was parked on the same side of the access road as when the citation was issued, but had been moved about one hundred feet down the road. Tr. 70. He did not specify in which direction the tractor was moved. Inspector Ellis took a picture of the tractor in its new location at the time he terminated the citation. Tr. 34; Photograph S-9. A grainy, black-and-white copy of that photo shows the tractor parked in front of a barely discernible wooded area and a large box-shaped piece of equipment, which appears to be black and white. Photograph S-9. Initially, Inspector Ellis testified he could not identify that piece of equipment and could not say how far the tractor had been moved since the issuance of the citation. Tr. 34, 39. Mrs. Pickett offered testimony that the unidentified piece of equipment was one of two boxes, one blue and the other black-and-white, that have been sitting behind a trailer on the property for several years. Tr. 66-8. Photographs R-13 and R-14, which were taken in May 2014, show the referenced blue box sitting in the storage area on the New London property. After viewing those pictures, Inspector Ellis agreed that the blue box might be the same box pictured in Photograph S-9. Tr. 45-8. Inspector Worrell testified that the boxes in the pictures resembled each other but did not look the same to him. Tr. 55-6.

Discussion and Conclusions of Law

The issue before me in this case is whether MSHA had jurisdiction to cite the Ford tractor for a violation of 30 C.P.R. § 56.14107(a).

Statutory Definition of "Coal or Other Mine"

Section 3(h)(1) of the Mine Act contains the following three-part definition of "coal or other mine":

"[C]oal or other mine" means (A) an area of land from which minerals are extracted

in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and 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.

30 U.S.C. § 802(h)(1). It is well established that Congress intended this definition to be interpreted broadly. *See, e.g., Calma! Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005), *citing* S. Rep. No. 95-181, at 14 (1977) ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation."). However, the courts have recognized that the jurisdiction of the Mine Act is not without limitations. *See, e.g., Secretary of Labor v. Nat'l Cement Co. of Cal., Inc., et al.*, 573 F.3d 788, 794-95 (D.C. Cir. 2009) (rejecting unreasonably expansive reading of subsection 3(h)(1)(B)); *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (Nov. 1985) ("While we have recognized that the definition of 'coal or other mine' provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly ... the inclusive nature of the Act's coverage is not without bounds."); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984).

In *Secretary of Labor v. National Cement Company of California*, the Court of Appeals for the D.C. Circuit discussed reasonable limitations on what could be considered part of a "coal or other mine" under subsections 3(h)(1)(A), (B), and (C). 573 F.3d at 793-97. In that case, the subject mine operator leased its mine site from a ranch and held an appurtenant easement to the ranch-owned road that provided the sole means of access to the mine. *Id.* at 789-90. MSHA, asserting jurisdiction under subsection (B), had cited the mine operator for failure to maintain the access road in safe condition. *Id.* at 790. The D.C. Circuit had previously expressed concerns that subsection (B) may be susceptible to an overly broad reading. *Id.* at 791. To allay these concerns, the Secretary explained that she interpreted subsection (B) more narrowly than subsection (A). She took the position that subsection (A), which covers extraction areas, extends to all the facilities and equipment within the boundaries of the extraction area, because virtually everything within an extraction area is necessarily related to mining activity. *Id.* at 794. However, she interpreted subsection (B), which covers private ways and roads appurtenant to extraction areas, to apply only to the ways and roads themselves. *Id.* Applying this interpretation, equipment and vehicles traveling on such roads would fall under MSHA jurisdiction only if they were covered under subsection (C), which covers only those facilities and equipment that are "used in, or to be used in, or resulting from" mining activities. The D.C. Circuit found that this interpretation of section 3(h)(1) was reasonable and in harmony with the Mine Act's overall enforcement scheme. *Id.* at 794-97.

The Parties' Positions

The Secretary asserts that because Pickett Mining Group is subject to MSHA's jurisdiction, the only remaining question is whether the cited Ford tractor was located in an MSHA-regulated area when the citation was issued. Secretary's Post Hearing Br. at 5-6. Acknowledging that MSHA lacks jurisdiction to issue citations on the recreational side of the New London property, the Secretary nonetheless contends that any equipment and facilities available for use by miners must comply with MSHA safety standards regardless of their location. *Id.* at 6. The Secretary asserts that the Ford tractor was subject to MSHA jurisdiction at the time it was cited because it was used by a miner, was available for use in mining, and was located on mine property. *Id.* at 7. The Secretary further argues that MSHA has jurisdiction over access roads under section 3(h)(1)(B) of the Mine Act, and therefore the tractor's location on the side of the mine access road subjected it to MSHA jurisdiction. *Id.* at 7-8.

Pickett Mining Group asserts that the tractor was parked in a storage area the operator shares with Cotton Patch Gold Mine. Respondent's Post Hearing Br. at 1. Pickett Mining Group contends that MSHA has historically allowed dual access to and usage of this area, which is used for storage of personal equipment and miscellaneous other items. *Id.* Pickett Mining Group further argues that the Ford tractor has never been used on mine property because there is no grass to mow, and the tractor never will be used on mine property because the company's operational and safety protocols preclude use of a piece of equipment of the tractor's age and condition. *Id.* at 2. Pickett Mining Group also argues that MSHA has inconsistently interpreted what part of the New London property constitutes mine property, considering that MSHA determined the tractor had been moved off of mine property when it had merely been moved one hundred feet down the road. *Id.* at 3.

Analysis of the Facts

The first point the Secretary makes in his closing brief is that Pickett Mining Group's operations fall within the definition of a "coal or other mine." Petitioner's Br. at 5. Pickett Mining Group does not dispute this fact. However, a mine's MSHA-covered status does not give the Secretary authority to regulate equipment that is not located within the boundaries of the extraction area, is not a component of an appurtenant road or way, is not used by the operator's employees, and bears no relation to its mining operations. I conclude that the Secretary has impermissibly attempted to regulate such equipment in this case. For the reasons discussed below, I find that MSHA had no jurisdiction to issue a citation to the Ford tractor.

First, consistent with the Court's decision in *National Cement Company of California*, discussed above, I find that the Ford tractor is not covered under section 3(h)(1)(B) of the Mine Act because the tractor is not a component of a road. A vehicle's mere presence on "private ways and roads appurtenant to" a mine site is not sufficient to bring the vehicle within the jurisdiction of the Mine Act.

Second, I find that the tractor is not subject to the jurisdiction of the Mine Act under section 3(h)(1)(C) because there is no evidence it has been used in, will be used in, or is the product of mining activities. The Secretary argues the tractor is subject to Mine Act jurisdiction because it was used by a miner and could be used for mining. Secretary's Post Hearing Br. at 7. However, the tractor is and always has been used to tow a bush hog and mow the grass on the Cotton Patch campground. It is true that mine employee Ronnie Crook uses the tractor on the weekends, but not in his capacity as a miner. When using the tractor, he is working as a weekend campground employee and is paid out of campground funds and accounts. Tr. 57-61. It is undisputed that there is no grass on Pickett Mining Group's property and worksite, so Pickett Mining Group has no use for the bush hog mower that is attached to the tractor. Inspector Worrell suggested at hearing that the tractor could be used to haul equipment if the bush hog were removed. Tr. 18. However, Mr. Pickett testified it may be difficult or impossible to remove the bush hog without taking measures such as shearing off the bolts, considering that the tractor is an antique 1942 model and the mower has been attached to it for a very long time. Tr. 34, 70. Inspector Worrell ultimately conceded he had no reason to believe the tractor had ever been used on mine property except that it was parked on the access road, and Inspector Ellis testified he did not believe Pickett Mining Group would ever use a piece of equipment like the tractor in its mining operations. Tr. 25, 38. In short, there is no evidence that the tractor has ever been used by Pickett Mining Group's employees or in connection with its mining activities, and it appears highly unlikely the tractor would ever be used for mining considering its age, customary usage, and the difficulties and hindrance detaching the bush hog would likely entail.

Finally, at the time the citation was issued, the tractor was not located at Pickett Mining Group's commercial pit, mill, or any other location that could be deemed part of an "extraction area" under section 3(h)(1)(A) of the Mine Act. Rather, the tractor was parked along the access road between the pit and the mill near the explosives magazine, on the same side of the road as the pit. Mere proximity to the magazine or pit is not grounds for assertion of jurisdiction. At the hearing, the Secretary's witnesses advanced the theory that the tractor was parked on mine property. They variously delineated the bounds of the mine property as including (1) everything "[b]eyond the fuel shed where there's now an abandoned pit," and (2) everything on the same side of the access road as the pit. Tr. 42, 50. However, Pickett Mining Group has introduced maps, photographs, and witness testimony suggesting that the property beyond the fuel shed on both sides of the access road is a dual-purpose storage area routinely accessed and used both by miners and by non-miner employees of the Cotton Patch campground and recreational area. Specifically, Mr. Pickett testified that equipment and supplies used on both the recreational and mine sides of the New London property, such as a backhoe (used on the recreational side) and railroad ties (available for use on either side of the property as needed) have been stored along the access road for years without MSHA's oversight or intervention. Tr. 40, 53, 69-82. His wife offered corroborating testimony, stating that the lumber and equipment had been in the storage area since she and Mr. Pickett moved to the New London property several years

back. Tr. 64-5. Mr. Pickett also submitted photographs taken in September 2012 and May 2014 showing machinery parked along the access road; equipment and supplies sitting in piles in the woods on the pit side of the accessroad; and the large storage barn across the road, which is not MSHA- regulated. Photographs R-6toR-14;Ex.R-1. TheMSHA inspector who issued the citation claimed he did not recall seeing various equipment or supplies between the pit and mill at the time he inspected the property. Tr. 52-5. However, MSHA's other witness testified he remembered seeing some of the trailers and storage boxes parked along the access road and seemed to agree that Mr. Pickett's photographs accurately depicted the storage area between the pit and mill. Tr. 39-45. On consideration, I find that the Picketts' description of a shared storage area along the access road makes sense in light of the layout and dual-purpose nature of the New London property and is credible. The tractor's location was not part of Pickett Mining Group's mine, but was part of a storage area that mine employees occasionally accessed.

Mr. Pickett testified that to abate the citation, he merely moved the tractor about one hundred feet down the same side of the access road, and MSHA was satisfied. Tr. 70. The MSHA inspector who terminated the citation could not recall how far the tractor had been moved and did not provide any details about its new location except that he felt it was no longer on mine property. Tr. 32-4. The photograph he took at the time of termination shows the tractor sitting along the edge of the woods in front of a box that is almost identical in appearance to a blue box seen in Mr. Pickett's photographs of the storage area. Photograph S-9; Photographs R-13, R-14. Mrs. Pickett testified that two boxes like the one in the termination photo had been sitting in the storage area since the Picketts moved to the property. Tr. 66-8. Taken together, the evidence weighs in favor of a finding that at the time the citation was terminated, the tractor was parked in essentially the same place it had been parked when the citation was issued. Thus, MSHA terminated the citation even though the tractor had not been moved out of the area its witnesses defined as "mine property." This further undermines the Secretary's position that the tractor was parked on MSHA-regulated mine property in the first place.

Citing various cases, the Secretary argues that because the tractor was parked in a dual- use area, it was subject to MSHA regulation so long as it was available for use by miners. However, the cases the Secretary cites are readily distinguishable from the instant case in that all of them include findings that the cited equipment was used for mining purposes.

For example, in *W.J. Bokus Indus., Inc.*, the Commission found that MSHA had jurisdiction to issue citations in a dual-use garage for improper storage of compressed gas cylinders, exposed wiring on a stove fan, and a defective grinding machine. 16FMSHRC 704 (Apr. 1994). The Commission first found that each piece of equipment at issue in that case was "used or to be used" in mining: the gas cylinders were used by miners as needed, the grinding machine was used to maintain mine equipment, and miners used the stove to

heat the garage while they were working in it. *Id.* at 708. The Commission then went on to explain how each cited condition could injure miners working in the garage. *Id.* By contrast, in this case the equipment in question is not used by miners or in mining. Moreover, the chance that the cited condition will injure a miner is virtually a nullity, as the unguarded moving parts present a hazard to miners only when the tractor's engine is engaged while it is in a dual-purpose location, and this apparently occurs only when Ronnie Crook is working in his capacity as a recreational employee on the weekends.

The Secretary also cites *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843 (Apr. 1981), in support of his argument that equipment "available for use" is subject to regulation. In that case, the evidence definitively showed the cited equipment, a track mobile with a defective component, had been used in mining. 3 FMSHRC at 844. However, the Commission went on to find that even if the evidence had been insufficient to show actual use during the time when the defect was present, the equipment was still "used" within the meaning of the Mine Act because it was located in its normal work area (on the tracks) and was fully capable of being operated. *Id.* at 845. The Commission noted, "To preclude citation because of 'non-use' when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Id.* By contrast, in this case, there is no indication the cited equipment was ever used in mining or ever will be used in mining, rendering inapposite the concerns underpinning the Commission's dicta in *Ideal Basic*.

The other three cases cited by the Secretary are Administrative Law Judge decisions which I may consider as persuasive authority. However, again, these cases are factually distinguishable from the case at hand. In *Jeppesen Gravel*, the ALJ upheld MSHA's assertion of jurisdiction over a loader that was being used to load processed gravel into dump trucks for removal from the mine, characterizing this as an "integral part of [the] overall mining operation." 32 FMSHRC 1749, 1750 (Nov. 2010) (ALJ). In the case at hand, the cited equipment was not a part of Pickett Mining Group's mining operation at all. In *Titan Constructors, Inc.*, the ALJ found that MSHA could assert jurisdiction over a mechanic shop when the evidence affirmatively established that the tools and materials in the shop had been used to repair and maintain mine equipment. 34 FMSHRC 403,412 (Feb. 2012) (ALJ). Finally, in *Beylund Construction, Inc.*, the ALJ determined MSHA had appropriately asserted jurisdiction over the equipment in question under section 3(h)(1)(A) of the Mine Act because the equipment was located at the extraction site -that is, at the mine itself. 31 FMSHRC 1410, 1414 (Nov. 2009) (ALJ). Here, the cited tractor was not located within the bounds of the extraction site, as discussed above. After considering all the

foregoing, I find that none of the cases the Secretary cites support a finding that equipment located in a dual-use area is subject to Mine Act jurisdiction when the equipment in question is not used by miners, has never and will never be used for mining activities, and does not pose a risk of injury to bystanders.

Accordingly, I find that MSHA had no jurisdiction to issue Citation No. 8640280.

ORDER

It is ORDERED that Citation No. 8640280 is DISMISSED.

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

Distribution:

Jeff Pickett, Pickett Mining Group, 41697 Gurley Road, New London, NC 28127

Yasmin K. Yanthis-Bailey, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

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

September 10, 2014

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

v.

AMERICAN COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2011-1054
A.C. No. 11-02752-265355

Docket No. LAKE 2011-1055
A.C. No. 11-02752-265355

Mine: The American Coal Company New
Era Mine

DECISION AND ORDER

Appearances: Ryan L. Pardue, Esq., Department of Labor, Office of the Solicitor,
Denver, Colorado 80202, on behalf of the Petitioner,

Jason W. Hardin, Esq. and Mark Kittrell, Salt Lake City, UT, on behalf of
the Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves nine (9) section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to American Coal Company (“AmCoal”) at its New Era Mine. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana on February 26 and 27, 2013.

Prior to trial, the parties came to an agreement on two of the citations from docket number LAKE 2011-1055 – Nos. 8424631 and 8427551.¹ Thus, the trial concerned only the six citations from LAKE 2011-1054 – Nos. 8427482, 8424603, 8432076, 8432085, 8432106, and 8432151– and one (1) citation from LAKE 2011-1055 – No. 8427550.

I find that for Citation No. 8432076, AmCoal violated § 75.1403 of the Mine Act, AmCoal’s negligence was moderate, the injury was reasonably likely to result in lost workdays

¹ The Secretary filed a Motion to Approve Settlement, wherein AmCoal agreed to withdraw the penalty contest and agreed to pay the citation fines as proposed by the Secretary. I have approved the Motion in a Partial Settlement Decision dated September 3, 2014, and directed AmCoal to pay the citations as issued for a total amount of \$942.00.

or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of \$1,842.00.

I find that for Citation No. 8432085, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of \$541.00.

I find that for Citation No. 8427482, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was low, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of \$264.00.

I find that for Citation No. 8432106, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in no lost workdays, and I find that the citation was properly designated as non-significant and substantial. I assess a penalty in the amount of \$586.00.

I find that for Citation No. 8432151, AmCoal violated § 75.370(a)(1) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of \$2,902.00.

I find that for Citation No. 8424603, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in be lost workdays or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of \$2,902.00.

I find that for Citation No. 8427550, AmCoal violated § 75.400 of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in be lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of \$745.00.

I. Stipulations:

The parties submitted the following stipulations at the hearing: (Tr. 452:10 – 453:1)

1. At all relevant times, AmCoal was engaged in mining operation in the United States, and its mining operations affected interstate commerce.
2. Prior to September 24, 2010, AmCoal was the owner and operator of the Galatia Mine, I.D. No. 11-02752, which encompassed multiple operations and mines (i.e., the New Era, New Future, and Galatia North mines). The Galatia North mine closed prior to September 24, 2010, and on that date, the New Future Mine began operating under Mine ID No. 11-03232, and the New Era Mine continued operating under Mine ID No. 11-02752. AmCoal remained the owner and operator of both mines. The citations

at issue in the aforementioned dockets all were issued after September 24, 2010 and concern the New Era Mine operated by AmCoal.

3. AmCoal is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801 *et seq.*
4. The Administrative Law Judge and Federal Mine Safety Health Review Commission have jurisdiction in this matter.
5. In addition to the aforementioned paragraph, the other exhibits offered by the parties were stipulated to be authentic, but no stipulation was made as to the relevancy or truthfulness of the matters or statements asserted therein or for any other purpose other than establishing their authenticity.
6. The citations at issue herein were properly served by a duly authorized representative of the Secretary upon an agent of AmCoal on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein for any other purpose other than establishing their issuance.
7. AmCoal demonstrated good faith in abating the violations.

II. Basic Legal Principals

A. Significant and Substantial

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) Some of the citations in dispute and discussed below have been designated by the Secretary as significant and substantial (“S&S”). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

B. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

D. Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the

violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.”); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (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.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See 30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. at 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

1. Special Assessment

Through notice and comment rulemaking, the Secretary has promulgated regulations specifying the “Criteria and Procedures for Proposed Assessment of Civil Penalties.” 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the “regular assessment” process, whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also provide that MSHA may elect to waive the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.² Nor do they identify how the amount of a special assessment will be determined, other than to state that “the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form.” *Id.* The narrative findings for special assessments are typically brief and conclusory.

AmCoal argued that the Secretary's secretive special assessment process arbitrarily subjects it to substantially enhanced penalties, and deprives it of due process. The lack of transparency in the Secretary's special assessment process coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially assessed penalty is not relevant to the Commission's determination of a penalty amount because the Commission imposes civil penalties *de novo*. While AmCoal's arbitrariness and due process arguments are unavailing,³ its concerns about the practical implications of the Secretary's determination to specially assess a violation, especially when the assessment is not based upon extreme gravity and/or gross negligence, are well founded, as evidenced by these proceedings. In AmCoal's words, “the large disparity between the proposed special assessments and what would have resulted under the regular assessment guidelines, make informal resolution of such matters almost impossible and make time consuming and costly trials much more likely.” (Rsp. Br. at 3).

² In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations “that would be reviewed to determine whether a special assessment is appropriate,” including, “[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.” Ex. R-36; 30 C.F.R. *Part 100 Final Rule*, 72 Fed. Reg. 13,592, 13,621 (March 22, 2007).

³ AmCoal argued that the absence of criteria specifying what violations would be specially assessed, and how special assessments would be determined, renders the special assessment process impermissibly vague in violation of the due process clause, citing *FCC v. Fox Television Station, Inc.*, 132 S.Ct. 2307, 2317 (2012). It also argued that the process cannot pass muster under the Commission's reasonably prudent person test, described in *Lanham Coal Co.*, 13 FMSHRC 1341, 1343-44 (Sept. 1994). However, the *FCC* and *Lanham* cases involved substantive standards, not penalties, and AmCoal did not challenge the language of any of the mandatory standards.

AmCoal also argued that the “Rule To Live By” initiative as applied constitutes a substantive, mandatory rule, requiring notice-and-comment rulemaking, citing *Drummond Company, Inc.*, 14 FMSHRC 661 (May 5, 1992). I find this argument to also be unavailing.⁴

III. The Citations

A. Citation No. 8432076 (LAKE 2011-1054)

On January 24, 2011, at 8:45am, MSHA Inspector Edward W. Law⁵ issued Citation No. 8432076 to AmCoal’s New Era Mine alleging a violation of 30 C.F.R. § 75.1403, specifically Safeguard No. 7568565, pursuant to Section 104(a)⁶ of the Mine Act. The regulation states that “all mine travelways be kept as free as practicable of bottom irregularities, debris, and wet and muddy conditions that could affect the control of mobile equipment traveling these areas.” 30 C.F.R. § 75.1403. Section 75.1403 regulates a mandatory safety standard. The citation alleges:

The Intake/Primary Escape way/ Travelway at cross cut #47 on the Main North travelway is not being kept free of bottom irregularities and muddy conditions that could affect control of mobile equipment. The area is rutted up and a mantrap has become stuck in the intersection when it bottomed out in the mud. The area was flagged off to prevent travel in the area of the ruts.

Ex. S-1.

1. The Violation

The citation also alleges the injury is reasonably likely to occur, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant

⁴ A substantive rule is one “issued by an agency pursuant to statutory authority and which implement[s] the statute.... Such rules have the force and effect of law.” *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1009 (D.C.Cir.1993) (quoting *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)) Here, AmCoal argues that according to Inspector Ramsey, one district manager imposed the Rule To Live By initiative as a requirement and not a discretionary act by each inspector, thereby making the initiative subject to notice-and-comment rulemaking. However, AmCoal does not make the argument that Inspector Ramsey was following the initiative of the Department of Labor. Additionally, AmCoal admitted that both Inspector Law and Inspector Rusher were not under an obligation to enforce the Rule To Live By Standard as a mandatory rule. (*See Resp. Br.* at 12; *Tr.* 74:19 - 75:23; 308:14-19; 313:9-20) Therefore, AmCoal did not prove that a non-discretionary initiative existed under the direction of the Department of Labor.

⁵ Inspector Law works for MSHA out of the Benton field office as a coal mine inspector. He has been an MSHA inspector since 2005. (*Tr.* 272:5-10) Before joining MSHA, he worked for Consol Mine for a year and a half and Galatia Mine for approximately 21 years. He worked mainly in maintenance for 19 of the 21 years. (*Tr.* 272:13-18)

⁶ All citations are 104(a) citations, and therefore, no analysis is necessary to determine if unwarrantable failures existed.

and substantial, one person could be affected, and the negligence standard level was characterized as moderate. *Id.* Additionally, as of the date the citation was issued, Section 75.1403 was cited 57 times in the two years preceding the issuance of the citation. *Id.*

AmCoal argues that the citation should be vacated because it does not strictly conform to the requirements of Safeguard 7568565. Safeguard No. 7568565 states:

Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways ... [at several] locations.... This Notice to Provide Safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions that could affect the control of mobile equipment.

Ex. R- 47, at 6.

Pursuant to section 314(b) of the Mine Act, and the Secretary's regulations, authorized representatives of the Secretary may issue orders, or safeguards, to address hazards related to the transportation of men and materials at a particular mine. 30 U.S.C. § 874(b); 30 C.F.R. § 75.1403. The mine operator is obligated to comply with a safeguard, and if it is violated, the operator may be subject to citations or orders issued pursuant to section 104 of the Act. *Cyprus Cumberland Res. Corp*, 19 FMSHRC 1781 (Nov. 1997).

Safeguards are issued by MSHA inspectors, who do not follow a notice and comment rulemaking procedure. Because this procedure is an “unusually broad grant of regulatory power” granted to MSHA, the Commission in *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (“*SOCCO I*”), held that “safeguards must be drafted with specificity, so that operators receive adequate notice of the conduct required and the conditions covered by the safeguard.” *American Coal Co.*, 34 FMSHRC 1963, 1967 (Aug. 2012). Thus, the language of a safeguard, which may be issued without consulting with representatives of the operator, must be narrowly construed. *Cyprus Cumberland*, 19 FMSHRC at 1785; *SOCCO I*, 7 FMSHRC at 512.

The validity of Safeguard No. 7568565 was recently upheld by the Commission, noting that it has “consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards.” *American Coal Co.* at 1974 (emphasis in original). The Commission concluded that the safeguard specifies the nature of the hazard, “i.e., bottom irregularities, debris, and muddy conditions in a travelway that could affect the control of mobile equipment[,]” and specifies a remedy, “i.e., all mine travelways are to be kept as free as practicable of bottom irregularities, debris, and muddy conditions that could affect the control of mobile equipment.” *Id.*

Here, AmCoal challenged Citation No. 8432076 and argued that a narrow interpretation of the safeguard, under *Cyprus Cumberland* and *SOCCO I*, requires that all three of the conditions identified in the safeguard be present before a violation can be established, i.e., that there must be bottom irregularities *and* debris *and* muddy conditions. (Resp. Br. at 61-63) Since there is no evidence that all three conditions were present, AmCoal argued that the citation must be vacated.

Any of the conditions addressed by the Safeguard could threaten the loss of control of mobile equipment. Under the Safeguard, AmCoal was obligated to keep its travelways as free as practicable from any and all of the three hazardous conditions. AmCoal's strict interpretation argument is rejected.

Inspector Law testified that the Safeguard requires the road should be maintained without ruts and irregularities so that the vehicles can travel and not affect their handling of the vehicle. (Tr. 273:25 – 274:1-3) Inspector Law testified that he wrote the citation because when traveling into the mine there was a piece of mobile equipment – a mantrip – stuck in the road in the primary entranceway. (Tr. 273:16-18) At the time of his inspection, the area was rutted, damp, and wet, which caused a loaded mantrip to bottom out. (Tr. 276:6-8; 277:16-22; 278:1-9) Inspector Law observed groundwater on the floor and noticed the ground was damp. (Tr. 276:1-9) Matt Mortis,⁷ AmCoal's safety director, testified that the condition of the area was muddy at the time the citation was issued. (Tr. 322:4-7) For the reasons stated above, I find that AmCoal violated § 75.1403 of the Mine Act.

2. Negligence

Inspector Law assessed the violation as arising from moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). AmCoal argued that the inspector did not investigate if management was on the mantrip that was stuck (Tr. 298:22); the mantrip could have been carrying a crew of hourly employees (Tr. 298:13-17); the citation was issued at 8:45am, but the crews did not leave until 9:00am (Ex. R-45; Tr.325:2 – 326:8); and Inspector Law's notes indicate that it was unknown who knew of the conditions (Tr. 295:16-19; Ex. R-2). Mr. Mortis testified that AmCoal built a sump area near the crosscut and used PVC pipe and a staged pneumatic pump to pump out excess water because the area is under an aquifer. (Tr. 322:6-23; 331:12-23) Mr. Mortis also testified that the road was maintained at first every shift, but then after they put the PVC pipe and the gravel they just maintain it “daily if they needed more work, they would do it; if not, it was okay.” (Tr. 329:4-7).

Inspector Law testified that the citation was marked as moderate negligence, as opposed to a higher negligence standard, because mine managers travel the road where the violation occurred and could have noticed the ruts, and that the area where the violation occurred can get rutted pretty quickly. (Tr. 286:9-18) He also testified that the negligence standard was cited as moderate because the mantrip in question sits lower to the ground than most models. *Id.* Mr. Mortis admitted that the area in question where the violative condition occurred is traditionally wet, is a travelway, and is an escapeway. (Tr. 327:17-24) Mr. Mortis also testified that the condition of the area at the time of the citation was muddy. (Tr. 322:4-7) From Inspector Law's vantage point coming into the mine, you could see the wet and rutted conditions “pretty easily”

⁷ At the time of trial, Mr. Mortis was the AmCoal New Era Mine Safety Director since July of 2010. (Tr. 88:15-19) Mr. Mortis previously worked for KVR for two years and Peabody Coal as a Safety Director. (Tr. 89:5-19) Mr. Mortis worked in safety for Alliance Coal Company before that for four years. (Tr. 89:23 – 90:2) Before that Mr. Mortis worked for Ken American Resources as a miner for six years. (Tr. 90:6-14)

and it was “fairly obvious.” (Tr. 284:19-25) He also testified that he had previously issued citations in this area for this issue. (Tr. 281:4-6) Based on the above, I find AmCoal’s negligence to be moderate.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law testified that the Safeguard covers road irregularities, so anywhere in the mine where a road becomes hazardous to travel or someone can get injured traveling in and out, the operator has to rehabilitate. (Tr. 287:14-19) He designated the citation as reasonably likely because he believed the mantrip would come to a sudden stop or would lose control in the muddied ruts in the travelway. (Tr. 282:7-12) He also testified that he listed lost work days due to the potential broken bones in the hands from the impact with the steel areas inside the mantrip. (Tr. 283:3-6) The mantrip in this case was all steel, so the miners would hit the steel if an accident occurred. (Tr. 282:15-17) These injuries were likely to occur if there was a sudden stop or loss of control of the mantrip. (Tr. 283:3-7) Breaking the bones in your hand or breaking your wrist from a vehicle accident caused by bottom irregularities is serious in nature. The fact that Inspector Law did not know how the mantrip bottomed out, or whether they slowed down or stopped suddenly is of no consequence to the gravity determination. (Tr. 280:16-20). I agree that the injury could reasonably likely result in lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, i.e. broken bones in the hand or broken wrists. A measure of danger to safety, a discrete safety hazard, was contributed to by the wet, muddy conditions that caused rutting on the ground, and thus can impair an operators ability to control a piece of mobile equipment, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

The area in question is a travelway that is used continually. (Tr. 288:3-6) Everyone coming in and out of the mine with a piece of equipment uses this entry. *Id.* It is also the primary escapeway from the mine and it was obvious to Inspector Law that the operator was not maintaining the roads. (Tr. 317:5-7)

Inspector Law testified that the hazards he was thinking about when he wrote the citation included people getting jostled around and thrown around inside the vehicles they were traveling in, hitting the corners, or hitting something solid while driving in a vehicle. (Tr. 281:9-20) The one person affected designation could be the operator or the person in the front passenger seat because he is sitting adjacent to the steel frames and he is going to be jostled or thrown in those areas. (Tr. 283:11-16)

AmCoal argued that there was no standing water in the area affected, it was just damp (Tr. 286:5-6); the travelway was straight and relatively level (Tr. 288:23-25; 306:20); the travelway was wide enough to have two-way traffic, and that after the mantrip was stuck, there was room for foot traffic. (Tr. 275:22-23; 285:6-7) However, these proffered reasons for the Secretary not meeting his burden of proving S&S is unavailing. A loss of vehicle control would be reasonably likely to result in impact injuries to passengers who would not expect or brace themselves for sudden impacts. Inspector Law testified that he was aware of even more serious injuries from mantrip accidents in rough, wet, and muddy conditions. (Tr. 303:4-13) I find that the Secretary properly designated this citation as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as \$5,600.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, as of the date the citation was issued, Section 75.1403 was cited 57 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$5,600.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation to be S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of \$1,842.00.

B. Citation 8432085 (LAKE 2011-1054)

On February 3, 2011, at 11:45am, MSHA Inspector Law issued Citation No. 8432085 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation 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." 30 C.F.R. § 75.202(a). The citation is a violation of a mandatory safety standard. The citation alleges:

The ribs on the inby side of cross cut #119, from the man door to the belt is not being adequately supported or controlled where the miners normally work or travel to protect miners from the hazards related to falls of the roof and ribs. The rib on the inby side is cracked and leaning out toward the walkway. The rib is approximately 20 feet long, 4 to 6 feet high and 1 to 8 inches thick. The rib is gapped open from 3-6 inches between the rib and coal pillar.

Ex. S-4.

1. The Violation

The citation also alleges the injury as reasonably likely to occur, said injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person would be affected, and the negligence standard was cited as moderate. *Id.* Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation.

Inspector Law testified that there was an area of the rib, inby crosscut 119 adjacent to a mandoor that was bad, broken, cracked open, leaning, and hazardous. (Tr. 333:11-13) AmCoal does not dispute the existence of the hazardous condition, i.e., the loose rib on the inby side of crosscut 19 near a mandoor. (Resp. Br. at 73) Inspector Law testified that the area is used by people accessing the back of the belt for things such as, cleaning, shoveling, or carrying materials through it. (Tr. 334:10-17; 335:3-6). For these reasons, I find that AmCoal violated Section 75.202(a) of the Mine Act.

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Inspector Law designated the citation as moderate negligence because of the location of the violative condition, and because it might be hard for an examiner to see the damaged area because of the rock dusting. (Tr. 341: 24 – 342:15) Inspector Law testified that he wrote it was unknown who knew of the violative condition at the time the citation was issued, but did notice the rib was rock dusted. (Tr. 337:7-17) In fact, it had been gapped open long enough that the rock dust present did not appear to be fresh. *Id.* Inspector Law also observed that there were no warning flags on the rib. (Tr. 339:2-3)

AmCoal argued that the mandoor was small – measuring three (3) feet by three (3) feet. (Tr. 345:17-18) Charles Thome,⁸ AmCoal’s mine examiner, testified that while he was responsible for examining the cited area, he “never” used this mandoor and did not know of anyone else who had ever used the mandoor. (Tr. 353:22-24; 360:12-25) Mr. Thome, during his inspections, did look down to inspect crosscuts with doors, but he did not walk each crosscut and did not see the cracked and leaning rib. (Tr. 364:17-25) AmCoal should have known of the hazard because, as Mr. Thome testified, on the date of the citation he performed the pre-shift examination of the belt line and in that immediate area of 119 and 102. (Tr. 353:17-24) There were no mitigating factors shown. For the reasons stated above, I agree with the designation that was cited, and find the negligence to be moderate.

⁸ Mr. Thome works for American Coal Company New Era Mine as a mine examiner. (Tr. 351:13-15) He travels all over the mine examining all areas of the mine, belt lines, units, heads, drives, and tails, return escapeways, and primary and secondary escapeways, examining for safety issues and hazards. (Tr. 351:17-24) Before working at American Coal, he worked at Zeigler Coal Company for thirty years as a roof bolter, general inside laborer, scoop operator, and he filled in on hoisting engineer and examining. (Tr. 352:14-23) Mr. Thome has thirty-nine years’ experience in coal mining. (Tr. 353:1-2)

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law testified that the hazard was that at any given time, any vibration, or if the rib continued taking weight it could not handle, the rib could fall over and badly injure someone. (Tr. 339:4-11) A miner's right side coming through the mandoor would be exposed up to six feet, depending on how close he was to the rib. (Tr. 340:18-24) A miner would likely be struck because the rib gives no warning when it falls. The rib was already separated, hazardous, and leaning. (Tr. 341:2-7) So it was ready to fall at any given time and it was likely to fall. *Id.* Inspector Law testified that it was a matter of when, not if, the rib was going to fall. (Tr. 341:8-9) He also testified that the injury cited was lost work day injuries from broken bones – leg or arm– or getting trapped with rubble on top of the miner. (Tr. 339:13-19) The injury sustained from being struck from a falling rib is serious in nature. I agree with the designation of lost work days or restricted duty as Inspector Law assessed.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, i.e. broken bones. A measure of danger to safety, a discrete safety hazard, was contributed to by the cracked, leaning, and unsupported rib, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Law indicated one person affected because typically only one person would be behind the belt shoveling or inspecting the belt. (Tr. 341:15-21) The rib did not have any support – it was freestanding and leaning. (Tr. 338:16-19) Indeed, it appeared to Inspector Law that the cracked and leaning rib was in a condition to fall at any time. (Tr. 339:10-11) However, only the miner's right side coming through the door would be exposed up to six feet, depending on how close he was to the rib. (Tr. 340:18-24) Additionally, Mr. Thome's testimony that he never used the 3x3 mandoor and that he never knew of anyone using the mandoor near the cracked rib, decreases the likelihood that an injury was reasonably likely to occur. (Tr. 360:12-25) Additionally, Inspector Law also testified that the mandoor and the area near the cracked rib was not used day-to-day. (Tr. 335:7-8) I find that the Secretary did not meet his burden to prove the violation was reasonably likely to result in serious injury, and therefore the citation should not be designated as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation at \$9,100.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation.⁹ As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$9,100.00, AmCoal's business will not be

⁹ The Secretary asserts that one of the reasons that all of the Section 75.202(a) citations were specially assessed was that AmCoal was put on notice of enhanced enforcement. This alone does not warrant a special assessment.

significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or “special” penalty assessment. Therefore, I assess a penalty in the amount of \$541.00.

C. Citation 8427482 (LAKE 2011-1054)

On February 14, 2011, at 11:50am, MSHA Inspector James D. Rusher,¹⁰ issued Citation No. 8427482 to AmCoal’s New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation 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.” 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

The roof of areas where persons work or travel was no longer adequately supported or otherwise controlled to protect persons from hazards related to falls of the roof. There are two installed pattern roof bolts that had been dislodged in the No. 3 entry at approximately tag No. 8250’ on the 8th West Unit, MMU 009-0.

Ex. S-6.

1. The Violation

The citation also alleges the injury is reasonably likely to occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence level was moderate. *Id.* Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation.

Upon inspection of the mine, Inspector Rusher discovered two pattern roof bolts that had been dislodged by mobile equipment, with bearing plates that were no longer connecting the roof as designed and no longer adequately supporting the roof. (Tr. 14:13-15) Inspector Rusher testified that the bearing plate, coupled with intact fully grouted roof bolts, are what give the roof its support, and when those bolts are bent, the bolts no longer provide the support necessary for the roof. (Tr. 84:15-21) The roof bolts were dislodged in a haulage road area. (Tr. 14:16-19) Mr. Morris agreed that the two bolts were damaged. (Tr. 100:16-24) Inspector Rusher testified that the people who use the entry where the dislodged bolts were located were the continuous miner,

¹⁰ James Rusher had worked for MSHA for approximately thirty-three years as a federal health and safety inspector at the time of trial. (Tr. 11:5-8) At one point Inspector Rusher was a district training manager. (Tr. 11:9) He also worked for Freeman United Coal Company in Sesser, IL for about eleven years. (Tr. 11:14-18)

the supervisor, coal haulers, roof bolter operators, possibly a mechanic, and mine examiners. (Tr. 16:10-14) He also testified that the conditions of the bolts were in violation of AmCoal's roof control plan. (Tr. 13:7-12) For the reasons stated above, I find that AmCoal violated 30 C.F.R. § 75.202(a).

2. Negligence

Inspector Rusher assessed the violation as moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Inspector Rusher indicated that the violative condition was obvious, and stated that he noticed the damaged bolts 50 to 60 feet away. (Tr. 20:12-15) However, I find that the Secretary failed to prove by a preponderance of evidence that AmCoal knew or should have known that the violative condition existed. The Secretary produced no evidence at trial that any AmCoal management or any personnel “knew” of the two damaged bolts. Inspector Rusher did not identify or notice any management or hourly personnel in entry No. 3 where the violative condition was located. (Tr. 20:16-18; 50:9-14) Additionally, the only evidence produced at trial that AmCoal “should have known” that the violative condition existed was: (1) that the supervisor would have to have conducted gas checks at the No. 3 face and thus would have been in the proximity of the damaged bolts, and (2) that the bolts were damaged by equipment being operated in the section.

The gas check requiring methane tests to be conducted every twenty (20) minutes “during the operation of equipment in the working place” but “[w]hen mining has stopped for more than 20 minutes, methane tests shall be conducted prior to the startup of equipment.” 30 C.F.R. § 362(d). Inspector Rusher based his gas check requirement on his notes stating that the unit was active. (Tr. 60:3-7; Ex. R-6, at 3) However, according to the production and delay report for that shift, and the testimony of Mr. Mortis, the area was idle from 8:55am until 2:00pm (Tr. 105:7-9), and the workers did not began loading until 2:50 pm. (Tr. 107:1-4) The citation was issued at 11:50am. Additionally, the Secretary produced no evidence at trial that the personnel operating the equipment would or should have known that their equipment hit two roof bolts.

As such, the Secretary failed to meet his burden to prove moderate negligence. Because Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation, I find that there was low negligence.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Rusher was concerned about the roof falling and hitting miners traveling in the area. (Tr. 22:14-17) A roof fall would usually result in lost-time injuries, or worse, possibility a fatality. (Tr. 22:20-22) The potential injuries from a roof fall are serious. I agree that if a roof fall were to occur, the injury could reasonably be expected to be lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the damaged roof bolts, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

It was apparent at trial that there was a question of fact whether limestone was present where the violative condition was located. Inspector Rusher testified that the roof sounded “drummy” when tested with a sounding rod. (Tr. 85:14-18) To Inspector Rusher, the “drummy” sound indicated that the beam was not solid. *Id.* He also testified that limestone thickness varied through the mine roof. (Tr. 39:24)

Gary Vancil, Jr.,¹¹ witness for AmCoal, testified that limestone is the best possible roof because it is very hard. (Tr. 134:8-15) Inspector Rusher testified that limestone is like concrete. (Tr.35:8-9) Mr. Vancil testified that he was personally familiar with the 8th west gate where the two bolts were dislodged because he was mapping, looking at limestone thickness, and looking for any geological hazards in the area. (Tr. 130:9-16) Mr. Vancil testified that the immediate roof at the location had very good limestone – non-jointed and no shale in it whatsoever. (Tr. 142:4-9) Additionally, he testified that there was limestone four feet to five feet up where the violative condition was located. (Tr. 142:10-15)

Mr. Vancil did not think there was a likelihood of a roof fall in the violative area even if the two roof bolts were damaged because of the strength of the limestone. (Tr. 144:10-22) He testified that the roof bolts were only in place because AmCoal was required to put them there and the roof bolts did not offer more strength than what the limestone already had. *Id.*

Inspector Rusher testified that due to the nature of the fully grouted resin bolts, the resin (glue) would spread into the cracks and strengthen the roof (Tr. 31:2-24), and would still provide some roof support if the bolts were dislodged. (Tr. 32:18-22) Additionally, neither the inspector’s notes nor the citation states that there was a “drummy” sound in the violative area. (Tr. 34:3-11)

Based on the foregoing, I find that the Secretary failed to prove by a preponderance of evidence that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that the S&S designation was unwarranted for this citation.

¹¹ Mr. Vancil is a senior geologist at AmCoal in the Galatia mine. He handles Utah, western Kentucky, and Illinois. (Tr. 128:23-25) He started working at AmCoal two and a half years before testifying at trial. (Tr. 129:3) After getting his Master’s degree, he worked in the oil fields of west Texas, and he also worked out in the Thunder River basin in Wyoming for Triton Coal Company. (Tr. 129:9-12) Mr. Vancil has a master’s and undergraduate degree, both in geology. (Tr. 129:14-16)

5. Penalty

The Secretary specially assessed the penalty for this citation at \$9,800.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation. As I found above, AmCoal's negligence was low. At even the assessed penalty of \$9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove elevated gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of \$264.00.

D. Citation No. 8432106 (LAKE 2014-1054)

On February 16, 2011, at 1:30pm, MSHA Inspector Law issued Citation No. 8432106 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation 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." 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

The roof on 5 seam at survey station #225 West and #225 South is not being adequately supported or controlled where miners work or travel to protect miners from the hazards related to falls of the roof and ribs. The corners on both sides of the travelway have rashed away. The East corner is 8 feet from the roof bolt to the coal pillar for 3 bolts and approximately 12 feet in length. The West corner is 7 feet from the roof bolt to the coal pillar for approximately 10 feet. The corners have been particularly loaded out by the end loader. The area was flagged out by the operator at the time of the issuance of the citation to prevent travel in the area.

Ex. S-8.

1. The Violation

The citation alleges the injury is unlikely, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was not significant and substantial, one (1) person could be affected, and the negligence standard was cited as moderate. *Id.* AmCoal is not contesting the citation as written; they are contesting the penalty amount. (Tr. 367:3-8) Additionally, at trial the parties stipulated to the designations alleged in the citation. (Tr. 367:1 – 369:15; 378:21-23) Further, AmCoal's attorney stated that they agree with the statutory criteria that would justify a regular assessment. (Tr. 368:7-9)

The citation was issued under 75.202(a). Inspector Law testified that a miner was doing some rehabilitation work, cleaning up the violative area with an end loader. (Tr. 370:8-20) He further testified that there was an area about 12 feet by seven feet that was unsupported where they had been cleaning under and around. *Id.* The violative condition occurred because the more the miner cleaned, the more the ribs rashed, and the ribs became wider from the bolts. (Tr. 372:3-6) Inspector Law testified that it is not unusual to do the rehabilitation work like what was occurring, but AmCoal had to go back and re-bolt or set timbers because of the expanded the size of the area. (Tr. 372:21-25) He cited Section 202(a) because the conditions and rehabilitation work caused the area to become unsupported. (Tr. 378:15-19) I find that AmCoal violated Section 75.202(a).

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation. Inspector Law testified that he cited moderate negligence because when he was in the violative area, only an operator was working and there was no foreman, and there is no way to know if the operator knew or should have known that something needed to be done about the roof. (Tr. 374:6-22) Inspector Law further testified that the foreman could have come and checked the area, but there was no way of knowing if he did so before or after or if he saw the damage. (Tr. 374: 25 – 375: 7) However, Inspector Rusher testified that someone should have been paying attention to make sure that the exposed area was supported. (Tr. 385:19-25) For the reasons stated above, I find that AmCoal was moderately negligent.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law assessed the violation as lost workdays or restricted duty. He testified that there were no people on foot in the area, and there was only an operator who was driving in a cab of a piece of equipment. (Tr. 377:22-25) He further stated that the machine operator would be protected by the cab and canopy if the roof were to collapse. *Id.* A roof fall could result in serious injury, however, the facts presented at trial indicate that the gravity determination should be lower. The Secretary failed to prove by a preponderance of evidence that there would be lost work days or restricted duty. As such, I find that the injury could be reasonably expected to be no lost work days.

4. Significant and Substantial

Inspector Law testified that there were no people on foot in the area, and there was only one operator who was driving in a cab of a piece of equipment who would be protected by the cab and canopy. (Tr. 377:22-25) The gravity designation was cited as unlikely by Inspector Law because the area was not hanging, or cracked, or hazardous, there was just a corner missing. (Tr. 377:2-8) I agree and find that the likelihood of injury is unlikely and that Inspector Law was correct in making the citation non-S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as \$9,100.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$9,100.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the gravity of the violation was elevated, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of \$586.00.

E. Citation No. 8432151 (LAKE 2014-1054)

On March 21, 2011, at 10:15am, MSHA Inspector Law issued Citation No. 8432151 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. §75.370(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation states that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine..." 30 C.F.R. §75.370(a)(1). The citation is a violation of a mandatory safety standard. (Tr. 395:19-21) The citation alleges:

The approved ventilation plan for this mine is not being complied with in the Intake/ Primary Escape Way/ Travelway from the 6th West Airshaft to the mouth of the 6th West Head gate is extremely dusty. Heavy concentrations of air born dust can be seen throughout the entry and is limiting the visibility of equipment operators in the area. A large plum of dust is also being created by the exhaust discharge of a supply tractor also creating visibility hazards. The dry roads had a layer of powdery dust that was getting suspended when driving through the area.

Ex. S-21.

1. The Violation

The citation alleges that an injury is reasonably likely to occur, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the violation arose from moderate negligence. *Id.* Section 75.370(a)(1) was cited 66 times in the two years preceding issuance of the citation. Inspector Law testified that from the 6 west headgate, where they were still developing the area as a longwall entry, examiners, mine managers, crew, and belt workers would be traveling in the

violative area. (Tr. 393:9-15) That is because the 6 west air shaft is on the main travelway and primary escapeway. (Tr. 393:16-20)

Inspector Law testified that as he was traveling on a golf cart, he ran into visible airborne dust, the roads were very dry, and the roads had not been watered. (Tr. 393:23 – 394:2) The closer he got to the mouth, the dustier it became. *Id.* AmCoal was running Fairchild scoops on which the exhaust dumps downwards. Because the roads were not watered, this caused plumes of dust in the air. (Tr. 394:9-12) Keith Violett,¹² witness for AmCoal, testified that Inspector Law told him to pull the golf cart over so that he could see how long it would take for the dust to settle – it took about 30 to 45 seconds. (Tr. 431:22 – 432:5) Mr. Violett also testified that it was fairly dusty, but not to the point where you couldn't see. (Tr. 432:17-18) Based on the foregoing, I find the AmCoal violated Section 75.370(a)(1).

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). The undisputed evidence at trial showed that the cited area is extremely dry during the winter months. (Tr. 396:13-19; 434:10-11) Inspector Law testified that this is a problem area of the mine for dry conditions, and AmCoal is required to keep the travelway watered. (Tr. 396:19-25) He was aware of the travelway watering program and admitted it usually does a pretty good job controlling the dust. (Tr. 401:14-23) He also testified that in the winter, the time it takes to dry depends on the temperature, so it could take as little as a shift for it to become dusty with low visibility. (Tr. 397:17-25) Inspector Law testified that the violative condition was obvious because the dust was visible as he was traveling through it. (Tr. 396:5-10)

Inspector Law testified that he designated the citation as arising from moderate negligence partly due to the time factor, because it can get dry very quickly, however, he said that he could have made the designation high just the same. (Tr. 400:14-17) Marvin Webb,¹³ witness for AmCoal, testified that if they had not been cited, they would have watered the area anyway in an hour or less. (Tr. 446:9-11) Mr. Webb testified that AmCoal has a road watering program that uses a modified ram car with installed water tanks to water the roadways. (Tr. 440:7-16) Mr. Webb testified that the area would be watered once or twice a shift, depending on how dry it was. (Tr. 446:20-22; Tr.447:18) This watering program is evidence that AmCoal knew of the dry and dusty condition of the area and should have been more vigilant to meet the ventilation plan and water the area. While the roads were watered every shift (Tr. 443:2-3),

¹² Mr. Violett is a safety specialist for AmCoal, and worked as both an examiner and now is in the safety department. (Tr. 430:22-23; 431:13-14) He had worked at AmCoal for six years prior to the time of trial. (Tr. 431:2-4) He has about 37 years in the mines, both underground and surface. He has been an examiner, mechanic, and pretty much everything else. (Tr. 431:7-10)

¹³ Mr. Webb is a shift foreman at AmCoal. (Tr. 437:21-23) He has worked for American Coal for fourteen years. (Tr. 438:5) At the time of trial, he had been in the mining industry for 39 years (Tr. 438:8), and he had been a supervisor at American Coal for six or seven years. Before joining AmCoal he was a supervisor at Old Ben Coal Company for about 17 years. (Tr. 438:20-22).

AmCoal's ventilation plan requires AmCoal to water the roadways *as required* before conditions deteriorate to dust clouds. For the reasons stated above, I find that AmCoal was moderately negligent.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law was concerned about the visibility hazard for people traveling through the area. (Tr. 398:4-10) He testified that there was equipment and people in the violative area and all you could see was the dim headlights and nothing else, and you couldn't tell if something was coming at you other than by sound. *Id.* Inspector Law testified that he could barely keep his eyes open at times because the dust was coming at him at a high volume. (Tr. 399:7-9) Inspector Law classified the citation as lost work days or restricted duty, but he could have easily classified it as fatal because he could have easily been run over in his golf cart by the machinery working in the mine. (Tr. 398:13-15) I find that there was a reasonably likelihood of a serious injury and agree with the lost workdays or restricted duty determination.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the dusty conditions in violation of the ventilation plan, which cause visibility issues, and could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Law testified that he designated the citation as one person affected, but it could have easily been two. (Tr. 400:9-12) He stated that he hoped someone would be able to get out of the way if a machine was going to hit him. *Id.* The dusty conditions made it difficult to determine the direction of travel of other vehicles. (Tr. 426:3-9) Mr. Violet testified that although it was dusty, he could still see the scoop. (Tr. 431:22 – 432:3) Based on the dusty conditions that negatively affected visibility, there was a reasonable likelihood that the hazard contributed to would result in an injury. I find that the Secretary met his burden to prove S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as \$9,800.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.370(a)(1) was cited 66 times in the two years preceding issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the gravity of the violation was elevated, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or “special” penalty assessment. Therefore, I assess a penalty in the amount of \$2,902.00.

F. Citation No. 8424603 (LAKE 2014-1054)

On March 28, 2011, at 9:30am, MSHA Inspector Danny R. Ramsey,¹⁴ issued Citation No. 8424603 to AmCoal’s New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation 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.” 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

A loose rib, measuring 9 feet long, 7.5 feet high and 3 inches to 6 inches wide, was present on the South side of the 8th West Headgate unit breaker feeder. A visible crack, measuring 1 inch to 3 inches in width was observed between the loose rib and the solid block. This area is routinely traveled by miners.

Ex. S-13.

1. The Violation

The citation alleges that an injury was reasonably likely to occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence standard was cited as moderate. *Id.* Section 75.202(a) was cited 103 times in the two years preceding the issuance of the citation.

Inspector Ramsey testified that as he was walking in the violative area he observed a loose rib in the feeder area of the 8th west headgate where the shuttle cars dump coal that they haul coal from the face area onto the belt. (Tr. 229:10-19) He testified that shuttle car operators, belt cleaners, examiners, and mechanics work in this area. (Tr. 229:21-25) AmCoal did not flag the loose rib as a hazard. (Tr. 231:7-9) AmCoal does not dispute the existence of the hazardous

¹⁴ Mr. Ramsey had worked for MSHA for the past nine and a half years as a roof control specialist inspector at the time of trial. (Tr. 226:15-20) He started working in mines in 1972. He worked for UMWA for five years, then worked for ten years as either a face boss or section foreman, then for a year and half worked as assistant mine manager. Then he was promoted to mine manager for six years. Then worked as a general underground mine manager for two years then superintendent for two years. Then he worked for Galatia (purchased by American Coal) for six and a half years as a longwall foreman then longwall coordinator, and had been the superintendent for three years. Then he went to Zeigler 11 as a section foreman for 11 months. Then he started working for MSHA as a coal mine inspector for four years. Then he was a ventilation specialist for four years. And he has been a roof control specialist for about two years. (Tr. 266:24 –227:24)

condition, i.e. the loose rib. (Resp. Br. at 51) For the reasons stated above, I find that AmCoal violated Section 75.202(a).

2. Negligence

Inspector Ramsey assessed the violation as involving moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Inspector Ramsey testified that he designated the citation as moderate negligence because the violative condition was not in the examiner’s book, and he did not designate the negligence as high because it looked like a fresh crack so it had not been there for an extended period of time. (Tr. 235-236:21-2) He also testified the loose rib was obvious and easily seen. (Tr. 230:20)

Despite the fact that Inspector Ramsey could not tell how long the condition existed or who knew of the violative condition (Tr. 250:15-251:5), belt examiners walk the entire belt on both sides and should have seen the cracked rib. (Tr. 249:15-16) However, the unit was idle (Tr. 255:9) and the crack in the rib appeared recent. (230:24 – 231:6; 250:15 – 251:5) The inspector had no personal knowledge that any mechanics or workers on the feeder had been working or when they were to start working. (Tr. 255:20 – 256:4)

Despite the fact that the unit was idle, due to the obvious nature of the cracked rib and the fact that belt examiners would be in the vicinity and should have seen the violative condition, I agree that the citation was properly designated as moderate negligence.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Ramsey anticipated lost work days, which probably could have been designated as permanently disabling. (Tr. 232:25 – 233:3) He testified that the hazard was the rib falling on the people in the area causing injury. (Tr. 232:11-12) An injury could include broken bones, contusions, cuts, and scrapes. *Id.* It appeared recent because there was no visible rock dust behind it. (Tr. 231:1-6) I find that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature and agree with the determination that the injury could reasonably be expected to be lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the damaged rib, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Ramsey testified that in the process of normal mining, people are going to travel the area routinely. This rib was loose, big, and cracked; it was going to fall. (Tr. 253:4-7)

He testified that there was also machinery running that could vibrate and cause the rib to fall. (Tr. 232:18-22) He also testified that he designated it as potentially affecting one person because there is usually no more than one person traveling through the area at a time. (Tr. 235:17-20) Additionally, Inspector Ramsey testified that the rib was pried down easily, which indicated to him that it was loose and could have easily fallen. (Tr. 233:17-25)

Inspector Ramsey testified that people traveled in the violative area routinely (Tr. 253:4-7), for example, examiners, belt cleaners, belt mechanics, and greasers (Ex. R-12). However, the unit was idle (Tr. 255:9), and the crack in the rib appeared recent. (Tr. 230:24 – 231:6; 250:15 – 251:5) Nonetheless, I find that the Secretary met his burden to prove that the S&S designation was warranted for this citation.

5. Penalty

The Secretary specially assessed the penalty for this citation at \$9,800.00. The AMCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 103 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity or the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of \$2,902.00.

G. Citation No. 8427550 (LAKE 2014-1055)

On July 11, 2011, at 11:45am, MSHA Inspector James Rusher, issued Citation No. 8427550 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.400 pursuant to Section 104(a) of the Mine Act. The regulation 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." 30 C.F.R. § 75.400. The violation is for a mandatory safety standard. (Tr. 151:13-16) The citation alleges:

There is an accumulation of spilled loose coal and coal dust (dry) that measured in depths of 4" to 6" deep on the floor of the No. 2 and 3 entries in the 9th West, unit, mmu 008-0. Additionally [,] [t]he roof, left and right coal ribs of both the No. 2 and No. 3 entries has not been rockdusted. This area in the No. 2 entry begins at approximately tag no. 8320" and extends inby to the last row of roof bolts at tag No. 8420". This is a distance of about 100'[,]. In the No. 3 entry, the roof, left and right coal ribs need to be rock dusted and the floor scooped to clean up 4" to 6" of loose coal and coal dust. This begins about tag No. [8200]" inby to about tag No.

8300'. No one was observed cleaning or rock dusting until this citation was issued.

Ex. S-15.

1. The Violation

The citation alleges a reasonable likelihood that an injury would occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence standard was cited as moderate. *Id.*

The violative area had previously been mined by AmCoal and the coal spillage had not been cleaned up. (Tr. 152:8-12) The coal accumulated four to six inches deep in number 2 and number 3 entries. *Id.* Inspector Rusher testified that the direct violation of Section 75.400 went for a distance of 100 feet in the number 3 entry. (Tr. 151:25 –152:1) The principal reason Inspector Rusher issued the citation was because AmCoal chose to move the belt and power before choosing to do the safety work. (Tr. 179:18-22) AmCoal does not dispute the accumulations, but disagrees with its extensiveness. (Tr. 175:12-14) Mike Smith,¹⁵ witness for AmCoal, testified that the depth was about two to three inches, and the further you got away from the center it will feather out to less than an inch. (Tr. 203:2-9)

Inspector Rusher testified that the area that had been previously mined had not been rock dusted and appeared black. (Tr. 152: 12-14) Mr. Smith, however, testified that the coal ribs in the number 2 and 3 entry were hand dusted. (Tr. 220:20-22) The weight of evidence supports my conclusion that the Secretary failed to meet his burden to show that the roof and ribs of the entry were not rock dusted.

For the reasons stated above, I find that AmCoal violated Section 75.400 of the Mine Act for the coal spillage, but not for failing to rock dust.

2. Negligence

Inspector Ramsey assessed the violation as involving moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Inspector Rusher testified that he designated the citation as moderate negligence, as opposed to a higher negligence, because it seemed as though AmCoal was hurrying to do the power move, not that it was a modus of operation they would normally do. (Tr. 163-164:22-3) He also testified that the

¹⁵ At the time of the trial, Michael Smith worked for the University SIU mining engineering department and resource development. (Tr. 195:19-25) He was studying dust control and trying to help the different coal mines with compliance with federal regulations with dust and trying to minimize dust exposure to miners. *Id.* He started that job on December 15, 2010. (Tr. 196:2-3) Before that worked for American Coal from 2003-2011. (Tr. 196:4-7). He was in the safety department and traveled with the federal and state mine inspectors, as well as tried to help the mine be in compliance with regulations. (Tr. 196:11-14) He was also part of the mine rescue team for 21 years between both mines. (Tr. 196-197:20-1)

condition was very obvious. (Tr. 158:13-14) The violative condition existed and should have been discovered prior to the power move. (Tr. 164:4-6) Additionally, Inspector Rusher had given prior safety talks about this type of condition before to operators of the mine. (Tr. 164:22-25) Because the coal accumulation was obvious, and because someone of authority made the decision to move the belt before cleaning the coal accumulation, I agree that the negligence determination is moderate.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Rusher testified that he believed a fire hazard existed. (Tr. 152:15-19) When giving out the citation, Inspector Rusher testified that he thought the coal spillage and oxygen formed two sides of the fire triangle – all that was left was an ignition source. (Tr. 160:1-8) Inspector Rusher testified that if an ignition did occur resulting in a fire or explosion, miners could get hurt or killed by the initial blast, or the fire could consume all the oxygen in the atmosphere. (Tr. 161: 25 – 162:5) I find that the resulting injury from a fire would be serious and agree that the resulting injury could reasonably be expected to cause lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the coal accumulation, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Rusher believed that there were two sides of a fire triangle in the violative area and all that was left was the ignition source. (Tr. 160:1-8) The diesel equipment in the area being used to bring the power transformer up provided a potential ignition source. (Tr. 160:20 – 161:6; 183:5-7) However, Inspector Rusher admitted that if there was diesel equipment in the area, it would not be allowed to operate above 302 degrees Fahrenheit. (Tr. 176:11-20) The ignition temperature of coal dust is above 400 degrees Fahrenheit. *Id.* He also testified that there was no methane in the section that day (Tr. 182:5-7), and that there was no “float coal dust” mentioned in the cite notes. (Tr. 170:5-8) The Secretary did not prove the existence of an ignition source.

Accordingly, I find that the Secretary failed to meet his burden to prove by a preponderance of evidence that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that the citation was not properly designated as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as \$9,800.00. The AMCoal New Era Mine operates a 5,774,752 tonnage mine. As I found above, AmCoal was moderately negligent. At even the assessed penalty of \$9,800.00, AmCoal’s business will not be

significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity or the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or “special” penalty assessment. Therefore, I assess a penalty in the amount of \$745.00.

WHEREFORE, it is **ORDERED** that AmCoal pay a penalty of **\$9,782.00** within thirty (30) days of the filing of this decision.¹⁶

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

Ryan L. Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado 80202

Jason W. Hardin, Esq., Fabian & Clendenin, 215 South State Street, Suite 1200, Salt Lake City, Utah 84111-2323

¹⁶ 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

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

September 11, 2014

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

v.

HIGMAN SAND AND GRAVEL, INC.,
Respondent

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

v.

MIKE HUBER, employed by
HIGMAN SAND AND GRAVEL, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2012-080-M
A.C. No. 13-02346-269803

HSG-Perm Washta Plant

CIVIL PENALTY PROCEEDING

Docket No. CENT 2013-701-M
A.C. No. 13-02346-330309 A

HSG-Perm Washta Plant

DECISION

Appearances: Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Godwin & Lohr, Sioux City, Iowa, 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 Higman Sand and Gravel and Mike Huber 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 Sioux City, Iowa, and filed post-hearing briefs.

Higman Sand and Gravel operates a permanent wash plant (the “Plant”) in Washta, Iowa, on an intermittent basis. These cases involve Citation No. 6550983, which was issued on May 16, 2011, under section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). The Secretary proposed a penalty of \$3,000.00 under his special assessment regulation against Higman Sand & Gravel and a penalty of \$2,200.00 against Mike Huber under section 110(c) of the Mine Act.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 16, 2011, MSHA Inspector Howard W. Wood issued Citation No. 6550983 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.12032 of the Secretary's safety standards. (Ex. G-3). The citation alleges that a 480 volt energized switch box upon a stacker conveyor was damaged in such a way that the door did not close completely, leaving an opening of about 4 inches. The door to the switch box includes push buttons that control the stacker. The citation further alleges that there was standing water in the area and that miners access the area at least two times a day. The citation states that miners informed the inspector that this condition existed for at least one month and that the operations manager was informed of the condition at least one week before the inspection.

Inspector Wood determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 56.12032 of the Secretary's safety standards provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The Secretary proposed a penalty of \$3,000.00 against Higman Sand & Gravel under his special assessment regulation at section 100.5. 30 C.F.R. § 100.5.

The Secretary also brought a civil penalty case against Mike Huber, a superintendent and operations manager with Higman Sand & Gravel, for the same alleged violation. This proceeding was brought under the authority of section 110(c) of the Mine Act. 30 U.S.C. § 820(c). The Secretary proposed a penalty of \$2,200.00 against Huber.

I find that Mike Huber did not violate section 110(c) and therefore the civil penalties assessed against him are vacated. I also modify Citation No. 6550983 to a 104(a) citation with moderate negligence.

Summary of the Evidence

Inspector Wood testified that when he inspected the No. 220 stacker conveyor he noticed that the energized electrical switchbox attached to the conveyor was damaged. (Tr. 19). He photographed the damaged switchbox, which was bent on the bottom right corner. (Ex. G-2). He assumed that the box was hit by a piece of equipment. As a result of the damage, the door to the electrical box did not fully close. He estimated that the distance between the door and cabinet of the box in the bottom right corner was 3 to 4 inches. (Tr. 20, 24-25; Ex. G-2). He did not measure the width of the opening. (Tr. 41). The circuits in the electrical box carry 480 volts of current. The inspector believed that a miner accessed the box at least twice a day to turn the conveyor on and off. (Tr. 25, 26).

The conveyor stacks sand, which is often wet. Inspector Wood testified that he was concerned about water and sand dripping off the bottom of the belt, entering the electrical box, shorting out the box, and energizing the cabinet of the box. (Tr. 20, 25-26). He observed puddles

of water upon the ground in the vicinity of the electrical box and there was wet sand on top of the box. (Tr. 21; Ex. G-2). According to the inspector, the cabinet and door of the box could become energized if wet sand accumulated upon the contacts within the box. (Tr. 25).

Based upon his observations and his conversation with the foreman at the plant, Inspector Wood issued Citation No. 6550983 under section 104(d)(1) of the Mine Act. He determined that the violation was serious and that an injury was reasonably likely based upon the conditions he observed. (Tr. 31). He determined that any injury was reasonably likely to be fatal because the area was wet, the box was metal, there were live 480 volt circuits in the box, and miners must open the box to turn the conveyor on or off twice a day. (Tr. 32). He further determined that the violation was S&S and one person would be affected. He considered the violation to be the result of Higman's high negligence because Larry Holzman, the foreman, told him that the box was in that condition for at least one week. Although Holzman requested that the electrical box be replaced a week before the inspection, Higman did not purchase a new one. (Tr. 32-34, 74-75). Holzman's supervisor was Mike Huber and according to the inspector, Huber told Holzman to try to straighten the existing box. (Tr. 35).¹

Inspector Wood recommended that MSHA file a penalty proceeding against Huber because he was the production supervisor, had the authority to purchase supplies, and failed to order a new electrical box to correct the hazardous condition. (Tr. 36-37). The inspector testified that he did not know whether Huber saw the damaged electrical box or knew the extent of the damage. (Tr. 37-38, 40-41, 50). Inspector Wood testified that Huber was not at the plant the day of the subject inspection.

Jason Coombs, a former assistant production manager at the plant, worked for Higman when the cited electrical box was damaged and when the subject citation was issued. He testified that the box was damaged around June 2009 when a loader operator backed into it. (Tr. 107-08). He did not believe that the damage to the box created a safety hazard. (Tr. 150). This damaged electrical box was not cited by MSHA until the May 2011 inspection.

Coombs further examined the electrical box after it was removed from the stacker conveyor and stated that there was a lip around the cabinet of the box that prevented rain or moisture from entering the box. (Tr. 115, 138-39; Ex. R-103(f)). He measured the opening between the door and the cabinet to be less than 1 inch. (Tr. 117; Ex. R-103(i)). He testified that it was possible that the opening in the box was different when he examined it than when the inspector cited it but, because the box was able to close and latch, it could not have been substantially different. (Tr. 128, 130).² Coombs further testified that, even if there was water in the area, a miner could not get a hand into the box to be shocked by energized parts. (Tr. 142).

¹ Inspector Wood initially determined that the violation was the result of Higman's "reckless disregard" but he modified the citation to high negligence because he did not talk to Huber. (Tr. 38).

² Higman used the box in the damaged condition to operate the sand conveyor and the box will not energize the conveyor unless the door is closed and latched. The damage did not affect the ability of miners to close and latch the door.

Mike Huber is the production manager for Higman. He oversees a number of plants and pits for Higman. (Tr. 153-54). His “second in command” is Jason Coombs. Larry Holzman became the foreman of the Washta Plant in April 2011. (Tr. 154-55). Huber testified that he never saw the subject electrical box prior to the MSHA inspection on May 16, 2011, but he knew that a loader damaged it. (Tr. 155). Holzman’s predecessor, Randy Rasmussen, accidentally backed into the electrical box. Huber testified that Rasmussen told him that the damage was “just a cosmetic issue.” *Id.* Huber stated that Higman did not move the cited sand conveyor after the loader damaged the electrical and that MSHA inspected it several times without issuing a citation. (Tr. 156). Because the electrical box was neither cited by MSHA nor mentioned as a safety issue, Huber did not think about the box until Holzman mentioned it shortly after he was hired in April 2011. (Tr. 157). Huber testified that he believed that the damage Holzman referred to was the “cosmetic” damage that Rasmussen told him about. (Tr. 158). He testified that he did not know that the electrical box presented a safety hazard and, if he had reason to believe that a hazard was present, he would have replaced the box. (Tr. 158).

Huber does not believe that the damaged electrical box presented a safety hazard to miners. (Tr. 169). First, moisture was unable to enter the box. Second, the continuity and resistance tests performed upon the box prior to the MSHA inspection demonstrate that the box was fully grounded. (Tr. 168-69, Ex. R-104). If water or wet sand did enter the box, the circuit breaker would cut off all power. (Tr. 182-83). Huber believed that MSHA inspectors examined the sand stacker conveyor including the electrical box during past inspections. Because these inspectors did not issue any citations for the condition of the electrical box, Huber assumed that it complied with the safety standards. (Tr. 173-74, 177). He never saw the box after the loader backed into it. The operations he supervises are spread out over 100 miles and they include about 400 conveyors. (Tr. 175). When it was reported to him that a loader damaged the box, but that the damage was cosmetic, he had no reason to disbelieve that statement. *Id.*

Larry Holzman started working for Higman as a foreman at the Washta Plant in April 2011. (Tr. 186-87). He was present during Inspector Wood’s May 2011 inspection. He testified that the opening in the electrical box caused by the loader was too narrow for a person to put their hand or fingers into the box. (Tr. 189). The gap was about 3/4 of an inch at its widest point. (Tr. 189-90, 195; Ex. R-103(g) & (i)). The presence of the “rain gutter lip” prevented extraneous material or someone’s fingers from entering the box. (Tr. 194-95). Holzman testified that it was not reasonably likely that the electrical box would injure anyone. (Tr. 190). Continuity and resistance testing demonstrated that the box was fully grounded. Although he recommended that the box be replaced, he did not believe that it was dangerous. (Tr. 192). He never indicated to Huber that it presented a hazard to miners.

Richard Lemmon, the safety superintendent with Higman, worked for the company for eight years. He does not work at the plant. He testified that after Rasmussen hit the electrical box with the loader, MSHA inspected the plant several times but issued no citations. (Tr. 200, 206-07, 218). He also stated that he is not aware of any facts that would have alerted Huber that the box presented a safety hazard to miners. (Tr. 207). He testified that the condition of the electrical box did not create a safety hazard, but he admitted that if water entered the box *and* the box became energized, someone could be electrocuted. (Tr. 213-14, 215, 217-18). The grounding

system would prevent the box from being energized in the event of a short, so a miner would not be shocked or electrocuted. (Tr. 220).

Discussion and Analysis

Higman does not dispute the fact of violation for Citation No. 6550983, but does challenge the S&S, negligence, and unwarrantable failure designations. Mike Huber argues that he should not be assessed a penalty under the section 110(c) civil penalty action.

I find that the violation was S&S.³ Higman accepts the violation of section 56.12032. I find that the discrete safety hazard presented by the violation was the danger of electrifying the box and resulting electric shock. As is typical, it is the third element of the *Mathies* test that presents the greatest challenge. In *U.S. Steel Mining Co.*, the Commission held that “the third element of the *Mathies* test does not require the Secretary to prove it was ‘more probable than not’ an injury would result.” 18 FMSHRC 862, 865 (citation omitted). The Commission has also long held that “[t]he fact that injury has been avoided in the past in connection with a particular violation may be ‘fortunate, but not determinative.’” *U.S. Steel*, 18 FMSHRC at 867 (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)).

The Commission reiterated these principles in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), and *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010). In *Musser Engineering*, the Commission rejected the mine operator’s argument that “there must be a reasonable likelihood that the violation will cause injury.” 32 FMSHRC at 1280-81. Instead, the Commission held that 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.” *Id.*

Assuming continued mining operations, the hazard contributed to by the violation was reasonably likely to lead to a serious injury. The cited cover closed and latched, preventing miners from directly contacting the interior circuit. I credit Inspector Wood’s testimony, however, that a miner could be shocked because the gap where the door met the cabinet could allow water to enter the box, contact the circuits, cause a short, and energize the box. This gap was in the bottom corner of the box, there was no foreign material in the box at the time of inspection, and the box had a lip to prevent material from entering; Higman, however, did not

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

plan to replace the electrical box. Assuming continued mining operations, I find that the violation and conditions in the area could degrade to allow water, sand, and other materials to enter the electrical box through the opening. This material could short the electrical circuit and the grounding system could fail to prevent current from energizing the box. Miners access the box at least twice a day. The electrical components in the box carry 480 volts of electricity. If this current energized the box as a result of foreign material entering the box through the opening, anyone who contacted the box would suffer a serious electrical shock, which is reasonably likely to cause a serious or fatal injury. I find that the risk of death or serious injury was not so remote as to fail the third element of the *Mathies* test. Consequently, I find that the violation was S&S.

Looking at all the facts and circumstances of this case, I find that the violation was the result of Higman's moderate negligence, not its high negligence or unwarrantable failure.⁴ The cited condition existed since June 2009 when a loader backed into the box. Although the violation existed for more than two years and was in plain sight, the plant did not move in that time and MSHA never cited the condition, despite conducting several inspections. The operator knew of and did not abate the condition, but I credit the testimony of Holzman, Coombs, Lemmon, and Huber that they did not believe that the damage to the electrical box presented a hazard and that Higman did not know that the condition violated the standard. None of the photographs the parties introduced at the hearing are conclusive and witness accounts differ concerning the condition of the box, but the damage was not extensive because the door still latched.⁵ The Secretary did not show that the operator was on notice that greater efforts were necessary for compliance with section 56.12032. Higman should have corrected the cited condition and therefore the violation was the result of its moderate negligence. Citation No. 6550983, however, was not the result of Higman's unwarrantable failure because its conduct was not aggravated.

⁴ Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

⁵ A shadow obscures the damaged area of the box in the Secretary's photo. (Ex. G-2). The photos presented by Respondents were taken after the box was removed from the sand conveyor. (Ex. R-103)

I find that the Secretary did not fulfill his burden⁶ to show that Huber knew or had reason to know of the cited condition that violated section 56.12032 and Huber therefore did not violate section 110(c).⁷ I credit Huber's testimony that he believed that the condition cited in Citation No. 6550983 constituted cosmetic damage that neither violated the Secretary's safety standards nor posed a danger to miners. Huber's subordinates alerted him of the damage, but did not suggest that it was dangerous or violative. Because the electrical box was neither cited by MSHA nor mentioned as a safety issue, Huber lacked notice that it required replacement. He did not work on-site and supervised all Higman's operations that included 400 conveyors spread over 100 miles. Huber did not see the cited condition; he relied upon the opinion of the miners he trusted who did not believe the condition created a hazard. Although Huber knew that the box was damaged, the Secretary did not present evidence to show that Huber knew or had reason to know that the cited condition created a hazard or violated the Secretary's safety standards. His actions did not exhibit aggravated conduct or greater than ordinary negligence. The civil penalty proposed by the Secretary against Mike Huber in CENT 2013-701-M under section 110(c) is **VACATED**.

⁶ In order to find individual liability in a 110(c) action, the Secretary bears the burden to show by a preponderance of the credible evidence that the conduct at issue was aggravated. *Maple Creek Mining*, 27 FMSHRC 555, 570 (2005).

⁷ The Commission summarized the law applicable to a Section 110(c) violation as follows:

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Cougar Coal Company, 25 FMSHRC 513, 516 (Sept. 2003).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-1). MSHA issued 15 citations at the plant in the 15 months prior to May 16, 2011, and none of the violations were S&S. At all pertinent times, the HSG-Perm Washta Plant was a small operation and Higman Sand and Gravel, Inc., was a small mine operator. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon the ability of Higman Sand & Gravel to continue in business. The gravity was serious and the negligence was moderate.

III. ORDER

For the reasons set forth above, Citation No. 6550983 is **MODIFIED** to a section 104(a) citation with moderate negligence and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,250.00 within 30 days of the date of this decision.⁸ The case against Mike Huber, CENT 2013-701-M, is hereby **DISMISSED**.

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

Distribution:

Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Two Pershing Square Building, 2300 Main Street, Suite 1020, Kansas City, MO 64108

Jeffrey A. Sar, Esq., Baron, Sar, Godwin, Gill & Lohr, PO Box 717, Sioux City, IA 51102

⁸ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 19, 2014

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

v.

YOUNGQUIST BROTHERS ROCK, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-0266 M
A.C. No. 08-01203-279931

Mine: Youngquist Brothers Rock Inc.

DECISION AND ORDER

Appearances: Emily O. Roberts, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, TN, for Petitioner;

Jake Huffman, Youngquist Brothers Rock, Inc., Myers, FL, pro se litigant,
for Respondent

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves one section 104(a) citation, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Youngquist Brother’s Rock, Inc. (“Youngquist”).¹ The parties presented testimony and documentary evidence at the hearing held in Fort Myers, Florida on September 24, 2013.

The contested issues at trial for Citation No. 8642418 included whether MSHA had jurisdiction under the Act to issue the Citation to Youngquist and whether Youngquist violated 30 C.F.R. § 56.15005 as alleged in the Citation.

For the reasons set forth below, I find that MSHA did have jurisdiction to issue the Citation under the Mine Act. I also find that Youngquist violated Section 56.15005 under the Act, the negligence was moderate, the injury was highly likely to result in fatality, and I find that the citation was significant and substantial. I assess a penalty in the amount of \$6,458.40.

¹ On July 25, 2013, I signed a Decision Approving Partial Settlement for the remaining eight Citations for Docket No. SE 2012-0266 M, and ordered Youngquist Brothers, Inc. to pay a total sum of \$3,278.00.

I. Stipulations

At the hearing, the Secretary read the Stipulations into the record: (Tr. 6:6-22)

1. The respondent owns and operates a surface mine producing sand and gravel lime rock products. The mine, Youngquist Brothers Rock, Inc., ID number 08-01203, is located in Lee County, Florida.
2. Employees at Youngquist Brothers Rock, Inc., Mine ID 08-01203 worked 80,543 hours in 2011.
3. Copies of 104(a) citation number 8642418 and 107(a) order number 8642417 were served on the respondent by an inspector employed by the Mine Safety and Health Administration.
4. The Respondent timely contested the 104(a) citation number 8642418.
5. The proposed penalty will not affect the respondent's ability to continue business.

Prior to the hearing, the parties also stipulated to the Commission's jurisdiction to hear and rule on this case in a Joint Prehearing Report received by the Court on September 18, 2013, which states:

Jurisdiction exists because the Respondent was an operator of a mine, I.D. Number 08-01203, as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and the products of that mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803, at all times relevant to these proceedings.

Joint Prehearing Report at 1.

II. Jurisdiction

A. Statutory Definition of "coal or other mine"

Section 3(h)(1) of the Mine Act defines of "coal or other mine" as follows:

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

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

It is well established that Congress intended this definition to be interpreted broadly. *See, e.g., Calmat Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005), *citing* S. Rep. No. 95-181, at 14 (1977) ([I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation.). However, the courts have recognized that the jurisdiction of the Mine Act is not without limitations. *See, e.g., Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc., et. al.*, 573 F.3d 788, 794-95 (D.C. Cir. 2009) ("*National Cement*") (rejecting unreasonably expansive reading of subsection 3(h)(1)(B)); *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (Nov. 1985) (While we have recognized that the definition of coal or other mine provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly the inclusive nature of the Act's coverage is not without bounds.); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984).

In *National Cement*, the Court of Appeals for the D.C. Circuit discussed reasonable limitations on what could be considered part of a "coal or other mine under subsections 3(h)(1)(A), (B), and (C). 573 F.3d at 793-97. The Secretary interpreted subsection (B) more narrowly than subsection (A). *Id.* at 793. She took the position that subsection (A), which covers extraction areas, extends to all the facilities and equipment within the boundaries of the extraction area, because virtually everything within an extraction area is necessarily related to mining activity. *Id.* at 794. However, she interpreted subsection (B), which covers private ways and roads appurtenant to extraction areas, to apply only to the ways and roads themselves. *Id.* Additionally, equipment and vehicles traveling on such roads would fall under MSHA jurisdiction only if they were covered under subsection (C), which covers only those facilities and equipment that are used in, or to be used in, or resulting from mining activities. *Id.* at 795. The D.C. Circuit found that the Secretary's interpretation of section 3(h)(1) was reasonable and entitled to deference. *Id.* at 794-97.

The Court in *National Cement* also adopted the Secretary's interpretation that "private" means are "restricted to a particular group or class of persons (not to a particular person)." *Id.* at 791,795. However, liability under the Mine Act requires a finding of control because only mine "operators" can be cited and held liable for violations. *See* 18 U.S.C. §§ 802(d), 814(a); *Sec'y of Labor v. Berwind Natural Res. Corp.*, 21 F.M.S.H.R.C. 1284, 1293 (1999) (stating that to be an "operator," an entity must have "substantial involvement" in the operation of the mine). Therefore, an entity cannot be held liable unless it "operates, controls, or supervises" the mine. 30 U.S.C. § 802(d).

Section 3(h)(1)(A) of the Mine Act is not in issue here. What is in issue is subsection (B), which covers private ways and roads appurtenant to extraction areas themselves, and subsection

(C) which covers equipment and vehicles that are used in or resulting from mining activities traveling on such roads. *National Cement* at 794-795. Thus, what must be determined is if the area is a private way, appurtenant to the mine and under the control of the mine, and that the truck in question is equipment used in or resulting from mining activities.

B. The Parties' Positions

On December 14, 2011, MSHA Inspector Leroy Ford² (“Inspector Ford”) issued Citation No. 8642418 to Youngquist alleging a violation of 30 C.F.R. § 56.15005. Inspector Ford observed a truck driver on top of his load in the bed of his truck shoveling material. Ex. S-1. The driver was not wearing a safety belt or line. *Id.* Inspector Ford testified that he had just finished inspecting the mine and was doing some work in his vehicle when he looked up and noticed a truck driver on the back of his bed about two hundred to three hundred feet from where he was sitting. (Tr. 24:24 – 25:6) He testified that the truck was approximately three hundred to four hundred feet inside the gate entrance to the mine. (Tr. 26:12-20) Inspector Ford was able to take a picture³ of the vehicle before it drove away. (Tr. 27:3-8)

Immediately, Inspector Ford went straight to the office to talk to Jake Huffman⁴ (“Mr. Huffman”) and explained that he was going to issue a 107(a) imminent danger order. (Tr. 27:18-21) Inspector Ford also testified that he wrote the Citation because he believed the property where the truck was located belonged to the mine. (Tr. 64:22-24) Inspector Ford testified that he told Mr. Huffman the truck was located at the gate entrance (Tr. 28:8-9) and located on mine property because it was just inside the gate to the mine. (Tr. 66:24-25) If the truck driver had been outside of the gate, Inspector Ford noted, it would not have been under MSHA’s jurisdiction. (Tr. 65:2-4)

Mr. Huffman testified that Youngquist owns two thousand acres, and that there are pieces of land that are leased out that MSHA does not have jurisdiction over, including the “restaurant” that sits on the property.⁵ (Tr. 51:4-10; Ex. S-4) Mr. Huffman testified that the truck in the picture was taken in the “restaurant” parking lot. (Tr. 51:4-10) Mr. Huffman testified that while the truck was on the mine property owned by Youngquist Brothers, that particular section was leased out. (Tr. 52:12-14) Mr. Huffman testified that truck drivers or the general public can drive into the dirt lot and go over into the leased “restaurant” area to have lunch. (Tr. 51:22-24)

² After serving in Vietnam, Inspector Ford worked in the coal mines in Kentucky. (Tr. 10:19-21) During his twenty-six year tenure for a surface mine (Tr. 5-13), he was a safety director for ten years, and worked on pretty much everything else in the mine. (Tr. 16-18) He also worked as a truck driver for ten years before working for MSHA. (Tr. 12:5-6) Inspector Ford began working for MSHA in 1998 in the metal non-metal division. (Tr. 12:8; 12:19-25) As of the day of the hearing, Inspector Ford worked a total of sixteen years for MSHA in Florida. (Tr. 13:20-21)

³ The picture was admitted into evidence. Ex. S-4.

⁴ At the time of the hearing, Mr. Huffman was the general manager of Youngquist Brothers Rock and agreed to represent the Respondent and to give testimony as required at trial. (Tr. 5:9-15)

⁵ The “restaurant” Mr. Huffman refers to is nothing more than a “truck that this man has turned into his restaurant... [that] hasn’t moved... [and] [h]e set it up on blocks.” (Tr. 75:4-9)

Inspector Ford spoke to Mr. Huffman and told him that the violation occurred on his property, but Mr. Huffman testified that he did not bring up any issues because “it’s best not to ruffle those feathers.” (Tr. 60:19-22)

Mr. Huffman, however, did admit that the land that the “restaurant” leases abuts the entrance and exit gate of the mine. (Tr. 77:1-3) Inspector Ford testified that he told Mr. Huffman at the time he wrote the imminent danger order that the truck was on his property, (Tr. 86:10-11) and at the time he issued the Citation there was no conversation that the area in question was a lunch area and not part of the mine. (Tr. 86:21-23) To Inspector Ford the area in question appeared to be a meals-on-wheels set up. (Tr. 66:9-12)

C. Analysis of the Facts

It is important to note that at no point during the hearing, (Tr. 82:12-14) or at any point after the hearing, did Mr. Huffman or any agent of Youngquist provide the Court with a copy of the lease agreement between Youngquist and the “restaurant.”⁶ Nor did Mr. Huffman call the “restaurant” owner as a witness to leasing out a portion of the mine property. As such, there is no evidence on record other than trial testimony of Mr. Huffman that a lease exists, and that the area in question does not in fact belong to Youngquist’s mine and subject to MSHA jurisdiction. Indeed, other than vague testimony that the leased property to the “restaurant” was a “dirt” section of approximately one acre, there is no evidence on record to show that the truck in the picture taken by Inspector Ford was actually on the restaurant’s property.⁷ Mr. Huffman did provide a handwritten drawing of the property, but without a lease or evidence showing where the actual property line existed, I cannot be certain that the truck was on any other property but on Youngquist’s mine property. Ex. S-4, Ex. R-1.

Even if Respondent had put forth credible evidence that the area in question where the truck was located was leased property to the “restaurant,” I would still find that under *National Cement*, the area in question is subject to the jurisdiction of MSHA.⁸

Mr. Huffman admitted that the land that the “restaurant” leases abuts the entrance and exit gate of the mine. (Tr. 77:1-3) Additionally, according to the drawing made by Mr. Huffman, the “restaurant” property abuts the mine property. Ex. R-1. Mr. Huffman testified that the whole property within the gates was owned by Youngquist (Tr. 51:4-10); that the “restaurant” was within Youngquist’s property gates (Tr. 77:1-3; 77:11-12); and assuming a lease does exist, the area in question is leased to a private party who provides food for patrons of the mine and other people who came onto the property. (Tr. 52:12-14) Mr. Huffman also testified that the truck depicted in the picture was in the “restaurant’s” dirt parking lot. (Tr. 51:9-10; Ex. S-4) The “restaurant” property is considered private even if it is open for business to the public because it

⁶ The Court did provide Mr. Huffman and Youngquist the opportunity to provide a copy of the lease to the Court after the hearing.

⁷ Mr. Huffman made the distinction that the mine property is the area that is asphalted and the “restaurant” property is the dirt area. (Tr. 67:8-18)

⁸ As the litigant was pro se, I will include the *National Cement* reasoning in the decision to explain that MSHA had jurisdiction to issue Citation No. 8642418 even if the land was leased to the “restaurant.”

is “restricted to a particular group or class of persons, namely its customers. Therefore, according to the above, I find that the truck in question was located on a private way appurtenant to Youngquist’s operations.

Mr. Huffman testified that the distance from the scales to the road, which is directly outside the mine gates, is approximately four hundred to five hundred feet. (Tr. 59:17-20) The mine property and the “restaurant” property share this gated entrance. (Tr. 77:11-12) When Mr. Huffman was asked if the load on the truck in the picture appeared to be sand and gravel, Mr. Huffman testified that it seemed to be the color of sand and gravel in the bed of the truck in the picture. (Tr. 54:16-18; Ex. S-4) By looking at the picture and the hand drawing made by Mr. Huffman together, it appears as though the truck in question was driving from the scales towards the exit gates of the mine, and on his way out, the truck driver pulled over slightly off to the side of the paved road to level off his load. (See Ex. S-4; See Ex. R-1) I therefore conclude that the truck was used in and resulted from the mining activities at Youngquist.

Youngquist’s control over the “restaurant” lot can be proven circumstantially by its location and testimony of Mr. Huffman. The “restaurant” is inside the mine’s gates, three hundred to four hundred yards away from the scale house, and adjoining the lot on which Youngquist’s printers and scales sit. (Tr. 77:1-3; 77:11-12; Tr. 26:12-20; Tr. 26:12-20; Ex. R-1) There is no barrier between the “restaurant” lot and the mine. (Tr. 79:19-21) Additionally, Mr. Huffman’s testimony showed that the behavior which led to Citation 8642418 is unusual because of the mine’s zero tolerance policy:

They’re all aware that if they get caught in the back of their trucks, in any of the rock mines, we’d just forever ban you from the rock mines... There’s a zero tolerance for any of this. It’s an issue we really don’t have. They go down the road where they’re far away from the mines, and they do what they have to there. This is something that we do not see.

(Tr. Tr. 58:25 – 59:9)

Mr. Huffman testified that the best place for the truck drivers to level off their load would be four miles down the road (Tr. 59:5-9; 60:4-7), and that this was because “[w]e don’t encourage it anywhere in the general vicinity of the mines.” This indicates that Youngquist did have some control over what the truck drivers did within the mine gates.⁹

I find that MSHA did have jurisdiction to issue Citation No. 8642418 to Youngquist because the area where the violative condition occurred was a private way appurtenant to the mine under the control of the mine, and the truck in question was used in mining activities.

⁹ This is not to say that MSHA has jurisdiction of the operations of the “restaurant,” but over violations such as the Citation at issue in this docket.

III. Citation 8642418

A. The Violation

On December 14, 2011, MSHA Inspector Leroy Ford issued Citation No. 8642418 to Youngquist alleging a violation of 30 C.F.R. § 56.15005. The regulation states that “[s]afety belt and lines shall be worn when persons work where there is a danger of falling.” Section 56.15005 regulates a mandatory safety standard. The Citation alleges:

One truck driver was observed on top of a load in the bed of the truck shoveling material. The driver was not wearing a safety belt or line. The fall to the ground was estimated to be a 6’ to 7’ drop. The truck was hauling from the scale house. The operation manager had signs posted all around the scale house with instructions to stay off the bed of the trucks. The signs were written in Spanish and English. This condition was a factor that contributed to the issuance of imminent danger order # 8642418 [sic]. Therefore no abatement time was set.

Ex. S-1.¹⁰

The Citation also alleges that the condition was highly likely to cause injury, that the injury was reasonably likely to be fatal, that the violation was significant and substantial (“S&S”), and the negligence standard was moderate negligence. *Id.* The Secretary proposed a penalty of \$7,176.00 for this violation.¹¹ Inspector Ford observed a truck driver on top of his load in the bed of his truck shoveling material. *Id.* Inspector Ford testified that the truck driver was approximately six or seven feet off of the ground, (Tr. 25:24) and the truck driver was not wearing a safety line, harness, belt, or anything to keep him from falling. (Tr. 26:2-5) Inspector Ford could tell the driver did not have safety equipment on because he had a shovel in his hand and he could see the truck driver moving around the back part of the bed. (Tr. 26:6-9; *See also* Ex. S-4) I find that Youngquist violated Section 56.15005.

B. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed

¹⁰ The actual imminent danger order number is 8642417.

¹¹ The Respondent failed to present any evidence regarding the Citation itself. The Respondent’s sole defense at the hearing was that MSHA lacked jurisdiction to issue the Citation. In fact, upon the conclusion of the Secretary’s direct examination of Inspector Ford, Mr. Huffman stated that “[e]verything he said is very accurate” when referring to Inspector Ford’s testimony. (Tr. 50:10)

conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Inspector Ford marked the citation as moderate negligence because he explained to Mr. Huffman at the time that he felt like they did everything they could possibly do as a company because they had signs. (Tr. 38:14-17) Inspector Ford considered the signs to be mitigation. (Tr. 38:22-25)

Mr. Huffman testified that he is aware that there is an issue that some of the truck drivers want to get into the bed of their trucks. (Tr. 57:1-5) Youngquist had seven signs at the scale house, in English and Spanish, telling the truck drivers not to get inside the beds of the trucks. (Tr. 21:7-10; 21:13-15; 56:23-25; 51:17-19) Mr. Huffman testified that there is a zero tolerance policy for getting onto the truck beds at Youngquist and that the drivers go down the road four miles where they are far from the mine to level the loads. (Tr. 59:5-9; 60:4-7)

Youngquist, however, does not provide a safe place for the drivers to level the load on the mine property. (Tr. 59:11-13) They do not provide safety lines, belts, or harnesses. (Tr. 59:14-16) Truck drivers are not advised of safe methods of tying off on the mine property. (Tr. 60:8-10) There are no signs that say that truck drivers must wear a belt to line if they need to tarp. (Tr. 58:9-11) There is no site-specific hazard awareness training for tying off. (Tr. 58:12-15) There are no trainings or signs for acceptable safety methods for leveling the load of the truck bed. (Tr. 58:16-18) There are no trainings or signs about acceptable safety methods for leveling the load of the truck bed. (Tr. 58:16-18) I find that given the known issue to Youngquist, they should

have training for safely tying off and safely leveling the load of the truck bed. For the reasons stated above, I find the negligence to be moderate.

C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) and *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Inspector Ford testified that the truck driver was approximately six or seven feet off of the ground, (Tr. 25:24) and the truck driver was not wearing a safety line, harness, belt, or anything to keep him from falling. (Tr. 26:2-5) Inspector Ford could tell the driver did not have safety equipment on because he had a shovel in his hand and he could see the truck driver moving around the back part of the bed. (Tr. 26:6-9; *See Ex. S-4*) The safety harnesses tether the drivers to the truck itself to prevent falls. (Tr. 33:22-25) From what Inspector Ford observed, the truck driver could fall over the side, hit the ground head first, and probably break his neck. (Tr. 32:7-13) The driver could have been killed because he was high enough off of the ground. (Tr. 32:7-13) Based on the above, I agree that the injury is serious in nature and that the resulting injury could result in a fatality.

D. Significant and Substantial

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) Some of the citations in dispute and discussed below have been designated by the Secretary as significant and substantial (“S&S”). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a high likelihood that the injury in question will be of a reasonably serious nature, i.e. broken neck or broken back resulting in a fatality. A measure of danger to safety, a discrete safety hazard, was contributed to by the lack of harness or safety equipment, and thus could fail to keep the truck driver from falling from the truck bed, which could result in serious injuries to a miner. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Ford had just finished inspecting the mine. He was doing paper work in his vehicle when he looked up and noticed a truck driver on the back of his bed about two hundred to three hundred feet from where he was sitting. (Tr. 24:24 – 25:6) That is what led Inspector Ford to write the imminent danger order. (Tr. 25:20-22) Inspector Ford told Mr. Huffman that the reason he wrote the imminent danger order was because a man was inside the back of the bed without any fall protection and he could fall and possibly be killed. (Tr. 28:3-6)

Inspector Ford testified that he marked the citation as highly likely because he felt that if the man had fallen from the top of the truck he could have broken his neck or his back, and that

would have resulted in paralysis or death. (Tr. 36:14-19; 37:3-6) Inspector Ford also testified that he felt that falling was very likely to happen from where the truck driver was standing in the back of the bed. (Tr. 36:24-25) It is also apparent from the photo exhibit that the truck driver was standing towards the back of the truck bed. Ex. S-4. Inspector Ford testified that he designated one person affected, and that person was the truck driver. (Tr. 37:7-8) Accordingly, I find that the Secretary did meet his burden to prove S&S.

E. Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.”); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (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.

The Secretary assessed the penalty for this citation as \$7,176.00. Youngquist operated the mine for approximately 80,543 hours in 2011, which indicates that the mine is medium sized. (Tr. 6:6-22; Ex. S-6) I have already determined above that Youngquist’s negligence was moderate. As per the joint stipulations, Youngquist’s business will not be significantly affected by the assessed penalty of \$7,176.00. (Tr. 6:6-22) As to the gravity of the violation, I found the violation to be S&S. The Secretary did not apply to ten percent penalty reduction for good faith abatement because it was issued in conjunction with an imminent danger order, Order 8642417. Therefore, no abatement time was set. However, given the circumstances that the truck driver was not apprehended and Youngquist could not abate the violation, I will give Youngquist the ten percent penalty reduction. Therefore, I assess the penalty amount against Youngquist to be \$6,458.40.

WHEREFORE, it is **ORDERED** that Youngquist pay a penalty of **\$6,458.40** within thirty (30) days of the filing of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

Emily O. Roberts, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 240, Nashville, TN 37219

Jake Huffman, Youngquist Brothers Rock, Inc., 15401 Alico Road, Fort Myers, FL 33913

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 2014

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

v.

PEABODY MIDWEST MINING, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2011-0277
A.C. No. 12-02295-242579

Docket No. LAKE 2011-1030
A.C. No. 12-02295-265364

Docket No. LAKE 2012-0543
A.C. No. 12-02295-284950-01

Docket No. LAKE 2012-0909
A.C. No. 12-02295-301060

Francisco Mine – Underground Pit

DECISION

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur M. Wolfson, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Peabody Midwest Mining, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Henderson, Kentucky, and filed post-hearing briefs. Four section 104(d)(2)¹ orders of withdrawal were adjudicated at the hearing. The orders were issued at the Francisco Underground Pit in Gibson County, Indiana.

¹ Subsequent to the hearing, the parties submitted Additional Stipulations with respect to the section 104(d) sequence for each order, as discussed below.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8428824; LAKE 2011-277

On July 20, 2010, MSHA Inspector Philip Douglas Herndon issued Order No. 8428824 under section 104(d)(2)² of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-5). The order states that loose rocks hung about 9.5 feet above the mine floor in the face area of the No. 7 entry on MMU-022. The order alleges that one rock was 3 feet by 2 feet and was up to 7 inches thick. The other rock was 2 feet by 1.5 feet and was up to 6 inches thick. The order also alleges that miners traveled directly below the hanging rocks.

Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 75.202(a) provides that the "roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of \$17,800.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

For the reasons set forth below, I modify Order No. 8428824 to a 104(a) citation with moderate negligence.

Discussion and Analysis

I find that the conditions cited in Order No. 8428824 constitute a violation of section 75.202(a). The Secretary's roof-control standard 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co Company*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Helen Mining Company*, 10 FMSHRC 1672, 1674 (Dec. 1988)). The requirements of the safety standard, as applied to the roof, can be broken down into three parts: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls of roof. The cited roof conditions were in by the last open crosscut in a busy area where workers traveled. (Tr. 17). I credit Terry Morson, a safety technician of Respondent, that pie pans and more bolts than the roof plan required helped to support the roof. (Tr. 41-42). I credit, however, Inspector Herndon's testimony that despite Respondent's efforts, the cited roof control was not adequate to protect miners from roof falls. Inspector Herndon testified that the rocks he cited were "barely hanging" and shed particles onto the floor. (Tr. 20). Respondent argues that the roof was controlled beyond the requirements of its roof control plan

² The parties stipulate that this order was issued in the proper sequence under section 104(d). Additional Stipulations ¶ 1.

and merely showed signs of changing geology. I credit Inspector Herndon's testimony, however, that the rocks he viewed hanging from the roof required further support. A reasonably prudent person familiar with the mining industry and this standard would provide more roof support to address the hazard viewed by the inspector. Respondent violated section 75.202(a).

I find that Order No. 8428824 was S&S because the violation contributed to a hazard that was reasonably likely to cause a serious injury.³ The cited condition violated section 75.202(a) and contributed to the hazard of a rock fall permanently disabling a miner. Although pie pans helped hold the cited rocks in place upon the roof and Respondent argues that as a result the rocks would not fall, I credit Inspector Herndon's testimony that the loose rocks were only held by the corner of the pan. (Tr. 41, 26). Clint Underhill, the shift mine manager, testified that the roof conditions at the mine changed daily due to geology and the humidity in July, which could account for this dangerous condition that occurred despite Respondent's additional roof control. (Tr. 57). Further changes in the geological conditions in the area could also lead to the cited stones falling. Although Respondent argues that the area beneath the rocks was not traveled the day of or before the inspection, assuming continued normal mining operations I find that miners would travel beneath the cited rocks. Inspector Herndon testified that rock dust in the cracks of the rock suggested that the rocks existed in the cited condition for days, which means the condition was unlikely to be corrected. The precarious position of the rocks made them likely to fall and the area underneath was often busy, making a rock fall likely to strike a miner. (Tr. 17). Due to the traffic in the cited area and the precarious position of the cited rocks, I find that Order No. 8428824 was S&S and a serious violation.

I find that Respondent's moderate negligence, but not its unwarrantable failure⁴ to comply with the safety standard, caused the violation. Respondent knew or should have known

³ 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).

⁴ Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for

(continued...)

of the condition, but mitigated its negligence by undertaking efforts to control the roof. I find that the condition of the roof was not obvious because the positioning of the rocks made them appear trapped by pie pans. The pie pans highlight Respondent's efforts to abate the hazardous roof condition by providing additional support. The pie pans were not required by the roof plan and Respondent also used more bolts than the plan required. Although aggravating factors exist including that the condition existed for several days and the condition posed a high degree of danger, I find that Respondent's efforts to abate the citation and comply with the standard make an unwarrantable failure designation inappropriate. Respondent did not ignore the need to properly support its mine roof, it merely misjudged what was necessary to do so. These factors combine to warrant a moderate negligence designation because Respondent should have known of the violative condition.

I **MODIFY** Order No. 8428824 to a 104(a) citation with moderate negligence. A penalty of \$15,000.00 is appropriate for this violation.

B. Citation No. 8433566, LAKE 2012-543; and Citation No. 8433568, LAKE 2011-1030

On June 27, 2011, MSHA Inspector Shawn D. Batty issued Order No. 8433566 under section 104(d)(2)⁵ of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. (Ex. G-5). The citation alleges that Peabody Midwest did not follow the provision in its approved roof control plan that requires entries in the mains to be no wider than 18 feet. The citation states that Inspector Batty measured the width of entries in Unit No. 1 and discovered 35 places where the width of an entry was greater than the permissible 18 foot maximum.

Inspector Batty determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 14 people would be affected. Section 75.220(a)(1) requires mine operators to "develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions and the mining system to be used at the mine." 30 C.F.R. § 75.220(a). The Secretary proposed a penalty of \$40,300.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

⁴ (...continued)

compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

⁵ Based upon these proceedings and the stipulations of the parties in Additional Stipulations, this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 3.

Inspector Batty also issued Citation No. 8433568 on June 27, 2011 under section 104(d)(2)⁶ of the Mine Act, alleging a violation of section 75.362(a)(1) of the Secretary's safety standards. (Ex. G-7). The citation alleges that Peabody Midwest did not conduct adequate on-shift examinations in Unit No. 1. The inspector determined that the on-shift examinations were inadequate based upon the conditions he cited in Citation No. 8433566. The citation states that the mine examiners' books did not contain the cited conditions.

Inspector Batty determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 14 people would be affected. Section 75.362(a)(1) requires that at "least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift" 30 C.F.R. § 75.362(a)(1). The safety standard further provides that the certified person "shall check for hazardous conditions and violations of mandatory health or safety standards referenced in paragraph (a)(3) of this section. . . ." *Id.* Paragraph (a)(3) references section 75.220(a)(1). The Secretary proposed a penalty of \$38,503.00 for this citation.

For the reasons set forth below, I modify Citation Nos. 8433566 and 8433568 to affect less than 14 people.

Discussion and Analysis

For Citation Nos. 8433566 and 8433568, Respondent accepts the violation, and the S&S, negligence, and unwarrantable failure designations. Respondent contests the fatal designation and the number of persons affected, seeking to reduce the penalty amount.

I find that fewer than 14 persons would be affected by the violation cited in Citation No. 8433566. An expansive, well-traveled area of entries of the submains were wider than 18 feet, potentially affecting multiple miners. I find, however, that it was unlikely that the cited condition would contribute to the injury of 14 miners. Although the inspector testified that 14 miners worked in the area, I find it unlikely that 14 miners would be in the same space at the time of a rock fall. I credit the testimony of Respondent's witnesses, Chad Barras, Respondent's safety director, and Jack Wells, who was a member of Respondent's safety department at the time of the violation, that 14 miners were unlikely to be in one spot due to their varied work duties. Wells testified that it "would be kind of a miracle" to see 14 miners together. (Tr. 108). Barras also testified that the mine's procedure to investigate roof falls would make it unlikely that this citation would contribute to a succession of numerous roof falls and injury causing events that would injure 14 people. (Tr. 118). I find that it was not reasonably likely that the violation at issue in Citation No. 8433566 would have affected the entire 14-person crew. The maximum number of miners affected would have been about five.

I find that the violation cited in Citation No. 8433566 was reasonably likely to contribute to a fatal injury. Respondent does not dispute that Citation No. 8433566 was reasonably likely to

⁶ Based upon these proceedings and the stipulations of the parties in Additional Stipulations, this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 3.

contribute to an injury,⁷ but does contest that the likely injury in such an event would not be fatal. Respondent argues that an injury causing event was unlikely to occur because the cited areas were newly mined submains instead of intersections, only marginally exceeded the standard in the roof control plan, and did not show any evidence of unsafe conditions. It is well recognized that roof falls pose one of the most serious hazards to miners in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The Commission has noted the inherently dangerous nature of mine roofs and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986). I find that the cited condition was extensive and unlikely to be corrected under continued normal mining operations. Respondent's arguments that the ribs were not cracking or falling and the submains were new suggest that danger was not imminent, but do not change the fact that a roof fall is likely to fatally injure a miner. Roof falls are one of the greatest dangers in mining and I credit the inspector's conclusion that the likely injury for Citation No. 8433566 would be fatal.

My findings concerning the fatal designation and affected people for Citation No. 8433566 apply to Citation No. 8433568, but Citation No. 8433568 could potentially affect more people. The dangers of the underlying conditions cited in Citation No. 8433566 affect the gravity of Citation No. 8433568, but a variety of other hazards also contribute to the gravity because inadequate examinations can allow additional hazards to exist. The distance covered by the violative conditions cited in Citation No. 8433568 shows that the inadequate examinations were not contained to a small area. Performing adequate examinations is one of the most important safety precautions for a mine; proper examinations lead to the identification and correction of hazards. Improper examinations allow hazards to exist and multiply. For these reasons and the ones discussed above concerning Citation No. 8433566, Citation No. 8433568 was reasonably likely to contribute to a fatal injury. The violation was serious and could affect more than five miners.

Although I reduce the number of miners affected by the conditions identified in Citation Nos. 8433566 and 8433568, I highlight the seriousness of the violations, which posed a hazard to multiple miners. Both of these violations could lead to roof falls that were likely to be fatal to miners.

⁷ If Respondent had not accepted the S&S designation and argued that an accident was not reasonably likely to contribute to a serious injury, I would have determined that Citation No. 8433566 contributed to the hazard of a roof fall that was reasonably likely to result in crushing injuries. The roof control plan mandated 18 foot submains at entries. Allowing greater widths is a clear violation of the plan that can contribute to a roof fall resulting in crushing injuries. The sheer volume of violative areas, 1142 linear feet in 35 different locations, makes an injury more likely. (Tr. 83). The cited areas of the mine were active and frequented by miners. (Tr. 84). The cited condition was extensive, dangerous, and reasonably likely to contribute to a fall of rock and resulting crushing injuries.

I **MODIFY** Citation No. 8433566 to be likely to affect no more than five miners and Citation No. 8433568 to be likely to affect more than five miners. A penalty of \$25,000.00 is appropriate for Citation No. 8433566 and \$28,000.00 is appropriate for Citation No. 8433568.

C. Citation No. 8434301; LAKE 2011-909

On May 26, 2011, MSHA Inspector Stephen J. Wilson issued Order No. 8434301 under section 104(d)(2)⁸ of the Mine Act, alleging a violation of section 75.1103-5(h) of the Secretary's safety standards. (Ex. G-9). The citation states that the carbon monoxide ("CO") sensor at crosscut 12 providing fire protection for the 2nd Southwest Main A belt line became inoperative at 02:57 am on May 26, 2011 during the midnight shift. The sensor alerted the person upon the surface who is responsible for tracking the system. The citation alleges that this person alerted the maintenance foreman of the condition but the foreman took no action to correct the condition and did not assign anyone to continuously monitor for CO at the inoperative sensor. The citation further alleges that two production units were in operation and belts continued to operate.

Inspector Wilson determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 64 people would be affected. Section 75.1103-5(h) provides that "[i]f any fire detection component becomes inoperative, immediate action must be taken to repair the component." 30 C.F.R. § 75.1103-5(h). The safety standard further provides that "[w]hile repairs are being made, operation of the belt may continue" if, as applicable here, a "trained person . . . continuously" monitors for CO "at the inoperative sensor." *Id.* The Secretary proposed a penalty of \$38,500.00 for this citation.

Discussion and Analysis

I find that Respondent's failure to immediately calibrate the cited CO sensor violates section 75.1103-5(h). I find that the cited sensor, which required calibration, was inoperative. Herbert Andy Ryder, Respondent's maintenance foreman, testified that the sensor still monitored CO, but underestimated the amount of CO in the area by 5 ppm. (Tr. 159). The screen that alerted Respondent that the sensor needed calibrated, however, did not contain specific data about the performance of the sensor. A test that exposes the sensor to a known quantity of CO had to be performed to garner this information. (Tr. 159). The sensor's CO monitoring ability could have estimated CO levels well below a calibrated sensor, which would impair the sensor enough to make it effectively inoperative. The standard requires immediate repair because an inoperative sensor cannot detect increased CO levels to provide warning of a fire, which can be true of a poorly calibrated CO sensor. Without performing a test to confirm the specific condition of the CO sensor, Respondent neglected to fix the sensor immediately, risking that an ineffective and inoperative sensor would fail to provide warning of a fire. Inspector Stephan J. Wilson

⁸ The parties stipulate that this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 2.

testified that Respondent did not recalibrate the sensor for almost six hours, which does not qualify as immediately, which violates the standard.

I find that Citation No. 8434301 was not S&S because it did not contribute to a hazard that was reasonably likely to cause an injury. Although it required calibration to function at its full capacity in violation of the standard, the CO monitor continued to detect CO.⁹ I credit Ryder's testimony that the cited sensor continued to alert miners to a drop in CO before the level of that CO became dangerous. (Tr. 157). If a fire occurred, the CO output would be great enough to trigger the cited sensor almost as quickly as a correctly calibrated sensor. I also credit Ryder's testimony that he calibrated the sensor as part of his normal duties and not due to the violation or a threat of a violation; he did not even know that Inspector Wilson was in the area when he traveled there with the intention to fix the sensor. (Tr. 158). Under continued normal mining operations, therefore, the condition would not have existed any longer than it did and would not have further deteriorated because normal mining operations rather than the violation led Ryder to correct the condition. This violation was unlikely to contribute to the hazard that a mine fire would propagate faster due to inadequate warning, resulting in burns or fatalities and therefore is not S&S. The gravity was serious, however.

I find that fewer than 64 miners were affected by the violation. The air passing over the cited sensor traveled outby, which means that it would not bring CO to the working faces. The slight delay responding to a fire caused by this improperly calibrated sensor would most likely only affect those miners who responded to fight the fire. I find, therefore that Citation No. 8434301 affected only a few miners.

The violation was the result of Respondent's high negligence. Charles S. Lyons, Respondent's third shift maintenance supervisor, knew or should have known of the violation yet failed to calibrate the sensor immediately. Lyons admittedly saw that the sensor required calibration. (Tr. 140-41). Instead of traveling directly to the sensor, Lyons performed various other duties and repairs and never reached the sensor before the end of his shift. (Tr. 143-47). Respondent did not address this violation for six hours. Lyons' negligence is attributable to the operator. The Secretary did not present evidence to show that Respondent was on notice that greater efforts were necessary to comply with section 75.1103-5(h). As discussed above, this violation presented little danger to miners and was abated as the citation was issued. Lyons knew of this condition and should have addressed it sooner, but was distracted by numerous maintenance projects, some of which were also safety concerns. It is important to note that Respondent believed that the sensor was functional and its condition did not contribute to a serious threat to safety. (Tr. 142-47). I find that Respondent's negligence was high but it did not rise to the level of aggregated conduct. Consequently, taking into consideration all of the relevant

⁹ The Secretary relies upon *Black Beauty Coal Co.* to argue that this violation should be S&S, but that decision addresses the complete absence of an audible warning device in a CO sensor system, which is different and more dangerous than the facts presented here. 33 FMSHRC 1504, 1525 (2011) (ALJ). Here, every other sensor continued to work and provide warning, which would not cause the same danger as a system that failed to provide an audible warning. That decision, furthermore, is not precedent.

facts, I find that the violation was not the result of Respondent's unwarrantable failure to comply with the safety standard.

I **MODIFY** Citation No. 8434301 to a non-S&S 104(a) citation with high negligence. A penalty of \$8,000.00 is appropriate for this violation.

II. SETTLED CITATIONS AND ORDERS

Docket No. LAKE 2011-277 was originally assigned to Judge Janet Harner. By order dated March 9, 2012, she approved the settlement of Citation Nos. 8426473 and 8426476 and Order No. 8430017. She ordered Peabody Midwest to pay a penalty of \$8,500.00 within 30 days of the date of her order.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-1). Peabody Midwest paid penalties for 688 violations in the 15 months prior to June 26, 2011 and 82 of these violations were S&S. *Id.* At all pertinent times, Peabody Midwest was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. The gravity and negligence findings are set forth above. I have assessed the penalty for each citation *de novo* taking into consideration the six penalty criteria. Peabody Midwest argues that the penalty for each citation should be substantially reduced from that proposed by the Secretary. I have assessed relatively high penalties based primarily on the size of the mine and the controlling company and on my gravity and negligence findings.

IV. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2011-277 8428824	75.202(a)	\$15,000.00
LAKE 2011-1030 8433568	75.362(a)(1)	\$28,000.00
LAKE 2012-543 8433566	75.220(a)(1)	\$25,000.00
LAKE 2012-909 8434301	75.1103-5(h)	\$8,000.00
TOTAL PENALTY		\$76,000.00

For the reasons set forth above, the citations and order are **MODIFIED** as set forth above. Peabody Midwest Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$76,000.00 within 40 days of the date of this decision.¹⁰

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

Distribution:

Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204 (Certified Mail)

Arthur M. Wolfson, Esq., Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified Mail)

RWM

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004-1710

September 26, 2014

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

v.

RECON REFRACTORY &
CONSTRUCTION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2010-450-M
A.C. No. 02-03243-203823 (NWB)

Mine: Drake Quarry

AMENDED DECISION AND ORDER

Appearances: Douglas L. Sanders, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Eugene F. McMenamin, Esq., Atkinson, Andelson, Loya, Ruud & Romo, Cerritos, California, for Respondent.

Before: Judge Paez

The decision and order issued August 28, 2104, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), to read as set forth below.¹

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). In dispute are five section 104(a) citations issued by the Mine Safety and Health Administration (“MSHA”) to Recon Refractory & Construction (“RECON” or “Respondent”) as a subcontractor at Drake Cement Company’s Drake Quarry mine. Respondent withdrew its contest to a sixth section 104(a) citation issued by MSHA. (Resp’t Answer at 2.) To prevail, the Secretary must prove the cited violations “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration*

¹ On September 24, 2014, the Secretary filed a Motion to Approve Penalty and Order Payment for Citation No. 6453944. In his motion, the Secretary explained that RECON had withdrawn its contest to the citation in its initial Answer to the Petition and agreed to pay the proposed penalty of \$263.00. (Sec’y Mot. at 1.) Although the withdrawal of contest for Citation No. 6453944 was noted on the record at hearing (Tr. 6:25–7:2), through clerical error, the citation was not addressed or dismissed in the August 28, 2014, Decision and Order. Accordingly, I approve this penalty under 30 U.S.C. § 110(i) and amend the August 28 decision *sua sponte* to rectify this clerical omission.

Citations, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). This standard requires the Secretary to demonstrate that “the existence of a fact is more probable than its non-existence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

I. STATEMENT OF THE CASE

Four of these alleged violations involve electrical equipment at Drake Quarry, and the fifth alleged violation involves workplace examination procedures at the site. First, Citation No. 6453940 charges RECON with a violation of 30 C.F.R. § 56.12025 for the failure to install a grounding rod on a power generator. Second, Citation No. 6453941 charges RECON with a violation of 30 C.F.R. § 56.12028 because continuity and resistance testing had not been performed on the aforementioned power generator. Third, Citation No. 6453945 charges RECON with a violation of 30 C.F.R. § 56.12004 for leaving 13 damaged electrical extension cords unprotected. Fourth, Citation No. 6453946 alleges a violation of 30 C.F.R. § 56.12025 because the ground prongs on five electrical extension cords and one grounding device were broken or missing. Finally, Citation No. 6454808 charges RECON with a violation of 30 C.F.R. § 56.18002(a) for a failure to perform and document required workplace examinations. The Secretary designated each violation as significant and substantial (“S&S”).² The Secretary proposed a total civil penalty of \$2,535.00 for these five citations.

A hearing was held in Riverside, California. The Secretary presented testimony solely from MSHA Inspector Enrique Vidal. (Tr. 16:17–101:9; Sec’y Preh’g Statement at 4.) RECON called three witnesses: Joseph Longstreet, Vice President of RECON; Benjamin Allen, RECON’s Cost Controls Manager; and Gregory Howearth, RECON’s Corporate Health and Safety and Environmental Manager. (Tr. 103:8–108:11; 110:17–117:6; 118:4–133:15.)

II. ISSUES

The Secretary argues that the conditions were properly cited as violations and that the allegations underlying the citations are valid. (Sec’y Post Trial Br. at 15.) RECON denies each violation, arguing that the Secretary has failed to meet his burden of proof for each citation. (Resp’t Post Trial Br. at 5.)

Accordingly, the following issues are before me: (1) whether, for each citation, the Secretary proved that a violation of a mandatory safety or health standard occurred at Drake Quarry; (2) whether the Secretary proved that each alleged violation was S&S; (3) whether the Secretary proved that RECON acted with moderate negligence regarding each violation; and (4) whether the Secretary’s proposed penalties are appropriate.

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

For the reasons that follow, I **AFFIRM** as written Citation Nos. 6453940, 6453941, 6453945, and 6453946, and I **VACATE** the fifth, Citation No. 6454808.

III. FINDINGS OF FACT

A. Operations at Drake Quarry

Prior to hearing, the Secretary filed a motion for partial summary decision to establish that RECON was subject to MSHA jurisdiction. (Sec’y Mot. for Partial Summ. Dec.) I held that the Drake Quarry site was a “mine” under the Mine Act, that the quarry was subject to MSHA jurisdiction, and that the MSHA inspectors had the authority to issue RECON the citations at issue in this case. *Recon Refractory & Constr., Inc.*, 34 FMSHRC 1722, 1731 (2012) (ALJ). Accordingly, I granted the Secretary’s motion for partial summary decision solely on the issue of jurisdiction. *Id.* My findings of fact from that order are reproduced below:

On April 6, 2009, MSHA assigned a mine identification number to Drake Quarry, a surface metal/nonmetal mine owned by Drake Cement Company (“Drake”) and located near Paulden, Arizona. On October 6 and 7, 2009, MSHA Inspector Enrique Vidal conducted a routine health and safety inspection of the Drake Quarry site. On October 8, 2009, MSHA Inspector Kyle Griffith continued the inspection of the Drake Quarry site.

RECON was hired as a subcontractor by CCC Group to build a facility on the Drake Quarry construction site. During the October 2009 inspections, the Secretary's inspectors issued RECON seven citations, five of which are before me.

Recon Refractory & Const., Inc., 34 FMSHRC 1722, 1724 (2012) (ALJ).

B. October 6–7, 2009 Inspection

Upon arriving at Drake Quarry on October 6, Inspector Vidal noticed a power generator (“Gen-set”). (Tr. 20:18–20.) Vidal discovered that the Gen-set did not have a grounding rod. (Tr. 20:20–21.) A grounding rod is required to prevent the metal generator from becoming electrified. (Tr. 23:24–24:4.) Inspector Vidal stated that miners regularly came into direct contact with the generator, which placed them in danger of fatal electrocution. (Tr. 24:5–25:2.) Based on his observations, Vidal issued Citation No. 6453940 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–2.) He determined that this violation was reasonably likely to result in a fatal injury to one miner due to the operator’s moderate negligence. *Id.* MSHA proposed a penalty of \$873.00 for this violation.

Moreover, because the grounding rod was not installed, testing on the rod could not be performed. (Tr. 34:21–22.) Accordingly, Vidal also issued Citation No. 6453941 alleging a violation of 30 C.F.R. § 56.12028. (Ex. G–5.) He determined that this violation was reasonably

likely to result in a fatal injury to one miner due to the operator's moderate negligence. *Id.* MSHA likewise proposed a penalty of \$873.00 for this violation.

Thereafter, during the inspection of the lay-down area³ in Drake Quarry, Vidal saw a gang box and asked one of Drake Quarry's employees about its contents. (Tr. 42:16–17.) The unidentified employee told Vidal that the gang box contained extension cords available for use by the miners. (Tr. 42:15–24.) Vidal further observed that out of 13 electrical extension cords, 11 had compromised outer protective jackets along with some damage to the inner conductors. (Tr. 46:7–11;49:4–17.) In addition, two of the electrical extension cords had completely exposed bare wiring that could expose miners to 110 volts of electricity. (Tr. 46:7–11;49:4–17.) Vidal testified that the unidentified employee told him the gang box containing the wires was unlocked and accessible by any miner. (Tr. 43:22–44:9.) As a result of his observations, Vidal issued Citation No. 6453945 alleging a violation of 30 C.F.R. § 56.12004. (Ex. G–8.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's moderate negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation.

While inspecting the gang box, Vidal also noticed that the ground prongs on five of the extension cords were either removed, missing, or broken. (Tr. 51:21–52:8.) Further, an on-site ground fault current interceptor (“GFCI”)—which is a device intended to prevent electrocution— was damaged. (Tr. 52:16–53:8.) Based on his observations, Vidal issued Citation No. 6453946 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–11.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's moderate negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation.

C. October 8, 2009 Inspection

On October 8, 2009, Inspector Kyle Griffith issued Citation No. 6454808 at Drake Quarry alleging a violation of 30 C.F.R. § 56.18002(a). (Ex. G–14.) The citation has boxes checked noting that the violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator's high negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation. The citation alleges that RECON failed to perform or document such workplace examinations. (Ex. G–14.) However, neither Inspector Griffith nor any other authorized representative of the Secretary testified regarding the issuance of this citation.

IV. PRINCIPLES OF LAW

A. Independent Contractors

The Commission has held that an independent contractor performing services at a mine is an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012) (“independent

³ The “lay-down area” consists of an office, fabricating area, and shop-area covered by a tarp. (Tr. 42:25–43:3.)

contractors who exercise supervision and control—in other words, ones also covered by the production-operator portion of § 3(d)—are [strictly] liable”). Moreover, the Commission has a “longstanding view that the purpose of the [Mine] Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed.” *Old Dominion Power Co.*, 6 FMSHRC 1886 (Aug. 1984) (citing *Phillips Uranium Corp.*, 4 FMSHRC 549 (Apr. 1982)).

B. Significant and Substantial

A violation is S&S if, “based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S 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 in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

Aside from specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a *measure* of danger.” *U.S. Steel Mining Co.*, 3 FMSHRC 822,827 (Apr. 1981). Moreover, the Commission has indicated “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission indicated an evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

C. Regulatory Interpretation

Interpreting the Secretary’s regulations that implement the Mine Act is a two-step process. First, unambiguous regulatory provisions “must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results.” *Jim Walter Res., Inc.*, 28 FMSHRC 578, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary’s

reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

V. ADDITIONAL FINDINGS OF FACT — ANALYSIS — CONCLUSIONS OF LAW

A. Electrical Violations

1. Citation No. 6453940 – The Grounding Rod

Section 56.12025 requires operators to ensure that all metal used to enclose or encase electrical circuits be grounded or provided with equivalent protection.⁴ 30 C.F.R. § 56.12025. Moreover, section 56.12025 is a performance standard; thus, it does not specify or require that the operator ground the metal in a specific manner. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 387 (Mar. 1996) (ALJ). Accordingly, an operator violates section 56.12025 when it fails to ground the metal that encloses electrical circuits. *See Brown Bros. Sand Co.*, 17 FMSHRC 578, 584 (Apr. 1995).

a. *Contractor Liability*

Inspector Vidal issued Citation No. 6453940 for RECON's failure to install a grounding rod on the power generator he observed. (Ex. G–2.) RECON does not dispute that a grounding rod was absent but instead argues that the Secretary should have issued this citation to the general contractor, CCC Group, which brought the power generator to the Drake Quarry but failed to install it properly. (Resp't Preh'g Report at 3.) Joseph Longstreet, RECON's Vice President, testified that, under the contract with CCC Group, RECON was not allowed to maintain any equipment provided by CCC Group, including the power generator. (Tr. 104:15–22.) However, despite this testimony, RECON failed to provide a copy of the specific contract provision that spelled out the prohibition it alleges.

Nevertheless, Respondent's argument misses the mark. The Mine Act is a strict liability statute that imposes liability without fault for things within one's control or supervision. *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F. 3d 788, 795 (D.C. Cir. 2009). It is undisputed that the power generator was located on RECON's work site. (Tr. 76:25–77:6.) Therefore, the power generator was under RECON's control and supervision at the time the citation was issued.

Although CCC Group installed the power generator, RECON—as a subcontractor hired to perform work at the mine—is deemed an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff'd*, 676 F.3d

⁴ Section 56.12105 provides: “All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.” 30 C.F.R. § 56.12025.

1109 (D.C. Cir. 2012). Consequently, RECON is strictly liable for the cited condition that occurred in connection with the power generator. Further, Respondent does not dispute that the power generator lacked a grounding rod. Accordingly, I conclude that RECON violated 30 C.F.R. § 56.12025.

b. *S&S*

RECON's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test requires that the violation contribute to a safety hazard. In this case, Inspector Vidal testified that the power generator's lack of a grounding rod would expose anyone who came into contact with the energized generator to approximately 240 volts of electricity. (Tr. 23:24–24:4.) Further, Vidal testified that the power generator was located right next to where miners worked, and thus miners could come in direct contact with the generator. (Tr. 24:21; 25–2.) Moreover, Vidal indicated that 240-volt electrocution would likely be fatal. (Tr. 25:14–17.) I give great weight to Inspector Vidal's testimony based on his 15 years as a MSHA inspector. Therefore, given Vidal's testimony, I determine that the third and fourth *Mathies* elements are established and, thus, conclude that this violation was appropriately designated as S&S.

c. *Negligence*

The Secretary's regulations define negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Moderate negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Inspector Vidal stated that looking for a grounding rod is a "very basic" practice (Tr. 20:20) and information regarding grounding rods is readily available on the Internet. (Tr. 30:1–3.) Thus, RECON knew or should have known that the power generator required a grounding rod. Nevertheless, I note that RECON's status as an independent subcontractor in conjunction with its understanding that CCC group, as the general contractor, was responsible for the installation of the power generator somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination and conclude that Citation No. 6453940 was properly designated as "moderate" negligence.

Based on the above analysis, I conclude that RECON violated section 56.12025, that the violation was S&S, and that the violation occurred as a result of RECON's moderate negligence.

2. Citation No. 6453941 – Continuity Testing

Section 56.12028 states the following: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." 30 C.F.R. § 56.12028.

Inspector Vidal issued Citation No. 6453941 for RECON's failure to perform continuity and resistance testing on the same power generator cited in Citation No. 6453940. Respondent argues that the absence of a grounding rod forecloses a claim for failure to perform the required continuity and resistance testing. (Resp't Reply to Sec'y Post-Trial Br. at 2.) Essentially, Respondent argues that Citation No. 6453941 cannot be sustained if I affirm Citation No. 6453940. Curiously, Respondent cites no case law for the proposition that its duty to comply with section 56.12028 depends on whether it has satisfied its duty to comply with section 56.12025. Notwithstanding Respondent's efforts to make compliance with section 56.12025 a necessary element of section 56.12028, I note that the Mine Act is a strict liability statute, and it requires operators to comply with the Secretary's safety and health standards. *Cf. Rock of Ages Corp.*, 20 FMSHRC 113–14 (Feb. 1998) (stating that the Mine Act imposes strict liability and refusing to insert an unwritten element into the text of a regulation). Moreover, the Secretary argues that Respondent misinterprets the phrase “immediately after installation” in 30 C.F.R. § 56.12028 by reading it narrowly to mean “immediately after installation of the grounding rod.” (Sec'y Post-Trial Br. at 8.) Instead, the Secretary claims that “installation” refers to installation of the equipment, rather than the grounding rod. (*Id.*) In addition, the Secretary asks that I defer to his interpretation of the regulation. (*Id.* at 9.)

a. *Ambiguity of the Phrase “Immediately After Installation”*

As explained above, the parties interpret the phrase “immediately after installation” differently. Neither the Mine Act nor the regulation provides a definition for the phrase. Looking at the text of the regulation and the parties' alternative interpretations, I conclude that it is in some respects ambiguous. *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998) (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992)); Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) (“Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.”). As the Supreme Court stated in *Boston & Maine*, “[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context.” 503 U.S. at 418.

b. *Reasonableness of Secretary's Interpretation*

Given my conclusion that the phrase “immediately after installation” is ambiguous as applied to the installation of a grounding rod on a power generator, I must decide whether the Secretary's interpretation of the provision is reasonable. The Secretary's interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *Gen. Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citing *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir.1991)). Moreover, a policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. *Id.* Under such circumstances, “the arguments for deference to administrative expertise are at their strongest.” *Gen. Electric Co.*, 53 F.3d at 1327 (citing *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813–14 (D.C. Cir.1981)); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (finding that the Administrator's interpretation represented a reasonable accommodation of manifestly competing

interests and was entitled to deference because the regulatory scheme was technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies.).

The Secretary interprets “immediately after installation” in section 56.12028 to mean immediately after the installation of the *equipment* that needs to be grounded. (Sec’y Post-Trial Br. at 8.) This interpretation focuses on the purpose of the regulation, which is to ensure that regular testing prevents fatalities and other injuries. *See* IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 21, at 44 (2003) (“PPM”) (“The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. [N]umerous fatalities and injuries have occurred due to high resistance or lack of continuity in the *equipment* grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.”) (emphasis added); *see also* 30 C.F.R. § 56.1 (“This part 56 sets forth mandatory safety and health standards for each surface metal or nonmetal mine, including open pit mines, subject to the Federal Mine Safety and Health Act of 1977. The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents.”). Testing “will alert the operator if a problem exists in the grounding system, which may not allow the circuit protective devices to quickly operate when faults occur.” IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 21, at 44 (2003). The Secretary’s interpretation does not deviate significantly from the language of the regulation. Furthermore, this interpretation is consistent with the purpose of the regulation reflected in MSHA’s PPM for 30 C.F.R. § 56.12028. As I noted, the preservation of safety is at the core of the regulation’s purpose. Testing the grounding system immediately upon installation of the equipment provides greater miner safety because it ensures the grounding rod and other elements of the grounding system are employed and tested. This provides the intended protection, especially if the generator is later energized. In contrast, allowing the generator to be installed without immediately testing the grounding system, as RECON suggests, provides less safety for miners from accidental electrocution. Thus, the Secretary’s interpretation serves a permissible regulatory function. Accordingly, I conclude that the Secretary’s interpretation is reasonable and, thus, entitled to deference.

c. *Violation*

Respondent admits that it did not perform continuity and resistance testing on the power generator. (Resp’t Reply to Sec’y Post-Trial Br. at 2.) Therefore, I conclude that RECON violated 30 C.F.R. § 56.12028.

d. *S&S*

RECON’s violation of 30 C.F.R. § 56.12028 establishes the first element for an S&S violation under the *Mathies* test. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard. Here, Inspector Vidal testified that the power generator’s lack of a grounding rod exposed anyone who came into contact with the generator to approximately 240 volts of electricity (Tr. 23:24–24:4) and that miners could come in direct contact with the generator. (Tr. 24:21; 25–2.) Vidal has significant experience inspecting mines

(Tr. 17:17–25), and I accord his experience great weight. Accordingly, I determine that the violation contributed to the discrete safety hazard of electric shock. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Here, Inspector Vidal testified that 240-volt electrocution would likely be fatal. (Tr. 25:14–17.) Given Vidal’s credible testimony, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur. Thus, the Secretary has satisfied *Mathies*’ third and fourth elements.

Based on my above determinations, I conclude that RECON violated section 56.12028, that the violation was S&S, and that it was the result of RECON’s moderate negligence.

3. Citation No. 6453945 – The Gang Box

Section 56.12004 requires operators to protect electrical conductors that are exposed to mechanical damage.⁵ 30 C.F.R. § 56.12004. An operator violates section 56.12004 when exposed cable or wiring that is capable of carrying an electrical current, thus creating a shock hazard, lacks an outer protective jacket or structure of some sort. *See Northshore Mining Co.*, 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Baker Rock Crushing Co.*, 32 FMSHRC 968, 977 (Aug. 2010) (ALJ).

a. *Additional Findings of Fact*

Inspector Vidal issued Citation No. 6453945 because 13 damaged electrical extension cords with compromised outer protective coverings and exposed bare wiring were left in a gang box and available for use by miners. Specifically, Vidal testified that an unidentified employee told him that the gang box was unlocked and accessible by any miner. (Tr. 43:22–44:9.) Inspector Vidal also stated that two of the cords had completely exposed bare wiring, potentially exposing miners to 110 volts of electricity. (Tr. 49:6–12.) He indicated that the injuries resulting from 110-volt electrocution could range from a fatality to lost work days and restricted duty. (Tr. 49:18–22.)

Respondent does not dispute the condition of the cords; indeed, RECON’s Cost Controls Manager, Benjamin Allen, admitted that at least some of the contents of the box were intended for use by miners (Tr. 112:21–113:1), and that the cords inside the box were unsuitable for use. (Tr. 116:4–8.) Instead, RECON alleges that the gang box was locked and, thus, the cords were

⁵ Section 56.12004 provides: “Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.” 30 C.F.R. § 56.12004.

unavailable for use. (Resp't Reply to Sec'y Post-Trial Br. at 3.) Specifically, Allen testified that the box was usually locked and was only unlocked for the inspection. (Tr. 113:3–114:3.) Allen also stated that there was only one key to the gang box and it was kept in a separate office. (Tr. 114:4–5.) Finally, Allen testified that equipment from the gang box had to be distributed to the miners by a supervisor per RECON's safety manual, which they provided as evidence. (Tr. 114:20–24; 115:14–16; Ex. R–2.)

I do not find Allen's testimony regarding the locked gang box persuasive for three reasons. First, operators are not given advance notice of MSHA inspections; it is unlikely that the box was unlocked in anticipation of Inspector Vidal's visit. Second, Respondent presented no evidence at the hearing indicating that Vidal "ordered all locked receptacles on site to be opened for his inspection," as it alleges in its reply brief (Resp't Reply to Sec'y Post-Trial Br. at 3.) Finally, Allen is RECON's Cost Controls Manager. (Tr. 110:21–22.) Allen did not explain how his duties as a cost control manager provided a basis for explaining the actual day-to-day operations of the rank-and-file miner. On the other hand, an actual miner told Inspector Vidal that the gang box was openly accessible by miners and that miners could use the equipment within as needed. (Tr. 42:15–24.) Therefore, I find that the gang box was unlocked and the items inside, including the extension cords, were accessible by any miner.

Inspector Vidal observed that 11 of the 13 extension cords had missing or damaged outer protective jackets (Tr. 47:16–19) and the remaining two were so damaged that bare wiring was visible. (Tr. 46:10–11.) Moreover, Vidal explained that, even with the bare wiring exposed, the extension cords were still capable of carrying a current. (Tr. 47:5–8.) Based on the evidence before me, I find that the 13 damaged extension cords were still functional and capable of carrying an electrical current.

b. *Violation*

Respondent does not dispute that the outer protective jackets of the extension cords were damaged thus exposing the bare wiring. Given my finding that the cords were available for use, I conclude that RECON violated 30 C.F.R. § 56.12004 because the extension cords in the gang box were capable of carrying an electrical current and left with damaged or missing protective coverings.

c. *S&S*

RECON's violation of section 56.12004 establishes the first element for an S&S violation under the *Mathies* test. As for the second *Mathies* element, Inspector Vidal credibly testified that the bare wiring on the extension cords exposed the miners to a safety hazard of 110-volt electric shock. (Tr. 46:7–11; 49:4–17.) As I have noted, I accord great weight Vidal's testimony based on his significant experience as an inspector. I therefore determine that the violation contributed to a discrete safety hazard of 110-volt electric shock. Thus, the Secretary has met his burden of proof on *Mathies*' second element.

Regarding the third and fourth elements of *Mathies*, Inspector Vidal credibly testified that the result of 110-volt electric shock would likely range from lost workdays to death. (Tr. 49:18–22.) I find his testimony regarding the electric shock hazard posed by the damaged extension cords credible and persuasive. Therefore, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and thus has satisfied the third and fourth elements of *Mathies*.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as "moderate" because the company is responsible for ensuring that any equipment that it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that, at some point, the gang box and access to the sole key was restricted. (Tr. 114:1–6.) Although RECON's written safety policy was not followed here, I note that RECON's safety manual requires that equipment such as the extension cords in the gang box be issued from a designated tool room attendant or supervisor. (Tr. 115:10–16; Ex. R–2.) That policy somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination that Respondent's negligence is properly designated as moderate.

Based on the above determinations, I conclude that RECON violated § 56.12004, that the violation was S&S, and that it was the result of RECON's moderate negligence.

4. Citation No. 6453946 –The Ground Prongs

Inspector Vidal issued Citation No. 6453946 because five cords in the same gang box had damaged or missing ground prongs. Moreover, a GFCI which is used to prevent electrocution was also damaged.

a. *Evidentiary Weight of The 2008 National Electrical Code*

At trial, and without prior notice to the Secretary, Respondent introduced evidence regarding the 2008 version of the National Electrical Code ("the Code")—a 600-page document. (Tr. 121:25–122:1.) Respondent admitted that it did not prepare this aspect of the hearing until a day prior. (Tr. 122:25–123:3.) RECON's Corporate Health and Safety and Environmental Manager, Gregory Howearth, testified that some unidentified "MSHA documents" referenced the code. (Tr. 121:25–122:1.) Respondent contends that it is not a hazard to use GFCIs in conjunction with extension cords. (Resp't Reply to Sec'y Post-Trial Br. at 3.) Further, Respondent claims that the Code supports its position. *Id.*

Respondent's eleventh hour introduction of the Code left the Secretary unable to adequately cross-examine Howearth on the document. At the hearing I had no reason to believe Respondent's action was anything more than a mere oversight, so I admitted the Code into evidence. (Tr. 123:22–24.) Regardless, I do not find Respondent's position on the Code persuasive. Respondent never identified the MSHA documents that purportedly reference the Code either at the hearing or in its post-hearing brief, and neither did Respondent establish their significance. Indeed, a miner using a damaged GFCI with a cord that has no grounding would

be exposed to the hazard of electrocution. Therefore, I conclude that Howearth's testimony regarding the 2008 version of the National Electrical Code is irrelevant to 30 C.F.R. § 56.12025.

b. *Violation*

Section 56.12025 states that “[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.” 30 C.F.R. § 56.12025. As I found above, the damaged extension cords in the gang box were capable of carrying an electrical current and left unprotected and accessible by miners. Therefore, I conclude that RECON violated 30 C.F.R. § 56.12025.

c. *S&S*

Respondent's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test. As for the second element, Vidal credibly testified that the use of an extension cord without a ground prong exposed miners to the safety hazard of electric shock. (Tr. 54:8–15.) In concluding that leaving extension cords with damaged or missing ground prongs available to miners constituted a violation, I have determined that a reasonably prudent person would recognize that allowing miners to use such damaged cords constituted a defect in safety. Likewise, I determine that the violation contributed to a discrete safety hazard of electric shock. Therefore, the Secretary has met his burden of proof on *Mathies*' second element.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this case are reasonably likely to result in lost workdays or restricted duty. (Ex. G–11.) Noting that these cords would likely carry 110 volts of electricity, Vidal described the potential injuries as a burn hazard, and heart defibrillation that could put a miner in the hospital. (Tr. 57:4–13.) Vidal determined this would reasonably likely result in lost workdays or restricted duty. As I noted, Inspector Vidal has significant experience inspecting mines. (Tr. 17:17–25.) Accordingly, given Vidal's significant experience as an inspector, I give his testimony great weight and determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and has thus satisfied *Mathies*' third and fourth elements.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as “moderate” due to the company's obligation to ensure that any equipment it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that he believed access to the gang box was restricted at some point. (Tr. 114:1–6.) Moreover, RECON, through its safety manual, had contemplated procedures to monitor distribution of the equipment. (Tr. 115:10–16; Ex. R–2.) I find these factors to be somewhat mitigating and, thus, I agree with Vidal's determination that Respondent's negligence is properly designated as moderate.

B. Citation No. 6454808 – Workplace Examination Violation

1. Parties' Arguments

The Secretary argues that the text of Inspector Griffith's citation itself, as well as his notes, establish a facial violation of 30 C.F.R. § 56.18002(a). (Sec'y Post-Trial Br. at 19.) Specifically, the Secretary points out that Citation No. 6454808 and Griffith's notes mention that the alleged failure to perform and document a workplace examination contributed to the issuance of three S&S violations during the same inspection. (*Id.*) Although counsel for the Secretary acknowledges that the Secretary has the burden of proof, counsel nevertheless highlights Respondent's failure to introduce any evidence regarding this citation. (*Id.*)

In contrast, Respondent argues that the Secretary has failed to meet his burden of proof regarding this citation. (Resp't Reply to Sec'y Post-Trial Br. at 4.) Respondent further argues that RECON has no obligation to present evidence given its position that the Secretary failed to meet his burden of proof. (*Id.*)

2. Analysis and Conclusions of Law

To establish the violation alleged in Citation No. 6454808, the Secretary must meet his burden of proof, which is by a preponderance of the evidence. To meet his burden of proof, the Secretary must demonstrate that "the existence of a fact is more probable than its non-existence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted). Put simply, "the evidence must be sufficient to convince the trier of fact that the proposition asserted is more likely true than not true." *Keystone Coal Mining Corp.*, 16 FMSHRC 857,896 (1994) (ALJ). Here, the Secretary presented only copies of Inspector Griffith's citation and notes. Yet, in his prehearing report, the Secretary stated that he would call Inspector Griffith to testify regarding this citation. (Sec'y Preh'g Statement at 8.) Thereafter, at the hearing, the Secretary indicated that a MSHA field office supervisor was supposed to testify regarding Citation No. 654808 but fell ill. (Tr. 14:14–17.) The Secretary could have asked for a continuance or, at a minimum, asked that the record be left open to introduce later deposition testimony from the then-ill MSHA supervisor. The Secretary pursued none of these options.

Instead, the Secretary chose to move forward with the hearing and circumvent the deficiencies in his presentation by attempting to introduce Inspector Griffith's citation under the business records exception to hearsay evidence through the testimony of Inspector Vidal, who could provide no information on Citation No. 6454808 itself. (Tr. 14:12–20.) The Secretary's attempt to use the business records exception is a red herring. It is a basic principle of administrative law that hearsay is admissible in federal and state administrative hearings. *See Richardson v. Perales*, 402 U.S. 389 (1971). Moreover, Commission Procedural Rule 63(a) specifically permits hearsay evidence in Commission proceedings. 29 C.F.R. § 2700.63(a).

I understand why the Secretary wants to introduce the citation into evidence under the business records exception to hearsay evidence, as I may then conclude that the text contained in the citation is somehow more reliable and should be taken at face value. However, Inspector

Vidal did not issue Citation No. 6454808, did not speak to Inspector Griffith about this citation, and was not at Drake Quarry on the date the citation was issued. Moreover, it was not his job to be the custodian of records. The Secretary's attempt to introduce the citation as a business record is unconvincing and inapposite. Nevertheless, the Commission's Procedural Rules allow for the introduction of hearsay evidence, and I duly admitted the citation and notes at the hearing. Their admission, however, does not determine the weight I give such evidence.

Indeed, the Secretary hopes to buttress his case by using the business records exception to the hearsay rule. Yet, in the end, it is still hearsay. With no foundation for the documents and no testimony to support the allegations and determinations contained in Citation No. 654808, I am left with little more than bald allegations to consider. In fact, I know nothing about the inspector who issued this citation or his qualifications, and nothing was admitted at hearing as evidence, such as an affidavit or deposition testimony, regarding Inspector Griffith or the issuance of this citation. As the Secretary well knows, MSHA vacates citations from time to time based on its view that the inspector erred in issuing a citation or in finding a violation, and Commission Judges have done the same. Without testimony from an inspector or witness who can substantiate the claims made in this citation, I have no way of determining the veracity of the charges contained in the citation. Thus, I am precluded from making any credibility determinations.

In my view, what the Secretary asks me to do here offends the basic tenets of due process. Moreover, it offends basic concepts of fairness, inasmuch as the operator cannot cross-examine a sheet of paper. The Secretary's attempt to find fault with Respondent's refusal to put on a case against this citation is also dubious. It is a failed attempt to draw attention away from the deficiencies in the Secretary's own case. All the Secretary has here is hearsay evidence, which I do not credit given the circumstances described and which I determine is insufficient to carry the Secretary's burden of proof. Consequently, I vacate Citation No. 654808.

VI. CIVIL PENALTIES

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Prior to the violations at issue, RECON has had no recorded history of violations. (Ex. G-1.) Of the five citations before me, I affirmed all but Citation No. 6454808. The Secretary has proposed a penalty of \$2,272.00 for the remaining four citations. Nothing in the record suggests that this penalty is inappropriate for the size of RECON's business or that it would infringe on RECON's ability to remain in business. Moreover, after these citations were issued, nothing suggests that RECON failed to make a good faith effort to achieve rapid compliance with the safety standards. RECON was moderately negligent in all four violations, and each affirmed violation exposed miners to a reasonable risk of fatal injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$2,272.00.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 6453940, 6453941, 6453945, and 6453946 are **AFFIRMED**. It is further **ORDERED** that Citation No. 6454808 is **VACATED**. It is further **ORDERED** that Respondent's request to withdraw its contest of the civil penalty for Citation No. 6453944 is hereby **GRANTED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of \$2,535.00 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5708

Eugene F. McMnamin, Esq., Atkinson, Andelson, Loya, Ruud & Romo, 12800 Center Court Drive, Suite 300, Cerritos, CA 90703-9364

/bm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 2014

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

v.

EXCEL MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2012-952
A.C. No. 15-08079-284662-01

Docket No. KENT 2012-953
A.C. No. 15-08079-284662-02

Mine: Mine No. 3

DECISION

Appearances: J. Malia Lawson, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, on behalf of the Secretary of Labor;

Gary D. McCollum, Esq., Excel Mining, LLC, Lexington, Kentucky, on behalf
of Respondent.

Before: Judge Paez

This case is before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. These matters were called for hearing on September 11, 2014, in Pikeville, Kentucky. For an hour beginning at the scheduled hearing time, the parties were permitted to attempt an amicable resolution of these dockets, given that counsel, witnesses, and the principals were all in attendance. At the conclusion of this period, I went on the record whereby the parties stated that they had resolved their differences. (Tr. 6–7.) Counsel for the Secretary specified the terms of the settlement, which I outline below, and counsel for Excel Mining, LLC (“Excel” or “Respondent”) concurred. (Tr. 7–8.) The parties read the terms of the settlement into the record and provided the rationale for the settlement agreement. (Tr. 7-10.)

The Secretary’s originally proposed assessment for both dockets was \$12,143.00, and the parties’ proposed settlement amount is \$10,500.00. The proposed settlement is as follows:

KENT 2012-952

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
8265645	01/10/2012	48.7(a)(3)	\$ 3,143.00	\$ 2,500.00
8268748	01/10/2012	50.10(b)	<u>\$ 5,000.00</u>	<u>\$ 5,000.00</u>
		Total:	\$ 8,143.00	\$ 7,500.00

KENT 2012-953

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
8268749	01/10/2012	50.12	\$ 4,000.00	\$ 3,000.00

Cumulative Totals: \$12,143.00 \$10,500.00

In support of the proposed settlement, the Secretary has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), including information regarding Respondent's size, ability to continue in business, and history of previous violations. In addition, the Secretary and Respondent have stated reasons on the record fully warranting the agreed upon reduction in the proposed penalties.

After review and consideration of the pleadings, arguments, and submissions in support of the settlement motion, I find that the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Respondent is **ORDERED** to **PAY** a civil penalty of \$10,500.00 within 30 days of this Order.¹

Additionally, within the same 30 days, the Secretary is **ORDERED** to **MODIFY** the following:

Citation/Order No.	Standard	Gravity			Number of Persons Affected	Negligence	Type of Action
		Likelihood	Severity	S&S			
KENT 2012-952							
8265645		To "Highly Likely"	N/A	N	N/A	N/A	N/A
KENT 2012-953							
8268749		N/A	N/A	N/A	N/A	N/A	To "104(a) Citation"

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

J. Malia Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Gary D. McCollum, Esq., Assistant General Counsel, Excel Mining, LLC, 771 Corporate Drive, Suite 500, Lexington, KY 40503

/cm

¹ Payments should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004-1710

September 30, 2014

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

v.

MACH MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2009-263
A.C. No. 11-013141-173084-01

Docket No. LAKE 2009-338
A.C. No. 11-013141-175621

Mine: Mach Mine No. 1

DECISION

Appearances: Sarah T. Weimer, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado, for Petitioner;

Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, Charleston,
West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. In dispute are two section 104(a) citations issued to Mach Mining, LLC (“Mach” or “Respondent”), alleging violations at Mach’s Mach No. 1 mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom.*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The Secretary filed his petitions for the assessment of penalty against Mach, and Mach timely filed its answers. Chief Judge Lesnick assigned consolidated Docket Nos. LAKE 2009-263 and LAKE 2009-338 to me along with Docket No. LAKE 2009-264. The parties subsequently settled Docket No. LAKE 2009-264, and I disposed of the case in a separate Decision Approving Settlement.

The Secretary has proposed a total civil penalty of \$4,800.00 for the two remaining citations, and I held a hearing on the record in Evansville, Indiana to determine the merits of the Secretary's case.¹ Citation No. 6683204 charges Mach with violating 30 C.F.R. § 75.380(f)(3)(iii) for obstructing a primary escapeway with a battery charging station, and alleges that Respondent's conduct constituted high negligence.² The Secretary presented the testimony of Mine Safety and Health Administration ("MSHA") Inspector and Electrical Engineer Dean Cripps, while Respondent presented testimony from Mach General Manager Anthony Webb and Fire Safety Incorporated Sales Representative Lowell Holler.

In addition, Citation No. 6679603 charges Mach with violating 30 C.F.R. § 75.400 for failing to clean up and prevent the accumulation of coal dust, loose coal, and other combustible material.³ The Secretary also alleges that the condition was significant and substantial⁴ ("S&S") and the result of Mach's high negligence. The Secretary presented testimony from two inspectors, Inspector Edward Law and Inspector Bobby Jones, while Mach presented evidence from Webb, Mach Examiner Dave Adams, and Mach Mine Foreman Chris England.

¹ In this decision, the following abbreviations are used: "Resp't Prehr'g Rprt" refers to the Respondent's Prehearing Report; "Br." refers to a brief by either party; "Tr." refers to the hearing transcript; "Sec'y Ex. #" refers to the Secretary's exhibits; "Resp't Ex. (Letter)" refers to Respondent's exhibits.

² Section 75.380(f)(3) provides:

The following equipment is not permitted in the primary escapeway

. . . .

- (iii) Underground transformer stations, battery charging stations, sub-stations, and rectifiers except—
- (A) Where necessary to maintain the escapeway in safe, travelable condition; and
 - (B) Battery charging stations and rectifiers and power centers with transformers that are either dry-type or contain nonflammable liquid, provided they are located on or near a working section and are moved as the section advances or retreats.

30 C.F.R. § 75.380(f)(3).

³ Section 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." 30 C.F.R. § 75.400.

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

Respondent has stipulated to my jurisdiction over this matter under the Mine Act, Mach's status as an operator subject to the Mine Act, and the effect Mach's coal has on interstate commerce. (Resp't Prehr'g Rprt. at 1.) The Secretary and Respondent each submitted posthearing briefs and reply briefs.

II. ISSUES

The Secretary asserts that the conditions were properly cited as violations and the allegations underlying the citations were valid. (Sec'y Br. at 1.) Mach admits a violation of both cited safety standards but contends that Citation No. 6679603 should be modified to a non-S&S citation. (Resp't Br. at 1.) Moreover, Mach asserts that both citations were improperly designated as resulting from Mach's high negligence. (*Id.*)

Accordingly, the issues before me are as follows: (1) whether the record supports the Secretary's assertions regarding the gravity of Citation No. 6679603; (2) whether the record supports the Secretary's assertions in Citation Nos. 6683204 and 6679603 regarding Mach's level of negligence; and (3) whether the civil penalties proposed by the Secretary are appropriate.

For the reasons set forth below, Citation Nos. 6683204 and 6679603 are **AFFIRMED** as written.

III. BACKGROUND AND FINDINGS OF FACT

The Mach No. 1 mine is a longwall coal mine in Johnston City, Illinois. (Sec'y Ex. 1; Tr. 18:8–9, 220:20–21, 263:8–11.) Mach Mine No. 1 is a “gassy” mine that liberates more than 1 million cubic feet of methane per 24 hours. (Tr. 143:20–144:3.) Each panel of the Mach No. 1 mine has a similar configuration and is generally about 18,000 feet in length. (Tr. 27:20–22, 30:13, 84:16–19.) A system of conveyor belts carries the coal to the main belt. (Tr. 13:7–8, 118:11–14.) The main belt—also known to as the “second east belt”—runs the entire 18,000-foot length of the longwall and carries the coal out of the mine. (Tr. 13:7–8, 118:11–14.) Mach Mine No. 1 also maintains sprinkler systems and carbon monoxide (“CO”) monitors as fire suppression and detection equipment in the Second East Headgate area of the mine. (Tr. 157:4–161:5, 255:4–11.)

In the fall of 2008, a temporary belt—known as a pony belt—extended into a setup room area to facilitate transfer of coal to the second east belt. (Sec'y Ex. 1; Tr. 114:5–23, 118:2–4.) The pony belt transferred the coal from the setup room onto the second east belt. (Sec'y Ex. 1; Tr. 115:12–117:23.) The pony belt and second east belt were the same width, making spillage common at the transfer point. (Tr. 13:9–13, 119:11–18, 231:12–23, 253:12–24.)

The mine also maintains primary and secondary escapeways for each section, which provide miners in the working area a safe pathway to exit the mine in the event of an emergency. (Tr. 24:15–25:10, 32:7–9.) Primary escapeways are designed to be ventilated with intake air

fresh from the surface to prevent smoke contamination of the main escape route in the event of a mine fire. (Tr. 24:24–25:3.) Alternate escapeways are separated from the primary escapeway in their entirety, but they need not be ventilated with intake air. (Tr. 25:4–10.)

IV. PRINCIPLES OF LAW

A. General Principles Governing Significant and Substantial (“S&S”) Designations

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S 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 in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc.*, 52 F.3d at 135–36 (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The third *Mathies* element is often heavily contested. In the accumulations context, the third element is met where a “confluence of factors,” such as the extent of the accumulation and presence of possible ignition sources, make the hazard reasonably likely to result in injury. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). This evaluation should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Materials need not be hot when inspected to prove friction as an ignition source, if heat will eventually result during continued normal mining operations. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (finding the lack of a hot spot immaterial where friction was present between belt rollers and accumulations).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission has indicated that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (finding no abuse of discretion where ALJ credited opinion of experienced inspector).

B. General Principles Governing Determinations of Negligence

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm. 30 C.F.R. § 100.3(d). Mine operators are held to a high standard of care, and failure to exercise such care constitutes negligence. *Id.* An operator is required to be alert for conditions affecting the health and safety of miners, while taking preventive and/or corrective action to address hazardous conditions or practices. *Id.* MSHA may consider mitigating circumstances which can include the operator’s actions to prevent or correct hazardous conditions or practices. *Id.*

Estoppel defenses are not generally available against the federal government. *See, e.g., Knob Creek Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Inspectors' previous representations about compliance with a regulation do not estop MSHA from issuing future citations, *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063–64 (Sept. 2000), but detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (indicating that a local MSHA office's past approval of operator's transportation methods does not negate an S&S finding and noting that detrimental reliance may be considered in mitigation of penalty).

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 6679603 — The Accumulations Violation

1. Additional Findings of Fact

a. Roof Fall, Inspection, and Accumulations — October 30

The early hours of October 30, 2008, were a busy time at Mach Mine No. 1. At approximately 2:00 a.m., Mach began to move the temporary pony belt connecting the mine's setup room to the second east belt, which would be a four or five hour process.⁵ (Tr. 240:17–241:7.) Meanwhile, at approximately 2:30 a.m., Adams identified coal accumulations in the second east belt tail area, deenergized the belt, and notified Mach's foreman that the belt tail needed to be cleaned. (Tr. 228:15–21, 229:1–12.) However, a roof fall occurred in the Second East Headgate area between 3:00 a.m. and 3:30 a.m. (Tr. 239:2–3.) Finally, at some point overnight prior to 7:00 a.m., a miner injured himself while installing supplemental support in another area of the mine. (Tr. 204:20–22, 205:8–11, 246:21–23.)

Two MSHA inspectors, Inspector Jones and Inspector Law, independently responded to the report of the roof fall. (Tr. 110:8–12, 113:4–5, 204:8–14, 205:4–5.) Inspector Jones arrived at Mach Mine No. 1 at approximately 6:30 a.m. (Tr. 204:8–14, 205:4–5, 122:18–22, 136:9–13, 137:13–15, 205:17–18.) He verbally issued a section 103(k) order at approximately 7:15 a.m., which required Mach to evacuate the area near the roof fall—including the area of the accumulations, which was approximately 400 feet away. (Tr. 123:6–11, 148:3–6, 208:4–10, 210:6–10, 14–17.) After Jones issued the section 103(k) order, Mach was prohibited from accessing the Second East Headgate area, including the junction point between the pony belt and main belt. (Tr. 185:2–5.) Jones testified that he saw the accumulations at the tail piece of the second east belt on his way to the roof fall area. (Tr. 206:4–8.) According to Jones, he did not immediately cite the accumulations because he was “more concerned with getting the roof control—the roof fall investigation so I could go and investigate the accident to the miner.” (Tr. 206:11–14.)

⁵ However, the stopped pony belt did not require the main belt to stop. (Tr. 190:10–15.)

Later that morning, Law received a call regarding the roof fall at Mach No. 1 Mine. (Tr. 110:8–11.) While traveling to the roof fall area, Law also observed the accumulations at the head of the pony belt and the tail of the second east belt. (Tr. 113:12–24.) At 10:40 a.m., Law issued a section 104(a) citation to Mach for violating 30 C.F.R. § 75.400. Law’s citation states:

The [Second] East Headgate belt tail has been running in accumulations of combustible materials in the form of coal fines, loose coal and coal. The accumulations are in front of, along the sides of and under the belt tail area. They range from 5 to 10 feet in length, 3 to 4 feet wide and from 6 to 24 inches in depth. The bottom belt has been running in coal and is in contact with the belt, under the tail pulley and in contact on both sides of the tail pulley. The accumulations of combustible materials are also built up under the pony belt scrapers in contact with the belt 10 to 18 inches in depth and the width of the belt. There has been a roof fall on the pony belt and the belts are currently not operating.

(Sec’y Ex. 7.) The accumulations were dark in color⁶ and were not rock dusted.⁷ (Sec’y Ex. 7; Tr. 120:2–7,0 121:9–10.) Although the second east belt was not running at the time, it appeared the accumulations were extensive and had been in contact with both sides of the belt. (Sec’y Ex. 7; Tr. 113:24, 114:1, 119:1–3.) According to Law, belt friction provided an ignition source. (Tr. 145:8–10.) He also indicated the accumulations appeared to have been there “for a while.”⁸ (Tr. 156:3–4.)

As to the extent of the accumulations, Law observed loose coal spilled along both sides of the belt, behind it, and underneath the head area. (Sec’y Ex. 7; Tr. 118:23–119:1.) Law measured the accumulations with a tape measure and described them as being five to 10 feet out along the sides of the belt tail and pony belt head area, three to four feet wide, and six to 24 inches deep. (Sec’y Ex. 7; Tr. 126:18–19, 113:19–20.) Underneath the pony head area, there

⁶ Although General Manager Webb testified that the accumulations were mostly rock (Tr. 251:12–19), I note that Law credibly testified that the material was coal. (Tr. 126:21–24.) Moreover, Respondent’s own witness, Foreman England, testified that the accumulations had “*a little bit of rock and coal.*” (Tr. 270:15–17 (emphasis added).) Thus I credit Law’s description regarding the composition of the accumulations.

⁷ Law did note that the surrounding area was rock dusted “fairly well” but indicated the accumulations, which were “pretty distinct in color,” were not. (Tr. 121:8–14.)

⁸ At the hearing, Inspector Law admitted he did not specifically know whether Mach had performed any work during the October 29 afternoon shift to address the accumulations noted in its afternoon examination books. (Tr. 156:24–157:2, 188:16–20.) However, Law noted that Mach’s exam records from both the October 29 afternoon and October 30 midnight shifts identified accumulations at the belt tail area but listed no corrective action had been taken. (Tr. 155:2–14; *see also* Resp’t Ex. B.) Inspector Law therefore inferred that the accumulations had been there for a “fairly long length of time.” (Tr. 155:9–11.)

were 10 to 18 inches of coal accumulations, such that the belt was “actually sitting on top of the coal.” (Sec’y Ex. 7; Sec’y Ex. 8; Tr. 113:21–24.)

Based on his observations, Law also determined that the violation was S&S and the result of Mach’s high negligence. (Sec’y Ex. 7; Tr. 111:7–13, 152:15–154:16, 164:1–165:17.)

b. Additional Findings of Fact — Mach’s Corrective Measures

Although Respondent admits that the cited accumulations were present in the belt tail area, Mach disputes Inspector Law’s determination regarding the duration of the violative condition. (Resp’t Br. at 2–3, 12–13.) Instead, Mach claims that the accumulations were a recent spill. Specifically, Respondent points to Examiner Adams’ testimony to suggest that accumulations listed in the exam book for the afternoon shift on October 29 had been cleaned. Adams worked a 9:00 p.m. to 7:00 a.m. shift at Mach Mine No. 1 on October 29 and October 30. (Tr. 224:22–23, 238:1–3.) Between 9:30 p.m. and 10:00 p.m. on October 29, Adams passed by the second east belt tail area. (Sec’y Ex. 7; Tr. 227:2–9, 228:10–11.) Adams testified that the accumulations described in Citation No. 6679603 were not consistent with his observations at 9:30 p.m. (Tr. 228:1–3.) According to Adams, at 9:30 p.m. the main belt and pony belt were running, and the tail rotor was clear. (Tr. 228:4–14.) Mach thus claims that the accumulations from the October 29 afternoon shift must have been cleaned before Adams’ 9:30 p.m. observations. (Resp’t Br. at 14.)

Despite Adams’ testimony, the evidence in this case convinces me that Respondent made no attempt to clean or address the accumulations at issue until Adams shut down the second east belt at 2:30 a.m. First, Inspector Law credibly testified that he believed no corrective action had been taken based on the amount of coal accumulations he found during his examination. As Law explained: “If it had been cleaned up twice prior to that, then they had an awful spill occurring . . . when whatever took the belt down, whoever took the belt down . . . it was running in coal and it had built up to the point that it was a pretty good size accumulation. . . . [I]f it was [cleaned up], then the spill they had ongoing was creating a very big hazard.” (Tr. 156:15–157:3.) In Law’s opinion, therefore, no corrective action had been taken between the October 29 afternoon shift and his inspection on October 30. (Tr. 156:15–17.) Law has more than 27 years experience as a miner and inspector. (Tr. 108:9–109:24.) His opinion is therefore entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported the ALJ’s S&S determination).

Second, Adams admitted he was not making a belt examination when he made his 9:30 p.m. observation; instead, he was in the area to examine a belt transformer. (Tr. 228:4–10.) Though Adams may have observed the area, his observation was not focused on the accumulations. In fact, during the hearing Adams gave no basis to believe his 9:30 p.m. observation of the belt tail area was at all rigorous. I therefore give no weight to Adams’ testimony on this point.

Finally, Mach produced neither testimony from General Manager Webb, Mine Foreman England, or Adams nor other evidence identifying any actual corrective action taken to clean up the accumulations.⁹ Based on the above, I therefore find Mach made no corrective actions to clean up the accumulations between the time the afternoon examiner observed them and the roof fall occurred at approximately 3:30 a.m.

2. Legal Analysis

a. Conclusion of Law — S&S Determination

Mach stipulated to a violation of 30 C.F.R. § 75.400, fulfilling the first *Mathies* factor. As I noted, Law credibly testified that the belt was in contact with the coal and an ignition was possible. Moreover, a belt running in coal may lead to a belt fire, creating smoke affecting anyone in the belt entry and increasing the chance of an explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985) (recognizing that coal can dry out and ignite). Thus, the accumulation contributed to a discrete safety belt fire safety hazard, and I determine that the Secretary has satisfied the second element of the *Mathies* test.

Mach also claims that injuries were not reasonably likely to occur, which is the third *Mathies* element.¹⁰ (Resp't Br. at 10–12.) First, Respondent contends that if an ignition did

⁹ Mach's posthearing briefs note that operators are allowed 24 hours to mark corrective actions in their examination books and that those 24 hours had not passed when Law inspected Mach's examinations books. However, Respondent's own brief highlights its lack of evidence: "Presumably, the accumulations noted during the afternoon shift (before 11:00 p.m. on October 29) could have been cleared prior to Mr. Adams' examination at approximately 9:30 p.m. that evening." (Resp't Br. at 14 (emphasis added).) Undeterred, Mach apparently hopes I will hypothesize about the corrective actions it might have taken and infer that those actions occurred. Yet, such conjecture provides no actual evidence from which I might infer that Mach actually cleaned the accumulations noted on its afternoon exam books.

¹⁰ Mach also included several other arguments that bear brief discussion, but which are ultimately inapposite. First, Mach suggests an ignition was unlikely because the material under the belt tail was wet and mostly rock. (Resp't Br. at 10; Resp't Reply Br. at 5.) However, I have credited Inspector Law's description of the accumulations. *See* discussion *supra* note 6. Here, Inspector Law indicated that the friction created from the belt contacting the coal would dry out the coal and provide an ignition source. (Sec'y Ex. 8; Tr. 135:14–19.) In addition, the Commission has consistently found that wet or damp coal will dry out and fuel or propagate a fire or explosion. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2329–30 (Aug. 2013) (citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985), and *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230, 1232 (June 1994)).

Mach also claims that its CO detection and fire suppression systems would alert affected miners to evacuate. (Tr. 15:12–21; Resp't Br. at 11–12.) Likewise, Mach suggests that personnel doors on the belt entry would allow a belt examiner to escape in the event of a fire. (Resp't Br. at 11–12). However, the presence of other fire safety equipment like CO monitors and personnel

(continued...)

occur, the direction of air flow in the entry meant that “smoke would travel outby away from miners in the working section.” (*Id.* at 11.) Second, Respondent claims that the belt did not provide a possible ignition source because it had been deenergized. (*Id.* at 10–11.) Finally, Mach claims that it would have cleaned the violative accumulations in the course of normal mining operations before the second east belt was reenergized. (*Id.* at 14–15.)

Nevertheless, the evidence before me demonstrates that the Secretary has satisfied his burden of proof on *Mathies*’ third element. Here, Law credibly testified that the second east belt had been running in coal. According to Law, one miner would be exposed to the hazard of a belt fire because the belt examiner that regularly checked the belt system would encounter smoke. (Tr. 154:8–9.) Regardless of the air flowing away from the miners on working section, a belt fire would therefore reduce visibility and make it difficult for the examiner to breathe or find his or her way out of the mine.

Respondent’s claim that the deenergized belt did not provide an ignition source is similarly inapposite. Although the second east belt had been deenergized at the time Law issued Citation No. 6679603, the belt was running in accumulations when Adams observed the accumulations at 2:30 a.m. *Cf. Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989) (noting that “[t]he operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed *prior to the citation* and the time that it would have existed if normal mining operation had continued.”) (emphasis added). Thus, the second east belt provided a source of ignition for several hours before Adams took any steps to shut down the belt.

In addition, the evidence suggests the belt was reasonably likely to be reenergized in the course of normal mining operations. Notwithstanding the belt shut down and Inspector Jones’ section 103(k) order, Respondent failed to clean the accumulations for several hours *prior* to the 3:30 a.m. roof fall. Thus, it appears that cleaning the accumulations was not a priority for Respondent. Indeed, England admitted that he prioritized conditions listed in Mach’s exam books. (Tr. 265:14–9.) In this context, the belt could be purposefully or inadvertently reenergized after Mach addressed the roof fall and completed its pony belt move. *Cf. Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1141 (May 2014) (concluding that an accumulation was S&S where the operator had already dispatched a clean-up crew to an accumulation running in coal

¹⁰ (...continued)

doors does not decrease the likelihood of injury. *Buck Creek Coal*, 52 F.3d at 136 (stating that the presence of fire safety measures does not mean that fires do not pose a serious safety risk to miners).

Finally, Mach claims that methane was not present at the time of the violation. (Resp’t Br. at 12.) I note that Mach Mine No. 1 is a gassy mine and methane may develop quickly. Nevertheless, it is unclear why Respondent believes methane is a necessary prerequisite for an ignition. As Inspector Law credibly testified, a fire may occur when a “fire triangle” is present. (Tr. 144:23–145:3.) A “fire triangle” has three components: an ignition source, fuel, and oxygen. (Tr. 145:1–3.) Law identified all three fire triangle components—an ignition source (the belt friction), fuel (the accumulations of coal), and oxygen (in the air). (Tr. 145:8–10.)

because the Commission could not assume the clean up would be completed before production resumed.) Given the presence of an ignition source, the size of the coal accumulation, the amount of time that the accumulations existed and ran in coal, Mach's previous inaction, and the possibility that the belt would be reenergized in continued mining operations, the confluence of factors in this case convinces me that the hazardous condition was reasonably likely to result in injury. I therefore determine that the third *Mathies* element has been satisfied.

Finally, Law also credibly testified to the seriousness of the injuries a belt fire would cause. Specifically, Law testified that a belt fire is reasonably likely to result in smoke inhalation and carbon monoxide poisoning injuries. (Tr. 154:8–16.) As the Commission has observed, smoke inhalation and carbon monoxide poisoning are serious injuries. *Cf. Big Ridge, Inc.*, 35 FMSHRC 1525, 1533 (June 2013) (affirming judge's S&S determination where the hazard was reasonably likely to result in smoke inhalation, carbon monoxide poisoning, and burns); *see also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (indicating that "ignitions and explosions are major causes of death and injury to miners."). Accordingly, I determine that the Secretary has also satisfied the fourth element of *Mathies*.

Based on the foregoing, I determine that the Secretary has established all four elements under *Mathies* and conclude that this violation was properly designated as S&S.

a. **Conclusions of Law — Negligence Determination**

The Secretary contends that Respondent's knowledge of the violative condition, notice that greater efforts were necessary for compliance, history of previous violations, the extent and obviousness of the accumulations, and the danger the accumulations presented each demonstrate Mach's high negligence. (Sec'y Br. at 21–22.) In contrast, Mach argues that the high negligence designation is improper because: (1) Examiner Adams shut off the belt upon discovery of the accumulations and instructed the foreman to clean up the accumulations; and (2) the roof fall and the resulting section 103(k) order prevented Mach from cleaning up the accumulations for a lengthy period before Inspector Law issued the citation.¹¹ (Resp't Br. at 16–17.)

Here, Mach knew that coal commonly accumulated at the transfer point where coal from the pony belt was dumped onto the main belt. (Tr. 13:5–11.) As Adams observed, accumulations and spillage occurred in that area "pretty often." (Tr. 231:23.) Likewise, General Manager Webb noted that coal accumulated at this transfer point because the two belts were the same width, causing significant build-up on the sides of the main belt. (Tr. 253:12–15.) Despite this knowledge, Mach allowed significant amounts of coal to accumulate under the belt. Indeed, Inspector Law's testimony and description in Citation No. 6679603 detail the extent of the

¹¹ Mach also suggests the accumulations listed in the exam book from the afternoon shift on October 29 had been cleaned and that the accumulations at issue in Citation No. 6679603 resulted from spillage. (Resp't Br. at 16–17.) However, I have found that Respondent took no steps to clean the accumulation in the belt tail area prior to the roof fall. *See discussion supra* Part V.A.1.b.

violation. (Sec’y Ex. 7; Tr. 125:20–126:2.) Mach was also on notice of the specific accumulations at issue beginning on the afternoon of October 29. (Tr. 13:14–19.) Thus, Respondent was on notice that accumulations were likely to arise at this transfer point *and* knew about the actual violative conditions in question.

Moreover, Law stated that Mach could have promptly cleaned up the accumulations with a shovel. (Tr. 150:3–7.) In fact, Mach quickly corrected the condition after Law issued Citation No. 6689603. (Tr. 237:14–16.) Compared with the danger the accumulations presented, it appears that cleaning the accumulation would have been relatively simple. Yet, Mach took no steps to clean the condition prior to the roof fall at 3:30 a.m.

Further, the evidence before me does not demonstrate any mitigating factors. Although Adams instructed the foreman to shut off the main belt because it was “gobbed out” (Tr. 228:24, 258:11–14), Adams’ efforts neither *prevented* nor *corrected* the hazardous condition: the coal accumulation remained under the belt line. Rather than mitigate its negligence, Mach’s willingness to shut down the belt and halt the transportation of coal out of the mine highlights just how negligent Mach had been in allowing the situation to progress over several hours. At that point, the accumulations must have been so serious that Mach was willing to stop the transport of coal despite the slowdown to its operations. Moreover, neither Adams’ action nor the roof fall precluded the main belt’s purposeful or inadvertent reengagement in the hours prior to the section 103(k) order at 7:15 a.m. or after the roof fall had been addressed. If the belt were reenergized, the belt remained an ignition source for a dangerous belt fire.

Mach’s claim that it would have cleaned the violative accumulations if the roof fall had not occurred is likewise unavailing. (Tr. 233:17–23.) It is true that the early morning hours of October 30 were busy ones at Mach Mine No. 1. A miner had been injured. A roof had fallen. Focusing on the roof fall and injured miner is a seemingly rational decision; indeed, Inspector Jones himself testified that he bypassed issuing the accumulation citation to attend to the roof fall and injured miner.¹² Superficially, Mach’s reasons for not cleaning the accumulations in those hectic early morning hours might seem to mitigate Respondent’s negligence. Yet when examined more closely, Mach’s argument ignores *hours* of inactivity *preceding* the roof fall. Despite the ease with which Mach could have cleaned the accumulation, Respondent took no steps to address the violative condition between the afternoon shift on October 29 and the roof fall at 3:30 a.m. on October 30.

For the foregoing reasons, I find the Secretary met his burden to prove Mach’s high negligence concerning Citation No. 6679603. In light of my conclusion that this violation was also S&S, Citation No. 6683204 is hereby **AFFIRMED** as written.

¹² Jones explained: “If it had been an normal day, I would have cited it, or if it—even if it had just been the roof fall, I probably would have cited it. My number one intention when I went below was to get where the miner was injured where I could look it over.” (Tr. 212:10–15.)

B. Citation No. 6683204 — The Charging Station Violation

1. Additional Findings of Fact

a. Additional Findings of Fact — Prior Citation

A battery charger is a large piece of electrical equipment, measuring approximately six feet long, three feet wide and two to three feet high. (Tr. 41:22–24.) Battery chargers connect, or plug in, to belt power centers through a cable attached to the charger. (Tr. 26:11–27:4.) The end of the battery charger cable, called a cathead, plugs into the belt power station. (Tr. 34:10–12.) When a lock is placed on the cathead, the battery charger’s cable cannot be plugged into the belt power center and thus the battery charger cannot be energized unless the lock is removed. (Tr. 38:8–11, 93:7–12.)

On October 28th, 2008, Inspector Cripps cited Mach for a violation of 30 C.F.R. § 75.380(f)(3)(iii) because he had found two charging stations in same primary escapeway. (Sec’y Ex. 5; Tr. 35:11–19.) After the October 28th citation, Mach moved the charger to the surface so to allow Fire Safety, Incorporated (“Fire Safety”) to update its fire suppression system. (Tr. 11:13–15, 104:18–23.) According to Sales Representative Holler, Fire Safety completed the update on October 29, tagged the charger, completed an inspection report, and left it on the surface of the mine because it was not Fire Safety’s responsibility to return the charger underground. (Tr. 104:14–16, 105:3–8; Resp’t Ex. C.)

On November 7, another inspector terminated the October 28 citation when the charger cable was locked out.¹³ (Sec’y Ex. 5; Tr. 36:19–37:1, 46:22–47:7, 68:21–22, 75:11–12, 100:5–16.) At some point, someone returned the charger to the primary escapeway, but the means by which it returned and the actual date of return is unknown. (Tr. 98:3–7.) General Manager Webb testified that he did not order any Mach employees to return the charger to the primary escapeway, does not have a way of knowing who returned the charger underground, and did not know the charger was returned to the primary escapeway until November 15 or 16. (Tr. 88:14–23.) When Webb found the charger in the escapeway, he saw its power cable rolled out towards the power center, with the cathead laying on the ground unlocked. (Tr. 93:12–19, 98:17–21, 99:19–22.) Webb then directed his longwall maintenance chief, Dallas Travelstead, to put a lock on the cathead. (Tr. 89:15–18, 93:5–10, 99:16–18.)

b. Cripps’ November 17, 2008 Inspection

On November 17th, 2008, Inspector Cripps conducted an inspection of Mach No. 1 mine. (Sec’y Ex. 6; Tr. 19:10–15.) During his inspection, Cripps noticed a battery charging station parked in the primary escapeway at Headgate Number 2, about one and a half miles away from the working section. (Tr. 24:8–10.) The charging station was not being used to maintain the

¹³ Cripps, however, would not have terminated the October 28 citation simply for locking out the charger’s cathead; instead, he would have required removal from the primary escapeway. (Tr. 37:10–14.) As Cripps noted, merely locking the cathead would allow “anybody [with] . . . a key . . . [to] go up and simply take the lock off and plug it in and begin charging with it at any time.” (Tr. 38:4–11.)

escapeway. (Sec'y Ex. 5; Tr. 23:21–24:6.) The charger cable was locked out, but it was extended to the belt power center one crosscut inby. (Sec'y Ex. 5–6; Tr. 34:7–12, 43:5–14, 38:8–11.) Cripps also noticed a battery-operated scoop located in the charging station in a position to be charged, although it was not charging at the time. (Tr. 23:8–9, 26:2–3, 31:5–6.) As Cripps observed the condition, Greg Patton, a foreman, approached the area and told Cripps he had come to see if his scoop was charged up. (Sec'y Ex. 6; Tr. 44:19–45:5.) Patton told Cripps he normally charged his scoop in this location, and he did not know whose lock was on the charging station. (Tr. 45:17–20.)

Based on his inspection and observations, Cripps issued Citation No. 6683204, indicating:

A scoop charging station, No. 4 charger, was located at No. 78 crosscut of the HG #2 primary escapeway and was not being used to maintained [sic] the escapeway. The cable that supplies 480 volts to the charger extended to the belt power center at No. 79 crosscut and was locked out. This charging station was cited on 10/28 for being in the primary escapeway. The citation was terminated when the charger was locked out. Evidence indicates that this charger has been being used since the previous citation was issued and terminated.

(Sec'y Ex. 5; Tr. 21:20–24, 49:6–51:1.) In addition, Cripps determined the violation was the result of Mach's high negligence. (*Id.*; Sec'y Ex. 6; Tr. 50:8–52:1, 57:24–58:10.)

2. Conclusion of Law — Negligence Determination

Mach argues that it did not receive notice that MSHA would no longer accept a locked-out cathead as abating the 30 C.F.R. § 75.380(f)(3)(iii) violation. (Resp't Br. at 20–22.) Mach notes that the charger's cathead was locked out—purportedly in conformance with the abatement procedures approved in abating its October 28 citation—when Cripps found it in the primary escapeway. (Resp't Br. at 20–22.) Mach argues, therefore, that conformance with prior abatement should mitigate its negligence. The Secretary argues the battery charger's return to the escapeway after its October 28 citation makes Mach negligent and contends the lock on the cathead does not mitigate Respondent's negligence.¹⁴ (Sec'y Br. at 10–12.)

¹⁴At the hearing and in their briefs, the parties disagreed whether Foreman Patton used the battery charger in the interim between the October 28 citation and November 17 citation. (*See, e.g.*, Resp't Br. at 7–8.) Yet, it is unclear why the chargers' actual use would measurably affect Mach's negligence in this case. As General Manager Webb admitted, the cathead had been unlocked and extended toward the power center when he found the charger in the primary escapeway just one or two days before Inspector Cripps issued Citation No. 6683204. (Tr. 93:7–8, 99:19–22.) It is also appears that Mach's management did not closely monitor the use of the charger. Indeed, Webb admitted he did not know how or when the charger returned to the

(continued...)

Although I recognize that prior forms of abatement *might* be the basis for mitigating negligence in *some* scenarios, *see* discussion *supra* Part IV.B, in this case Mach made no showing of detrimental reliance. Standing alone, General Manager Webb’s order to lock the cathead once he found the charger in the escapeway *might* have been a basis to infer a late-in-the-game attempt to rely on the abatement required for the October 28 citation.¹⁵ However, the text of the regulation itself suggests Mach knew or should have known the charger could not be in the escapeway regardless of whether it was locked. In fact, the regulation itself specifically states that battery charging stations are not permitted in primary escapeways. *See* 30 C.F.R. § 75.380(f)(3)(iii). Thus, it is unclear why Respondent believes that the locking the cathead on the battery charger would allow the charger to be placed in the escapeway.

Moreover, the evidence before me also suggests that Mach *knew* a battery charger could not be located in the primary escapeway. Webb admitted that when he noticed the charger in the escapeway and had it locked, he was trying to do “the next best thing . . . to prevent it from being energized until we could . . . get it either, one, moved out of there or two, get it air locked.”¹⁶ (Tr. 93:2–11.) Further, Mach brought forth no other evidence demonstrating that Respondent *relied* on MSHA’s allegedly inconsistent guidance when it stationed the battery charger in the escapeway. On the contrary, Webb indicated he did not know how or when the charger returned to the escapeway, nor did he order anyone to do so. Thus, no matter how many back of the envelope calculations it might make, Mach’s math does not add up: unplanned activity and after-the-fact efforts to do “the next best thing” do not equal reliance.

Although the cathead was locked out when Mach moved the charger back to the escapeway, the cathead was *unlocked* in the escapeway a few days before Citation No. 6683204. Webb’s steps to relock the cathead notwithstanding, such actions do not preclude its future use. Allowing the charger to return to a place where it could be used does not meet the Mine Act’s high standard of care. Though Mach’s policy may not have been to use the charger in the

¹⁴ (. . .continued)

escapeway. (Tr. 88:14–23.) Thus, Mach allowed the cathead to be unlocked and available for use for an indeterminate length of time. If the charger was not actually used during that period, that inactivity appears to have been fortuitous or accidental.

Although good fortune and happy accidents are always welcome outcomes, the Mine Act holds operators to a high standard of miner safety. Regardless of the charger’s actual use, and 30 C.F.R. § 75.380(f)(3) prohibits Mach from placing battery chargers in the escapeway absent certain conditions. The actual use of the battery charger in this case is irrelevant to that duty. Thus, I need not determine whether Patton actually used the battery charger after its return to the escapeway.

¹⁵ Although Respondent argues it conformed with the procedures approved in abating its October 28 citation, Mach curiously did not introduce a copy of the October 28 citation into the record. Cripps and Webb both testified regarding those abatement steps, but the record is unclear precisely when and how Mach abated the October 28 citation.

¹⁶ Air locking is a means by which a battery charger could be separated from the escapeway using a set of doors between entries. (Tr. 86:19–87:8.)

escapeway, charger's location, convenience, and utility provide both an opportunity and incentive for miners to use the misplaced charger. I conclude, therefore, that Mach's level of negligence was high. Citation No. 6683204 is hereby **AFFIRMED** as written.

C. Penalty Assessment

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Secretary seeks a penalty of at least \$4,800 for these violations. I have reviewed the History of Violations and Assessments Reports, which are not disputed (Sec'y Ex. 2; Sec'y Ex. 3; Sec'y Ex. 4.) This report included nine previous section 75.400 violations, of which one was S&S. In considering this history along with the other statutory factors, I also take special note that the section 75.380(f)(3)(iii) violation occurred just three weeks after an identical violation. Respondent stipulated to the gravity of Citation No. 6683204, and I have found Mach's negligence to be high. I have also found Citation No. 6679603 to be properly designated S&S and the result of Mach's high negligence. Additionally, nothing in the record suggests that the Secretary's proposed penalty of \$4,800 is inappropriate for the size of Mach's business, that it would infringe on Mach's ability to remain in business, or that Mach did not abate the violation in good faith. The violations were abated in good faith. (Sec'y Ex. 5; Sec'y Ex. 7.)

Considering the evidence before me, I conclude a total civil penalty of \$4,800.00 is appropriate, given the violation history, size of the mine and Mach's ability to remain in business, Mach's high negligence, the gravity of both violations, and Mach's good faith abatement of the violations. Accordingly, I hereby assess a civil penalty of \$4,800.00.

VI. ORDER

WHEREFORE, it is **ORDERED** that Citation No. 6683204 and 6679603 are **AFFIRMED**. Within 40 days of this decision, Mach is **ORDERED** to pay a civil penalty of \$4,800.00.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

Gregory Tronson, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Christopher D. Pence, Esq., Hardy Pence, PLLC, P.O. Box 2548, Charleston, WV 25329

/dyb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004

September 30, 2014

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

v.

BLACK BEAUTY COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2009-328
A.C. No. 12-02010-177009

Mine: Air Quality #1 Mine

DECISION

Appearances: Emily L.B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado, for Petitioner;

Arthur M. Wolfson, Esq., and Patrick W. Dennison, Esq., Jackson
Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary's Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815 (2006). In dispute are four section 104(d)(2) orders issued to Black Beauty Coal Company ("Black Beauty" or "Respondent") over a 40-day period at its Air Quality #1 Mine operation ("AQ1 Mine"). The Secretary has proposed a total penalty of \$163,225.00 for these four alleged violations.

The parties stipulated to the following:

1. Black Beauty is an "operator" as defined in [section] 3(d) of the [Mine Act], as amended, 30 U.S.C. § 803(d), at the coal mines at which the Citations and Orders at issue in this proceeding were issued.
2. Operators of Black Beauty, at the coal mine at which the Citations and Orders were issued in this proceeding, are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individual whose signature appears in Block 22 of the Citations and Orders at issue in this proceeding [was] acting in the official capacity and as an authorized representative of the Secretary of Labor when the Citations and Orders were issued.

5. True copies of the Citations and Orders at issue in this proceeding were served on Black Beauty as required by the Mine Act.
6. The total proposed penalties for the Citations and Orders in this proceeding will not affect Black Beauty's ability to continue in business.
7. LAKE 2009-328 involves six [section] 104(d)(2) orders, four of which remain at issue for the hearing. The [section] 104(d)(1) order giving rise to these four orders was issued on August 15, 2007 (Order No. 6670623) and is a final [section] 104(d) order. In the period from August 15, 2007 to November 24, 2008, thirty-one orders (including those at issue here) were issued pursuant to [s]ection 104(d) of the [Mine] Act. Ten of these orders are listed as being final 104(d) orders. The rest are still in contest.
8. The R-17 Assessed Violation History Report ([Ex. G-9]) is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

I. STATEMENT OF THE CASE

The Secretary has filed a Petition for Assessment of Civil Penalty, and two of the six alleged violations in this docket were settled and disposed by a separate decision and order prior to the hearing. The remaining four violations, Order Nos. 6681061, 6681064, 6681073, and 6682224, charge Black Beauty with violating the health and safety standard at 30 C.F.R. § 75.400 that prohibits accumulations of combustible materials in active workings.¹ In addition, the Secretary determined these violations were significant and substantial ("S&S"),² constituted an unwarrantable failure³ to comply with a mandatory health and safety standard, and resulted from Black Beauty's high negligence.

Chief Administrative Law Judge Robert J. Lesnick assigned this case to me, and I held a hearing in Evansville, Indiana.⁴ The Secretary presented testimony from MSHA Inspector Glenn Fishback, who issued the contested orders on October 15, October 20, October 23, and November 14, 2008. Currently an MSHA Roof Control Specialist, Fishback has twenty-eight

¹ Section 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." 30 C.F.R. § 75.400.

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁴ In this decision, the hearing transcript, the Secretary's exhibits, and Black Beauty's exhibits are abbreviated as "Tr.," "Ex. G-#," and "Ex. R-#," respectively.

years of experience in the coal mining industry, first as a general laborer, then in supervisory positions, including eight years with AQ1 Mine, and he has four mining certificates. (Tr. 16–20.)

Respondent presented nine witnesses. Randall Hammond, a Compliance Supervisor with Black Beauty at the time of the hearing, was a Section Foreman at the AQ1 Mine at the time of the inspections. (Tr. 117.) Matthew Benjamin, the current Section Foreman for AQ1 Mine, was a Section Foreman on the midnight maintenance shift at the time. (Tr. 98.) Stephen Elliot, currently a Belt Examiner, was a utility worker. (Tr. 157.) Eric Carter, currently a third-shift Mine Manager, was an Assistant Mine Manager. (Tr. 170.) Harry Luckett was and is a hauler driver for the mine. (Tr. 177.) Del Culbertson, currently an Examiner, Assistant Mine Manager, and Operator, was an Assistant Mine Manager whose duties often included escorting MSHA inspectors. (Tr. 250–53.) Todd Armstrong, currently a Belt Mechanic, was an outby laborer in 2008 and accompanied MSHA inspectors on occasion. (Tr. 308–09.) Rick Carie, a Shift Foreman for the AQ1 Mine in 2008, currently works with Special Projects. (Tr. 331.) Chad Barras is the Midwest Safety Director for Peabody Energy, which was the parent company of Black Beauty at the time of the inspection, and who previously worked with MSHA for one year as a ventilation engineer. (Tr. 345–46.)

The Secretary and Respondent each submitted post-hearing briefs and reply briefs.

II. ISSUES

The Secretary asserts that the four conditions before me were properly cited as violations of section 75.400, and that the significant and substantial (“S&S”), unwarrantable failure, and high negligence determinations are valid. (Sec’y Br. at 1, 10–20, 22–26, 29–34.) The Secretary emphasizes that the opinions of an experienced MSHA inspector are entitled to substantial weight. (*Id.* at 35–36; Sec’y Reply Br. at 1–4, 6.)

Respondent denies that the alleged accumulations described in three of the four orders—Order Nos. 6681061, 6681064, and 6682224—constituted violations of section 75.400. (Resp’t Br. at 5–7, 24–26, 34–35.) In addition, Respondent contends that the record is insufficient to support the Secretary’s S&S,⁵ unwarrantable failure, and high negligence determinations for all four orders. (Resp’t Br. at 7–20, 26–30, 35–45, 48–55.)

⁵ Black Beauty also argues that I should consider the presence of functioning carbon monoxide (CO) monitors, self-contained self-rescuers (SCSRs), and other fire detection, suppression, or management systems “in evaluating what would occur in continued mining operations.” (Resp’t Reply Br. at 8; *see also* Resp’t Br. at 51–52.) According to Respondent, “[t]his inquiry is relevant in analyzing the third element of the [test for S&S], which is to be considered assuming continued normal mining operations.” (Resp’t Reply Br. at 8–9 (citations omitted).) However, the Commission has repeatedly rejected operator arguments that additional fire safety measures prevent an S&S finding. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369–70 (Oct. 2011), *aff’d*, *Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *see also* *Buck Creek Coal, Inc. v. Fed* (continued...)

Accordingly, the following issues are before me: (1) whether the cited conditions in three of the four orders constitute a violation of 30 C.F.R. § 75.400; (2) whether the record supports the Secretary's S&S designation in each order; (3) whether the record supports the Secretary's allegations that Black Beauty's level of negligence was high in each order; (5) whether the record supports the Secretary's unwarrantable failure designation in each order; and (6) whether the proposed penalty for these violations is appropriate.

For the reasons that follow:

1. Order No. 6681061 is **AFFIRMED** as S&S, and **MODIFIED** to remove the unwarrantable failure designation and to lower the level of negligence from "high" to "moderate";
2. Order No. 6681064 is **AFFIRMED** as written;
3. Order No. 6681073 is **AFFIRMED** as S&S, as an unwarrantable failure, and as the result of Black Beauty's high negligence, and **MODIFIED** to reduce the number of miners affected from ten to three;
4. Order No. 6682224 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Air Quality #1 Mine – Background

The AQ1 Mine is a room-and-pillar coal mine located in Vincennes, Indiana. (Tr. 18, 20; Ex. G-10; Ex. R-20.) The strata below the AQ1 Mine's coal seam is made up of fireclay, which is an incombustible rock. (Tr. 121, 130-31, 134, 136, 173-74, 198-99.) Respondent uses an intricate system of conveyor belts to transport the newly-mined coal and rock out of the mine. (Tr. 30-31, 35, 100.) The belt system contains several distinct parts, including the tailpiece, the rollers, and the feeder. (Tr. 30-37, 100.) At the end of the tailpiece is a roller, two-and-a-half to three feet in diameter, which turns while the belt is running. (Tr. 34-35; Ex. G-21.) The feeder sits directly on top of the tailpiece and is the point at which coal is loaded onto the belt. (Tr. 37-38, 100, 109, 122, 168.) The tailpiece is used to maintain belt alignment and is constructed of a metal I-beam framework. (Tr. 34-35, 39.) The belts themselves vary from three feet to seven feet in width. (Tr. 34.)

⁵ (...continued)

Mine Safety and Health Admin., 52 F.3d 133, 136 (7th Cir. 1995) ("The fact that [Respondent] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires."). Accordingly, I decline to consider the presence or functionality of Black Beauty's CO monitors, SCSRs, and other fire detection, suppression, or management systems in evaluating the Secretary's S&S allegations.

B. Air Quality #1 Mine – Operations

At the time of the inspections, the mine operated on three shifts: day shift, second shift, and midnight shift. (Tr. 122–23.) Black Beauty performed maintenance on the midnight shift. (Tr. 122, 222.) During midnight maintenance shifts, a crew typically checked the tailpiece at least three times: once upon arrival at the unit, once during an on-shift examination, and once around 4:00 a.m. during the preshift examination in preparation for the day shift. (Tr. 101–102, 236–37.) Before the day shift arrived, the maintenance crew typically dusted and cleaned the tailpiece and fixed any hazards. (Tr. 99–104, 123, 237.)

The day shift typically arrived between 7:15 a.m. and 7:30 a.m. (Tr. 102.) Compliance Supervisor Hammond was a section foreman on the day shift in 2008, and he normally conducted a cursory check of the tailpiece within the first twenty minutes of the shift. (Tr. 123–24, 147–48.) The section foreman typically conducted another six to ten checks throughout the shift. (Tr. 123.) If it was clear of accumulations, Hammond would date, time, and initial the tailpiece. (Tr. 124–25.) He testified he normally—but not always—instructed someone to clean up any accumulations and address any hazards immediately. (Tr. 125–26, 149.)

Notwithstanding Black Beauty’s examinations and maintenance efforts, the AQ1 Mine has a history of section 75.400 violations. (Ex. G–9; Ex. G–10; Ex. G–11.) Specifically, MSHA records show 94 final orders involving section 75.400 between July 2007 and December 2008. (Ex. G–9.) In addition, Inspector Fishback testified that numerous conversations took place between mine management and MSHA inspectors regarding accumulations violations in the AQ1 Mine. (Tr. 46, 47–49, 286.) Specifically, Fishback recalled issuing an order on September 11, 2008, and discussing belt problems with mine management. (Tr. 46, 47–49, 286.)

As part of MSHA’s regular inspections of the AQ1 Mine, Fishback visited the mine on October 15, October 20, October 23, and November 24, 2008. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) Based on his observations, he issued Order Nos. 6681061, 6681064, 6681073, and 6682224, respectively. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) These orders each charge Black Beauty with violating 30 C.F.R. § 75.400, which prohibits accumulations of combustible materials in active workings. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) These orders are addressed seriatim below. *See* discussion *infra* Part V.B–E.

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 75.400 – Accumulations

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”). 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 argument regarding recency of spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of the spill). Finally, the Commission has observed that damp coal and coal mixed with fireclay remains combustible; thus, excluding such materials 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).

B. Significant and Substantial Determinations

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S 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 in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc.*, 52 F.3d at 135–36 (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The third *Mathies* element is often heavily contested. In the accumulations context, the third element is met where a “confluence of factors” such as the extent of the accumulation and presence of possible ignition sources make the hazard reasonably likely to result in injury. See *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). This evaluation should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Materials need not be hot when inspected to prove friction as an ignition source, if heat will eventually result during continued normal mining operations. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (finding the lack of a hot spot immaterial where friction was present between belt rollers and accumulations).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that “an inspector's judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); see also *Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector).

C. Unwarrantable Failure and High Negligence Determinations

In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987).

Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also* *Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). The Commission’s factors are “viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario.” *Consolidation Coal Co.*, 22 FMSHRC at 353. All “relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated” or whether mitigating circumstances exist. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Combustibility and Ignition

Based on the evidence at hearing, loose coal, coal fines, and float coal dust are each combustible materials. (Tr. 26–27, 91–92.) Combustion requires fuel, oxygen, and an ignition source. (Tr. 352.) Methane is the most common source of ignition and becomes explosive at concentrations of 5–15%. (Tr. 22, 80–81.) The AQ1 Mine is considered a “gassy” mine and liberates over a million cubic feet of methane in a 24–hour period. (Tr. 22.) During October and November 2008, the AQ1 Mine was on a five-day spot inspection for methane gas. (Tr. 22–23, 69–70, 204.) A five-day spot inspection means that MSHA must inspect the mine’s ventilation every five days to ensure that methane is properly being ventilated out of the mine. (Tr. 22–23.) However, methane levels never tested above 0.3% during any of the four inspections at issue in this case. (Ex. G–2 at 19–20; Ex. G–4 at 10; Ex. G–6 at 12–13; Ex. G–8 at 19–21.)

Frictional heat is another common ignition source, particularly for belt fires. (*See, e.g.*, Ex. R–25 at 20 (indicating that friction along the belt or belt drive ignited 36% of belt entry fires).) Friction also increases the likelihood of a fire by creating small fragments of material with an increased surface-to-mass ratio. (Ex. G–12 at 85.) Although dampness and incombustible materials decrease flammability (Tr. 27–28), frictional heat can first dry accumulations and then ignite the material. (Tr. 92.)

Both belt rollers and coal rubbing the belt structure framework are methods by which coal may be ground into float coal dust. (Tr. 27.) Float coal dust is coal that has been ground into

extremely small pieces, with the consistency of baby powder. (Tr. 27.) Float coal dust is highly combustible. (Tr. 27–28.) Conversely, rock dust lowers the combustibility of float coal dust. (Tr. 27–28.) Although float coal dust also requires suspension in order to combust on its own, a nearby ignition can “kick up” non-suspended float coal dust and propagate the explosion. (Tr. 80, 353.)

B. Order No. 6681061 – Accumulations at 5 North on October 15

1. Order No. 6681061 – Accumulations at 5 North on October 15

Inspector Fishback visited the AQ1 Mine to conduct a quarterly inspection on October 15, 2008. (Ex. G–1; Tr. 24.) Upon arriving at the mine, Fishback first met with mine management and reviewed Black Beauty’s record books. (Tr. 24–25.) Next, he traveled into the mine along with Belt Examiner Elliot as his escort. (Tr. 25; Ex. G–2 at 3.) The pair arrived at the section tailpiece of the 5 North energized belt conveyor between crosscuts 12 and 13 in the MMU-003 active working section at approximately 11:00 a.m. (Ex. G–2 at 10–11, 13; Ex. G–13; Tr. 24.) At the time the working face of the section was just seventy feet away from the tailpiece. (Tr. 41–42; Ex. G–2 at 20.)

Previous production at the AQ1 Mine had mined 5 North Section twelve crosscuts deep, but the section was then flooded with water. (Tr. 119–20, 179.) When Black Beauty restarted production in the area approximately two weeks prior to October 15, they pumped the water out of the panel’s crosscuts and entries. (Tr. 120, 179–80.) However, the geologic conditions of the mine meant there was a constant inflow of water through the floor of the mine. (Tr. 120–21, 179–80, 245–48.) Because the floor was wet, Black Beauty tried to soak up the water in the area using rock dust and placed the belt tailpiece on crib blocks. (Tr. 86, 121, 246.) Notwithstanding these efforts, the tailpiece structure and feeder were sinking into the floor. (Tr. 122, 154, 246.) The tailpiece was therefore closer to the mine floor than normal. (Tr. 122.) At the time, the belt was just four inches above the mine floor. (Tr. 38.)

According to Fishback’s contemporaneous notes and testimony, he observed coal underneath the belt line that measured three feet in width, three feet in length, and two to eight inches in depth. (Tr. 32; Ex. G–2 at 11–12.) He also indicated that the belt was in contact with the loose coal and coal fines below the tailpiece. (Ex. G–2 at 11–12; Tr. 32.) In addition, Fishback observed float coal dust on the framework of the tailpiece, and he characterized the dust as black in color and dry. (Tr. 28, 32; Ex. G–2 at 12–13.) He measured the float coal dust at nine-inches wide, seven-feet long, and one-to-three inches deep. (Tr. 32; Ex. G–2 at 12–13.) However, the float coal dust was not in suspension. (Tr. 79, 135–36, 161, 184.) Fishback also testified that Elliott agreed with his observations. (Tr. 59, 84–85; *see also* Ex. G–2 at 13–14 (noting Elliot’s agreement).)

Elliot then shut down the belt and called for section foreman Randall Hammond. (Ex. G–2 at 14; Ex. G–13; Tr. 84.) Hammond gathered a sample of the alleged accumulation for testing after he arrived; however, the material was accidentally placed on the belt and discarded.

(Ex. G-2 at 15-16; Tr. 71-74, 134-35.) Based on his observations, Fishback issued Order No. 6681061, providing:

Combustible material in the form of loose coal, coal fines and float coal dust (black in color and dry) have been allowed to accumulate on the 5 North Energized belt conveyor tail located between crosscut 12 and crosscut 13 on the roadway side of the belt line located on the MMU-003. The combustible material under the belt line measured approximately 3 feet in width by 3 feet in length by 2 to 8 inches in depth and was observed rubbing the belt for this total distance. On the tailpiece structure directly above these accumulations dry float coal dust was present which measured approximately 1 to 3 inches in depth by 9 inches in width for a length of 7 feet. The operator, Randy Hammond (Section Foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This [v]iolation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1.) Fishback also designated the order as S&S. (*Id.*) In Fishback's judgment, the materials were "obvious to the most casual observer" (Tr. 51) and had existed for two to three shifts. (Ex. G-2 at 18; Tr. 50.)

To abate the condition, Black Beauty cleaned the area from rib-to-rib and spread rock dust. (Ex. G-1; Ex. G-2 at 18). According to Fishback, four employees spent sixty-five minutes abating the cited conditions. (Ex. G-1).

2. Additional Findings of Fact

Black Beauty challenges three factual details underlying the Secretary's allegations in this case. First, Respondent disputes the amount of time that any such conditions existed. Black Beauty claims that any coal at the tail piece had been deposited only recently. (Resp't Br. at 1-3, 7.) Respondent explicitly points to evidence that the unit was checked and found clear of accumulations multiple times: no accumulations were noted during Section Foreman Benjamin's preshift examination at 4:52 a.m., or during Compliance Supervisor Hammond's check at 7:41 a.m. (Ex. R-3; Tr. 103-06, 126.) Conversely, Inspector Fishback testified that the conditions existed for two-to-three shifts and based his estimation on his observations and experience. In particular, he claimed it would take a "substantial amount of time for that much dust to develop." (Tr. 52.) Yet, it is also uncontroverted that coal deposits may accumulate quickly. (*See, e.g.*, Tr. 262-63.) Indeed, a well-worn aphorism in mining law is that mining is a dynamic process. Moreover, I note that Fishback issued no citation for improper preshift examinations. This failure does not *prove* that the tailgate section was clean at the time of the preshift examination, but, coupled with the potential for rapid accumulation, I have doubts about Fishback's testimony on this point. Given the evidence in this case, I therefore find that the conditions at issue in Order No. 6681061 developed *after* Hammond's check at 7:41 a.m.

Second, Black Beauty contends that the cited material was not combustible. (Resp't Br. at 6.) Specifically, Compliance Supervisor Hammond, Belt Examiner Elliot, and hauler driver Luckett each claim that the material under the belt contained minimal amounts of coal and was mostly mud and water. (Tr. 128, 134, 160, 185.) As for the alleged float coal dust accumulation, Elliott, Hammond and Luckett each testified that the material was a gray mix of float coal and rock dust. (Tr. 135–36, 160–61, 182.)

At first blush, contrary testimony from three operator employees would appear convincing. However, upon closer examination, I have serious questions regarding the testimony of Elliot and Luckett. In particular, Elliot's testimony conflicts with the text of his Inspector Report.⁶ Moreover, it appears that Luckett conflated the inspections that took place on October 15 and 20. (Tr. 187–88, 192) As he admitted: “[T]hey kind of blend together, because they're so close together and they're in the same location” (Tr. 188.) Given the number of accumulations violations Black Beauty received during this period, it is understandable why Luckett might conflate some of the events of the days in question. Nevertheless, these deficiencies give me significant pause regarding the testimony each witness provided.⁷

In light of my doubts regarding two of the operator's three witnesses, it appears this is a simple case of conflicting testimony. Here, Fishback credibly testified that he observed loose coal and coal fines in contact with Black Beauty's belt. Likewise, Fishback credibly testified regarding the color, size and composition of the float coal dust he observed on the belt's tailpiece. In particular, he testified that he saw and touched the float coal dust. (Tr. 28.) He also indicated that loose coal, coal fines, and float coal dust are combustible. (Tr. 26–28, 92–94.) Moreover, he explained his basis for identifying each type of accumulation. (Tr. 199.) Finally, his contemporaneous notes also support his observations. (Ex. G–2 at 12–15.)

⁶ Elliot prepared this “Inspector Report” as he traveled with Inspector Fishback on October 15. Notably, the “Inspector Report” states: “Arrived at #3 unit at approx 11 am. Found belt & tail roller of 5N running in accumulations.” (Ex. G–13.) The report also states that “[a]lthough not written up [the] unit needed [to be] cleaned better. Unit was heavily dusted.” (*Id.*) Elliot testified that his notations reflected *Fishback's* observations rather than his own. (Tr. 162–69.) In other words, Elliot claimed a Black Beauty employee would record an inspector's observations—observations with which the escort specifically disagreed—to produce a report of what the Inspector observed. Paradoxically, however, those same details would be recorded in any citation or order Inspector Fishback issued. If believed, Elliot's self-serving testimony would neutralize the probative value of his “Inspection Report.” However, Elliot curiously did not explain why Black Beauty would adopt a seemingly redundant system. Accordingly, I do not credit Elliot's testimony on this point. On the contrary, I determine that the “Inspector Report” supports Fishback's testimony regarding the cited conditions.

⁷ I recognize that Fishback also admitted that the passage of time had affected his memory. (*See, e.g.*, Tr. 37, 70–73, 86.) Unlike Luckett, Fishback was able to refer to his contemporaneous notes to refresh his memory and differentiate this case from the many accumulation citations and orders MSHA issued to Black Beauty during this time period. Accordingly, I find his testimony to be more credible than Luckett's testimony.

Although Fishback had only been an inspector for a few months, I recognize that he has more than twenty-eight years of experience in the coal mining industry. In addition, he specifically worked in the AQ1 Mine before becoming an inspector, and is therefore familiar with the specific conditions found at this mine. His opinion is therefore entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that the substantial evidence supported an ALJ’s S&S determination).

I also note that neither Hammond nor Lockett were present at the time Fishback arrived at the tailpiece. Although both witnesses arrived thereafter, neither were able to observe the precise conditions Fishback encountered. Further, Fishback’s testimony about the color of the float coal dust is consistent with my above factual findings regarding the duration of these conditions. Benjamin and Hammond testified that the tailpiece was free of accumulations and had been rock dusted, so the *recent* accumulation of float coal dust predictably would be black in color. I also note that Fishback’s own testimony admitted that the area around the tailpiece was wet. (Tr. 86.) Based on the evidence before me, I therefore find that the accumulations appeared as Fishback described them in his written order except that they were wet.

Third, Respondent also questions Fishback’s testimony that four miners spent 65 minutes abating the conditions he found. Hammond testified the material took at most fifteen minutes to clear. (Tr. 132.) In addition, Hammond testified that Fishback’s 65-minute estimate included time to lock the belt, assemble miners, collect necessary equipment, and clean the material. (Tr. 133.) Further, Lockett stated that shoveling the material took only a few minutes. (Tr. 182–86.)

Although Fishback may have correctly estimated the amount of time from his arrival to ultimate abatement, I credit Hammond’s testimony that his estimate included time not spent removing the material. Further, four miners operating in concert would seem likely to remedy coal deposits of the size Fishback cited in fewer than 65 minutes. Thus, I find that the conditions at issue were cleared in approximately 15 minutes.

3. Violation of 30 C.F.R. § 75.400

Order No. 6681061 alleges that Respondent violated section 75.400 by allowing extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust at 5 Main North belt tailpiece located between crosscuts 12 and 13. The Secretary contends that Inspector Fishback’s testimony and notes support his allegations. (Sec’y Br. at 10–11; Sec’y Reply Br. at 2–4.) In addition, the Secretary claims that Black Beauty’s history of previous violations “raises serious doubts about the mine’s ability to control accumulations . . . including those in [Section Foreman] Benjamin’s section.” (Sec’y Br. at 11–12.)

For its part, Respondent argues the material was a non-combustible mix of mud, water, and minimal coal under the belt and a mix of rock dust and float coal dust on the tailpiece. (Resp’t Br. at 6.) Black Beauty also argues that any combustible material was “de minimis and

constituted non-violative spillage because it did not exist until shortly before the Order was issued.” (*Id.* at 6 n.6.) Finally, Black Beauty also disputes the credibility of Inspector Fishback’s testimony. (*Id.* at 7.)

In light of my factual findings, I determine that a reasonably prudent person, familiar with the mining industry and protective purposes of section 75.400, would have recognized these coal deposits were the type of hazardous conditions the regulation seeks to prevent. *See Old Ben II*, 2 FMSHRC at 2808 (“[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe.”) In this case, Fishback observed loose coal and coal fines underneath the belt in question, as well as significant deposits of black float coal dust on the framework of the tailpiece. Despite the presence of fireclay and water in the area, it is uncontroverted that loose coal, coal fines, and float coal dust are combustible. Although these accumulations were relatively small in size, Fishback also testified that these materials were combustible and could ignite. (Tr. 26–28, 43–44.) These accumulations developed between Hammond’s 7:41 a.m. check of the tailpiece and Fishback’s arrival on the scene at 11:00 a.m., but the Commission has *rejected* the argument that “accumulations may be tolerated for a ‘reasonable time.’” *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957–58 (Dec. 1979) (“Old Ben I”). Thus, a reasonably prudent person who is familiar with the mining industry and protective purposes of section 75.400 would therefore have recognized that these were the types of materials that could propagate a fire or explosion and were impermissible accumulations. I therefore conclude that Black Beauty violated 30 C.F.R. § 75.400.

4. S&S

Black Beauty’s violation of section 75.400 establishes the first element of an S&S violation. In addition, Inspector Fishback credibly testified that the violation at issue contributed to fire and mine explosion hazards. (Tr. 43–45.) I do not doubt that combustible material along the belt contributes to—or makes more likely—mine fire and explosion hazards. Further, Fishback credibly described that smoke inhalation, burns, or death were the type of injuries that would reasonably result from a mine fire or explosion. (Tr. 45–46.) In view of Fishback’s testimony, I determine that the Secretary has satisfied his burden of proof on the second and fourth elements of the *Mathies* test.

The parties most heavily contest whether the mine fire and explosion hazards are reasonably likely to result in injury. According to the Secretary, the “energized belt rubbing against loose coal and coal fines created an ignition source as it produced friction and, under continued mining operations, would cause the loose coal and coal fines to ignite.” (Sec’y Br. at 15.) The Secretary also contends that the “ignition of the loose coal and coal fines would, in turn, ignite the float coal dust above it.” (*Id.*) In contrast, Black Beauty contends that the material under the tailpiece was not in contact with any point of friction. (Resp’t Br. at 9.) In addition, Respondent argues that the float coal dust at issue “was not in contact with any ignition sources.” (*Id.* at 10.) Further, Black Beauty argues that an ignition of methane was unlikely to place the dust into suspension because methane was not present at the time of the inspection.

(*Id.*) Finally, Respondent also suggests that the dampness of the area makes an S&S determination inappropriate. (Resp't Br. at 11 n.9.)

Based on the evidence before me, I determine that the Secretary has satisfied his burden of proof on *Mathies'* third element. I have credited Fishback's description of the accumulations he found. Thus, the loose coal and coal fines under the tailpiece were in contact with the belt, which provided an ignition source as the coal dried out and heated up in the course of continued mining operations. Given the belt as an ignition source and the loose coal and coal fines as fuel, these accumulations were reasonably likely to ignite. Moreover, these ignitions were also reasonably likely to place the float coal dust in suspension, which could lead to a mine explosion.

Furthermore, I note that the tailpiece in question was located just seventy feet from the working face of the mine. Given that the AQ1 Mine is a gassy mine, methane may quickly accumulate on the section. I also note that MSHA's Assessed Violations History Report for the AQ1 Mine shows thirty-two violations of the approved ventilation plan in the twenty-seven months prior to the citation at issue. (Ex. G-9 at 5-6.) Moreover, Fishback and Safety Director Barras each mentioned arcing as a potential source for ignition at the AQ1 Mine. (Tr. 94, 351.) In light of the proximity of the tailpiece to the working face and the potential for methane accumulation, I also determine that is reasonably likely in the course of continued mining operations that a methane ignition at the face would put the float coal dust in suspension and propagate an explosion.

Finally, I recognize that this area of the AQ1 Mine was very wet at the time of the inspection. Yet, the Commission has consistently found that wet or damp coal will dry out and fuel or propagate a fire or explosion. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013) (citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985), and *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230, 1232 (June 1994)). Given Respondent's regular on-shift and preshift examinations, I recognize that a section foreman might have identified this accumulation in the next few hours. However, Hammond's 7:41 a.m. check of the tailpiece was the last recorded examination. Accordingly, these extremely dangerous conditions created a window of several hours where a quick uptick in methane, a spark, or frictional heat were reasonably likely to lead to disaster.

In view of the above, I therefore determine that *Mathies'* third element has been satisfied. Given my prior determinations regarding the first, second, and fourth elements, I conclude that this violation was appropriately designated as S&S.

5. Unwarrantable Failure and High Negligence

The Secretary characterizes Black Beauty's negligence as high and has designated this violation to be an unwarrantable failure. In support of his allegations, the Secretary points to the obviousness, extent, and duration of the cited conditions. (Sec'y Br. at 17.) In addition, the Secretary characterizes the violative condition as highly dangerous and claims that Respondent did not take steps to address the conditions prior to Inspector Fishback's arrival. (*Id.* at 17-18.)

Conversely, Black Beauty claims the Secretary's unwarrantable failure and high negligence allegations are inappropriate. (Resp't Br. at 15.) Respondent contends that the condition existed only for a short time and was not extensive. (*Id.*) Further, Black Beauty argues that its past accumulations violations did not put the operator on notice that greater efforts were necessary to comply with section 75.400 because there is no "nexus" between the "basis for heightened alert" and "the facts of the alleged violation at issue."⁸ (*Id.* at 16.) Finally, Respondent avers that the condition was not highly dangerous. (*Id.* at 20.)

Looking at the Commission's factors for unwarrantable failure, three of the unwarrantable factors suggest that Black Beauty's conduct was aggravated. First, I have concluded that Black Beauty's conduct was serious and dangerous enough to constitute an S&S violation. Second, Respondent had a sizable history of violations: Fishback specifically testified that Black Beauty had a "terrible reputation of belt violations" (Tr. 47), and MSHA's records demonstrate a significant history of accumulations violations. (Ex. G-9; Ex. G-10; Ex. G-11.) These violations put Black Beauty on notice that greater efforts were necessary for compliance. Third, the obviousness of the condition is also an aggravating factor. Here, Fishback asserted the accumulations were "seen as soon as I walked up, obvious to the most casual observer" and he did not have to get down on his hands and knees or move anything to see the accumulations. (Tr. 51-52.)

In contrast, four of the Commission's unwarrantable factors mitigate Black Beauty's conduct in this case. First, I have found that the accumulations in question had been present for less than a shift. *See* discussion *supra* Part V.B.2. Notwithstanding Black Beauty's on-going duty to correct dangerous conditions, this relatively short duration suggests that Respondent's conduct was not aggravated. Second, the cited accumulation was not extensive. Although the

⁸ Black Beauty focuses much of its argument on explaining the "nexus" required between past and present violations. (*See* Resp't Br. at 16-20 (citing *Brody Mining, LLC*, 33 FMSHRC 1329, 1366-67 (May 2011) (ALJ), *petition for review granted* (June 30, 2011).) However, the Commission has indicated:

[i]t was appropriate for the Judge to conclude that such [section 75.400] violations were sufficient to place the operator on notice that greater efforts were necessary for compliance with the standard. We do not agree that past violations of section 75.400 can provide such notice only if they are factually indistinguishable from the cited condition.

Big Ridge, Inc., 35 FMSHRC 1525, 1530 (June 2013). Although operators may draw "a distinction demonstrating an anomaly," they bear the burden of rebutting the Secretary's "contention that the prior violations did, in fact, put the operator on notice." *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014). Here, Respondent's arguments do not demonstrate that the violation in question was an anomaly. Accordingly, I determine that Black Beauty's past accumulations violations put the operator on notice that greater efforts were necessary to comply with the Secretary's regulations.

float coal dust itself was deeper than Fishback had seen in the past, the remainder of the accumulation spanned only a few feet. Indeed, I have found that Respondent was able to abate the condition in approximately 15 minutes. Third, this relatively swift abatement and the examinations by Section Foreman Benjamin and Compliance Supervisor Hammond suggest that Black Beauty efforts to keep the tailpiece free of accumulations were having at least some effect. *See Manalapan Mining, Co.*, 35 FMSHRC 289, 295 (Feb. 2013) (“The evidence of the number of miners and time necessary to clean up the accumulations after the issuance of the citation and orders is relevant to [an operator’s efforts to abate the violative condition prior to a citation or order’s issuance], as it is to the factor of extensiveness of the violation.”) Finally, the Secretary has not demonstrated that Black Beauty or its agents had knowledge of the condition in question. In fact, the Secretary presented no evidence that any supervisor or other agent had been through the area since Hammond’s on-shift examination at 7:41 a.m. that morning. Thus, it is unclear that Respondent *should* have known about the violative condition.⁹ *Cf. E. Associated Coal Corp.*, 32 FMSHRC 1189, 1199–1200 (Oct. 2010) (affirming ALJ conclusion that operator had no knowledge of the violative condition where Secretary made no attempt to establish actual knowledge, and did not establish “predicate” circumstances necessary to conclude that Eastern reasonably should have known of the violative condition.”).

In light of the facts and circumstances, I do not believe the Secretary has met his burden of establishing aggravated conduct. Nevertheless, I recognize that the aggravating factors before me are significant. The float coal accumulations presented significant dangers to miners in the AQ1 Mine. As Fishback succinctly observed: “Float coal dust is what blows up coal mines.” (Tr. 43.) Moreover, it is extremely troubling that Black Beauty received a series of accumulations violations but did not adequately solve the problems in this mine. These are significant shortcomings, and Respondent’s failure to adequately fulfill its safety duties under the Mine Act despite repeated warnings is the epitome of negligence.

Yet, after weighing these serious concerns against the mitigating circumstances of this case, Respondent’s failure in this case does not cross the line from ordinary negligence to aggravated conduct. The condition in question was *dangerous*, but its relatively short duration and limited extent circumscribes the window within which a hazard could develop. Indeed, given the accumulations’ obviousness and Respondent’s regular exams of the area, it appears likely that Black Beauty’s section foreman would have identified the accumulations and had them cleaned up within a few hours. Although Respondent’s procedures were ultimately inadequate to satisfy its duties, the Secretary has not demonstrated that Black Beauty’s missteps constitute intentional misconduct, indifference, reckless disregard, or a serious lack of reasonable care. *Cf.*

⁹ Fishback relied on Respondent’s history of past violations, finding the operator should have known about the accumulations on October 15 “from the previous history.” (Tr. 50.) The Secretary also introduced into evidence Order No. 6681046, a section 104(d)(2) order involving accumulations along a belt. (Ex. G–20.) However, I know little about the actual facts involved in Order No. 6681046. Although Black Beauty’s previous history of accumulations violations is relevant to an unwarrantable failure analysis, *see* discussion *supra* note 8, Fishback’s vague testimony and the text of Order No. 6681046 are insufficient for me to infer that Respondent had constructive knowledge in this case.

Twentymile Coal Co., 36 FMSHRC 1533, 1534, 1538–39 (June 2014) (affirming ALJ determination of unwarrantable failure where accumulation existed in a large area over several shifts).

For these same reasons, I conclude that the Secretary has not met his burden of showing Black Beauty was highly negligent. Respondent had a duty to ensure that coal did not accumulate in the AQ1 Mine, and it failed to fulfill that duty. I also recognize that these accumulations posed a significant danger to miners, and their abatement required only a small amount of effort. *Cf.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Nevertheless, the Secretary’s own standards call for moderate negligence where “there are mitigating circumstances.” 30 C.F.R. § 100.3(d) at Table X. Black Beauty’s regular examinations of the area in question, the relatively short time frame, and the limited extent of these accumulation somewhat mitigate Respondent’s negligence in this case. Accordingly, I conclude that Respondent’s level of negligence was moderate.

Based on all of the above, Order No. 6681061 is **MODIFIED** to remove the unwarrantable failure designation and change the cited level of negligence to moderate.

6. Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator’s history of previous violations; the appropriateness of the penalty relative to the size of the operator’s business; the operator’s negligence; the penalty’s effect on the operator’s ability to continue in business; the violation’s gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(I).

The Secretary initially sought a penalty of \$41,574.00 for Order No. 6681061, and nothing in the record suggests the proposed penalty is inappropriate for the size of Black Beauty’s business. Moreover, the parties have stipulated that the proposed penalty would not infringe on Respondent’s ability to remain in business. I have affirmed the Secretary’s S&S allegation noting the seriousness of the float coal dust accumulations, but I have removed his unwarrantable designation and concluded that Black Beauty’s negligence to be moderate. Of the 787 violations in Respondent’s history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) Once this order was issued, nothing suggests that Respondent failed to make a good faith effort to achieve rapid compliance with the safety standard. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$14,000.00.

C. Order No. 6681064 – Accumulations at 5 North on October 20

1. Order No. 6681064 – Accumulations at 5 North on October 20

Just five days later on October 20, 2008, Fishback returned to the 5 North Section accompanied by Mine Manager Eric Carter. (Tr. 60–61, 171.) The belt’s tailpiece still remained in the same location. (Tr. 61, 107–108, 171.) However, during the early morning hours of October 20, Section Foreman Benjamin and his midnight shift crew lifted the feeder off the

tailpiece to install belt hangers, which would facilitate a future belt move. (Tr. 108–109, 114.) Before resetting the feeder, Benjamin’s crew attempted to stabilize the ground in the area with a load of gob rock. (Tr. 109.) The crew also used a “slinger duster” to apply rock dust to the area around the tailpiece. (Tr. 109–110, 114–15.) According to Benjamin, the area was clean and “snow white.” (Tr. 110.)

Upon inspecting the same tailpiece, Fishback again observed loose coal, coal fines, and float coal dust underneath and on the structure. (Ex. G–4 at 5–6; Tr. 60–62.) In Fishback’s judgment, these materials were obvious and excessive. (Tr. 64–65.) According to Fishback, he and Carter both observed contact between the loose coal and the belt. (Ex. G–4 at 5–6.) The belt was shut down, and at 10:05 a.m. Fishback issued Order No. 6681064, providing as follows:

Combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) have been allowed to accumulate on the 5 Main North energized belt conveyor tail located between crosscut #12 to crosscut #13 on the roadway side of the belt line located on the MMU-003. The combustible material under the beltline measured approximately 2 foot in width by 3 [feet] in length and 1 to 2 inches in depth and was observed rubbing the belt for approximately 1 foot of this distance. On the tailpiece structure directly above these accumulations dry float coal dust was present which measured approximately 9 inches in width by 5 feet in length by 1 to 2 inches in depth. The operator, Randy Hammond (Section Foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–3 at 1–2.) Fishback designated the Order as S&S. (*Id.* at 1.) Further, Fishback testified that four employees worked for forty-five minutes to abate the violative condition. (Tr. 66, 88; Ex. G–4 at 8.) He also indicated that he saw no evidence that Black Beauty attempted to abate the condition prior to his arrival. (Tr. 65.)

2. Further Findings of Fact

Black Beauty again challenges three important aspects of Inspector Fishback’s testimony. First, Black Beauty claims that when Compliance Supervisor Hammond performed his check at 9:17 a.m. the tailpiece area was free of accumulations and had been recently rock dusted. (Resp’t Br. at 21.) As I noted above, coal deposits may accumulate quickly. Given the evidence before me, I therefore find that the conditions at issue in Order No. 6681064 developed after Hammond’s check at 9:17 a.m. and had recently been rock dusted.

Second, Respondent disputes the composition of the material Fishback identified. (Resp’t Br. at 24–26.) Specifically, Respondent’s witnesses claimed the material under the belt consisted largely of mud and standing water. (Tr. 111, 141–42, 172–75; Ex. G–14 at 1; Ex. R–13.) Hammond and Mine Manager Carter also contended that the dust on the framework of the

tailpiece was a lighter gray than five days earlier because of the recent rock dusting. (Tr. 145, 173.) Hammond also claimed that the dust was not 1–3 inches deep. (Tr. 145.)

Nevertheless, the evidence in this case again convinces me that the cited conditions generally appeared as Fishback described them. Despite Hammond and Carter’s opinion that the material under the tailpiece was mostly fireclay and water, Fishback’s credible testimony reflected his personal observations. Further, I have accorded Fishback’s testimony significant weight based upon his long experience as a coal miner. Considering the evidence before me, I find that the cited materials were as Fishback described them. However, I also find that the coal deposits themselves were wet.

This finding is consistent with my factual determinations for Order No. 6681061. *See* discussion *supra* Part V.B.2. Although Black Beauty had treated the mine floor and applied rock dust, the tailpiece and feeder in question remained in the same location. Accumulations predictably developed in the same spots of the tailpiece. Those accumulations in Order No. 6681061 developed during the three-and-a-half hour window between Black Beauty’s last check of the tailpiece and Fishback’s 11:05 a.m. order on October 15. Here, in contrast, Hammond last examined the belt at 9:17 a.m. on October 20, and Fishback issued Order No. 6681064 at 10:05 a.m. Thus, this smaller window predictably allowed a smaller amount of coal to accumulate.

Third, Black Beauty disputes the amount of effort required to abate the condition at issue. (Resp’t Br. at 22, 28–29.) According to Hammond, the majority of the forty-five minutes recorded by Fishback consisted of informing Carter of the order, shutting off the belt, finding and informing Hammond, gathering shovels, and removing the guarding from the belt. (Tr. 144–45.) Hammond testified that he and Lockett spent ten minutes shoveling soupy material from underneath the tail to abate condition. (Tr. 144.) Again, I credit Hammond’s testimony that Fishback’s estimate included time not spent removing the material, and I find that the conditions at issue were cleared in approximately 10 minutes.

3. Conclusions of Law — Violation of 30 C.F.R. § 75.400, S&S, Unwarrantable Failure, and High Negligence — Order No. 6681064

The Secretary and Black Beauty each revisit the arguments they made in connection with Order No. 6681061 to reach the identical conclusions regarding Order No. 6681064 issued on October 20. Given the similarities between the conditions at issue, the parties’ redundancy is unsurprising. Unfortunately, the rematch proves less compelling than the original. I need not follow the parties’ lead and mechanically rehash each argument. Instead, I focus below on identifying any differences between the orders and determining whether those differences impact my analyses.

Very little distinguishes the conditions Inspector Fishback identified in Order No. 6681064 from the conditions he cited five days earlier in Order No. 6681061. As I noted, Respondent had installed chain hangers at the tailpiece, attempted to stabilize the ground with additional rock, and applied rock dust to the area on the preceding midnight shift. In addition, the

materials Fishback identified on October 20 were slightly smaller in size than were present in Order No. 6681061 on October 15. Finally, the materials in question had been present for less than an hour.

Yet, none of these three differences palpably affect my analyses. First, a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.400 would have recognized that these materials could propagate a fire or explosion. Fishback credibly testified that the cited material was combustible and would ignite (Tr. 63, 92), and neither Respondent's maintenance efforts nor the smaller size of the materials nor the somewhat shorter amount of time they existed renders the materials incombustible. Accordingly, I conclude that Black Beauty violated 30 C.F.R. § 75.400.

Second, those differences also do not alter my S&S analysis. Although I recognize the accumulations in this case were smaller in size than those present in Order No. 6681061, they would have continued to grow in on-going mining operations until Hammond performed a check of the tailpiece area in a few hours. Moreover, Black Beauty's maintenance efforts *preceding* the accumulations in question do not affect my determination that the Secretary has demonstrated all four elements of the *Mathies* test. As with Order No. 6681061, the accumulations at issue in Order No. 6681064 developed *after* Compliance Supervisor Hammond found the tailpiece area clean and rock dusted at 9:17 a.m. Consequently, Black Beauty's midnight-shift maintenance efforts affect neither the hazards the developing accumulation presented nor the reasonable likelihood of those hazards causing reasonably serious injuries.

Indeed, the circumstances that remained *constant* convince me that the Secretary has again met his burden of proving his S&S designation. Here, Fishback again credibly testified that the violative condition contributed to—or made more likely—mine fire and explosion hazards that were reasonably likely to cause reasonably serious injuries. (Tr. 62–63, 65.) The coal accumulations under the tailpiece were in contact with the belt, which presented an ignition source. Further, the AQ1 Mine remains a gassy mine that is susceptible to rapid methane buildup. Given the evidence before me, I therefore determine that the Secretary has met his burden of proving all four elements of *Mathies*, and I conclude that he properly designated Order No. 6681064 as S&S.

Third, Black Beauty's maintenance efforts on the previous shift, the somewhat smaller accumulations at issue in Order No. 6681064, and the shorter duration the accumulations existed have little impact on my unwarrantable failure or negligence analyses. None of these factors counterbalance the obviousness of these accumulations or the grave danger they presented in continuing mining operations.

However, I am extremely troubled that loose coal, coal fines, and float coal dust were able to accumulate in the *same spot and same fashion* as occurred five days earlier. Indeed, the rapid build-up of accumulations in Order No. 6681061 placed Black Beauty on notice that greater efforts were necessary to comply with section 75.400. Given that accumulations had so recently developed at this precise spot in the mine, Respondent reasonably should have known about this violative condition. Instead, Black Beauty apparently continued to adhere to the same

processes for checking the tailpiece it had used before Order No. 6681061 but with an “extra eye” on the tail. (*See Resp’t Br.* at 29–30 (quoting *Tr.* 139–40).) Unfortunately, this reaction was inadequate to prevent this violative condition from recurring in a location where dangerous amounts of coal were known to rapidly accumulate. Based on the accumulations’ obviousness and danger, the nearly identical order just five days earlier, and Respondent’s resulting reason to know of the violation, I determine that Black Beauty’s conduct constituted a serious lack of reasonable care. Accordingly, I conclude that Inspector Fishback appropriately designated Order No. 6681064 as an unwarrantable failure. For these same reasons, I conclude that Respondent was highly negligent.

4. Penalty

The Secretary originally proposed a \$41,574.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty’s business. The parties also stipulated that the penalties would not infringe on Respondent’s ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary’s high negligence and unwarrantable failure allegations. Of the 787 violations in Respondent’s history of violations report, 94 involved 30 C.F.R. § 75.400. (*Ex. G–9.*) I also note that the conditions underlying Order No. 6681064 were extremely similar to the conditions cited just five days earlier in Order No. 6681061. Given the gravity, egregiousness, and similarity of Black Beauty’s missteps in this case, I conclude that a significant penalty is appropriate. Considering all of the facts and circumstances in this matter and the criteria of section 110(i), I hereby assess a civil penalty of \$41,574.00.

D. Order No. 6681073 – Accumulations at 4 Main North on October 23

1. Order No. 6681073 – Accumulations at 4 Main North on October 23

Just three days later on October 23, Inspector Fishback again conducted an inspection at the AQ1 Mine. (*Tr.* 276; *Ex. G–5.*) Upon examining the mine’s Belt and Roadway Inspection Reports, Fishback noted that a “spill” at Crosscut 178 had been present for three shifts with no action taken. (*Ex. G–6* at 18; *Ex. G–16*; *Ex. G–17*; *Ex. G–18*; *G–19*; *Tr.* 286–91, 295.)

After checking the exam books, Fishback traveled with Belt Mechanic Todd Armstrong to examine the belt in the 4 Main North C entry. (*Tr.* 310, 369.) The belt ran down the middle of the entryway until it reached Crosscut 178. (*Ex. R–20*; *Tr.* 320–21.) At that point, it intersected at a right angle with another belt—the 4 Main North A—that ran through the middle of Crosscut 178. (*Ex. R–20.*) Because the 4 Main North C belt bisected the entry, the entry was split into a travel/roadway side and a “back” side. (*Tr.* 297, 320–323; *Ex. R–20.*) The belt was four feet wide and located just one foot off of the ground. (*Tr.* 325.)

Fishback and Armstrong traveled into the mine along the roadway/travel side of the 4 Main North C entry. (*Tr.* 370–71.) As they approached Crosscut 178, Fishback testified that he observed loose coal, coal fines, and float coal dust under the belt conveyor tail. (*Tr.* 277–78, 295–96.) According to Fishback, the material was black. (*Ex. G–6* at 5; *Tr.* 277–78.) In addition,

he testified that one of the belt's bottom rollers was running in the material. (Ex. G-6 at 5; Tr. 277-81, 297-98, 304-05.) In Fishback's judgment, the accumulations had existed for more than one shift (Ex. G-6 at 6) and were obvious to the most casual observer (Tr. 292). At 9:40 a.m., Fishback issued Order No. 6681073, providing as follows:

Combustible materials in the form of loose coal and coal fines, including float coal dust, black in color have been allowed to accumulate under the 4 Main North [C] energized belt conveyor tail located at crosscut #178. These accumulations measured approximately 35 feet in length by 4 feet in width and 6 inches to 1 ½ feet in depth. One of the bottom rollers was observed running in these accumulations for a distance of half the length of the roller. Due to past history of accumulations of combustible material on belt lines at this mine, this violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-5.) In addition, Fishback indicated that the cited condition was reasonably likely to result in lost workdays or restricted duty from smoke inhalation and burn injuries.¹⁰ (Ex. G-5; Tr. 279, 281-82.) Fishback testified that the abatement required six men and 2-½ hours and that he saw no evidence of previous efforts to abate the condition. (Tr. 293-94.) No methane was present at the time the order was issued. (Tr. 298-99.)

2. Additional Findings of Fact

Although Black Beauty admits an accumulation existed (Resp't Br. at 47), the operator again disputes Inspector Fishback's testimony on three points. First, Respondent contends that the admitted accumulations of loose coal were much smaller than Fishback had indicated in Order No. 6681073. Specifically, Belt Mechanic Armstrong claimed that Fishback issued the order on account of a small pile of coal that was one-foot tall and eight-inches in diameter. (Tr. 310-11, 320.) He also testified that the remainder of the thirty-five feet of material contained "sprinkles" of coal.¹¹ (Tr. 314.) Although I believe Armstrong testified to the best of

¹⁰ Fishback initially wrote that the cited condition would affect ten persons. (Ex. G-5.) However, at hearing he testified that the Order should be modified to three persons affected based on the miners who were likely to be present in the outby area. (Tr. 283-84, 307.) In light of his testimony, counsel for Black Beauty moved to modify Order No. 6681073 to reflect three persons affected. (Tr. 307.) The Secretary did not object, and I noted for the record that the number of persons affected would be modified to three. (Tr. 307.)

¹¹ Shift Foreman Carie also testified that members of the clean-up crew told him that "there wasn't very much stuff here." (Tr. 337.) However, Carie did not arrive at 4 North Main C tail until the materials in that portion of the mine had already been cleaned. (Tr. 333-34, 337.) Given Carie's position as a Shift Foreman, the members of a clean-up crew might have a strong
(continued...)

his recollection, Respondent's own preshift belt examination reports for the three shifts *preceding* Fishback's inspection identify spills at crosscut 178 that had not been cleaned. (Ex. G-16 at 2; Ex. G-17 at 2; Ex. G-18 at 2.) Notwithstanding Respondent's argument that these spills were non-hazardous, the preshift examiners's notations on the report suggest to me that the materials in question include more than mere "sprinkles" of coal. In addition, Fishback's contemporaneous notes support his description of the size of the accumulation in question. (Ex. G-6.) Accordingly, I find that the coal accumulations in question appeared as Fishback described them in Order No. 6681073 and his contemporaneous notes.

Second, Black Beauty disputes the allegation that the cited material was in contact with a roller on the 4 Main North C belt. (Resp't Br. at 45, 48-49, 54-55.) According to Fishback, he and Armstrong approached the tailpiece at Crosscut 178 on the roadway side of the belt line. (Tr. 370-71.) He testified that he then observed the accumulations running in the belt rollers on the back side of the belt and crossed the belt to examine and measure the accumulations. (Tr. 296-97, 370-71; Ex. R-20.) Fishback also credibly testified that he examined the coal pile while on his hands and knees, and that he observed the coal to be in contact with the belt roller. (Tr. 277-81, 296.) Finally, Fishback's contemporaneous notes also indicate that Armstrong, Superintendent Gary Campbell, Section Foreman Emery Cain, and Safety Technician David Weisigner all agreed the roller was in accumulations. (Ex. G-6 at 5.)

In contrast, Armstrong claimed that material was not in contact with the roller. (Tr. 311.) He agreed that Fishback pointed out the pile of coal from the roadway/travel side of the belt. (Tr. 310-11.) However, Armstrong claimed that he alone crossed to the back side of the belt, bent down on his knees, and shined a light up towards the rollers to determine whether the pile of coal was in contact with the roller. (Tr. 310-11, 327-29.) Finally, Armstrong initially claimed that Fishback made his determination regarding the pile of coal from 10-15 feet away. (Tr. 311, 326-27.)

Yet, on cross-examination Armstrong admitted that Fishback later joined him on the back side of the belt. (Tr. 328.) Thus—even according to Armstrong's version of the events—Fishback had a close-up opportunity from which to measure and observe the materials. In light of that opportunity and Fishback's contemporaneous inspection notes, I credit Fishback's account over Armstrong's contrary testimony. Based on the evidence before me, I therefore find that the pile of coal accumulation Fishback identified was in contact with a roller on the 4 Main North C belt.

Third, Respondent again disputes Fishback's claim that six miners required two and half hours to abate the violative condition. (Resp't Br. at 46, 50-51, 53.) Armstrong described three areas that Fishback required to be cleaned before the 4 Main North C belt could be restarted:

¹¹ (...continued)

incentive to minimize the seriousness of the violation to their boss. Further, Carie had no basis to judge the accuracy of the clean-up crew's statements because he arrived *after* the crew had finished cleaning the area. Although hearsay evidence is admissible in Commission proceedings, *see* 29 C.F.R. § 2700.63(b), I accord no weight to this testimony.

(1) the actual pile of coal under the tailpiece, which Armstrong claimed was cleaned in less than one minute; (2) the 4 Main North C area was cleared and rock dusted from rib to rib, which required 30–40 minutes to clean; and (3) the area out to the 4 Main North A takeup—located sixty feet from the intersection with 4 Main North C belt, which was cleaned in 90 minutes.¹² (Tr. 313–16.) Although Carie was not present when clean-up began, he testified that the area around 4 Main North C belt was “pretty well finish[ed] up” and rock dusted when he arrived 20–25 minutes after the belt was shut down. (Tr. 333–34.) Further, he testified that cleaning the area to the 4 Main North A takeup required an additional 1-½ hours because it required removal of guards and time-consuming mud removal. (Tr. 333–35.) Curiously, Fishback did not testify about the extent of the clean-up efforts he required; instead, he testified only that clean-up required six miners “a period of two and a half hours to remove the materials and rock dust the affected area.” (Tr. 293–94.) Based on Armstrong and Carie’s credible testimony on this point, I therefore find that the cited conditions on the were abated within thirty minutes.

3. S&S

Black Beauty admits that the cited material violated 30 C.F.R. § 75.400; therefore, the first *Mathies* element is met. In addition, I have found that the accumulation was in contact with one of the belt rollers on the 4C belt. As Fishback credibly testified, friction from the belt roller could lead to a mine fire. (Tr. 279–80.) Accordingly, I determine that the Secretary has met his burden of proof for *Mathies*’ second element has been satisfied because the coal accumulations in question contributed to a mine fire hazard. *Cf. Buck Creek Coal, Inc.*, 52 F.3d 133 at 136 (noting precautions are in place “because of the significant dangers associated with coal mine fires”); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 at 1120 (noting “ignitions and explosions are major causes of death and injury to miners”).

The Secretary has also met his burden of proof for the third *Mathies* element. The cited accumulations were in contact with a roller on the 4C belt, which provided a frictional ignition source. (Tr. 279–80.) Moreover, I have found that the accumulations of coal stretched approximately thirty-five feet in length, spanned four feet in width, and measured between six and eighteen inches in depth. *See* discussion *supra* Part V.D.2. According to Fishback, the size of the accumulations increased the likelihood of fire because it provided additional material to burn. (Tr. 280.) I also note that the belt in question was located just a foot above the mine floor. Further, Shift Foreman Carie claimed that the “spills” mentioned on these reports were nonhazardous and were something that “*may* need attention later.” (Tr. 340.) Given the repeated notations in Black Beauty’s own preshift reports and Carie’s testimony, it appears likely that Respondent had no plans to clean this area in the course of continuing mining operations. Thus, the accumulations would have continued to grow deeper—eventually contacting the belt located just one foot above the mine floor— and exposed the accumulations to additional points of frictional ignition. Finally, it is uncontroverted that three miners would be present in this outby area. In light of the record before me, I therefore determine that the Secretary has satisfied his burden of proving that the mine fire hazard was reasonably likely to result in injuries.

¹² Notably, this area is not listed on Order No. 6681073.

Finally, I determine that Fishback's testimony regarding the smoke inhalation and burn injuries that are likely to occur also satisfies the Secretary's burden of proof for *Mathies'* fourth element. As I determined in Order Nos. 6681061 and 6681064, these injuries are reasonably likely to be reasonably serious. In view of these determinations and the evidence before me, I therefore conclude that Order No. 6681073 was properly designated as S&S.

4. Unwarrantable Failure and High Negligence

The evidence in this case also convinces me that Black Beauty's conduct was both an unwarrantable failure to comply with section 75.400 and highly negligent. Indeed, *each* of the Commission's factors for the analysis of unwarrantable failure suggest that Respondent's conduct was aggravated in this case and constituted more than ordinary negligence. As I noted above, *see* discussion *supra* Parts V.B.5 and V.C.3, Black Beauty has a significant history of accumulations violations—including two section 104(d)(2) orders from the preceding seven days also involving accumulations on a belt line—that put Respondent on notice that greater efforts were necessary for compliance. In addition, Black Beauty's own preshift reports demonstrate the operator's knowledge that coal was accumulating along the 4C belt. Yet those same reports, Shift Foreman Barras' testimony, and Inspector Fishback's observations make clear that no steps had been taken to clean up the coal. (*See also* Resp't Br. at 53–54 (characterizing the accumulating coal as non-hazardous and claiming that immediate correction was not required).) Likewise, Black Beauty's reports and Inspector Fishback's testimony also indicate that the accumulations were obvious and had been building over three shifts. In addition, I have found that the accumulations in question extended for thirty-five feet and required six miners thirty minutes to abate. Finally, these accumulations were sufficiently dangerous to warrant an S&S designation. Based on all of the above, Black Beauty's conduct was more than ordinary negligence and constituted a serious lack of reasonable care. Thus, I conclude that Order No. 6681073 was appropriately marked as an unwarrantable failure. Given the lack of mitigating factors, I also conclude that the Secretary has also demonstrated Black Beauty's high level of negligence.

5. Penalty

The Secretary originally proposed a \$41,574.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty's business. The parties also stipulated that the penalties would not infringe on Respondent's ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary's high negligence and unwarrantable failure allegations. However, I have modified the citation to reduce the number of miners affected from 10 to 3. Significantly, of the 787 violations in Respondent's history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) Specifically, I note that the conditions underlying Order No. 6681073 were similar to the conditions cited in the previous seven days in Order Nos. 6681061 and Order Nos. 6681063. In considering all of the facts and circumstances in this matter and the criteria of section 110(i), I hereby assess a civil penalty of \$31,000.00.

E. Order No. 6682224 – Accumulations at 5 Main North on November 24

1. Order No. 6682224 – Accumulations at 5 Main North on November 24

Just one month later on November 24, 2008, Inspector Fishback conducted another inspection in the 5 Main North section of the AQ1 Mine—the same section where he observed the violative conditions described in Order Nos. 6681061 and 6681064. (Tr. 205–06, 220–21.) During that month, Black Beauty’s mining had progressed and the tailpiece unit was accordingly advanced to Crosscut 24 so that the tailpiece and feeder would remain near the working face. (Tr. 206–07, 220–21, 240–245.) Crosscut 24 is only 700 feet deeper into the 5 Main North section, but the mine floor in this area was generally dry and level. (Tr. 206–07, 220, 246–48, 254.)

Upon arriving at the 5 North energized conveyor belt with Assistant Mine Manager Del Culbertson, Fishback checked the tailpiece. (Tr. 202, 204, 254; Ex. G–8 at 2–3, 8–9.) According to his notes and testimony, Fishback once again observed coal underneath the tailpiece and float coal dust on its framework. He testified that the material was black and dry, and the entire width of the belt was running in accumulations. (Tr. 202–06, 209–10.) In Fishback’s judgment, the material had been present for several shifts. (Ex. G–8 at 13–14; Tr. 215, 222.) He also found the material obvious without having to bend down, although he was “pretty sure” he did bend down to check for friction. (Tr. 217, 221.) Fishback observed rock dust in the area but asserts it was not mixed with float coal dust. (Tr. 223.) At that point, Culbertson shut off the belt, and at 10:20 a.m. Fishback issued Order No. 6682224, providing:

Combustible material in the form of loose coal, coal fines and float coal dust (black in color and dry) have been allowed to accumulate on the 5 North energized belt conveyor tail located in the #4 entry between crosscut #24 and #25 on Unit #3 MMU-003. The combustible material under the belt tail piece measured approximately 2 inches to 6 inches in depth by 3 feet wide by 4 feet in length and was observed rubbing the belt for this total distance. On the tailpiece structure directly above these accumulations dry float dust was present which measured approximately ½ inch to 3 inches in depth by 6 inches wide for a length of 7 feet. The operator, Bob Smith (section foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–7 at 12.) The order states that abatement required four employees and took fifty-five minutes. (*Id.*) Fishback testified that the mine offered no mitigating factors. (Tr. 216.) He also characterized these accumulations as “[e]xactly the same” as those at issue in Order Nos. 6681061 and 6681064. (Tr. 210.)

2. Additional Findings of Fact

In its briefs, Black Beauty admits that loose coal was present underneath the tailpiece. (*See, e.g.*, Resp't Br. at 31–32 (“Upon removing the tailguarding, Mr. Culbertson . . . found a small pile of coal at the tail inside the guard.”).) In addition, Respondent’s arguments also admit that float coal dust was intermixed in the material Inspector Fishback found on the tailpiece’s framework. (*See, e.g.*, Resp't Br. at 37 (“Mr. Culbertson disagreed with Mr. Fishback’s assessment [that the] float dust was hazardous because the dust was 80% incombustible, ‘layered’ rock dust mixed with coal dust.”).) However, Respondent again disputes four important facts underlying the Secretary’s allegations in this case.

First, Black Beauty disputes the length of time the loose coal was present. (Resp't Br. at 36–37.) Black Beauty once again points to Benjamin’s testimony that the tailpiece area was cleaned and dusted at the end of the midnight shift.¹³ (Tr. 239; Ex. R–30.) Further, Culbertson testified that the “skirt rubber” around the tailpiece had become detached, allowing coal to collect underneath the tailpiece. (Tr. 262–63, 266–67.) Finally, Respondent suggests that the depth of the loose coal underneath the tailpiece—here, two to six inches—suggests that the coal had only recently piled up. (Resp't Br. at 32, 34, 36–38.) Although Fishback estimated that the loose and float coal were both present for several shifts, he provided no explanation as to why he reached that conclusion. As I have noted, coal can accumulate quickly. Given this dynamic environment, Fishback’s conclusion that the loose and float coal were both present for several shifts appears tenuous. Accordingly, I find that the coal deposit underneath the tailpiece developed at some point after the day shift at began 7:00 a.m.¹⁴

Second, Black Beauty claims that the coal pile underneath the tailpiece was not in contact with the belt. (Resp't Br. at 38.) Here, Inspector Fishback observed the coal deposit and instructed Assistant Mine Manager Culbertson to shut down the belt. (Tr. 231, 256.) Moreover,

¹³ The Secretary suggests that I should not find Benjamin’s testimony credible because Black Beauty has a long history of coal accumulations. (Sec’y Br. 22–23.) Although he does not make this clear in his brief, it appears the Secretary would like me to infer that Respondent *did not* regularly clean and dust the tailpiece from Black Beauty’s repeated accumulations. Yet, correlation does not necessarily imply causation. Indeed, a failure to clean and dust the belt lines is not necessarily the best or most natural inference of causation in this case. Fishback’s own testimony suggests that poor belt installation and repairs contributed to Black Beauty’s ongoing accumulations problem. (*See* Tr. 213, 221 (noting that the mine had a history of “very poor” belt installation and suggesting it caused accumulations).) Repeated installation or repair errors are also unacceptable, but they do not imply that Benjamin failed to clean or dust the tailpiece on the midnight shift.

¹⁴ I note that the size of the loose coal deposit under the tailpiece in Order No. 6682224 is comparable to the size of similar accumulations in Order Nos. 6681061 and 6681064. *See* discussion *supra* Parts V.B.2 and V.C.2. My finding that the loose coal at issue in Order No. 6682224 developed in the hours between 7:00 a.m. and 10:20 a.m. on November 24, 2008, is therefore consistent with those earlier findings.

Fishback credibly testified that he got down on his hands and knees to examine the coal in contact with the belt. (Tr. 221.) Assistant Mine Manager Culberston agrees that he first shut down the belt, but he testified that he then joined Fishback near the accumulations in question. (Tr. 256–57.) At that point, Culberston claims he was able to run his pen between the pile of coal and the belt itself. (Tr. 257–58.) Culbertson also claims that Fishback did not physically examine the materials. (Tr. 258, 264.)

Despite Culbertson’s testimony, the record as a whole convinces me that the coal pile was in contact with the 5 Main North Belt when the inspection party arrived at the tailpiece. As I have noted, I credit Fishback’s observations based on his long experience as a coal miner. Specifically, Fishback explained that he physically inspected the coal accumulations in question on his hands and knees and measured it using a tape measure. Moreover, Fishback’s contemporaneous inspection notes and Culbertson’s Escort Report both indicate that the belt was running in coal.¹⁵ (Ex. G–8 at 10; Ex. G–15.) Culbertson also admitted that he did not immediately join Fishback at the coal deposit because the belt needed to be shut down. Fishback therefore had an opportunity to examine the materials independently, and the conditions may have changed after Culbertson shut down the belt. Given the evidence before me, I therefore find that the Secretary has met his burden of demonstrating that the coal underneath the tail piece was in contact with the belt.

Third, Respondent claims that the dust that Fishback found on the framework of the tailpiece was “part of a dust mixture that was incombustible and ‘layered’ with rock dust.” (Resp’t Br. at 41.) Specifically, Culbertson described the surrounding area as very white from a recent rock dusting. (Tr. 261–63.) He also recalled Fishback dragging his walking stick through the dust material, revealing layered float coal and rock dust. (Tr. 260.) In addition, Culbertson testified that roadway dust would also collect on the tailpiece because it was located near a ventilation regulator. (Tr. 260–61.) Nevertheless, I again credit Fishback’s testimony regarding the color and depth of the dust accumulations based on his long experience as a miner.

Finally, Respondent again disputes the clean-up time recorded in the order. (Resp’t Br. at 41.) Culbertson claimed that he shoveled the loose coal within 5 minutes, spent another 5 or 10 minutes washing the float coal dust mixture from the structure, and spent 20 to 25 minutes locking and tagging the belt and pulling the guarding. (Tr. 264–65.) In light of Culbertson’s testimony, the size of the coal deposits, and the similarity to the condition underlying Order Nos. 6681061 and 6681064, I find that the cited materials required fifteen minutes to clean.

¹⁵ Culbertson’s Escort Report indicates: “5MN tail roller running in fines - terminated.” (Ex. G–16.) Black Beauty again claims that this Escort Report reflects *Fishback’s* observations rather than Culbertson’s. (See Resp’t Reply Br. at 7.) I have previously explained that I do not find Respondent’s position to be credible. See discussion *supra* note 6. Accordingly, I determine that Culbertson’s Escort Report weighs in favor of finding that the 5 Main North belt was in contact with the coal when Fishback and Culbertson arrived at the belt tailpiece.

3. Violation of 30 C.F.R. § 75.400

Despite the presence of loose coal under the tailpiece and float coal dust on the framework of the tailpiece, Black Beauty contends the cited conditions do not constitute a violation of section 75.400. Specifically, Respondent characterizes the loose coal as “spillage” rather than an accumulation. (Resp’t Br. at 34.) Yet, Respondent’s argument is a red-herring. Combustible materials of sufficient quantity to cause or propagate a fire are prohibited, even if recent. *Prabhu Deshetty*, 16 FMSHRC at 1049; *see also UP&L*, 12 FMSHRC at 968 (discussing Congress’ intent to prevent accumulations rather than cleaning them up in a reasonable period of time).

Given my factual findings in this case, I determine that the cited conditions violated section 75.400. It is uncontroverted that loose coal, coal fines, and float coal dust are combustible. Although these accumulations were relatively small in size, Fishback also testified that these materials were sufficient to ignite. (Tr. 209–11.) Thus, a reasonably prudent person that is familiar with the mining industry and protective purposes of section 75.400 would therefore have recognized that these were the types of materials that could propagate a fire or explosion and were impermissible accumulations. I therefore conclude that Black Beauty violated 30 C.F.R. § 75.400.

4. S&S

Black Beauty’s violation satisfies the first element of the *Mathies* test. Further, Fishback credibly testified that the cited accumulations contributed to belt fire and explosion hazards. (Tr. 211–12.) Accordingly, the Secretary has satisfied *Mathies*’ second element.

Once again, Black Beauty focuses its attention on *Mathies*’ third element. (Resp’t Br. at 35–40.) Black Beauty claims that the “confluence of factors’ necessary to make an explosion or fire reasonably likely was not present at the time the Order was issued.” (*Id.* at 36.) Specifically, Respondent claims that the cited accumulations were “minimal” and had recently developed. (*Id.* at 36–37.) Further, Black Beauty claims that no ignition source was present. (*Id.* at 38.) Finally, Respondent also contends that the float coal dust was not hazardous because it was incombustible, was not in suspension, and only 0.1% methane was present at the time of the citation. (*Id.* at 38–39.)

Given the similarities between Order Nos. 6681061, 6681064, and 6682224, I am not surprised to see Respondent revisit this dispute for a third time. Yet such persistence does not ultimately prove effective. Despite Black Beauty’s claims that these accumulations were minimal, the loose coal and float coal dust spanned several feet and had significant depth. Moreover, it is well known that S&S determinations are to be made in the context of continuing mining operations. Although I agree that these accumulations developed at some point since the beginning of the day shift, in the course of continued operations these combustible materials provided potential fuel for a mine fire or explosion. Again, the AQ1 Mine is gassy and methane

could rapidly develop in the course of continued mining.¹⁶ In addition, I have found that the loose coal accumulations were in contact with the belt, *see* discussion *supra* Part V.E.2, which Fishback credibly testified would provide an ignition source. (Tr. 211.) In light of the evidence before me, the confluence of factors convince me that an ignition or explosion hazard was reasonably likely to lead to an injury-causing event. Thus, I determine that the Secretary has established the third element of *Mathies*.

Finally, Fishback again credibly testified that smoke inhalation and burn injuries would result from a mine fire or explosion. (Tr. 212.) Accordingly, I determine that *Mathies*' fourth element has been satisfied. Based on my determinations above, I conclude that the Secretary properly designated Order No. 6682224 as S&S.

5. Unwarrantable Failure and High Negligence

Once more, the Secretary has characterized Black Beauty's negligence as high and has designated this violation to be an unwarrantable failure. According to the Secretary, each of the seven aggravating factors support a conclusion of unwarrantable failure and high negligence. (Sec'y Br. at 25–26.) In contrast, Black Beauty claims that the extent, duration, notice, and degree of danger each suggest that its conduct was not unwarrantable. (Resp't Br. at 40.) Looking at the evidence before me, the Secretary has met his burden of proof on both his unwarrantable failure and high negligence allegations.

I note the accumulations in question were comparatively small and had developed at some point after the day shift began. Nevertheless, I have concluded that these accumulations presented significant dangers to Black Beauty's miners. As Fishback testified, the conditions at issue in Order No. 6682224 were nearly identical to the conditions he identified in Order Nos. 6681061 and 6681064. These recent and nearly identical violations in the same 5 Main North section of the mine—not to mention Black Beauty's significant history of accumulations violations—should have put Respondent on notice that greater efforts were necessary for compliance. Those extremely similar orders also suggest that Respondent reasonably should have known that accumulations would predictably pile up at the tailpiece. Perplexingly, Black Beauty appears to have continued to employ the same measures and procedures that had produced recurring and dangerous accumulations along its belt lines. Further, it appears Black Beauty made no efforts to clean up the loose coal and float coal dust accumulating in this area since the beginning of the shift. Finally, it is uncontroverted that the accumulations were obvious. In light of the record in this case—especially the similarity to recent tailpiece

¹⁶ As Black Beauty admits in its posthearing brief, the “presence of methane increases the likelihood of a fire or explosion when accumulations are present.” (Resp't Br. at 39.) The tailpiece and the feeder are purposely located near the active working face to cut to down on travel time. (Tr. 206–07, 220–21, 240–245.) Although little methane was present at the time, S&S determinations are made considering continued mining operations. *See* discussion *supra* Part V.B.4.

accumulation violations—I determine that Respondent’s conduct constituted a serious lack of reasonable care. Accordingly, I conclude that Black Beauty’s conduct was unwarrantable in this case. Given the ease with which these accumulations were ultimately cleaned relative to the danger they presented, I also conclude that Black Beauty’s negligence was high.

6. Penalty

The Secretary originally proposed a \$38,503.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty’s business. The parties also stipulated that the penalties would not infringe on Respondent’s ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary’s high negligence and unwarrantable failure allegations. Of the 787 violations in Respondent’s history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) I also note that the conditions underlying Order No. 6682224 were extremely similar to the conditions cited just five days earlier on Order Nos. 6681061 and 6681064. In considering all of the facts and circumstances in this matter and the criteria of section 110(i), I hereby assess a civil penalty of \$38,503.00.

VII. ORDER

In light of the foregoing, I hereby **ORDER** the following:

Section 104(d)(2) Order No. 6681061 is **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation, and lowering the cited level of negligence from “high” to “moderate.”

Section 104(d)(2) Order No. 6681064 is **AFFIRMED** as written.

Section 104(d)(2) Order No. 6681073 is **AFFIRMED** as S&S, as an unwarrantable failure, and as resulting from Black Beauty’s high negligence and **MODIFIED** to reduce the number of miners affected from “10” to “3.”

Section 104(d)(2) Citation No. 6682224 is **AFFIRMED** as written.

Black Beauty shall **PAY** a civil penalty of \$125,077.00 within 40 days of the date of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

Emily L. B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Arthur M. Wolfson, Esq., and Patrick W. Dennison, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

/tw & pjv

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

September 30, 2014

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

v.

CAMPBELL COUNTY HIGHWAY
DEPARTMENT,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2012-198-M
A.C. No. 40-00739-276522

Mine: County Quarry

DECISION

Appearances: Robert S. Bexley, Esq., Office of the Solicitor, U.S. Department of Labor,
Atlanta, Georgia, for Petitioner;

Charles W. Kite, Esq., Knoxville, Tennessee, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). In dispute are two section 104(d)(2) orders issued by the Mine Safety and Health Administration (“MSHA”) to the Campbell County Highway Department as the owner and operator of the County Quarry mine. To prevail, the Secretary must prove the cited violations “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom.*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The two alleged violations in this case were issued at the Campbell County (Tennessee) Highway Department’s County Quarry. Order No. 8542424 charges the Campbell County Highway Department (“Campbell County” or “Respondent”) with a violation of 30 C.F.R.

§ 56.4102¹ for failing to remove in a timely manner a pool of flammable hydraulic fluid on the cab floor of the mine's John Deere 544G loader. Order No. 8542431 charges the mine operator with a violation of 30 C.F.R. § 56.11001² for failing to clean up an accumulation of rock material on a walkway used to service the quarry's rock crusher, also known as the hammer mill. The Secretary designated both violations as significant and substantial ("S&S")³ and in both instances characterized the Campbell County Highway Department's negligence as high. The Secretary further asserts that each violation was an unwarrantable failure⁴ to comply with a mandatory health and safety standard. The Secretary proposed a penalty of \$4,000.00 for each violation, for a total penalty of \$8,000.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. SE 2012-198-M to me, and I held a hearing in Knoxville, Tennessee.⁵ The Secretary presented testimony from MSHA Inspector Robert McPheeters. Campbell County presented testimony from Safety Director Samuel Franklin, Campbell County Highway Superintendent Dennis Potter, and Assistant Road Superintendent Estel Muse. The parties each filed post-hearing briefs, and Campbell County Highway Department filed a reply brief.

II. ISSUES

For Order No. 8542424, the Secretary asserts that Respondent failed to fulfill its duty imposed by 30 C.F.R. § 56.4102 by allowing a combustible liquid to accumulate on the floor of a vehicle at the mine. (Sec'y Br. at 5–7.) The Secretary further claims that the dangerous nature of the violation, the length of time the violation existed, and Respondent's knowledge of the violation provide sufficient aggravating circumstances to support the issuance of an order under section 104(d)(2). (*Id.* at 7–13.) Campbell County asserts that the Secretary did not satisfy its burden of persuasion to show that a combustible liquid was present. (Resp't Br. at 4–5.) Alternatively, Campbell County claims that additional safety measures mitigated the gravity of

¹ Section 56.4102 provides: "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard."

² Section 56.11001 provides: "[s]afe means of access shall be provided and maintained to all working places."

³ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes in gravity violations that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

⁴ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by the "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁵ In this decision, the hearing transcript, the Secretary's exhibits, and Campbell County's exhibits are abbreviated as "Tr.," "Ex. P-#," and "Ex. R-#," respectively.

the violation and the operator's efforts to repair the violative leak mitigate the level of Respondent's negligence. (Resp't Br. at 5-7.)

For Order No. 8542431, the Secretary contends Respondent failed its duty under 30 C.F.R. § 56.11001 to maintain safe access to a workplace. (Sec'y Br. at 15-17.) The Secretary asserts that an accumulation of rock material made access to the mine's rock crusher unsafe. (*Id.*) He further claims that the duration of the violation's existence and the operator's knowledge of the violation were sufficient aggravating factors to support the issuance of an order under section 104(d)(2). (*Id.* at 16-25.) Campbell County contends the area where the accumulation occurred was not a working place and, alternatively, disputes the Secretary's allegations about the danger posed by the debris and the length of time the debris was present. (Resp't Br. at 7-15.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the removal of spills involving flammable or combustible liquids; (2) whether the cited conditions violated the Secretary's mandatory health or safety standards regarding safe access to working places; (3) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including the S&S determinations; (4) whether the record supports the Secretary's assertions regarding Campbell County's negligence, including the unwarrantable failure determinations, in committing the alleged violations; and (5) whether the Secretary's proposed penalties are appropriate.

III. FINDINGS OF FACT

The Campbell County Highway Department owns and operates the County Quarry in Jacksboro, Tennessee. Campbell County mines and crushes stone at the County Quarry for use on the county's roads. (Tr. 228:6-10.) Campbell County employs four workers at the County Quarry. (Tr. 162:2-10.) Among its equipment, Campbell County employs a rock crusher to grind larger pieces of rock into gravel. The mine also employs a John Deere 544G front-end loader to move and load rock. (Tr. 46:15-19.)

On June 22, 2010, MSHA Inspector Robert McPheeters and his supervisor, Inspector Don Ratliff, visited the County Quarry as part of a regular biannual inspection of the Mine. (Tr. 33:11-14.) McPheeters had extensive experience as a mining safety inspector, working for thirty-three years as a state or federal inspector, including thirteen years for MSHA. (Tr. 24:11-28:16.)

A. Order No. 8542424: The John Deere Loader

Prior to his visit, McPheeters looked at past MSHA inspection reports to check for any history of violations at the mine. (Tr. 37:1-25.) McPheeters' review revealed a history of citations and orders issued under section 104(a) and (d) of the Mine Act. (Tr. 39:10-12, 42:11-19.) Upon arriving at the mine, McPheeters and Ratliff also examined the mine's pre-shift safety inspection reports, which included notes indicating the presence of a leak on the mine's John Deere front-end loader. (Tr. 57:4-6.)

Along with quarry Safety Director Samuel Franklin, inspectors McPheeters and Ratliff examined the mine's John Deere 544G front-end loader. (Tr. 46:12–20.) The front-end loader has a single-person cab. (Tr. 47:14–23.) The cab stands seven to eight feet above the ground and has one entry door. (Tr. 47:6–23) The vehicle's cab also has windows on all sides. (Tr. 47:22–23.) Although not required by law, the cab possessed a fire extinguisher. (Tr. 48:7.)

At the mine, an employee alerted McPheeters to a potential problem with the front-end loader, telling the inspector that a valve or hose in the machine was leaking. (Tr. 50:18–21.) Campbell County's Franklin testified that one of the inspectors asked him to remove a rubber mat covering the floor of the vehicle's cab before checking the interior. (Tr. 149:10–11.) Upon inspection of the cab floor, McPheeters found an oily sheen across the entire floor and a puddle of brown, oily fluid in the corner. (Tr. 48:12–49:19.) McPheeters identified the brown liquid as oil-based hydraulic fluid. (Tr. 48:19.) The fluid was mixed with dirt. (Tr. 51:21–22.)

The inspectors observed that the mine's workplace examination records first noted the presence of a leak of hydraulic fluid in January 2010, five months prior to the June 22 MSHA inspection. (Tr. 115:14.) Yet, Campbell County's records revealed no attempts to repair the hydraulic fluid leak. (Tr. 125:21–126:2.)

Based on his observations, Inspector McPheeters issued Order No. 8542424, alleging a violation of 30 C.F.R. § 56.4102:

Flammable or combustible liquid spillage or leakage was not removed in a timely manner or controlled to prevent a fire hazard. On the John Deere 544G loader, a hydraulic leak exist[ed] in the cab. The floor is covered with oil and employees are exposed to a fire or burn hazard. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. P–4 at 1.) McPheeters designated the order as an S&S violation affecting one person and characterized the Campbell County Highway Department's negligence as "high" and as an unwarrantable failure to comply with a mandatory health or safety standard (*Id.*) Because of the mine's history of citations and orders under section 104(d)(1) of the Mine Act, McPheeters issued a closure order under section 104(d)(2) for the alleged violation.

B. Order No. 8542431: The Hammer Mill

After examining the front-end loader, the MSHA inspectors checked the mine's rock crusher, which they generally referred to as the "hammer mill." (Tr. 96:14–15.) The hammer mill is a big piece of equipment used to reduce large rocks to a size suitable for use by the Campbell County Highway Department. (Tr. 70:14–15.) The hammer mill operates almost continually when the mine is open. (Tr. 178:1–10.) The machine's design causes material to be expelled during the crushing process. (Tr. 172:6–8.) To prevent this expulsion of material, the hammer mill is equipped with chains covering the ejection points. (Tr. 168:14–25.)

A miner operates the hammer mill remotely from a stand located approximately 100 feet away from the crushing device. (Tr. 161:2.) However, workers must still access the area immediately surrounding the crusher device to perform occasional repairs and weekly maintenance. (Tr. 161:6–13.) To facilitate those repairs and maintenance, Campbell County installed an elevated walkway around the hammer mill. (Tr. 228:25–229:10.) The main portion of the walkway is approximately eight feet long, thirty inches wide, and stands about eight feet off the ground. (Tr. 71:5–14.) The walkway has guard rails around the outer edge. (Tr. 73:17–20.) The walkway runs around the side of the hammer mill and then reaches a small platform area that is level with the walkway. (Tr. 185:4–7.) A feeder runs across the small platform and connects to the hammer mill. (Tr. 182:23–183:3.) The feeder stands approximately four feet above the walkway and platform. (Tr. 73:10–13.) A small catwalk branches off from the platform and runs to other parts of the rock crusher. (Tr. 183:21–184:17.)

Upon inspecting the elevated walkway, Inspector McPheeters discovered an accumulation of rock material six inches to a foot in depth. (Tr. 73:21–22.) The material covered the entire width of the elevated walkway and stretched a length of four to five feet. (Tr. 74:7–15.) The material, which included rocks ranging from the size of gravel to the size of a fist, had spilled out of the hammer mill where the feeder overhangs the walkway. (Tr. 73:5–9.) McPheeters testified that during the inspection an employee at the mine told him the hammer mill was missing chains that would prevent rock from being thrown out of the mill. (Tr. 97:12–15.)

When looking at the County Quarry’s workplace records, McPheeters discovered that the accumulated material had been noted on June 16, six days prior to the inspectors’ visit, but with no indication it had been cleaned up. (Tr. 79:18–21.) Franklin, the mine’s safety director, testified that the hammer mill would take several days to expel the quantity of rock McPheeters found on the walkway. (Tr. 178:2–4.)

Based on his observations, McPheeters issued Order No. 8542431, alleging a violation of 30 C.F.R. § 56.11001:

Safe means of access was not provided and maintained to all working places. At the primary plant the walkway adjacent to the hammer mill had a build up of rock material about six inches to a foot deep. Employees that work in this area are exposed to a trip or fall hazard. This condition was noted on work place exams; however, it was not corrected.

(Ex. P–18 at 1.) McPheeters designated Order No. 8542431 as an S&S violation affecting one person and characterized Campbell County’s negligence as “high” and as an unwarrantable failure to comply with a mandatory health or safety standard. (*Id.*)

IV. PRINCIPLES OF LAW

A. **30 C.F.R. § 56.4102 – Spillage and Leakage**

Section 56.4102 requires that operators (1) remove or control (2) flammable or combustible liquid spillage or leakage (3) in a timely manner.

MSHA has defined “flammable liquid” as a “liquid that has a flashpoint below 100F.” 30 C.F.R. § 56.2. The Secretary has defined “combustible liquids” to mean “liquids having a flash point at or above 100F.” *Id.* “Flash point” in turn is defined as “the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure.” *Id.* As one Commission Judge observed, these expansive definitions mean the regulation covers nearly every liquid other than water. *See Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 352–353 (2011) (ALJ).

The determination of whether an operator fails to correct a defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of the condition’s existence. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001) (affirming Judge’s ruling that the Secretary must present evidence of when a device became defective to show a violation of 30 C.F.R. § 56.14100(b) for failing to correct the defect “in a timely manner”) (footnote omitted). Where an operator has actual knowledge of a violative condition and nevertheless continues to use the equipment without addressing the hazard, Commission Judges have found violations of this standard. *See, e.g., Consolidated Rebar, Inc.*, 35 FMSHRC 3025, 3027–28 (Sept. 2013) (ALJ) (violation established because operator continued to use vehicle for several days while damaged); *Northshore Mining Co.*, 35 FMSHRC 1006, 1017 (Apr. 2013) (ALJ) (violation established because operator used vehicle for six months without replacing damaged mirrors); *Sweetman Construction Co.*, 21 FMSHRC 101 (Jan. 1999) (ALJ) (violation established because defective truck was in use at the time the inspector found the defect); *Walker Stone Company*, 20 FMSHRC 1225 (Oct. 1998) (ALJ) (violation established where the operator had been using equipment without functioning headlights for a long period of time due to a lack of knowledge that MSHA required them).

B. **30 C.F.R. § 56.11001 – Safe Access**

Section 56.11001 requires that operators (1) provide and maintain (2) safe means of access (3) to all working places. The Commission has held that section 56.11001 “comprises the dual requirements of providing *and* maintaining safe access to working places.” *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 680 (July 2002) (emphasis added) (citation omitted). The Commission also has concluded that the term “maintain” requires “an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place.” *Lopke Quarries*, 705 at 708. MSHA has defined a “working place” as any place in or about a mine where work is being performed.” 30 C.F.R. § 56.2.

The Commission has held that in determining whether a broadly worded standard that is intended to be applied to many factual situations, such as this one, applies to a specific situation,

“it is appropriate to evaluate the evidence in light of what a ‘reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Applied to section 56.11001, the standard imposes an obligation on the operator to make each means of access to a working place safe unless, for example, there is no reasonable possibility that a miner would use the route as a means of reaching a workplace. *The Hanna Mining Co.*, 3 FMSHRC 2045, 2047 (Sept. 1981).

C. Significant and Substantial Violations

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S 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 in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission has observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e. that the violation present a *measure* of danger.” *U.S. Steel Mining Co.*, 3 FMSHRC 822, 827 (Apr. 1981). The Commission also has indicated that “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Id.* at 2003–04. Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. The Commission has identified several such factors, including: (1) the length of time a 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, (6) whether the violation posed a high degree of danger, and (7) the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC 1356, 1350-51 (Dec. 2009). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or mitigating circumstances exist. *Id.*

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Order No. 8542424 – The John Deere Loader

1. Further Findings of Fact

a. *The Presence and Flammability of Hydraulic Fluid*

Respondent claims the Secretary did not demonstrate that the material in the front-end loader's cab was hydraulic fluid. (Resp't Br. at 2, Resp't Reply at 2.) Respondent's argument lacks support in the evidence. Here, McPheeters, an MSHA inspector with thirty-three years of experience working at mines, identified the material on the cab floor as hydraulic fluid that had likely leaked from the front-end loader's steering column. (Tr. 48:19.) At the hearing, McPheeters testified that an employee of the mine alerted the MSHA inspectors to the hydraulic fluid leak before the inspectors checked the vehicle. (Tr. 50:18–21.) Moreover, Campbell County's own witness, Franklin, testified that the front-end loader had leaked oil into the cab intermittently for several months. (Tr. 217:2–218:4.) Franklin further testified that the mine had attempted to repair the leak by replacing seals in the hydraulic system. (Tr. 217:2–218:4.) Finally, Franklin testified that he cleaned the pooled liquid from the cab floor with Oil-Dri, a material specifically designed for cleaning oil-based fluids. (Tr. 157:10–15.) Indeed, Campbell County's witnesses failed to provide any evidence suggesting an alternative origin for the fluid in the vehicle's cab, or even questioning the Secretary's assertion that the spill was of hydraulic fluid. Given the evidence before me, I find that the accumulated material on the cab floor of the John Deere loader was hydraulic fluid.

Respondent also argues that the Secretary has not demonstrated that the accumulated fluid was flammable or combustible.⁶ (Resp't Br. at 2.) At the hearing, however, McPheeters

⁶ Relying heavily on *LeBlanc's Concrete and Mortar Sand Co.*, 11 FMSHRC 660 (1989) (ALJ), Respondent claims 30 C.F.R. § 56.4102 requires the Secretary to collect a sample of the accumulated liquid and submit it to rigorous laboratory testing. (Resp't Br. at 5.) Respondent's argument runs counter to the text of the regulation. MSHA has defined the terms of section 56.4102 broadly enough to cover most liquids. *See Lehigh*, 33 FMSHRC at 352–53. The Judge in *LeBlanc's* relied on the definitions of “flammable” and “combustible,” rather than the definitions for “flammable liquid” and “combustible liquid.” *LeBlanc's*, 11 FMSHRC at 674. Furthermore, while some MSHA regulations require laboratory testing to prove a violative condition, the Commission has not extended that requirement to section 56.4102. *See Old Ben*

(continued...)

credibly testified from his extensive experience that hydraulic fluid is combustible. (Tr. 52:7–53:3.) Given his experience, I find McPheeters’ testimony persuasive. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ’s S&S determination). Meanwhile, Campbell County again curiously failed to present any evidence at hearing suggesting the fluid in the cab was not flammable.

Based on the evidence before me, I therefore find that the accumulated liquid was hydraulic fluid and that it was combustible.

b. The Duration of the Spill

Respondent also disputes the amount of time the leaked hydraulic fluid was present in the front-end loader’s cab. (Resp’t Br. at 5–7.) Here, Inspector McPheeters testified the hydraulic fluid spill was first noted in equipment examination reports in January 2010, five months prior to the MSHA inspection. (Tr. 59:20–23.) Although McPheeters did not specifically note any subsequent equipment examination reports showing the presence of hydraulic fluid, the MSHA investigator testified that his use of the term “since” in his notes suggested he had found other examination reports noting the presence of the fluid after January. (Tr. 59:20–23, 134:18–135:23.) McPheeters also testified that Respondent did not produce any repair records showing him the front-end loader’s leak had been remedied. (Tr. 89:6–19.) McPheeters further noted the quantity of hydraulic fluid present in the cab and the presence of dirt mixed into the fluid suggested the leakage was present “for sometime.” (Tr. 51:15–52:6.) Accordingly, McPheeters inferred the material had been present since first reported in January. (Tr. 63:11–22.)

At the hearing, Respondent presented testimony that the mine attempted to repair the front-end loader after the leak’s discovery in January. Assistant Superintendent Estel Muse, who oversaw repair of equipment at the mine during the period, claimed Campbell County had worked on the front-end loader three times, but he was unsure of the precise dates of the work. (Tr. 247:11–15.) Safety Director Franklin likewise testified the operator attempted to repair the leak twice prior to the June 22 inspection, but admitted neither attempt permanently solved the problem. (Tr. 153:8–154:2.) Superintendent Potter testified that the county purchased a set of seals specific for the 544G John Deere front-end loader on November 3, 2009, over seven months prior to McPheeters’ inspection, and that the seals were used on the machine. (Tr. 227:1–20.) Nevertheless, Campbell County failed to provide any record of repairs for the front-end loader during that period. Speaking specifically of the leak McPheeters cited on June 22, Franklin testified the accumulated liquid was present for at least two days prior to the inspection. (Tr. 215:14–25.)

⁶ (...continued)

Coal Co., 2 FMSHRC 2806 (Oct. 1980) (upholding the use of band sample method to prove violations of 30 C.F.R. § 75.403). More importantly, decisions by Administrative Law Judges are not precedential. 29 C.F.R. § 2700.69(d). Thus, I am not bound by *LeBlanc’s*, and I chose not to follow it.

Based on the above testimony, I conclude the leak in the front-end loader's hydraulic system existed from January until the MSHA inspection. Campbell County's efforts to repair the loader were repeatedly ineffectual. I further find the specific accumulation forming the basis of the Secretary's claim existed for at least two days prior to the examination.

2. Analysis and Conclusions of Law

a. Violation of 30 C.F.R. § 56.4102

Inspector McPheeters issued Order No. 8542424 for Campbell County's failure to clean up an accumulation of hydraulic fluid in the cab of the mine's John Deere 544G front-end loader. (Ex. P-4.) I have already found that the accumulated liquid present in the John Deere loader's cab was hydraulic fluid, which is a combustible liquid as defined by 30 C.F.R. § 56.2. I therefore determine that an accumulation of combustible material was present and not controlled, satisfying the first and second elements of a violation of § 56.4102.

Consequently, this violation turns on whether Campbell County failed to remove the leakage in a timely manner. As discussed above, I have found that the defect causing the leak existed for five months prior to the MSHA inspection. I have also found that the accumulation of hydraulic fluid on June 22 existed for at least two days, during which the operator knew of the leaked fluid and still operated the vehicle.

Given the evidence before me, I determine that Campbell County failed to remove the leakage in a timely manner. The repeated recurrence of the leak, despite numerous, inadequate repair efforts throughout the five-month period leading up to MSHA's inspection, put Campbell County on notice that it needed to be vigilant in checking for new accumulations of hydraulic fluid. Furthermore, Campbell County had actual knowledge that the combustible liquid lay at the feet of the front-end loader's operator for two days, yet failed to clean up the liquid. Considering the danger posed by having a pool of combustible liquid at the feet of a worker in a vehicle eight to ten feet off the ground, as well as the ease with which the material could be removed, the operator could be expected to remove the hydraulic fluid immediately upon noticing the accumulation. In fact, Franklin testified that he was able to clean the accumulation with a pressure washer and Oil-Dri. (Tr. 157:10-15.) Under the circumstances, two days certainly was not a timely response. Thus, I conclude that Respondent violated 30 C.F.R. § 56.4102.

b. Gravity and S&S Determination

Campbell County's violation of section 56.4102 establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard; that is, whether the violation provides a measure of danger to safety. Here, Inspector McPheeters credibly testified that accumulated hydraulic fuel contributed to the safety hazard of a fire in the cab of the front-end loader, as well as the hazard of slipping and falling from the vehicle. (Tr. 55:10-18.) Respondent claims that the risk of a fire was negligible because the vehicle's operator did not smoke. (Resp't Br. at 13.)

However, McPheeters testified that the electrical components in the vehicle's cab or a related fire in the engine of the vehicle also could light the hydraulic fluid on fire. Accordingly, I determine that the violation contributed to the discrete safety hazard of a fire in the vehicle cab. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this instance are reasonably likely to be fatal. I recognize that the opinion of an experienced inspector is entitled to significant weight. *Harlan*, 20 FMSHRC at 1278–79. Based on the quantity of hydraulic fluid and its location in the cab of the vehicle, Inspector McPheeters determined that injuries from a fire were reasonably likely to be serious. (Tr. 58:9–11.) The potential for the vehicle operator to slip on the fluid and fall eight feet to the ground when evacuating in an emergency compounded the potential for a serious injury. (Tr. 55:10–18.)

Campbell County contends that several factors mitigate the threat of a serious injury posed by a fire in the vehicle's cab. First, Respondent argues that a second point of egress through the cab window increases a miner's chances of escaping from a dangerous fire. (Resp't Br. at 13.) Respondent adds that the presence of a fire extinguisher also reduces the chances of a fire causing serious injuries. (*Id.*) Finally, Campbell County argues that the rubber mat on the floor reduces any risk of the operator slipping and falling. (*Id.*)

The evidence and the law do not support Respondent's arguments. A second exit through the cab window adds only a negligible degree of safety. A miner forced to scramble out the cab window of his vehicle during a fire faces an increased risk of falling from the vehicle. McPheeters already testified that the accumulation of hydraulic fluid increased the risk of a potentially fatal fall from the vehicle cab. (Tr. 55:16–18, Tr. 129:19–130:4.) Next, the Commission has consistently rejected the argument that extraneous safety measures such as the front-end loader's fire extinguisher reduce the likelihood of a serious injury. *See Buck Creek*, 52 F.3d at 136 (indicating that the fact a mine operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners"). Finally, while a rubber mat may make the floor less slippery, McPheeters testified it would not prevent a fire, the primary danger involved in this case. (Tr. 130:17–131:7.)

Given the evidence before me, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, thus satisfying *Mathies*' third and fourth elements. Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence and Unwarrantable Failure

The Secretary designated this violation as an unwarrantable failure and characterizes Campbell County's negligence as high. In support of his allegations, the Secretary points to the length of time Campbell County had knowledge of the leak's existence. The Secretary further emphasizes that Campbell County provided no evidence of mitigating circumstances during the inspection or in the following closeout conference. (Sec'y Br. at 10–13.)

Looking to the aggravating factors in the unwarrantable failure determination, five of the seven factors favor the Secretary's unwarrantable failure allegation. First, the violative conditions lasted for a long time. Respondent's own witness testified that the hydraulic fluid accumulation was present in the cab for at least two working days prior to the inspection, during which time the front-end loader was in regular use. When a hazard is found to exist, it must be addressed. *See Buck Creek*, 52 F.3d at 133 (finding unwarrantable failure where cited accumulation hazard must have been present at least since the previous shift). Considering the ease with which the fluid could be removed, allowing the combustible material to persist for two days exhibited a lack of care. Furthermore, the front-end loader had a defect in the hydraulic system of its steering column for approximately five months prior to the inspection on June 22, 2010. Over that period, Campbell County's safety director noted accumulations of hydraulic fluid in the loader's cab at least five times. Second, Campbell County had actual knowledge of the accumulation of hydraulic fluid in the front-end loader's cab. Third, Campbell County's actual knowledge of the violative conditions on June 22 and its repeated failure to repair the leak over the previous five months put Respondent on notice that greater efforts were necessary to come into compliance with the regulation. The Commission has indicated that a mine operator's own safety reports can serve to put the operator on notice that its existing abatement efforts are insufficient. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262 (1992) (holding that a mine's preshift examination books were "relevant in demonstrating that [the operator] had prior notice that a problem with coal and coal dust accumulations existed in the cited area, and that greater efforts were necessary to assure compliance. . . ."). Fourth, the extent of the violative condition was significant. The leaked fluid had formed a six-inch puddle at the feet of the vehicle's operator and was smeared across the cab floor. As such, the hazard posed a high degree of danger to the vehicle operator, which applies to the fifth factor. As I have already held, the violation was S&S and reasonably likely to cause a fatal injury.

In its defense, Respondent first contends that the presence of a rubber mat on the cab floor obscured the leakage. But the repeated incidences of the leaked hydraulic fluid in the months leading up to the MSHA inspection put Campbell County on notice that it should be extra vigilant in examinations of the front-end loader. Just as an apartment owner who covers his leaking pipes with a rug gets no reprieve when the apartment below floods, Campbell County merits no sympathy for having a mat covering the loader's floor.

Finally, Respondent claims that its efforts to fix the leak by replacing seals on the hydraulic lines should weigh against the Secretary's allegations. Campbell County's good intentions garner it minimal credit. As the Commission has observed: "Good intentions [] and good faith are not the same. Good faith requires vigilance about one's responsibilities, commitment to finding the resources to get the job done, and accountability for failure." *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (2000). Perhaps if this were the first or even the second time that the hydraulic fluid leak had arisen, I would credit Respondent's abatement efforts. But the condition was noted no less than five times. Campbell County's abatement efforts amount to treating a bullet wound with a Band-Aid; at some point, the efforts must become inadequate to any reasonable observer.

In light of Campbell County's failure to address the leakage of combustible material in the cab of the front loader, I conclude that the Secretary has met his burden of proving unwarrantable failure.

Similarly, I conclude that the Secretary has demonstrated Campbell County's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.") Here, Respondent knew of the hydraulic fluid leak yet dangerously allowed violative conditions to remain in the cab. For at least two days, the miner operating the loader faced potentially serious injuries from a known condition that Respondent failed to address. Campbell County's efforts to address the leakage repeatedly proved inadequate to fix the problem, and thus do not mitigate Respondent's negligence.

d. Penalty

The Secretary proposed a \$4,000.00 civil penalty for this violation. I have found that this order was properly designated S&S. I also have found Campbell County's negligence to be "high" and its actions to amount to an unwarrantable failure. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In the two years prior to the MSHA inspectors' visit on June 22, 2010, Campbell County received approximately fifty citations or orders for violations of mandatory safety and health standards. (Ex. P-1.) Considering that the County Quarry employs a modest four miners on site, such a high number of violations is substantial. Nothing in the record suggests that the penalty would impinge on Campbell County's ability to remain in business. Moreover, Campbell County was highly negligent in allowing the hydraulic fluid accumulation to persist, and the violation exposed miners to a reasonable risk of fatal injuries. Nevertheless, I acknowledge the small size of Campbell County's mining operation and the operator's rapid efforts to repair the front-end loader after the June 22 inspection.

The Mine Act sets a minimum penalty of \$4,000.00 for an order issued under section 104(d)(2). 30 U.S.C. § 820(a)(3)(B); *see Stansley Mineral Resources, Inc.*, 35 FMSHRC 1177 (May 2013) (holding that Administrative Law Judge cannot reduce penalty below statutory minimum set under 30 U.S.C. § 820(a)(3)(A) for analogous section 104(d)(1) violation).

Considering all of the facts and circumstances of this matter, I do not see that the violation deserves a penalty beyond the statutory minimum. Accordingly, I affirm the Secretary's proposed penalty and assess the statutory minimum penalty of \$4,000.00.

B. Order No. 8542431: The Hammer Mill

1. Further Findings of Fact

a. Whether Work Took Place on the Elevated Walkway

Campbell County disputes at length the Secretary's allegation that the walkway upon which debris had accumulated was a workplace or the means of access to a workplace for the purposes of section 56.11001. (Resp't Br. at 7-10, Resp't Reply at 2-5.) Campbell County contends the only work performed on the elevated walkway is "clearing the catwalk of build-up, which miners are required to do, per quarry rules, as they make their way to the de-activated hammer mill to perform maintenance and repairs." (Resp't Br. at 9.)

The evidence does not support Respondent's position that work did not take place on the elevated walkway. In fact, Safety Director Franklin, testified that workers accessed the walkway at least once a week to grease the machinery. (Tr. 161:9-11.) Indeed, Superintendent Potter testified that the entire reason for installing the elevated walkway was to provide a safer means of performing maintenance work on the hammer mill. (Tr. 229:1-10.) In addition to this regular maintenance, miners accessed the walkway on a daily basis to perform necessary equipment safety checks. (Tr. 196:9-11.) Workers also occasionally accessed the catwalk branching off of the main walkway section. (Tr. 188:16-19.) Inspector McPheeters testified the walkway was a work area because mine employees accessed it to perform regular maintenance on the hammer mill. (Tr. 143:8-10.) Indeed, the testimony of McPheeters, Franklin, and Potter is uncontroverted.

All three witnesses agree that work is performed on the platform where the rock material had accumulated. Based on the evidence before me, I find that work did take place on the elevated walkway on a daily basis.

b. Whether the Rock Material Covered Accessible Parts of the Walkway

Campbell County also asserts that the area containing the accumulation of material cannot constitute a working place or a means of access under the regulation because the accumulation was confined to the small area underneath the overhanging feeder. (Resp't Br. at 9.) Respondent argues that the low clearance of the feeder makes traversing the area difficult, and thus not a means of access. (*Id.*)

Once again, the evidence does not support Respondent's argument. McPheeters testified that the rock pile covered nearly four feet of the elevated walkway, leaving no way to navigate past the rubble without traversing it. (Tr. 82:1-4.) In addition, the Secretary introduced into evidence photographs showing the accumulated rocks spreading to the edge of the walkway and completely blocking access to the catwalk. (Ex. P-5.) In the photograph, the debris spread well beyond the shadow of the feeder. (*Id.*)

Based on this evidence, I find that the accumulation of rubble extended to an accessible area of the walkway.

c. The Duration of the Rock Spill's Existence

Next, Respondent challenges the Secretary's assertion that the ejected material had been present on the walkway for approximately a week at the time of the inspection. (Resp't Reply Br. at 4.) At the hearing, Inspector McPheeters said the accumulation of debris along the walkway was noted on June 16, 2010, six days prior to the MSHA inspection. (Tr. 79:16–21.) He also speculated that the hammer mill would have to run for about a week to eject the amount of rock found at the site. (Tr. 75:19–76:6.)

In contrast, Superintendent Potter testified that the hammer mill would eject the amount of material present at the time of the inspection in merely two days. (Tr. 178:2–5.) Respondent emphasizes that McPheeters did not find any notes identifying the accumulated rock in the mine's workplace examination reports subsequent to the initial June 16 notice. (Resp't Reply Br. at 4; Tr. 81:13–22.) Notably, however, Respondent presented no specific testimony that anyone had cleaned the walkway in the time between the June 16 report and the inspection on June 22. Respondent urges me to make the negative inference that because McPheeters did not note any report of the debris accumulation subsequent to that of June 16, it therefore follows that Campbell County cleared the violation. The evidence does not support such a conclusion.

I find that the inspector's testimony is credible in that a regularly functioning hammer mill could eject the amount of collected material in one week. Because Potter had greater specific knowledge of the County Quarry's hammer mill, I also find credible his testimony that the hammer mill was functioning more poorly than McPheeters estimated. Furthermore, it is uncontroverted that the design flaw allowing a mass of material to eject onto the elevated walkway had been present for longer than a few days. (Tr. 170:22–172:11.)

Based on the evidence before me, I find that the rock spill had lasted at least two days. Indeed, the defect in the hammer mill causing the material to eject onto the elevated walkway likely existed since the hammer mill's installation.

2. Analysis and Conclusions of Law

a. Violation of Section 56.11001

Inspector McPheeters issued Order No. 8542431 for Campbell County's failure to clean an accumulation of rock debris off the elevated walkway around the mine's hammer mill. (Ex. P–5.) To demonstrate a violation of 30 C.F.R. § 56.11001, the Secretary must prove by the preponderance of the evidence that the operator (1) failed to provide or maintain (2) safe means of access (3) to a working places.

I have already determined that work regularly took place on the elevated walkway and that the expelled material covered the walkway where workers could walk. For the debris-covered section of the walkway to constitute means of access to a working area under section 56.11001, therefore, I need only find there was a reasonable possibility that a miner would access that area. *Hanna Mining*, 3 FMSHRC at 2047.

Here, the rubble was directly adjacent to access points to grease the hammer mill. Furthermore, a worker would have to traverse the material to reach the catwalk for equipment examinations. Thus I determine it is reasonable to believe a miner would have reason to walk across the walkway covered in debris to perform work.⁷ Based on the evidence before me, I conclude that the walkway around the hammer mill was a working area. The Secretary has therefore satisfied the second and third elements necessary to show a violation of the regulation.

As there is no question that Campbell County provided safe access to the hammer mill by constructing the walkway,⁸ the case turns on whether Campbell County *maintained* the walkway in a reasonably prudent manner.

At the hearing, Inspector McPheeters testified that accumulation of material presented a distinct trip-and-fall hazard to miners working on the walkway, and that no amount of ejected material would be safe. (Tr. 78:10–11, 77:4–8.) He also explained that the reasonably prudent course of action for the mine would be to repair the hammer mill to prevent the escape of material onto the elevated walkway. (Tr. 77:15–19.) In contrast, Campbell County claims that the ejection of material is a natural function of the hammer mill and that the Secretary's demands would require the mine to shut down the hammer mill several times per day to clean the accumulated debris. (Resp't Br. at 14; Tr. 178:5–9.)

⁷ Rather than attempting to show there was no reasonable possibility of miners crossing the debris pile, Campbell County contends its use of signs blocking the entrance to the elevated walkway while the hammer mill was in operation precludes the walkway from being considered a working area. (Resp't Br. at 8–9.) Respondent's argument, which is devoid of any citation to law, essentially claims that only areas in which work is currently taking place are subject to the Secretary's regulations. Such an interpretation effectively would require inspectors to observe work in progress in the area before MSHA could find a violation. Thus, an operator could escape penalty by shutting down operations upon the inspector's arrival. The Commission has consistently rejected this argument. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545–51 (Sept. 1987).

⁸ Respondent appears to contend that it met its duty under section 51.11001 simply by building the elevated walkway. (Resp't Br. at 9.) Respondent argues that upholding Order No. 8542431 would tacitly deter mine operators from providing such safety measures. (*Id.*) This contention is inapposite. The question of whether providing maintenance on the hammer mill from ladder-top would constitute safe access is not relevant to the question of whether Campbell County maintained the walkway in a reasonably prudent manner. Simply stating that its conduct could have been worse is not evidence that the steps Campbell County took fulfilled the high standard of safety required under the Mine Act and the Secretary's mandatory health and safety regulations.

Respondent's argument again is inapposite. By their nature, safety regulations may impede mining operations to ensure that workers are safe. In passing the Mine Act, Congress prioritized worker safety over mine output. In allowing the rock debris to accumulate around the hammer mill for days at a time, Campbell County prioritized output above the safety of its workers. At the very least, reasonable prudence would require the operator to clean up the debris on a daily basis to protect miners performing the daily workplace inspections. It is unclear from the record how daily cleaning would require the operator to alter the hammer mill's operating schedule. By Superintendent Potter's own admission, the ejected rock took at least two days to accumulate. Thus, Campbell County did not even reach the low bar of daily cleaning. I find McPheeters's testimony credible, and I determine that a mine's reasonable response to the continual ejection of material would be to modify the hammer mill to prevent the debris from spilling out. Campbell County eventually did exactly this, but only when faced with a work closure order from MSHA. (Tr. 169:2–13.)

Consequently, I determine that the Secretary has satisfied all three elements to show a violation of section 56.11001. The area around the hammer mill was a working place as defined in the regulation, and the elevated walkway was a means of access to that working place. Campbell County therefore had a duty to maintain the walkway in a reasonably safe manner. Campbell County failed in this duty by allowing the accumulation of rock material that created a risk of tripping and falling.

b. Gravity and S&S Determination

Campbell County's violation of section 56.11001 establishes the first element of the *Mathies* test for an S&S violation. Second, I must assess whether the violation contributed to a discrete safety hazard. Inspector McPheeters credibly testified that the debris on the walkway threatened to trip a miner traversing the area. (Tr. 78:10–11.) McPheeters judged that the material, which included fist-sized rocks, was six to twelve inches high. (Tr. 73:21–22.) I find his testimony credible, and determine that the loose rubble in the middle of a walkway presented a discrete risk of causing a worker to fall and suffer injury.

Next, I must determine whether the safety hazard is reasonably likely to contribute to an injury. In support of its assertion that the rubble pile would reasonably likely result in injury, the Secretary points to the size of the rock pile and the regularity with which miners accessed the walkway to perform maintenance and daily workplace examinations. (Sec'y Br. at 19.) Campbell County, on the other hand, emphasizes the low frequency with which miners access the hammer mill and the mine's efforts to limit access to the mill by chaining off walkway entrances while the mill is operational. (Resp't Br. at 13–14.) Campbell County also claims that the overhanging feeder belt forces miners in the area to move slowly, further reducing the risk of an injury occurring. Again, the evidence does not support Respondent's argument. The debris pile covered the entire width of the walkway in parts. A miner performing workplace evaluations would be forced to traverse the pile of rocks on a daily basis. I determine that a miner traversing the rock accumulation regularly could reasonably be expected to trip and fall, resulting in injury.

Finally, I must determine whether the injury caused would likely be serious. The Secretary claims the injuries in this instance are reasonably likely to be permanently disabling. (Sec’y Br. at 19.) McPheeters testified that the resulting fall from tripping on the walkway could result in a damaged back, broken bones, torn tendons, or a head injury. Respondent contends that, because a railing enclosed the walkway and because the overhanging feeder prevented workers from moving quickly through the area, any injuries resulting from a fall likely would be minor. In addition, Respondent suggests that a trip and fall hazard is insufficient to support a designation of S&S without the presence of aggravating circumstances.⁹ (Resp’t Br. at 14.)

Looking at the evidence, I am convinced that the injury likely to result from a fall on the walkway would not be permanently disabling. Given the presence of the railing and the fact that miners did not access the walkway while the hammer mill was operational, the injuries resulting from a fall on the platform likely would be limited in severity. In this context, the kind of injuries McPheeters describes are more likely to cause lost work time than to be permanently disabling. Accordingly, I reduce the type of injury in Order No. 8542431 from “permanently disabling” to “lost workdays or restricted duty”

Nevertheless, the Commission has consistently recognized that muscle strains, sprained ligaments and tendons, and broken bones are injuries of a sufficiently serious nature to support an S&S designation. *S & S Dredging Co.*, 35 FMSHRC 1979, 1981 (July 2013) (overturning a judge’s ruling that muscle strains were insufficient to underpin an S&S designation); *see, e.g., Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (affirming Judge’s conclusion that serious injuries such as a leg or back injury would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming Judge’s conclusion that a trip and fall would result in reasonably serious injuries such as “sprains, strains, or fractures”).

Given the evidence before me, I determine that the Secretary has met his burden of proving that reasonably serious injuries were reasonably likely to occur, thus satisfying the fourth element of *Mathies*. Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence and Unwarrantable Failure

The Secretary designated this violation as an unwarrantable failure, characterizing Campbell County’s negligence as high. In support of this allegation, the Secretary points to the obvious nature of the risk and the length of time the problem existed. (Sec’y Br. at 23.) In

⁹ Respondent’s argument relies on *Hamilton Pipeline, Inc.*, 24 FMSHRC 915 (Oct. 2002) (ALJ). In *Hamilton*, the judge determined on the evidence that a single crooked step on a short, narrow stairway bordered by two railings did not present a risk of injury resulting in lost workdays. *Id.* at 924–925. Those same facts are not present in the case before me. Furthermore, decisions by Administrative Law Judges do not constitute binding precedent. 29 C.F.R. § 2700.69(d).

response, Campbell County asserts that its efforts to limit access to the walkway during operation and its policy of cleaning the walkway whenever work must be performed in the area mitigate the operator's negligence. (Resp't Reply Br. at 8.)

Each of the Commission's unwarrantable failure factors suggests Respondent's conduct was aggravated. First, the extent of the violation was significant, spreading across half the length of the eight-foot walkway and covering nearly the entire width of the walkway, as well as the platform directly under the feeder. Second, Campbell County's own safety inspections put the operator on notice regarding the need to clean the accumulating debris. Furthermore, Respondent had been cited for violations of section 56.11001 four times in the two years prior to the order in question, so it was well aware of the requirements of the regulation. (Tr. 84:7-14.) Third, the operator did not provide any evidence of specific efforts it had made to prevent the material from collecting, other than the assertion that miners servicing the hammer mill were told to grab both grease and a shovel to clear their way. Indeed, Campbell County did not clear the rock piles on even a daily basis and instead apparently adopted a policy of allowing the material to collect for days at a time. Fourth, the violation was obvious, accumulating quickly and spreading across the breadth of the walkway. Furthermore, the material was ejected in the direct line of site of the machine's operator. Because of the rapidity with which the hammer mill expelled material, the operator either knew or should have known of the existence of the accumulated debris on June 22. Sixth, as I determined above, the trip-and-fall hazard was dangerous because it could result in broken bones, torn tendons, or a head or back injury.

In response, Campbell County suggests its negligence is mitigated because the debris accumulation took place over two days instead of the inspector's estimated week. (Resp't Reply Br. at 4.) Respondent's argument is unsupported. It defies logic to suggest that the operator should be granted leniency because the machine creating a hazard functioned worse than the inspector believed when he found the violation. In light of the obviousness of the violation and the significant degree of danger, leaving the material on the walkway for two days is aggravated conduct. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 32-37 (Jan. 1997) (finding unwarrantable failure for extremely unsafe violation that lasted only minutes).

Campbell County next argues that its negligence is mitigated because the hammer mill was operating within its design parameters. (Resp't Br. at 14.) Respondent's reliance on the hammer mill's safety manual is misplaced. The manual warns of the danger of ejected material and explicitly states that alterations may be necessary to conform to federal and state safety regulations. (Ex. R-3.)

Similarly, Campbell County Highway Superintendent Potters testified expansively on the pristine safety record the County Quarry enjoys. While it may be true that Campbell County has a commendable record of injury-free operations, MSHA does not need an injury to find a violation of a mandatory health or safety standard. The Mine Act is a strict liability statute. *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989).

In light of these factors, I find that the Secretary has met his burden of showing that Respondent's conduct was aggravated, amounting to an unwarrantable failure.

Likewise, I determine Campbell County's negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances."). Again, the violative conditions were readily apparent and exposed Campbell County's miners to significant injuries. Rather than clearing the walkway, however, Campbell County chose to continue operating the hammer mill.

d. Penalty

The Secretary also proposed a \$4,000.00 civil penalty for this violation. Again, I have found that this order was properly designated S&S. I have also found Campbell County's negligence to be "high" and its actions to amount to an unwarrantable failure.

Turning to the relevant factors for assessing a penalty, I again note the mine's history of violations. The record does not show that the Secretary's proposed penalty would impinge on Campbell County's ability to remain in business, but I note that the County Quarry is a small mining operation. Campbell County's negligence in allowing the debris accumulation was high, but the hazard posed only the risk of lost workdays or restricted duty. Finally, Campbell County swiftly made adjustments to the hammer mill after the MSHA inspection to prevent future debris accumulations.

The evidence does not support a penalty above the Secretary's proposed penalty, which is the statutory minimum penalty allowed for an order issued under section 104(d)(2). 30 U.S.C. § 820(a)(3)(B); *see Stansley Mineral Resources*, 35 FMSHRC at 1177. Accordingly, I hereby assess a civil penalty of \$4,000.00 for this violation.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8542424 is **AFFIRMED**. It is further **ORDERED** that Order No. 8542431 be **MODIFIED** by changing the type of injury from "permanently disabling" to "lost workdays or restricted duty."

WHEREFORE, Respondent is **ORDERED** to pay a penalty of \$8,000.00 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

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

Christian Barber, Esq., U.S. Department of Labor, Office of the Solicitor, 211 Seventh Avenue
North, Suite 420, Nashville, TN 37219-1823

Charles W. Kite, Esq., 9925 Tierra Verde Drive, Knoxville, TN 37922

/lct

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

September 30, 2014

HECLA LIMITED,
Contestant

v.

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

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

v.

CEMENTATION USA, INC.,
Respondent

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

v.

HECLA, LIMITED,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2011-1390-RM
Order No. 8565445; 08/16/2011

Mine: Lucky Friday
Mine ID: 10-00088

CIVIL PENALTY PROCEEDING

Docket No. WEST 2012-0631-M
A.C. No. 10-00088-281470 M445

Mine: Lucky Friday Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2012-0760-M
A.C. No. 10-00088-283636

Mine: Lucky Friday Mine

DECISION AND ORDER

Appearances: Matthew Vadnal, United States Department of Labor, Office of the Solicitor, Seattle, Washington for Petitioner;

Willa B. Perlmutter, Crowell & Moring, Washington, DC 20004, for Contestant and Respondents;

Mike Clary, Hecla Limited, Coeur d'Alene, Idaho, for Respondent Hecla, Limited.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves one section 104(d)(2) Order, 30 U.S.C. § 814(d)(2), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Hecla, Limited, and one section 104(d)(1) Citation, 30 U.S.C. § 814(d)(1), issued by MSHA to Cementation USA, Inc. (“Cementation”). The parties presented testimony and documentary evidence at the hearing held in Coeur d’Alene, Idaho, on January 14 and 15, 2014.

The original dockets before me consisted of two civil penalty proceedings – WEST 2012-0760M and WEST 2012-0631M – and three contest proceedings – WEST 2011-1390 RM, WEST 2011-1428RM, and WEST 2011-1429RM. On November 5, 2012, I signed an Order to Sever and Reconsolidate. I ordered that Citation Nos. 8559609 and 8559610 be severed from WEST 2012-0760M, be given a new docket number, and be consolidated with WEST 2011-1428RM and WEST 2011-1429RM. I also ordered that WEST 2012-0760M, WEST 2012-0631M, and WEST 2011-1390M be consolidated. Therefore, only Order No. 8565445 and Citation No. 8565446 are before me in this proceeding.

For the reasons stated below, I vacate both Order No. 8565445 and Citation No. 8565446.

I. Stipulations

At the hearing, the Secretary read the Stipulations into the record: (Tr. 9:3 – 10:20)

1. Hecla admits that its Lucky Friday Mine is a mine within the definition of the Mine Safety and Health Act of 1977.
2. At all times relevant to these matters, the Lucy Friday Mine had products that entered interstate commerce or had operations or products which affected interstate commerce within the meaning and scope of Section 4 of the Act.
3. Hecla admits that it was a mine operator within the meaning of the Act and subject to the Act.
4. Cementation admits that it is a mine contractor within the meaning of the Act and subject to the Act.
5. Cementation and Hecla admit that this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding administrative law judge has authority to hear this case, issue a decision, and assess the appropriateness of the evidence.
6. At all relevant times, Keith Palmer was an authorized representative of MSHA acting in an official capacity.
7. Hecla and Cementation were served copies of the citation or order with qualifications at issuance in this proceeding by an authorized representative of MSHA.

8. Exhibit A of the Secretary's Petition for Assessment of Civil Penalty, actively sets forth the number of inspection days at the site for Cementation and Hecla, their history of violations, and the number of persons affected.
9. Hecla timely contested the order contained in these dockets, and Hecla and Cementation served timely answers to the Secretary's Petitions for Assessment of Penalty.
10. The maximum proposed penalties for the alleged violations will not affect the ability of Hecla or Cementation to remain in business.
11. The exhibits the parties intended to offer into evidence and exchanged prior to the hearing are not subject to objection on that basis.

II. Background Facts

The Lucky Friday Mine ("the Mine") is an underground silver mine owned and operated by Hecla Limited ("Hecla") in Mullan, Idaho. (Tr. 25:2; 27:17-18) Hecla hired Cementation USA, Inc. ("Cementation") to construct a new vertical shaft at the Mine. (Tr. 25:15-16) The 4860 slot¹ of the Mine at the 51 ramp² is a three-sided slot that is about eighteen feet high, twenty-five feet wide, and eighty feet deep. (Tr. 36:19-20; 37:18; 37:23-24) The Mine uses slot 4860 for a gob pile, or waste debris pile. (Tr. 98:2-4) On April 7, 2011, a gob pile located at the 4860 slot was cleaned up to remove combustible materials³ from the pile. (Tr. 48:14-19; 123:19-22; 242:7-19; 349:7-11) What remained behind among rock, cement, and metal debris in the 4860 slot were some pieces of timber, some fire-retardant vent bags, one HDPE pipe, and one wooden pallet. (Tr. 215: 22-25; 266:20-267:19; 352:15-18) After the April 7, 2011 clean up date, management at the Mine decided not to dump any more gob at the 4860 slot. (Tr. 297:5-6)

Justin Bartlett,⁴ who was in charge of cleaning up the 4860 slot on April 7, 2011, testified that he did not think there was any waste debris left that was a fire hazard. (Tr. 352:19-24) Mr. Bartlett testified that there was old wire mesh, rock, shotcrete, and some timbers left, but nothing in the pile that he considered easily combustible. (Tr. 215:21-25) William Strickland⁵ also

¹ A slot is an "area that is cut out of rock that can be used to store materials... mine trash... permanent electrical boxes... powder magazines, [and] cap magazines..." (Tr. 28:2-8)

² The 51 ramp is a winding ramp "from the 4900 level going up along the vein and providing access to the lead, silver, zinc veins for the mining activities." (Tr. 213:12-14)

³ "Combustible material" is defined as "a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials." 30 C.F.R. §57.2.

⁴ At the time of the hearing, Mr. Bartlett was employed by Cementation at the Lucky Friday Mine and had been for approximately two and a half years. (Tr. 244:20 – 245:12) He had worked as a construction miner for approximately three and a half years at the time of the hearing. (Tr. 245:13-16)

⁵ At the time of the hearing Mr. Strickland was employed by the Franklyn Company and
(continued...)

testified that he did not consider anything he saw in the gob pile to be a fire hazard. (Tr. 226:7; 242:16-19). James Duane Perryman⁶ also saw nothing in the pile that he considered to be a fire hazard (Tr. 285:10-22; 293:5-8) and said that he “went back up there to make sure that we got everything, and I didn’t see anything else.” (Tr. 324:12-14)

The following month, however, excavations in the Mine created more waste which was moved to the 4860 slot on approximately May 29, 2011. (Tr. 295:3-6; 297:17-19; 300:14-16) The new gob items included metal split sets, metal mats, and approximately three pieces of old wood lagging (3” x 12” planks, each about six to eight feet long). (Tr. 296:4-7; 315:4-6; 317:6-7) After the additions to the gob pile at the 4860 slot, the slot area was barricaded, first with a snow fence (Tr. 299:10-13), which was later replaced by a chain-link fence. (Tr. 36:10-12, 234:12, 300:20) A sign was hung on the fence notifying miners that the area was not ventilated. (Tr. 300:11-12)⁷ As of July 2011, the gob pile itself was approximately ten feet wide by twelve feet high. (Tr. 330:15)

On July 26, 2011, an arsonist intentionally set fire to the gob at the 4860 slot of the Mine at the 51 ramp at or around 6:30 pm. (Tr. 22:15; 27:24-25; 31:10-11; 170:22-23). The mine was safely evacuated, and there were no injuries as a result of the fire. (Tr. 70:19-25) The fire lasted about twelve to fourteen hours before it was put out. (Tr. 31:13) MSHA Inspector Keith Palmer⁸ (“Inspector Palmer”) arrived on July 27, 2011, to investigate. (Tr. 26:11-20) Additionally, personnel from the local Shoshone County Sheriff’s office, the Idaho State Fire Marshal’s office, and the federal Bureau of Alcohol, Tobacco, Firearms and Explosives came to the Mine to investigate the fire. (Tr. 33:3-21)

III. The Law

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone*

⁵ (...continued)
was working as a contract employee for Hecla. (Tr. 202:5-10) He was project engineer for all of Hecla’s projects by overseeing all design work, engineering work, and supervises four construction coordinators. (Tr. 202:12-17)

⁶ At the time of the hearing, Mr. Perryman was employed by the Franklyn Company and was working in a temporary-type position for Hecla. (Tr. 248:20-25) He was a construction coordinator and was in charge of helping Hecla oversee the shaft construction project. (Tr. 249:4-6)

⁷ To the best of Inspector Palmer’s knowledge, there was no active work being performed in the 4860 slot. (Tr. 98:10-12)

⁸ At the time of the hearing, Inspector Palmer had been employed by MSHA since January of 2001, (Tr. 17:13-16) as the field office supervisor for the Kent, Washington MSHA field office. (Tr. 20:19-20) At MSHA, Inspector Palmer worked as a mine inspector, he worked for the educational policy and development educational field services division, and was a field office supervisor at the time of the hearing. (Tr. 19:17-21) Before working at MSHA, Inspector Palmer worked approximately ten years at Asarco Incorporated in Arizona, which is an open-pit copper mine. (Tr. 17:21-24) Inspector Palmer also worked for the State of Arizona Game and Fish Department as a crew leader for about three or four years. (Tr. 19:9-11)

Mining Corp., 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) The Citation and Order in this case allege a violation of Section 57.4104(a) of the Mine Act, which states that “[w]aste material, including liquids, shall not accumulate in quantities that could create a fire hazard.” 30 C.F.R. § 57.4104(a).

The Secretary must prove by a preponderance of evidence that waste material accumulated and that the accumulation “create[d] a fire hazard.” 30 C.F.R. § 57.4104(a). The regulation, however, is silent on the quantity of waste that is allowed to accumulate before a waste pile is considered to be a fire hazard. Therefore, the appropriate analysis is whether a “reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *Walker Stone Co. v. Secretary of Labor*, 170 F.3d 1080, 1083-1084 (10th Cir. 1998). This test is an “objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.” *Canon Coal Co.*, 9 FMSHRC at 668.

In *Essroc Cement Corp.*, 33 RMSHRC 459 (Feb. 2011) (ALJ Manning), Administrative Law Judge Manning vacated a citation that alleged a violation of § 56.4104(a)⁹ and found that:

[T]he Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid [...]
Without a realistic possibility of a fire hazard, there is no violation.

33 FMSHRC at 465.¹⁰

⁹ Section 56.4104(a) states that: “[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard.” 30 C.F.R. § 56.4104(a). This language is exactly the same as Section 57.4104(a), however, Part 56 of the Mine Act pertains to surface metal and nonmetal mines and Part 57 pertains to underground metal and nonmetal mines.

¹⁰ The Secretary attempts to analogize Section 77.1104 to Section 57.104(a). He cited case law that states that “the Secretary is not required to provide that an ignition or explosion was reasonably likely to occur. Rather, he is required to prove the presence of sufficient accumulations that can create a fire hazard or add to a fire hazard if an ignition source is introduced.” *Pittsburgh & Midway Coal Co.*, 16 FMSHRC 574, 576 (Mar. 1994) However, I find this argument unavailing because Part 77 pertains to surface coal mines and surface work areas of underground coal mines. Additionally, Section 77.1104 states that “[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.” 30 C.F.R. § 77.1104. (emphasis added) Part 56 and 57 of the Mine Act specifically refer to “waste materials,” whereas Part 77 specifically refers to “combustible materials.”

The Secretary put great emphasis on the fact that the Mine Act is a strict liability statute. He also emphasized that mine owners are vicariously liable for employees' deliberate violations and that "the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator." *Western Fuels-Utah, et al. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989) He further stated that the 9th Circuit Court of Appeals, in affirming a decision of the Commission, held that a mine owner was liable for a violation of the Mine Act committed by an unknown person who entered the mine property without the knowledge of the owner. *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983)

IV. The Violation

On August 16, 2011, MSHA Inspector Palmer issued Order No. 8565445 to Hecla and Citation No. 8565446 to Cementation alleging that both had unwarrantably failed to comply with 30 C.F.R. § 57.4104(a).¹¹ Section 57.4104(a) regulates a mandatory safety standard. The Citation and Order allege:

An excessive amount of combustibles were [*sic*] allowed to accumulate in the 4860 slot. The 4860 slot, off of the 51 ramp, was used as a gob area. Old timber, driscoll pipe, hydrolic [*sic*] hoses, pallets, and card board¹² had been thrown away in this area. Evidence indicated that this area contained the combustibles since at least 04/07/2011. Hecla and Cementation management was aware of this condition and had discussed this area on 04/07/2011. According to a miner, a barricade was erected to prevent access in this area sometime during the week of June 20, 2011 because of an ongoing MSHA inspection. There are several miners that work and travel on the 4900 level and the 51 ramp on a daily basis. There is no evidence that reasonable efforts were made by Hecla or Cementation to correct this condition. A fire occurred in this gob area on 7/26/2011 in which the excessive amounts of combustibles contributed to the intensity and duration of the fire. Management engaged in aggravated conduct constituting more than ordinary negligence because they were aware of the excessive amounts of combustibles and did not take reasonable efforts to remove them. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1, Ex. G-4.

The Citation and the Order also allege that the condition was reasonably likely to cause injury, that the injury was reasonably likely to be fatal, that the violation was significant and substantial ("S&S"), the negligence standard was high, and the number of persons affected was

¹¹ The Citation and Order are identical in substance apart from the Order being a 104(d)(2) violation and the Citation being a 104(d)(1) violation.

¹² Inspector Palmer admitted at the hearing that there was no cardboard present in the gob pile. (Tr. 105:19 – 106:9)

eighteen. Ex. G-1, Ex. G-4. The Secretary proposed a penalty of \$63,000.00 against Cementation and \$38,000.00 against Hecla for this violation.

Inspector Palmer admitted that in some cases some combustible waste is allowable underground and that the mine has the discretion to decide how much combustible waste is stored underground. (Tr. 92:4-8; 92:9-18) Inspector Palmer testified that he believed the waste materials that accumulated in the 4860 slot created a fire hazard (Tr. 69:22 –70:1) because the wood in the pile and the pallet could catch fire. (Tr. 70:3-14) He testified that there was at least one pallet that was considered waste on the gob pile. (Tr. 89:18-21) However, Inspector Palmer admitted that the slot held mostly rock and dirt. (Tr. 85:10-12; 108:5-6) The Secretary admitted into evidence some photos taken on April 8, 2011, but they depict some limited pieces of timber in the gob pile in slot 4860 that are not in close proximity to one another. Ex. G-9.

Mr. Strickland testified that most of the combustible materials were removed, put in dumpsters, and sent to the surface of the mine to be discarded. (Tr. 241:25 – 242:1) Most importantly, Mr. Strickland testified that “[a]nything of kindling size, that concerns me more. Paper waste, of course, rags, of course, any material like that gets sent out in bins to the surface.” (Tr. 232:18-21) Further, Inspector Palmer admitted that the fire marshal was unable to determine how much combustible material was present before the fire. (Tr. 105: 2-5) Inspector Palmer also testified that there was no evidence that an abundance of combustibles had been present before the fire due to the small amount of ash after the fire was extinguished. (Tr. 105:9-13) In Mark Aamondt’s, the Fire Chief of Shoshone County Fire District No. 2, report he noted that “[i]t could not be confirmed how much debris was removed or how much remained after the cleanup.” Ex. R-6, pg. 4.

Mr. Strickland testified that the amount of combustibles in slot 4860 was at most ten percent, maybe less (Tr. 218:2-6) He also testified that he was not worried that the wood timbers were a fire hazard because it is very difficult to light 4x4s, 2x12s, 6x8s, or 6x10 timbers. (Tr. 222:22 – 223:7) Mr. Strickland was also not worried that the pallet was a fire hazard because it is very difficult to light a pallet. (Tr. 223:17-23) He was not concerned that the HDPE pipe was a fire hazard because its melting point is above 400 degrees. (Tr. 225:11-14) Inspector Palmer admitted that it would be difficult to hold a match to a timber and light it on fire. (Tr. 112:8-10)

Inspector Palmer testified that there was no ignition source identified at the 4860 slot other than the arsonist. (Tr. 96:10-12) Further, to the best of Inspector Palmer’s knowledge, there is no methane in the mine. (Tr. 101:6-7) Fire Chief Aamondt testified that he found nothing in the 4860 slot that was an ignition source, (Tr. 189:6-8) and that there were no electrical problems in the slot. (Tr. 189:9-19) After the fire was investigated, it was concluded that the fire was intentionally set with an open flame by a person. (Tr. 170:22-23) Inspector Palmer did mention other potential ignition sources – cigarettes and/or a pressurized paint can that was lit on fire. (Tr. 215:10-14; 228:9-10) However, the Secretary presented no evidence at the hearing that these sources were anywhere near slot 4860.

As stated above, the Secretary put great emphasis on the Mine Act being a strict liability statute and the fact that there is vicarious liability even for unknown persons who enter a mine and violate the Mine Act. However, the Secretary did not prove by a preponderance of evidence

that a trespasser accumulated waste material in quantities sufficient to create a fire hazard in violation of Section 57.4104(a). The Secretary cannot use vicarious liability or the Mine Act's strict liability to infer that a criminal intervener who intentionally set a fire to the gob pile in slot 4860 somehow violated Section 57.4104(a). The Secretary also did not prove by a preponderance of evidence that a mine employee or agent accumulated waste material in quantities sufficient to create a fire hazard in violation of Section 57.4104(a). Indeed, the only thing that the Secretary proved by a preponderance of the evidence is that a fire was set by an arsonist in slot 4860, which is not a violation of Section 57.4104(a).

While the Secretary did show that there were some waste materials in slot 4860 that were combustible, the Secretary failed to meet his burden by a preponderance of evidence that a reasonably prudent miner familiar with the purposes of Section 57.4104(a) could find that the accumulation of waste materials in slot 4860 could create a fire hazard. The Secretary also failed to present sufficient evidence that there would have been an ignition source to create a fire hazard if the arsonist had not intervened. Therefore, I find that Hecla and Cementation did not violate Section 57.4104(a). Because I find that no violation existed, I need not discuss the gravity, negligence, significant and substantial, and unwarrantable failure standards.

WHEREFORE, it is **ORDERED** that both Order No. 8565445 and Citation No. 8565446 be **VACATED**;

It is further **ORDERED** that Docket Nos. WEST 2011-1390-RM, WEST 2012-0631-M, and WEST 2012-0760-M be **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

Matthew Vadnal, United States Department of Labor, Office of the Solicitor, 300 Fifth Avenue, Suite 1120, Seattle, Washington 98101

Willa B. Perlmutter, Crowell & Moring, 1001 Pennsylvania Avenue, NW, Washington, DC 20004

Mike Clary, Hecla, 6500 North Mineral Drive, Suite 200, Coeur d'Alene, Idaho 83815

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 13, 2014

AMERICAN 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.

AMERICAN COAL COMPANY,
Respondent.

CONTEST PROCEEDINGS

Docket No. LAKE 2010-408-R X
Order No. 8418503; 1/19/2010

Docket No. LAKE 2010-409-R X
Citation No. 8418504; 1/19/2010

Mine: New Era Mine
Mine ID: 11-02752

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2010-759
A.C. No. 11-02752-219590-02

Mine: New Era Mine

**ORDER DENYING AMERICAN COAL COMPANY’S MOTION TO SUPPLEMENT
THE RECORD &
DECISION ON SECOND REMAND**

Before: Judge Miller

These matters are before me upon remand from the Federal Mine Safety and Health Review Commission. *American Coal Co.*, 36 FMSHRC 882 (Apr. 2014). The cases involve an order and citation issued to the American Coal Company (“American”) by the Secretary of Labor, Mine Safety and Health Administration, following an inspection of a coal stockpile at American Coal’s New Era Mine. The Commission remanded the cases with the direction that the parties be allowed to file briefs and that further proceedings, as necessary, be conducted. Subsequently, American filed a Motion to Supplement the Record, to which the Secretary filed a response in opposition. The parties then filed simultaneous briefs and a joint stipulation. For reasons that follow, I **DENY** American’s Motion to Supplement the Record, and **AFFIRM** my earlier findings regarding the fact of violation in both Order No. 8418503 and Citation No. 8418504.

I. BACKGROUND

On January 19, 2010, MSHA inspectors issued Order No. 8418503 to American pursuant to section 103(k)¹ of the Act after observing what they believed to be a “mine fire” on the coal stockpile. At the same time, MSHA issued Citation No. 8418504 for American’s alleged failure to timely notify MSHA of the incident in violation of 30 C.F.R. § 50.10. American contested both issuances.

On July 22, 2010 Judge Avram Weisberger held an expedited hearing to address Order No. 8418503. At the conclusion of the hearing the parties presented oral arguments and Judge Weisberger issued a bench decision vacating the order, which he later reduced to writing and issued on September 28, 2010. *American Coal Co.*, 32 FMSHRC 1387 (Sept. 2010) (ALJ). Subsequently, the Secretary of Labor appealed the matter to the Commission.

On February 28, 2013, the Commission issued a decision concluding that a “mine fire” does not require the presence of a flame. 35 FMSHRC 380, 387 (Feb. 2013). The Commission stated that the Secretary reasonably interpreted the term “mine fire” in section 3(k) to include “both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames.” *Id.* As relevant to this proceeding, the Commission noted:

Indeed, this interpretation is somewhat different from the interpretation the Secretary presented at the hearing. Before the judge, [he] articulated an interpretation that included “both events marked by flaming combustion and events marked by smoking combustion.” . . . In other words, the Secretary’s interpretation at the hearing did not require that the smoking or smoldering combustion “reasonably [have] the potential to burst into flames.”

Id. at 384-385 (citations and footnotes omitted). Accordingly, the Commission vacated the judge’s decision and remanded the matter for further proceedings.²

On January 16, 2014, I issued a Decision on Remand addressing Order No. 8418503, which is the subject of Docket No. LAKE 2010-408-R. *American Coal Co.*, 36 FMSHRC 176 (Jan. 2014) (ALJ). There, the primary issue was whether the smoldering and smoking coal on the stockpile that the inspectors observed was a “mine fire” as that term is used in the Mine Act and defined by the Commission. I found that the smoking and smoldering stockpile was a fire and, therefore, an accident had occurred and the 103(k) order was properly issued.

¹ Section 103(k) states that “[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine” 30 U.S.C. § 813(k).

² Judge Weisberger retired while the case was on review before the Commission. The cases were then reassigned to me for a decision after remand.

On March 3, 2014, I issued a second and related decision addressing Citation No. 8418504. *American Coal Co.*, 36 FMSHRC ___, slip op. (Docket Nos. LAKE 2010-409-R and LAKE 2010-759) (Mar. 3, 2014) (ALJ). In that decision, the issue was whether American violated section 50.10 of the Secretary's regulations, by failing to notify MSHA of the fire on the stockpile. Relying upon my finding in LAKE 2010-408-R that a mine fire had occurred, I found that American had failed to immediately report the incident to MSHA in violation of section 50.10 of the Secretary's regulations. At the request of the parties, the negligence of the citation was reduced to low.

American petitioned for, and was granted, discretionary review of my decisions in the two contest cases and the penalty case that accompanied LAKE 2010-409-R. On review, American argued that it should have been offered the opportunity to file a brief on the issues raised following the Commission's original direction remanding Docket No. LAKE 2010-408-R. The Commission agreed with American and noted that "the issues that were presented to the Judge were somewhat unusual because the Secretary had presented a modified definition of the term "mine fire" to the Commission as compared to the definition that he proffered at the initial hearing. 35 FMSHRC at 384-85. 36 FMSHRC 884 (Apr. 2014). Accordingly, the cases were remanded so that the parties could brief the issues.

Subsequent to the Commission's decision, I asked the parties whether there was any other evidence that the parties wanted to enter into the record by stipulation and sought the parties' opinion about taking further evidence in the case. After speaking to the parties and reviewing the record, however, I determined that a new hearing was not appropriate because both parties had ample time to prepare and to present evidence, including evidence on the meaning of fire and the fair notice issue. The parties informed the court that there was no dispute of fact and a hearing was not needed, but American wished to supplement the record with additional information, and both parties wished to file a brief.³ I then allowed the parties time to stipulate to any facts or items they wished to include in the record. The parties were not able to reach any stipulations. Thereafter, American filed a Motion to Supplement the current record with testimony from depositions. The Secretary objected to the submissions and I deny the motion herein. Therefore, no other testimony or evidence is included in the original record made before Judge Weisberger but both parties have filed a brief.

II. MOTION TO SUPPLEMENT

On May 29, 2014 American filed a Motion to Supplement the Record with Designated Deposition Testimony. American asks the court to supplement the formal record with designated deposition testimony of MSHA inspector Michael Rennie. It argues that this testimony is "necessary to address issues that were not directly raised at the previous hearing in this matter before Judge Weisberger." American. Mot. to Supp. 2. Specifically, it argues that these deposition designations demonstrate that the Secretary's interpretation of fire that was raised on appeal is unconstitutionally vague as applied to American in this case and therefore

³ American, in its Motion to Supplement the Record, states that "it is willing to forego requesting a new evidentiary hearing if these deposition designations are admitted into the formal record." American Mot. to Supp. 2 n. 1.

American did not receive fair notice.⁴ *Id.* 2-3. American asserts that Inspector Rennie's deposition testimony shows that he had seen conditions similar to those he observed on the New Future stockpile, a coal stockpile smoking in spots with no flames, but that he had never before issued a Section 103(k) order for those conditions. A reasonably prudent person familiar with the mining industry and the protective purpose of the standard, as of the date the order was issued, therefore would not recognize that the cited conditions constituted a "fire" or "mine fire" for purposes of the Act and its regulations. *Id.* at 5. Moreover, American asserts that Rennie's deposition testimony indicates that he did not see "smoldering combustion" and therefore, he did not use the Secretary's new interpretation of 'fire' when he and Inspector Crick issued the 103(k) Order and reporting violation on January 19, 2010. Given the arbitrary enforcement of the new interpretation and the inspector's application of a definition broader than what was endorsed by the Commission in the original appeal, American could not know, on January 19, 2010, what was required of it to act accordingly. *Id.* at 5-6. As a result, American requests that it be allowed to supplement the record with the deposition testimony of Inspector Rennie.

On June 6, 2014 the Secretary filed a Response to American's Motion objecting to American's request to supplement the record. The Secretary argues that American stipulated at the initial hearing that the existence of a mine fire was the issue to be decided by the Court and if the Court found that the conditions constituted a fire, then the order would be upheld. The Secretary also asserts that Inspector Rennie's testimony is not relevant to the fair notice issue, given that he did not issue the 103(k) order. In any event, American did have notice of the Secretary's interpretation of the word "fire". The Secretary argues that smoke without flame is the true issue for decision and whether smoldering or smoke have the potential to burst into flames does not change the issue of notice to the mine. While the Secretary acknowledges that there is an "additional requirement that a smoldering location have the reasonable potential to burst into flame," American need only have known that smoldering was sufficient for a fire.

American asserts that the deposition testimony is relevant to the issue of "fair notice" and whether "smoldering combustion" existed on the day the order was issued. The motion to supplement seeks to introduce deposition testimony regarding what Rennie observed on the day the order was issued and his previous treatment of allegedly similar conditions. While the issue of notice is relevant based upon the Commission's direction on remand, American offers no reasonable justification to now address Rennie's deposition testimony. Clearly the question of statutory interpretation, as well as fair notice was at issue in the original proceeding and the record demonstrates that the parties argued those issues before Judge Weisberger. Moreover, American deposed Rennie prior to the hearing and could have elicited similar testimony at hearing. American asked for an expedited hearing on the issues here, made time to depose witnesses, and presumably was prepared to defend its position before the ALJ. While the original hearing focused upon the limited issue of whether there was a fire, American also raised the issue of fair notice in its argument to the Court. American had its opportunity to include this

⁴ American points to the difference in the Secretary's interpretation of "mine fire" that he put forth before the Commission, which included "both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames[.]" from the interpretation the Secretary argued before the judge, which included "both events marked by flaming combustion and events marked by smoking combustion." American Mot. to Supp. 2.

information in the record, and failed to do so. Parties are responsible for developing a complete record at hearing. Given the lack of any reasonable justification for why American failed to address the deposition testimony at hearing, I decline to allow it now. *See e.g., Hansen Truck Stop, Inc.*, 26 FMSHRC 293 n. 1 (Mar. 2004) (ALJ). In addition, since both parties had equal opportunity to present evidence and develop a factual record, no matter what legal arguments they chose to raise, there is no reason to reopen the record and allow a new hearing on the matter.⁵ Accordingly, I **DENY** American's Motion to Supplement and will not consider the deposition testimony of Inspector Rennie, or the arguments premised upon that testimony.

III. DISCUSSION

On June 23, 2014 the parties filed simultaneous briefs. American, in its brief, argues first that that the Secretary failed to meet his burden of proving that the conditions cited constituted "smoldering combustion that reasonably has the potential to burst into flames," and second, that it lacked fair notice of the Secretary's new interpretation. American Br. 4. The Secretary argues that ample evidence supports a finding of a mine fire as defined by MSHA to include smoldering that has the reasonable potential to burst into flame, and that the mine did receive fair notice of MSHA's interpretation. After careful consideration of all the evidence in the record, finding no conflict in the facts presented at hearing, I find that the condition of the coal stockpile constituted a "mine fire."

Interpretation of mine fire. American contends that, on remand, the court should defer to the Secretary's prior interpretation of what constitutes "smoldering" or "smoldering combustion" as evidenced by articles and treatises submitted by the Secretary. American Br. 4. Those articles and treatises, for the most part, state that smoldering combustion requires the presence of oxygen and is evidenced by heat generation, some form of 'glowing' or 'illumination,' visible smoke, and 'toxic gasses' such as carbon monoxide that give way to complex chemical reactions. American Br. 4-5. Therefore, American argues, the Secretary must show evidence of some glowing or illumination in order to show that there was a fire.

American argues that based upon the same interpretive material, self-heating of coal occurs along a spectrum from low temperature weathering, to non-combustion oxidation, to the point of spontaneous ignition, to smoldering combustion, and then possibly to flaming combustion. With that spectrum in mind, American argues that heat, light colored smoke, and noxious gases can be emitted even in the absence of ignition or combustion. Given the lack of any evidence regarding the observation of a flame, illuminated or glowing material, and the failure of the MSHA inspectors to further examine the smoking areas, analyze the purported white ash, or take any carbon monoxide or temperature readings, the Secretary failed to establish that flaming or smoldering combustion occurred. American contends that the testimonial evidence relied upon by the court on remand to find the existence of a fire: the sulfur-like smell, whitish-brownish smoke, heat waves, and white ash, can all be explained by non-combustion self-heating coal phenomena that do not rise to the level of a "mine fire." *Id.* at 8-10.

⁵ Finally, even if Rennie's testimony were added to the record, it would not change my decision in this case. Rennie testified to what he observed and his deposition testimony does not differ significantly from his testimony at hearing. In addition, a fair notice argument requires much greater evidence than the general testimony of one inspector who may or may not have seen these same conditions and failed to issue a citation.

In the first decision on remand, I relied upon the facts from the transcript as presented by each of the witnesses who testified, including MSHA supervisor Rennie, mine inspector Crick, and American's witness, Michael Smith. The transcript was short but each party had the opportunity to present its evidence and to cross examine all witnesses. In that previous decision I explained that Rennie, who has been a mine inspector for 20 years, observed the five areas described as smoldering and took photographs, which are included in the file as exhibits. Inspector Crick, while a fairly new inspector, had more than 20 years of mining experience and once owned a safety company where he trained miners in the area of stock pile safety. Crick's testimony included a description of the stockpile and what he observed at the time he issued the order. He explained that he noted a sulfur smell, and that he observed smoking and smoldering material from about 5 feet away. He described the smoke as whitish and brownish with visible heat waves and he observed white ash around the area. American's only witness, Michael Smith, who was a member of its safety department testified on behalf of the mine. He observed the same areas as the inspectors and also did not see any flames. He had fire brigade training once each quarter while at the mine, and he was never called to fight a fire without a flame. (Tr. 106-107). Smith described the workings of the Galacia complex and the reasons for having stockpiles of coal outside the mine. He says he was within 60 to 70 feet of the smoking and smoldering but did not see any flame and his carbon monoxide detector did not alarm. When asked if he saw white ash, he said he did not, but saw a grayish rock that comes out with the coal. His opinion was that there was no fire. He did not comment on whether it was windy or that if the smoking and smoldering coal came into contact with oxygen it would ignite.

While I understand American's argument that the conditions observed, the smoldering, white ash, heat waves and sulfur smell could lead to results other than combustion and fire, there is no evidence in the record that is the case. Instead, the mine inspector's unrefuted testimony is that it was windy on the day of the inspection and that the smoldering areas, when exposed to oxygen could reasonably lead to combustion. While the inspectors did not specifically testify that they observed some kind of illumination, the testimony they presented is sufficient to suggest a fire existed at the mine.

American next argues on this second remand that Inspector Crick did not rely upon the Secretary's new interpretation, and instead relied upon his personal definition of 'fire' and determined that when "[y]ou see smoke, there's fire." American Br. 11. Though the inspector claimed to have relied upon his "life experience and on his experience as a volunteer firefighter," American points out that the trial judge did not accord much weight to the inspector's opinions. American argues that, since the trial judge was the only judge to preside over and observe Inspector Crick's testimony, this court should defer to that credibility determination. American Br. 11. I note that in Judge Weisberger's discussion of deference in the first decision, he writes that he is aware of no case in which the position of the Secretary's witness is a basis for deference. In doing so, in a footnote, he mentions that he does not give much weight to the Secretary's witness, who is presumably Crick, because while Crick has extensive experience as a firefighter, there is no evidence that the experience relates to coal fires. Further, he says, Crick was not established as an expert. *American Coal Co.*, 32 FMSHRC 1387 (Sept. 2010) (ALJ), n. 5. I disagree with American's interpretation of Judge Weisberger's footnote and instead I find

that the fact that an ALJ gave less weight to Crick's opinion when discussing the issue of deference does not translate into a credibility finding nor does it support a finding that Crick's lay opinion should be disregarded. Crick described in detail what he observed and how he interpreted it based upon his experience and particularly his experience as a firefighter. While I agree that Crick was not an expert, neither was any other witness at the hearing. Each witness relied upon his experience to translate what he observed into his opinion. For the MSHA supervisor and MSHA inspector, it translated into a fire, but not so for the safety supervisor at the mine. I relied upon the facts presented by each witness in my earlier decision and do so in this one.

American also argues that the Secretary has not offered an interpretation of, nor provided any credible evidence regarding, the "reasonable potential to burst into flames" element endorsed by the Commission. American Br. 12-13. American asserts this element was not raised before or during the hearing, the Secretary did not directly address it, and American was not given the chance to present evidence to rebut it, or cross-examine the Secretary's witnesses regarding their testimony upon it. Moreover, American argues, the only evidence that could be construed to address this element was the inspector's testimony that if oxygen or air hit the cited areas, they could burst into flame at any time. I find this argument also to be without merit. American had an opportunity to call any and all witnesses to discuss combustion and the potential of the coal, as observed, to lead to a fire, or a flame. The Secretary was the only party to produce any evidence of what causes coal to burst into flames and if American failed to cross examine on that testimony, or rebut it, then it did so by choice. The transcript reflects that both parties were focused upon the issue of having a flame to define a fire at hearing. American had an opportunity to present evidence about what constitutes a fire and how the smoking and smoldering material can be defined. The only evidence in the record on that issue, however, is Crick's testimony that it was possible on that windy day for oxygen to mix with the smoldering areas and burst into flame. While the evidence is not overwhelming on either side, and both parties could have done a much more thorough job of presenting evidence in the case, the Secretary did meet his basic burden of proof and American provided no rebuttal.

American, while citing a source relied upon by the Secretary during the initial appeal,⁶ also argues that "propagation and spreading of smoldering combustion as well as how smoldering combustion transitions to flaming combustion are complex technical issues involving a number of factors." *Id.* at 14. American argues that the Secretary presented virtually no evidence on these issues. Moreover, the source cited by the Secretary indicates that when smoldering combustion occurs below the surface of a stockpile and it begins migrating toward the surface, it does not have the potential to burst into flames until it reaches the surface, which can be a slow process depending up on the fuel layer above the smoldering material. Here, there is no evidence that the alleged smoldering areas were on the surface and the inspectors took no steps to determine if smoldering occurred on the surface or below the surface. American Br. 16. American is correct that many documents were submitted in this case with little or no explanation and that a number of complex issues regarding combustion are noticeably absent from the record. However, the record reflects that both Crick and Rennie agree that the

⁶ American cites T.J. Ohlemiller, National Fire Protection Association, SFPE Handbook of Fire Protection Engineering, §2, Chap. 9, "Smoldering Combustion," at 2-200, 2-201 to 2-207 (3d ed. 2002).

smoldering, when mixed with oxygen, would burst into flames. Again, American did not refute that finding in its cross examination or in its case in chief.

Applying the Secretary's interpretation, I find that the area observed and subsequently cited constitutes a "mine fire" based upon the observation of smoke, ash, and heat as well as the smell of sulfur. Both Crick and Rennie testified that they observed smoking and smoldering areas on the stockpile. Additionally, Crick testified that he observed "heat waves" and white ash in the smoking and smoldering areas. Further, he explained that if oxygen or air hit those areas, they "could burst into flame at any time." (Tr. 59). Smith, the mine's sole witness, did not testify to the existence of smoke or smoldering material, and instead offered that he did not see flames, "hot coals," or white ash. While Smith testified that he was only able to get within 60 to 70 feet of the smoldering areas, Crick indicated that he was able to travel within 5 feet of at least one of the areas. Given the testimony as a whole, I find that smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time; therefore there was a fire on the stockpile, which in turn is an accident as described by the statute. Given the testimony of the witnesses at hearing and accepting all testimony as true, I reaffirm my finding that "smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time, and therefore there was a fire on the stockpile, which in turn is an accident as described by the statute." *American Coal Co.*, 36 FMSHRC 176, 179 (Jan. 2014) (ALJ).

Fair Notice Argument. American asserts that a reasonably prudent person familiar with the mining industry and the protective purpose of Section 3(k) of the Act would not have recognized that "fire" or "mine fire," as used in Section 3(k), could include "smoldering combustion that reasonably has the potential to burst into flames." American Br. 18-19. American points to the deposition testimony of Inspector Rennie, in which he commented that he previously saw similar conditions as those observed on the stockpile, but never issued a 103(k) order for those conditions. Rennie's testimony is not admitted in this proceeding, but even if it were, I find that American had adequate notice.

American argues that, even in the absence of Rennie's testimony, the Secretary's interpretation was never communicated to American prior to the issuance of the 103(k) order. The order itself mentions smoking and white colored ash, but not the reasonable potential to burst into flames. American is unaware of any prior history of a 103(k) order or any other available guidance from the Secretary that existed as of January 19, 2010 and provided advance notice that the Secretary's inspectors might find smoldering or smoking areas on a surface stockpile devoid of flames or glowing embers to constitute a fire and hence to be an 'accident' under Section 3(k) of the Mine Act. Further, American argues that the Secretary never presented, before or during the hearing of this matter, the altered interpretation that was upheld by the Commission and requiring the Secretary to prove the additional element that smoldering material has the reasonable potential to burst into flames. This interpretation was not raised at trial and American was not given an opportunity to address this additional element. Finally, the Commission's decision in *Phelps Dodge Tyrone*, 30 FMSHRC 646 (Aug. 2008), does not provide fair warning to mine operators that their surface stockpiles are subject to 103(k) orders absent a flaming fire.

The Secretary, in his brief, argues that American had notice of the Secretary's interpretation that a fire included smoldering combustion that reasonably has the potential to burst into flames. Sec'y Br. 2. The Secretary states that (1) American stipulated at hearing that the existence of a fire was the singular issue in the case and that a determination as to whether a fire existed would dispose of the case, (2) the Secretary's interpretation of the standard at hearing gave American notice that MSHA considered smoldering combustion to be 'fire' without the presence of flames, (3) that the issue of whether the smoldering locations had the potential to burst into flames was tried at the original hearing, and (4) that the trial record contains evidence regarding the conditions observed: that is smoke, sulfur odor, white ash, and heat waves, such that the mine operator should reasonably have believed that a mine fire existed on New Future Stockpile.

The Commission has stated that "due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *Lafarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013) (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). Fair notice is provided when a party has "actual notice of MSHA's interpretation . . . prior to enforcement . . . against the party." *Id.* (citing *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996)). In the absence of actual notice, the Commission has applied the "reasonably prudent person" test, in which "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). The Commission has explained that "'the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,' but whether a reasonably prudent person, familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that 'particular factual setting[.]'" *Lafarge North America*, 35 FMSHRC at 3501 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-416 (Nov. 1990)).

There is no evidence in the record that the Secretary articulated his interpretation introduced during review before the Commission directly to American prior to the issuance of the 103(k) order. However, I find that the purpose of the Act, Congress' recognition of the dangers of smoldering flameless fires, and prior Commission case law involving an identical interpretation of the term "fire" are all things that a reasonably prudent person familiar with the mining industry would have been aware of and considered to determine that the conditions on the stockpile amounted to a hazard that warranted corrective action within the purview of the cited provision of the Act.

Section 103(k) of the Act provides, in pertinent part, that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine[.]" 30 U.S.C. § 813(k). The Act defines the word "accident" as "includ[ing] a mine explosion mine ignition, *mine fire*, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k) (emphasis added).

In the Commission's original decision, relying upon the legislative history of the Act, it stated that "Congress understood that 'mine fires' may manifest themselves differently in different environments or scenarios." *American Coal Co.*, 35 FMSHRC 380, 383-384 (Feb. 2013). Further, it stated that "the purpose of the Mine Act is to enhance safety standards 'to prevent death and serious physical harm.'" *Id.* (citing 30 U.S.C. § 801(c)). In upholding the Secretary's interpretation of the term "mine fire," the Commission noted that the "proffered interpretation [was] also aligned with the purposes of the Act" and agreed that "Time is of the essence when dealing with a fire, and requiring an inspector who observes smoldering coal to wait to observe a flame before evacuating an area may cause a delay that is the difference between life and death." 35 FMSHRC at 385.

Mine operators are aware of the broad nature in which safety standards are to be interpreted and the dangers associated with mine fires. Here, the Secretary's interpretation, while broad, is certainly one a reasonably prudent person familiar with the dangers of fire and the Act's purpose of enhancing safety would be aware of and expect. The testimony of the MSHA inspectors and that of the mine safety manager indicate that fire is a serious and ever-present hazard in coal mining. The fact that the stock pile was smoking, smoldering, smelled of sulfur and exhibited waves of heat would all lead a reasonably prudent person to understand that flames were imminent and that the conditions as described met the definition of a mine fire. While the Secretary did not explicitly set forth the fact that the smoldering must have the reasonable potential to burst into flames, I find that a reasonably prudent person would understand the potential for fire and that the smoldering in the manner observed by the inspectors was considered a fire.

American also argues that the Commission's decision in *Phelps Dodge Tyrone, Inc.*, does not provide notice of the Secretary's interpretation. 30 FMSHRC 646 (Aug. 2008). Specifically, American asserts that *Phelps Dodge Tyrone* "involved the term 'fire' as used in 30 C.F.R. § 50.2(h)(6) and as the Commission recently recognized, 'Section 50.2 plainly limits its application to terms 'used in this part,' that is Part 50 of MSHA's regulations (the reporting regulations)." American Br. 21 (citing *Revelation Energy, LLC*, 35 FMSHRC 3339 (Nov. 20, 2013)). For reasons that follow, I disagree and find that *Phelps Dodge Tyrone* did provide notice of the Secretary's interpretation.

In *Phelps Dodge Tyrone* the mine operator petitioned for review of a Commission judge's decision upholding a violation of section 50.10 of the Secretary's regulations.⁷ There, the Secretary alleged that an "accident," as defined by the Section 50.2(h)(6),⁸ occurred due to an "unplanned fire." *Id.* at 651. A Commission judge, relying upon a dictionary definition of "fire," decided that a flame must be present for there to be a fire, and that once a flame is present, the mine operator is under an obligation to comply with section 50.10 and notify MSHA. *Id.* at 650. There, the Secretary put forth an interpretation of "fire" before the Commission which is identical to that which he advanced in the instant matter.⁹ *Id.* at 659.

⁷ Section 50.10 provides in pertinent part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10.

⁸ Section 50.2(h)(6) provides that "Accident means: . . . In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery."

Here the Secretary has set forth an interpretation of “fire” identical to that which was set forth in *Phelps Dodge Tyrone*. While American asserts that the interpretation in *Phelps Dodge Tyrone* is limited to part 50 of the Secretary’s regulations, I disagree. At least one Commission judge addressing a violation of a standard not under part 50 of the Secretary’s regulations has interpreted the *Phelps Dodge Tyrone* decision to mean that smoldering coal fines are included in the definition of “fire.” See *Powder River Coal, LLC*, 31 FMSHRC 243, 254 (Feb. 2009) (ALJ). Moreover, given the statements of the Commission in the original decision on review and the majority’s acknowledgement that the instant matter was “not the first time [the Secretary] has proffered this interpretation to the Commission,” I find that *Phelps Dodge Tyrone* provided notice of the Secretary’s interpretation.

While American argues that the Secretary did not present his new interpretation before or during the hearing of this matter, I find that notice of that interpretation was provided, as discussed above, by means of the Mine Act, Congress’ recognition of the dangers of smoldering flameless fires, and the Commission’s decision in *Phelps Dodge Tyrone*. American argues that the additional element that smoldering material has the “reasonable potential to burst into flames” was not raised at trial and American was not given a chance to present rebuttal evidence. However American was given every opportunity to present evidence about smoldering and combustion relevant to the case and the fact the issue was not raised at hearing does not change my view that the mine received fair notice of the meaning of fire prior to being issued the order in this case. The reasonably prudent person test must be based upon conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based upon the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (citations omitted). Therefore, I find that the Secretary provided American with fair notice of his interpretation.

IV. CITATION 8418504

On June 23, 2014 the parties filed a joint stipulation regarding Citation No. 8418504. The parties stipulate that, if I vacate Order No. 8418503, then Citation No. 8418504 should also be vacated. Jt. Stip. ¶ 7. Conversely, they stipulate that, if I find that a “‘fire’ or ‘mine fire’ occurred on the New Future stockpile” then the violation of section 50.10, as alleged in Citation No. 8418504, should be affirmed. *Id.* The parties agree that, if Citation No. 8418504 is

⁹ A split Commission did not address the question of whether the mine had notice of the Secretary’s interpretation. Commissioners Jordan and Cohen, however, agreed that the Secretary’s interpretation was reasonable while Commissioners Duffy and Young declined to address the Secretary’s interpretation and instead advocated that the case should be decided on other, narrower grounds. *Id.* at 660, 663. Notably, Commissioners Duffy and Young believed that section 50.2(h)(6)’s use of the term ‘fire’ is hardly unique in the Mine Act and its regulations. ‘Fire’ is found in numerous sections of the amended Mine Act and in more than 100 of MSHA’s Mine Act Regulations.” *Id.* at 664.

affirmed, the negligence of the citation should be reduced from “high” to “moderate” based upon American’s claimed good faith belief that it had no reporting obligation because it did not believe there was a mine fire at the time the order and citation were written. The parties also agree that, if Citation No. 8418504 is affirmed, the violation will remain S&S, but that the degree of injury should be modified to “lost workdays or restricted duty” since although the hazard would result in injuries of a reasonably serious nature, those injuries would not be fatal. *Id.* at ¶ 7(f). Further, the parties provide a stipulation as to the remaining penalty factors and agree that \$4,000.00 is an appropriate penalty for this violation, which was originally assessed at \$8,893.00. *Id.* at ¶ 7(j).

Given my findings with regard to Order No. 8418503, I **AFFIRM** Citation No. 8418504 as modified by the stipulations of the parties. Citation No. 8418504 is modified to “lost workdays or restricted duty” and “moderate” negligence. I assess a penalty of \$4,000.00.

V. ORDER

American’s Motion to Supplement the Record is **DENIED**. Consistent with the Commission's decision and direction on remand and based upon the record evidence, I find that the Secretary established that Order No. 8418503 was validly issued. Order No. 8418503 is hereby **AFFIRMED** and contest proceeding LAKE 2010-408-R X is **DISMISSED**. Further, Citation No. 8418504 is **MODIFIED** to “lost workdays or restricted duty” and “moderate” negligence. American Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$4,000.00 within 30 days of the date of this decision. Upon receipt of payment, contest proceeding LAKE 2010-409-R X is **DISMISSED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

Lauren Polk, Office of the Solicitor, U.S. Dept. of Labor, 1999 Broadway, Suite 800, Denver CO 80202-5708

Barbara Villalobos, Office of the Solicitor, U.S. Dept. of Labor,
230 South Dearborn St., 8th Floor, Chicago, IL 60604

Jason Hardin, Fabian & Clendenin, 215 South State St., Suite 1200, Salt Lake City, Utah 84111-2323

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

September 3, 2014

DICKENSON – RUSSELL COAL CO.
LLC

Contestant,

v.

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

CONTEST PROCEEDING

Docket No. VA 2014-163-R
Citation No. 8208673-01; 01/15/2014

Cherokee Mine
Mine ID 44-06864

ORDER OF DISMISSAL

Before: Judge William B. Moran

Contestant, Dickenson-Russell Coal Company (“Contestant” or “DRC”), has filed a Notice of Contest challenging the issuance of a notice to provide safeguard, pursuant to Section 314(b) of the Mine Safety and Health Act of 1977 (“Mine Act”).¹ In turn, the Secretary filed an Answer, and Motion to Dismiss, together with a memorandum in support thereof (“Response”).²

¹ A notice of safeguard is issued under the Mine Act pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b) which provides: “Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” Section 75.1403 of the Secretary's regulations repeats verbatim the provisions of section 314(b) of the Act. The procedure for issuing citations for safeguard violations under section 75.1403 is described as: The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act. 30 C.F.R. 75.1403-1(b). *See generally Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992), *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781 (Nov. 1997).

² Also filed was DRC’s Motion to Expedite and the Secretary’s Opposition thereto; DRC’s Opposition to the Secretary’s Motion to Dismiss and its Notice of Additional Authority and the Secretary’s Reply to DRC’s Opposition. All filings were considered.

Contestant's Contest and Associated Filings

In its Statement in Opposition to the Secretary's Motion to Dismiss its Notice of Contest ("Contestant's Opposition"), Contestant first mentions some history with a prior safeguard at this mine,³ which background the Court considers to be immaterial as, at the end of the day, this matter still comes down to the safeguard issued on January 21, 2014, to Dickenson-Russell.⁴

No citation has been issued in connection with this safeguard notice but the Contestant still maintains that the Commission has jurisdiction over the matter as soon as such a notice is issued, regardless of whether a citation has been issued. With no Commission level decision addressing its claim, the Contestant points particularly to the decision issued by administrative law judge William Steele in *Affinity Coal Co. v. Secretary*, Unpublished Order (Aug 29, 2013). Essentially, and fairly characterizing its argument, the Contestant's Opposition mirrors the points made by Judge Steele in his decision, citing cases such as *Drummond Co., Inc.*, 14 FMSHRC 661 (May 1992), involving review of a program policy letter ("PPL"). Referencing *Drummond*, Contestant's position is that since the Commission has, in other contexts, broadly interpreted its jurisdiction, it may therefore do so whenever the Secretary's actions adversely affect an operator. Opposition at 5. Contestant also maintains that section 314(b) of the Mine Act, "which was published under Title III of the Act, is an interim mandatory safety standard applicable to all underground coal mines, and because a 'mandatory health or safety standard' is defined to include interim mandatory health or safety standards under Title III, section 314(b) is a

³ It is questionable whether the history offered by the Contestant actually creates a sympathetic picture. Apparently intended to show that MSHA erred by originally relying on an earlier-issued safeguard, which applied to personnel carriers transporting *six or more* miners, the personnel carrier cited in January 2014 carried less than *six* miners. The new safeguard was then issued to cover personnel carriers transporting *five or less* miners. It is true that a new safeguard had to be issued but, that said, it should not be lost that both safeguards addressed MSHA's perceived need for sanding devices on those personnel carriers and that both originated from a perceived hazard of losing control on a slippery and wet track.

⁴ "The condition or practice on this citation should have read: The Co. #DM39 Brookeville track mounted personnel carrier, used at this mine to transport miners, was not equipped with sanding devices. This personnel carrier was in the motor barn and available for immediate use by the miners. This is a notice to provide safeguard(s) requiring that the Brookeville Co. #DM39 personnel carrier and all other track mounted personnel carriers that transport 5 men or less be equipped with properly installed and well maintained sanding devices. This mine has a slope which runs from the motor barn on the surface to the mine portal, with a sharp curve at the bottom. This slope is outside and exposed to rain, snow, ice and other inclement weather. An accident has previously occurred on this slope. The track entry at this mine has several dips and hills and was wet at the time of inspection. The foreman stated that when this ride is used, miners carry sand in the front passenger compartment and reach out and sand the track as needed. The hazard exist of loosing [sic] control of the personnel carrier due to slick track conditions, and loss of braking ability, resulting in de-railing, colliding with other personnel carriers and/or running over miners on foot." Contestant's Opposition at 2-3, quoting from January 21, 2014, condition or practice identified in safeguard.

mandatory safety standard. 30 U.S.C. § 803(l).” Opposition at 6. Contestant then continues that, “when an inspector . . . issues a notice of safeguard, the inspector is, *in effect*, issuing a citation under section 104(a) for the violation of a mandatory safety standard.” *Id.* (italics added).

As a separate basis for its position, Dickenson-Russell contends that due process also requires that a mine operator be able to immediately contest a notice of contest upon its issuance. For this portion of its argument, Contestant points to *Mathews v. Eldridge*, 424 U.S. 319 (1976), for support, noting that “three distinct factors are considered: [] the private interest that will be affected by the official action; [] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Opposition at 7 (quoting *Mathews v. Eldridge*, 424 U.S. at 335).

Applying those factors, Contestant asserts that its affected interests are substantial: “[t]he instant Safeguard will require three personnel carriers to be retro-fitted with sanding devices, at considerable expense to the mine. [] These three personnel carriers are used on a daily basis. As a result of the Safeguard, however, all three are currently out of service and cannot be used. This unnecessarily and negatively impacts the mine’s operations and employees.” Opposition at 7-8, citations to declaration omitted). Nor, it contends can it wait to receive a citation, because there is no “guarantee of when a citation will be issued” and that route also exposes it to civil penalties. Finally, Contestant contends that allowing operators to contest notices of safeguard upon issuance will not unduly burden the Secretary. Opposition at 7-8.

As noted, a particular case cited by the Contestant as authority is *Affinity Coal Co. v. Secretary*, Unpublished Order (Aug 29, 2013). That case does involve the same issue⁵ but, as the parties well know, the decision of another administrative law judge has no precedential effect. Its value is limited to the persuasiveness of the reasoning in the decision upon another judge who is presented with a similar situation. The judge in *Affinity* was persuaded by the argument that a mine need not wait for a citation to be issued, on the basis that section 105(d) allows an operator to contest an order or a citation upon the view that “[a] notice of safeguard is just that – a violation of a provision of the Mine Act.” This Court does not share that perspective because a notice to provide a safeguard is plainly not a violation. Instead, it is analogous to the promulgation of a safety and health standard, albeit it comes into existence through a different, but Congressionally prescribed, procedure to address hazards with respect to the transportation of men and materials.⁶

⁵ In *Affinity*, five safeguard notices had been issued following a fatality and the mine then filed notices of contest. The Secretary took the same stance as here: the Commission’s jurisdiction is limited under section 105(d) and as such it does not extend to notices of contest. Instead, a mine must wait until a citation is issued for not complying with the safeguard notice.

⁶ Although the judge in *Affinity* also stated that “the Commission has jurisdiction to hear all disputes arising out the Mine Act . . . and make a determination upon, any proceeding instituted before the Commission,” the Court believes that jurisdiction must exist first and that instituting a proceeding does not by itself confer jurisdiction.

In short, this Court believes that, so to speak, the other shoe must drop before litigation of a safeguard can commence. Accordingly, this Court cannot adopt the rationale expressed in the *Affinity* decision that “jurisdiction is conferred in the Commission because Affinity is specifically alleged to have violated a mandatory health or safety standard.” *Affinity* at 6. This is because in point of fact the Secretary has not made such an allegation at the point in time the safeguard notice is created and issued. For this reason, the Contestant’s claim that a notice to provide safeguard is *in effect* the equivalent as issuing a citation or order, does not mean that the two are the same.

Although the judge in *Affinity* rested his conclusion on the theory that Section 105(d) confers jurisdiction, he also rested his view on due process grounds. The example offered by the judge was a mine operator having to wait twenty-two years before having the ability to challenge the validity of an underlying safeguard notice. However, while that recounting is a dramatic characterization of such an instance, it is misleading in a sense because there is nothing to prevent a mine operator from simply refusing to comply with a safeguard notice. Once that refusal happens and a citation then follows, the mine can then challenge the validity of the safeguard, together with the citation and the appropriateness of the penalty proposed by the government for that citation. Such a challenge can occur immediately after the citation is issued, putting all issues on the table.

The Secretary’s Response

The Secretary’s central contention is that the Mine Act does not give the Commission jurisdiction to review a safeguard notice until there has first been a subsequent citation or order issued in connection with that notice. The basis for its position is simple and direct, noting that the section of the Act addressing the Commission’s jurisdiction, section 105(d), pertains to “MSHA’s issuance or modification of orders, (2) MSHA’s issuance or modification of citations and proposed assessments of penalties; and (3) the reasonableness of the length of time that MSHA sets for abatement.”⁷ Response at 4. Thus, the Secretary contends that as section 105(d)

⁷ The full text of section 105(d) provides: (d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the
(continued...)

makes no mention of a safeguard notice, nor the provision from which it is derived, section 314(b) of the Act, the Commission lacks jurisdiction.⁸ Unlike a reviewable citation under section 105(d), which stems from the Secretary's allegation that a mine operator has violated the Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act, the safeguard notice is analogous to a mine-specific mandatory standard. Both, the Secretary notes, establish required conduct, and both, when violated can be cited for failing to comply with such conduct.⁹

Perhaps more importantly, at least from the Court's perspective, as the Secretary notes, the issuance of a safeguard notice does not assert that a mine operator has committed any violation.¹⁰ Instead, a violation can only occur *later* in time, upon a mine operator's subsequent failure to comply with the safeguard notice. Naturally, this also means that there is no civil penalty proposed either. That too only occurs upon a *subsequent* failure to comply with the safeguard notice. It is true that, upon issuance of the notice to provide a safeguard, a standard is created, but as with every other safety standard, no civil penalty occurs when the standard is created; rather it is only when the standard, however it comes into being, is thereafter violated. Accordingly, it is the Secretary's contention that no Commission jurisdiction attaches until after the safeguard notice comes into existence and then, following that, there is issued a citation or order asserting that the safeguard was violated.¹¹

In *Pocahontas Coal Company, LLC v. Secretary of Labor*, 2014 WL 2809893 (June 11, 2014) ("*Pocahontas*"), another administrative law judge addressed the same issue. As in the case

⁷ (...continued)

Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

⁸ The Secretary has also taken note that the Contestant, DRC, did not cite to any specific provision of the Mine Act as supplying jurisdiction to the Commission in DRC's Notice of Contest. Response at n.1.

⁹ Nor, the Secretary notes, is a safeguard analogous to an Order issued under section 104, as the latter requires withdrawal from an area of a mine, but the former does not. Response at 5.

¹⁰ A reply was also filed by the Secretary. Much of the Secretary's reply echoes the points it already made but it emphasizes that without jurisdiction first being present to hear the challenge the Commission cannot reach a due process claim. Jurisdiction, then, is a condition precedent to addressing a due process claim.

¹¹ If the Contestant's action is a request for declaratory relief, which it appears to be, the Secretary also notes that the Commission provides such "relief *only* 'where jurisdiction otherwise exists' based on Section 105(d) or another one of the Mine Act's delegations of authority to the Commission. Response at 8 (citing *Kaiser Coal*, 10 FMSHRC 1165, 1170-71 (Sept. 1988); *Drummond Company, Inc.*, 14 FMSHRC 661, 671-76 (May 1992)). Thus, the Secretary argues that jurisdiction is a condition precedent to declaratory relief.

presently before this Court and in the *Affinity Coal* matter (*supra*), notices to provide safeguards were issued to Pocahontas pertaining to the transportation of men or materials, and the mine filed notices of contest for each notice. The Secretary, again as in this case, filed a motion to dismiss on the grounds that the Commission lacks jurisdiction to hear such a contest until after a citation or order is issued for a violation of the underlying safeguard notice. The judge in *Pocahontas* noted that the Commission has addressed a safeguard challenge only in the context of when it has been accompanied by a citation alleging a violation of that safeguard.¹² Reduced to its essential conclusion, the judge in *Pocahontas* concluded that the Commission’s jurisdiction is limited under section 105(d) of the Mine Act to particular challenges, but that challenging a safeguard notice itself, unaccompanied by citation or order alleging a violation of that safeguard notice is not one of those bases for Commission jurisdiction. The judge in *Pocahontas* also concluded that the ability for a mine to challenge a safeguard notice, once the triggering event of a citation or order occurs, also answers the claim that due process demands review prior to the allegation that the notice has been violated. In that regard, the judge noted that it “cannot create jurisdiction where none exists . . . [and that] less formal mechanisms, such as a request for a technical citation, . . . could seemingly be used to immediately contest the issue on an expedited basis . . . [and also that] the operator [could] bring a facial challenge [to that safeguard notice] in Federal District Court.” *Id.* at *4. Last, the judge in *Pocahontas* observed that “the government interest in flexibly and quickly addressing hazards related to the transportation of men and materials is an extremely compelling one.” *Id.*

This Court agrees with both conclusions by the judge in *Pocahontas*; section 105 review of a challenge to a safeguard is limited to instances when a citation or order has been issued alleging a violation of that safeguard notice; and due process is achieved through that challenge mechanism.¹³

As this docket contains no citations or orders, but only the notice to provide safeguard that was issued to the mine, the above captioned contest proceeding is DISMISSED.

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

¹² The judge also noted that it is not bound by the opinion of another administrative law judge and that she did not concur with the reasoning of the judge decision in *Affinity*. On both those points, this Court shares the views of the decision in *Pocahontas*.

¹³ It is also noted that the Court’s conclusions regarding reviewability and due process are fully consonant with the Commission’s most recent observations on these subjects, as reflected in *Secretary of Labor (MSHA) v. Brody Mining, LLC*, 36 FMSHRC ___, slip op., No. WEVA 2014-82-R (Aug. 28, 2014).

Distribution:

K. Brad Oakley
Jackson Kelly PLLC
175 East Main Street, Suite 500
Lexington, KY 40507
859-255-9500
859-281-6478 fax

R. Henry Moore
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222
412-434-8055
412-434-8062 fax

Matthew N. Babington, Esq.
U.S. Department of Labor
Office of the Regional Solicitor
1100 Wilson Boulevard
22nd Floor West
Arlington, VA 22209-3939

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES 1331
PENNSYLVANIA AVENUE, NW SUITE 520N
WASHINGTON, DC 20004

September 5, 2014

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

v.

CARL MOORE, employed by
CALVARY COAL CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2012-356
A.C. No. 44-06791-282333A

Mine: No. 1

ORDER TO SHOW CAUSE TO CARL MOORE

Before Judge Feldman:

This matter concerns section 104(d)(1) Order No. 8169789, issued to Calvary Coal Corporation (“Calvary”) on May 4, 2010, for an alleged violation of the mandatory standard in 30 C.F.R. § 75.400 that is attributable to an unwarrantable failure.¹ The cited violative condition concerns loose coal, coal dust, and float coal dust that accumulated along the entire distance of the #1 belt, measuring from a thin layer, up to five inches in depth. The order also cites accumulations from nine inches to 30 inches in depth at the #1 tailpiece. The order further notes that foreman Carl Moore stated that the accumulations had been present for two shifts, that they were obvious to the most casual observer, and that Moore knew of the existence of the accumulations.

The Mine Safety and Health Administration’s (“MSHA”) data retrieval system reflects that MSHA proposed a civil penalty of \$7,176.00 against Calvary for 104(d)(1) Order No. 8169789. Calvary did not contest the order.

¹ Section 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.

30 C.F.R. § 75.400.

On May 16, 2012, the Secretary filed an assessment for civil penalty against Carl Moore, seeking to impose a \$3,300.00 civil penalty for personal liability under section 110(c) of the Federal Mine Safety and Health Review Act (“Mine Act” or “the Act”), 30 U.S.C. § 820(c), for the violative condition cited in Order No. 8169789. Section 110(c) provides that supervisory mine personnel “who knowingly authorized, ordered, or carried out” a violation of a mandatory safety standard may be subject to personal liability. Absent strict liability, knowledge by mine supervisory personnel is always assumed for all violations that are attributable to an unwarrantable failure. Although Moore’s acknowledgement that he knew about the cited accumulations, which is imputed to Calvary, may provide an adequate basis for an unwarrantable failure designation, his knowledge alone may not be adequate to impose personal liability under section 110(c), absent aggravated circumstances.

An individual is subject to personal liability under section 110(c) if he is uniquely “in a position to protect employee safety and health [and] fails to act on the basis of information” regarding the existence of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The issue is whether Moore’s “failure to act” in the face of his awareness of the cited accumulations constitutes the requisite “authoriz[ing], order[ing], or carr[ying] out” of the subject section 75.400 violation as contemplated by the personal liability provisions of section 110(c) of the Act.

In order to determine whether the Secretary has an adequate basis for seeking your personal liability in this case, it is necessary that you actively participate in these proceedings. However, to date, you have been unresponsive to my office’s inquiries, in that you have not provided an adequate method of reaching you by telephone, mail, or email. For example, the telephone number of record, which was provided by Moore and furnished to the Solicitor, has repeatedly indicated that its mailbox is full. Thus, my office has been unable to reach you, and you have failed to contact my office.

Consequently, Carl Moore **IS ORDERED TO SHOW CAUSE within 21 days** of this Order why he should not be held in default and ordered to pay the \$3,300.00 civil penalty, as proposed by the Secretary. In order to avoid default, Carl Moore must contact my law clerk, Avery Peechatka, via telephone at 202-233-4010 or email at apechatka@fmshrc.gov, and demonstrate his continued desire to participate in this matter by providing a mailing address and a telephone number or email address at which he can be successfully reached. **IT IS FURTHER ORDERED** that Moore must make himself available for participation in a telephone conference with the Judge and with J. Matthew McCracken, Esq., Counsel for the Secretary, which can be scheduled through contact with Mr. Peechatka.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

J. Matthew McCracken, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA 22209-2247

Carl Moore, Calvary Coal Corporation, 16463 KY Rt. 122, Hi Hat, KY 41636

Carl Moore, Calvary Coal Corporation, 268 East Main Street, Prestonsburg, KY 041216

/acp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

September 10, 2014

AFFINITY COAL COMPANY, LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 2013-700-R
Safeguard No. 3575542; 02/28/2013

Docket No. WEVA 2013-701-R
Safeguard No. 3575543; 02/28/2013

Docket No. WEVA 2013-702-R
Safeguard No. 3575544; 02/28/2013

Docket No. WEVA 2013-703-R
Safeguard No. 3575545; 02/28/2013

Docket No. WEVA 2013-704-R
Safeguard No. 8155075; 03/04/2013

Mine: Affinity Mine
Mine ID: 46-08878

ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest filed by Affinity Coal Company, LLC, pursuant to Section 105(d) of the Federal Mine Safety and Health. These contests are directed not at a particular citation or order but, rather, at five written notices to provide safeguard issued by MSHA pursuant to Section 314(b) of the Act. For reasons that follow, these cases are **STAYED** until the Commission rules on the issue of whether the Commission judges have jurisdiction to undertake an independent review of notices to provide safeguard issued pursuant to section 314(b) of the Mine Act.

On April 15, 2013 the Secretary filed motions to dismiss these five contests. The Secretary, in each of the motions to dismiss, argued that, in the absence of a citation or order issued for violation of a safeguard, the Commission lacks jurisdiction under the Mine Act to hear contests of notices to provide safeguard. Subsequently, on April 25, 2013, Contestant filed a statement in opposition to the motions, arguing that notices to provide safeguard should be treated as section 104(a) citations and, as a result, section 105(d) of the Act confers jurisdiction on the Commission to hear independent contests of notices to provide safeguard. Further, Contestant argued that due process concerns demand that mine operators be able to contest notices to provide safeguard at the time they are issued, and not have to wait until a citation or order is issued for violation of the safeguard. On August 29, 2013 Judge William Steele denied the Secretary's motion and found that section 105(d) of the Act granted the Commission jurisdiction to hear contests of notices to provide safeguard prior to the issuance of a citation or

order for an alleged violation of the safeguard. *Affinity Coal Co., LLC*, Unpublished Order Denying Motion to Dismiss dated August 29, 2013, Docket No. WEVA 2013-700-R et al. (ALJ).

On June 11, 2014 this court dismissed a separate, but similar matter. *Pocahontas Coal Co.*, 36 FMSHRC ___, slip op. (Docket Nos. WEVA 2014-642-R, WEVA 2014-646-R through 679-R) (June 11, 2014) (ALJ). In Pocahontas, the parties raised essentially identical arguments to those raised in the instant proceeding. There I found that, while the Commission had acknowledged a mine operator's right to contest the validity of a safeguard in the context of contest to a citation issued pursuant to a violation of the underlying safeguard, it had not addressed the question of whether it has jurisdiction to hear a contest of a notice to provide safeguard in the context of a separate proceeding prior to the issuance of a citation or order for a violation of the safeguard. *Id.* (citing *Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992)). In dismissing the cases I relied upon the absence of any legal authority to hear contests of notices to provide safeguard within the context of a dedicated proceeding, the unique nature of safeguards that prevents them from being considered a citation or order, other avenues which the contestant could have utilized to properly challenge the notices to provide safeguard, and the current protections in place which negate any due process concerns. *Id.* On July 16, 2014 the Commission granted Pocahontas' petition for discretionary review. Clearly the decision issued in Affinity is directly opposite the decision in Pocahontas. Additionally, in the time since these cases were reassigned at least one Commission judge has dismissed a similarly situated matter for many of the same reasons cited in my June 11th order. *Dickenson-Russell Coal Co.*, 36 FMSHRC ___, slip op. (Docket No. VA 2014-163-R) (Sept. 3, 2014) (ALJ).

On August 14, 2014 these five cases were reassigned to this court.¹ The Secretary has represented that, as of August 28, 2014, no citations or orders have been issued for violations of the safeguards that are contained in these cases. The reassignment of these cases presents a novel issue, namely that an order finding jurisdiction is presently in place, however the currently presiding judge believes that there is no jurisdiction and these cases should not be before the Commission. Judge Steele's determination that jurisdiction exists directly contradicts my finding in the similarly situated *Pocahontas* case. While the instant proceeding involves Affinity Coal Company, and my June 11th order related to Pocahontas Coal Company, the two entities are one and the same, sharing the same mine identification number. While the court recognizes that Judge's Steele order remains in place, it disagrees with his ultimate finding and, in an effort to avoid confusion by issuing a contradictory order, the court believes that the question of jurisdiction should be stayed until the Commission issues an order in the *Pocahontas* case presently before it.

ORDER

Consequently, these cases are **STAYED** until the Commission issues a decision in the *Pocahontas* case, after which time, this matter will either be dismissed or set for hearing. Further, should the Secretary believe it necessary, he may request that this matter be put before the Commission on interlocutory review.

¹ Judge Steele retired and his cases have been reassigned to other Commission judges.

The parties are **ORDERED** to notify the Court immediately should the status of these cases change or the *Pocahontas* case is decided.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

Benjamin D. Chaykin and Robert Wilson, U.S. Department of Labor, Office of the Regional Solicitor, 1100 Wilson Blvd., 22nd Floor, West, Arlington, VA 22209-2247

Jason M. Nutzman, Dinsmore & Shohl, LLP, Huntington Square, 900 Lee Street, Suite 600, Charleston, WV 25301

Robert H. Beatty, Jr., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 26501