July 2025

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NORTH AMERICAN MINING COMPANY	Docket No. SE 2024-0059 A.C. No. 08-01058-588041

BEFORE: Jordan, Chair; Baker, and Marvit Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On December 13, 2024, the Commission received from North American Mining Company ("North American Mining") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 11, 2024, the Chief Administrative Law Judge issued an Order to Show Cause to North American Mining by U.S. Postal Service Certified Mail. On April 10, 2024, the Order to Show Cause assessment was deemed a final order of the Commission, when it appeared that the operator had not filed an Answer within 30 days.

North American Mining asserts that it timely filed its Answer to the Order to Show Cause on March 15, 2024. The operator provides a confirmation email of receipt from the Commission's electronic case management system ("e-CMS') supporting its claim. The Secretary supports the request to reopen.

Having reviewed North American Mining's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause as it timely complied with the Order. *See Vulcan Constr. Materials*, 33 FMSHRC 2164 (Sept. 2011).

This renders the Order to Show Cause and Default Order a nullity. Accordingly, the default order is vacated, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2025-0154 A.C. No. 02-02633-602391
MDI MINING	

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 12, 2025, the Commission received from MDI Mining a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

In its motion to reopen, MDI Mining represents that on May 31, 2024, it filed notices to contest Citation No. 9908246, Order No. 9908247, and Citation No. 9908248 with the Commission.[1] MDI Mining further represents that it did not receive the proposed assessment for

[1] The Commission assigned the cases the following docket numbers: WEST 2024-0251, WEST 2024-0252 and WEST 2024-0253.

civil penalty from the Secretary of Labor's Mine Safety and Health Administration for these citations until October 2024. When the proposed assessment was received in October, it was dated July 9, 2024, providing the appearance that the 30-day period for contest of the penalty assessment had lapsed. The operator states that this caused confusion and, as a result, it failed to timely file.

The Secretary of Labor does not oppose the operator's request to reopen. The Secretary's Mine Data Retrieval System indicates that the civil penalty assessment became a final order of the Commission on November 27, 2024.

Having reviewed MDI Mining's request and the Secretary's response, we find that the operator made a good faith effort to timely file and that its failure to file to contest the proposed penalty was the result of a mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700. 28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting:

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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July 28, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2025-0191 A.C. No. 14-01477-609859
NELSON QUARRIES, INC.	

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On March 25, 2025, the Commission received from Nelson Quarries, Inc. ("Nelson Quarries") a motion seeking to reopen a penalty assessment proceeding and relieve it from the proposed assessment that became a final order.

On December 20, 2024, the subject proposed assessment became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), after Nelson Quarries did not file a notice of contest. Mine Safety and Health Administration, *Mine Data Retrieval System*, www.msha.gov/data-and-reports/mine-data-retrieval-system (last visited July 25, 2025).

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

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

In its motion to reopen, Nelson Quarries asserts that it timely filed to contest the proposed penalties within 30 days, but "may have sent our notice of contest to the wrong [MSHA office]."

Mot. at 1. Nelson Quarries further represents that it had incorrectly assumed that MSHA would have routed its notice of contest to the correct office. The Secretary filed a response indicating that she did not oppose the operator's motion.

Attached to the operator's motion is an email it received from MSHA's Wilkes-Barre Office of Assessments on December 11, 2024. The email states:

> Per our phone conversation, I have attached the proposed assessment for statement number 000609859
>
> When contesting, please send or email to the instructions on the 3rd page of the highlighted area.

Ex. 1.

The Commission requires that an operator seeking to reopen a proceeding after a final order bear the burden of establishing an entitlement to extraordinary relief. "At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure . . . ." *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010). Moreover, "[i]t is an operator's responsibility to fully read any information provided by the Secretary in connection with a proposed penalty." *Mike Morgan Indus., LLC*, 46 FMSHRC 863, 865 (Oct. 2024) (citing *Stone Zone*, 41 FMSHRC 272, 275 (June 2019)).

I conclude that the operator has failed to satisfy its burden and to "fully read" the information provided on how to contest the penalty. Nelson Quarries' motion provides no details regarding its alleged attempt to timely contest. The email attached to the motion contains no reference to an attempt to contest the penalties; instead, it references a prior "phone conversation." Additionally, the email was sent by MSHA on December 11, 2024 – nine days before the 30-day contest period expired. Rather than demonstrating good cause for Nelson Quarries' failure to timely file, I conclude that the email in exhibit demonstrates that the operator missed a second opportunity to timely file.

Because the operator has not provided specific details or evidence regarding its attempt to timely file, I find that it did not satisfy its burden to demonstrate that its failure to timely file was the result of a mistake, excusable neglect, or some other good cause reason. Accordingly, Nelson Quarries' motion is denied.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree with Commissioner Baker in this case for the reasons he set forth above and the additional reasons explained below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975, 977 (Dec. 2024) (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, the operator received the final order. We deny reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

Chair Jordan, dissenting:

On March 25, 2025, Nelson Quarries filed its motion to reopen with the Commission.

Nelson Quarries maintains that it timely filed to contest the proposed penalties; it further states that the reason the contest form was not received by MSHA may have been because it was mistakenly sent to the wrong address. Nelson Quarries attached a December 11, 2024 email it received from MSHA's Wilkes-Barre Office of Assessments, as an exhibit to its motion to reopen. The email demonstrates that the operator was communicating with MSHA about contesting the penalties within the 30-day contest period. An operator's good faith efforts to timely contest penalties are a relevant factor when considering whether the operator has indicated a good cause reason. *See, e.g., Deatley Crushing Co.*, 46 FMSHRC 632 (Aug 13, 2024). I find that Nelson Quarries has established that it was acting timely and in good faith in an attempt to contest the penalties.

Moreover, the Commission has routinely granted motions to reopen when the operator has made timely, albeit mistaken, attempts to contest a civil penalty assessment. *See, e.g., Mitsubishi Cement Corp*., 47 FMSHRC 283 (Apr. 2025) (granting an unopposed motion to reopen where the operator sent its notice of contest to St. Louis, Missouri). Here, Nelson Quarries maintains that it made a timely attempt to contest. The Secretary does not oppose the operator's request to reopen.

Accordingly, upon consideration of the operator's motion to reopen, and the Secretary's response, I conclude that Nelson Quarries has sufficiently established that its failure to timely file was the result of a mistake.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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July 31, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ARGOS PUERTO RICO CORP.	Docket No. SE 2025-0061 A.C. No. 54-00120-605838

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On February 10, 2025, the Commission received from Argos Puerto Rico Corp. ("Argos") a motion seeking to reopen an uncontested proposed penalty assessment which appeared to be a final order of the Commission according to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Argos represents that it did not file a notice of contest because it never received the proposed penalty assessment from the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). Argos seeks to reopen this proceeding so that it may contest the citations and proposed penalties contained therein before the Commission. The Secretary filed a response indicating that she did not object to the operator's request.

On June 27, 2025, the Commission issued a Request for Information, seeking to obtain copies of the proposed assessment and any mailing receipts or delivery tracking records in the possession of the Secretary of Labor in order to determine whether any delivery issues precluded the proposed assessment from becoming a final order of the Commission. *See* 30 U.S.C. § 815(a) (If, within 30 days from the *receipt* of the [proposed assessment], the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty . . . the proposed assessment of penalty shall be deemed a final order of the Commission . . . .) (emphasis added).

On July 28, 2025, the Secretary responded to the Commission's request and provided documentation demonstrating that the Secretary's attempts to deliver the proposed assessment to Argos' address of record were unsuccessful; the failure originated from an error made by the Secretary when typing the operator's address. Specifically, the Secretary used an incorrect zip code, and as the United States Postal Service records indicate, the assessment was not delivered. Additional attempts to deliver the proposed assessment were also unsuccessful.

Accordingly, we conclude that the proposed assessment was not properly received by the operator as required by section 105(a) of the Mine Act and therefore there is no final order of the Commission. *See e.g.*, *Belt Tech, Inc.*, 46 FMSHRC 975, 975-76 (Dec. 2024).

Therefore, the operator's motion to reopen is moot. We now deem Argos' motion to reopen a contest of the proposed penalty assessment[1] and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

[1] The proposed penalty assessment is included in the record as Attachment A to the Secretary's July 28th response to the Commission.

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March 21, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O ALVARO SALDIVAR	
v.	Docket No. WEST 2021-0178-DM
CALPORTLAND COMPANY O/B/O GRIMES ROCK, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: THE COMMISSION

This case arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018).[1] It involves the granting of temporary reinstatement for a miner employed by Grimes Rock, Inc. ("Grimes Rock"). On December 20, 2024, Grimes Rock filed a petition for discretionary review of the above-captioned docket, which the Commission granted. On March 18, 2025, CalPortland Company ("CalPortland") filed a Notice of Operator Change informing the Commission that the facility operating under Mine ID 04-05432 is now operated by CalPortland and that moving forward the respondent in the instant matter will list the current operator as "CalPortland on behalf of Grimes Rock, Inc."

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the 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.

In light of the operator's submission, we hereby amend the caption to reflect the change in operator.

On March 18, 2025, CalPortland on behalf of Grimes Rock also filed an unopposed motion to dismiss this case. Upon consideration of CalPortland's motion, the Commission's direction for review is hereby VACATED and the operator's appeal is DISMISSED.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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March 21, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. WEST 2022-0334 WEST 2023-0015 WEST 2023-0016
CALPORTLAND COMPANY O/B/O GRIMES ROCK, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: THE COMMISSION

On August 22, 2024, Grimes Rock, Inc. ("Grimes Rock") filed a petition for discretionary review of the above-captioned dockets, which the Commission granted. On March 14, 2025, CalPortland Company ("CalPortland") filed a Notice of Operator Change informing the Commission that the facility operating under Mine ID 04-05432 is now operated by CalPortland and that moving forward the respondent in the instant matter will list the current operator as "CalPortland on behalf of Grimes Rock, Inc."

In light of the operator's submission, we hereby amend the caption to reflect the change in operator.

On March 14, 2025, CalPortland on behalf of Grimes Rock also filed an unopposed motion to dismiss Docket Nos. WEST 2023-0015, WEST 2023-0016, and WEST 2022-0333. Upon consideration of Grimes Rock's motion, the Commission's direction granting review of Docket Nos. WEST 2023-0015 and WEST 2023-0016, is hereby VACATED and the operator's appeal is DISMISSED.

With regard to Docket No. WEST 2022-0333, this case, along with Docket No. WEST 2022-0335, was previously dismissed by the assigned Administrative Law Judge on July 24, 2023.

Docket No. WEST 2022-0334, which was not included in the operator's motion to dismiss, remains pending before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 4, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2022-0334
CALPORTLAND COMPANY O/B/O GRIMES ROCK, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: THE COMMISSION

On August 22, 2024, Grimes Rock, Inc. ("Grimes Rock") filed a petition for discretionary review of the above-captioned docket, which the Commission granted. On April 3, 2025, CalPortland Company ("CalPortland") filed a Notice of Operator Change informing the Commission that the facility operating under Mine ID 04-05432 is now operated by CalPortland and that moving forward the respondent in the instant matter will list the current operator as "CalPortland on behalf of Grimes Rock, Inc."

In light of the operator's submission, we hereby amend the caption to reflect the change in operator.

On April 3, 2025, CalPortland on behalf of Grimes Rock also filed an unopposed motion to dismiss Docket No. WEST 2022-0334. Upon consideration of Grimes Rock's motion, the Commission's direction granting review of the above-referenced case, is hereby VACATED and the operator's appeal is DISMISSED.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 8, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY SOUTHEAST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0174 A.C. No. 01-02901-569908 Mine: Shoal Creek Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., United States Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

Arthur M. Wolfson, Esq., Fisher & Phillips LLP, 6 PPG Place, Suite 830, Pittsburgh, Pennsylvania 15222

Before: Judge John Kent Lewis

INTRODUCTION

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Peabody Southeast Mining, LLC ("Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801, *et seq*. This docket originally contained 18 citations, 17 of which were settled prior to hearing.[1] The single citation at issue, **Citation No. 9705670**, was issued to Respondent on December 14, 2022, for the Shoal Creek Mine ("Mine"), for violation of 30 C.F.R. § 75.202(a).

I held a virtual Hearing on Zoom for Government for the remaining citation on February 25, 2025, during which the parties presented testimony and documentary evidence. Witnesses were sequestered during the hearing. MSHA Inspector John Yarko ("Inspector Yarko") testified for the Secretary; Longwall Face Boss Daniel Piper ("Piper") and Safety Supervisor Paul Moore ("Moore"), both of Respondent's Shoal Creek Mine, testified for Respondent.

After carefully considering the testimony and evidence presented, as well as the parties' post-hearing briefs and arguments, I **AFFIRM Citation No. 9705670** as issued and order Respondent to pay the assessed penalty of $2,561.00.

[1] *See* Amended Decision Approving Partial Settlement (Oct. 18, 2024).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have considered the interests of the witnesses or lack thereof, as well as the consistencies and inconsistencies in each witness' testimony and between the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied on the witness' demeanor. Any failure to provide detail in this Decision and Order as to any witness' testimony does not mean I did not fully consider that testimony; similarly, any failure to discuss certain evidence does not indicate that such evidence was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

A. Joint Stipulations

At the Hearing, the parties agreed to the following stipulations as contained in the Secretary's Prehearing Statement dated Feb. 18, 2025:

1. At all relevant times, Respondent was the operator of the Shoal Creek Mine, Mine Identification No. 01-[02901], within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. ("Mine Act"), specifically § 802(d).[2]

2. At all relevant times, Shoal Creek Mine was a "coal or other mine" within the meaning of the Mine Act, specifically § 802(h).

3. At all relevant times, the products of the Shoal Creek Mine entered commerce, or the operations or products of the Shoal Creek Mine affected commerce, within the meaning of the Mine Act, specifically §§ 802(b) and 803.

4. Respondent is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801 *et seq*.

5. **Citation 9705670**, identified in the Petition for Assessment of Civil Penalty, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the Respondent on the date and place stated therein.

6. The proposed penalty of $2,561.00 for **Citation No. 9705670**, if paid as prayed for in the Petition for Assessment of Civil Penalty, will not affect Respondent's ability to remain in business.

7. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

[2] The Secretary's original Prehearing Statement contained an incorrect Mine Identification No. for Shoal Creek Mine in ¶1, and a correct Mine Identification No. in ¶8. Both are now correct.

8. Respondent operates Shoal Creek Mine, Mine ID 01-02901.

9. Employees at Respondent's Shoal Creek Mine worked more than 1.1 million hours in 2022.

Jt. Ex. 1 (bolding, and select capitalization, italics, and section symbols added).

B. Summary of Hearing Testimony[3]

1. Inspector Yarko

a. Direct Examination of Inspector Yarko: Background

Inspector Yarko, employed by MSHA since October of 2015, Tr. 13:19 – 14:1, is an MSHA "roof control/ground control specialist." Tr. 14:3-4.[4] In that role, his duties include reviewing and analyzing roof control plans for underground coal mines and ground control plans for surface mines, conducting 6-month roof evaluation reviews, and conducting E01, E02, spot and methane inspections, and accident inspections. Tr. 14:7-17. Before becoming an MSHA inspector, he worked in the mining industry, Tr. 15:10-12, 18:2-7, serving on a "belt crew,

[3] References to the Hearing Transcript are designated as "Tr." followed by page number: line number. References to Joint Exhibits are designated by "Jt. Ex." followed by a number. References to the Secretary's Exhibits are designated as "Sec. Ex." followed by a number. References to Respondent's Exhibits are designated as "R" followed by a letter and sometimes a numbered subdivision. References to the post-hearing briefs are designated "Sec. Br." and "Resp. Br." as appropriate.

The following Exhibits were admitted at the Hearing: J Ex.-1 (Stipulations); Sec. Ex. 1 (**Citation No. 9705670**); Sec. Ex. 2 (two sets of inspection notes from Inspector Yarko dated Dec. 14, 2022); Sec. Ex. 3 (103(k) Order ((Order No. 9705667 and -01)); Sec. Ex. 4 (inspection notes from Inspector Yarko dated Dec. 13, 2022); Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022); Sec. Ex. 8 (MSHA Approval Letter for Action Plan Update, dated Feb. 3, 2023); Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2022); Sec. Ex. 10 (Shoal Creek Mine – Roof Control Plan); Sec. Ex. 11 (On-Shift Examiner's Reports, dated Dec. 7-14, 2022); Sec. Ex. 12 (four photos of pumpable cans); Sec. Ex. 14 (diagram, bearing handwritten dates Jan. 6, 2023 and Jan. 30, 2023); Sec. Ex. 15 (Assessed Violations History Report); R-A(1) (Preshift Examiner's Reports, dated Oct. 25, 2022); R-E(1) (longwall diagram); R-E(2) (XC 42 -42 ½ diagram); R-F (notes from Safety Supervisor Moore, dated Dec. 11, 2022); R-G (production reports, dated Dec. 12-14, 2022); R-I (inspection notes initialed "RT," dated Dec. 11, 2022); R-J(3) (inspection notes from Inspector Yarko dated Dec. 14, 2022). *See also infra* n. 7 (explaining the two sets of inspection notes contained in Sec. Ex. 2).

[4] Inspector Yarko joined MSHA in October 2015 as a trainee, attended the MSHA Academy, was subsequently transferred to Litchfield, Illinois as a mine inspector and in 2022, moved to Birmingham, Alabama, after which he assumed his current role as a roof control/ground control specialist in August of 2022. Tr. 14:5-6, 14:18 – 15:9.

instructing, advancing, and maintaining" underground conveyor belts, performing various roof bolting tasks, and eventually becoming a full-time continuous miner operator. Tr. 15:13 – 16:8.[5]

Inspector Yarko described the Shoal Creek Mine ("Mine"), which he had inspected numerous times, as a room & pillar longwall mine. Tr. 18:10 – 19:3. The Mine operated a longwall identified as "the J-2,"[6] which had a headgate serving as the main entrance through which the crew entered, and a tailgate serving as an airflow return and as an additional escape route from the longwall face. Tr. 19:16-21, 20:17-18. The height of the Mine roof varied but was on average 8 to 9 feet high. Tr. 20:8-11.

Inspector Yarko conducted an E08 noninjury accident inspection at the Mine on Dec. 13, 2022, under Event No. 6920805 for the "possibility of a roof fall on the J-2 longwall," Tr. 20:15-18, and he identified Sec. Ex. 4 as his inspection notes from that day. Tr. 20:19 – 21:12; 23:11-15; Sec. Ex. 4. He returned the next day, Dec. 14, 2022, and upon arrival, issued two citations (Citation No. 9705669 and the contested citation, **Citation No. 9705670**) under Event No. 9620805. Tr. 21:17-21; 34:11-19; Sec. Ex. 2. He then conducted an E01 inspection under a new event number (Event No. 6916737). Tr. 22:3-22; Sec. Ex. 2. Inspector Yarko identified Sec. Ex. 2 as his inspection notes from Dec. 14, 2022, Tr. 23:11-15,[7] and explained the difference in coding contained thereon: "the E08 [on Dec. 13, 2022] was due to issuance of the roof fall on the tailgate [of the J-2 longwall], and then I switched over to an E01 [on Dec. 14, 2022] to conduct normal inspections for the E01 event . . . open at the mine for that quarter." Tr. 22:18-22. Thus, he issued **Citation No. 9705670** on the morning of Dec. 14, 2022, under the Event Number associated with the E08 inspection conducted on Dec. 13, 2022, before switching to an E01 inspection under a new event number.

[5] Inspector Yarko had worked for Freeman United, MaRyan Shay, and Prairie State Generating Company. Tr. 18:2-7.

[6] As explained *infra*, the Mine had also operated a longwall known as the "J-1." *See e.g.*, Tr. 73:21 – 75:5.

[7] Sec. Ex. 2 contains two separately numbered sets of inspection notes dated Dec. 14, 2022. The first set (MSHA-016 to MSHA-020) contains 14 numbered pages, bears Event No. 6920805, documents the *issuance* of Citation No. 9705669 and **Citation No. 9705670**, and notes on page 14, "Changed from the E08 Event to E01 Event, hand delivered these citations to the mine operator today when I arrived at the mine for E01 inspection." Sec. Ex. 2, first set, page 14. The second set (MSHA-022 to MSHA-027) contains 16 numbered pages, bears Event No. 6916737, documents the *termination* of **Citation No. 9705670** and Citation No. 9705669, the extension of Citation No. 9632675, and the issuance of Citation No. 9705671. Sec. Ex. 2, second set.

b. Direct Examination of Inspector Yarko: E08 Inspection

On Dec. 13, 2022, Inspector Yarko arrived at the Mine at 7:45 AM and informed Moore he would conduct an E08 inspection. Tr. 24:1-4, 33:5-7. Inspector Yarko travelled with Moore and a miners' representative on the J-1 gate road, which was also tailgate Entry No.1 for the J-2 longwall. Tr. 24:5-12. Inspector Yarko issued Order No. 9705667 under Section 103(k) of the Mine Act for the roof fall he observed on the J-1 gate road/J-2 tailgate at Entry No. 1, Crosscut 41 to 42 ½. Tr. at 25:2-14, 17-18; Sec. Ex. 4, at 14; Sec. Ex. 3.[8] That order provided:

> An unplanned roof fall has occurred at this mine in the J-1 gate road Entry #1, Crosscut #41-42.5 and the J-2 Longwall Section MMU 017. This area is at the active J-2 longwall tailgate and face where coal is being extracted. This order is being issued, under Section 103(k) [of the Mine Act], to assure the safety of all persons at this operation. This order is also being issued to prevent the destruction of evidence which would assist in investigating the cause or causes of the accident. It prohibits all activity in the affected area, until MSHA has determined that it is safe to resume normal operations. The order applies to all persons engaged in the recovery operation. The operator is required to submit and receive approval for an action plan to restore the area.

Sec. Ex. 3 (hereinafter the "103(k) Order").

After issuing the 103(k) Order, Inspector Yarko travelled to the headgate of the J-2 and walked the estimated 1000-foot length of the J-2 longwall face from the headgate to the tailgate, taking air readings along the way. Tr. 26:9-17. He also examined the roof fall he had just observed on the J-1 gate road/J-2 tailgate from the perspective of the J-2 longwall face, noting fall that extended along the face. Tr. 27:1-10; Sec. Ex. 4, at 21. He testified that, looking toward the tailgate from the J-2 longwall face, he could "see material that ha[d] fallen towards the face area of the shields." Tr. 28:14-20. In his inspection notes, he drew a diagram depicting the fall he observed extending from Shield 176 (i.e., the shield immediately adjacent to the tailgate) to

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[8] Section 103(k) of the Mine Act, 30 U.S.C. § 813(k) provides:

> In 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, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

While Order No. 9705667 is not at issue, it provides important context for the contested citation. I note also that Inspector Yarko's inspection notes from Dec. 13, 2022, document the issuance and termination of Citation No. 9705666 (involving a loose rib), also written during the E08 inspection at the Mine. Sec. Ex. 4, at pages 5-10.

Shield 166 along the face and made a handwritten note indicating "[f]all of face from T.G. [tailgate] to Sheild 145." Tr. 27:4-6, 29:5-10, Sec. Ex. 4, at 21.

Inspector Yarko returned to the surface and inspected the J-2 On-Shift Examination record book. Tr. 29:13 – 30:8; Sec. Ex. 11 (On-Shift Examiner's Reports, dated Dec. 7, 2022 – Dec. 14, 2022). He issued Citation No. 9705668 because those records did "not show a hazardous condition record for the section tailgate egress plan." Tr. 30:16 – 31:2 (further explaining "the record book showed that the [tailgate] section is [on] egress, but there is no hazardous condition in the records [identifying] the reason . . . why" the tailgate section was on egress); *see also* Sec. Ex. 4, at 23-28(1).[9]

Inspector Yarko then reviewed the Action Plan which the Mine had submitted to correct the hazard identified by the 103(k) Order and modified the 103(k) Order to allow implementation of the Action Plan which aimed to provide "[a]dditional support of the roof." Tr. 31:18 – 32:15, Sec. Ex. 4, at 28(2); Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022).[10] The Action Plan, which contained a 1-page textual description and a 1-page map of the pertinent area, had two phases:

Phase 1

1. Props and/or timbers (8" x 8" or 6" by 6") will be installed as shown on the attached map working from outby and supporting the way inby.

2. Pre-shift examinations of the J-1 #1 Entry, approximately two (2) crosscuts outby the longwall face, will be required until a t-split examination can be made from the J-2 Longwall face.

3. Once the twelve (12) – 8" x 8" or twenty-four (24) – 6" x 6" props and/or timbers have been installed, checked by MSHA, and a pre-shift examination performed in the J-1 #1 Entry, production may resume on the J-2 Longwall.

[9] Respondent did not contest Citation No. 9705668. Egress is discussed in detail *infra*, Section B.1.e. I also note that Inspector Yarko's inspection notes from Dec. 13, 2022, contained two pages identified as page 28. I use 28(1) and 28(2) to distinguish between them.

[10] "Crosscut" and "XC" for Crosscut are used interchangeably by Inspector Yarko and the Mine in pertinent exhibits.

Phase 2

1. Pumpable cribs will be installed as shown on the attached map to a minimum of XC 41.

2. Additional supports will be installed in the intersection of XC 41 as shown on the attached map.

3. Once the t-split examinations can be made from the J-2 Longwall face normal operations will resume.

Sec. Ex. 7, at 2.[11] The Action Plan's 1-page map depicted both existing and proposed additional pumpable cribs (with already compromised pumpable cribs marked by an X), as well as existing and proposed props or timbers (with already compromised props marked by an X). Sec. Ex. 7, at 3. All of the supports (existing, compromised, and proposed) were clustered in the area of Entry No. 1, Crosscut 42 to 42½ with existing and proposed pumpable cribs also shown extending outby to Crosscut 41 and beyond. *Id.*

After concluding the E08 inspection, Inspector Yarko held a post-inspection conference with Moore and the miner's representative, informing them of the 103(k) Order and the two citations he had issued that day. Tr. 32:18 – 33:1; Sec. Ex. 4, at 29. He also gathered comments, including Moore's comment that Moore did "not agree with this 103(k) Order referring to the roof fall" and "didn't agree that it [i.e., the condition prompting the order] was a roof fall." Tr. 33:14-20, Sec. Ex. 4, at 29.

c. Direct Examination of Inspector Yarko: Two Additional Citations Issued, Plus the Switch to E01

Inspector Yarko returned to the Mine the next day (i.e., Dec. 14, 2022), and upon arrival, issued two citations under the Event Number associated with the prior day's E08 inspection: **Citation No. 9705670** under 30 C.F.R. § 75.202(a) and Citation No. 9705669 under 30 C.F.R. § 50.10(d) for the Mine's failure to contact MSHA within 15 minutes of the unplanned roof fall.[12] Tr. 34:1-19; Sec. Ex. 2, first set, 2-13. **Citation No. 9705670** provided:

> 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. A roof fall is present at the J-2 Longwall

[11] A copy of Sec. Ex. 7 is attached to this Decision and Order as Attachment A.

[12] Citation No. 9705669, which was settled as part of this docket, *see* Amended Decision Approving Partial Settlement (Oct. 18, 2024), provided in pertinent part: "The operator has neglected to inform MSHA of notification for an unplanned roof fall at the J-2 Longwall Section MMU 017 Tailgate/Face and the J-1 gate road Entry # 1, Crosscut #42½." Petition for Assessment of Civil Penalty, at 86.

> Section MMU 017 and J-1 gate road Entry #1, Crosscut # 42½. The section has the[ir] egress plan active and an action plan is in place.
>
> Standard 75.202(a) was cited 79 times in two years at mine 0102901 (79 to the operator, 0 to a contractor).

Sec. Ex. 1; Tr. 40:8-14.[13] In his inspection notes for Dec. 14, 2022, first set, documenting the issuance of **Citation No. 9705670**, Inspector Yarko made a drawing (hereinafter "Page 9 drawing") depicting the roof fall he had observed the day before. Tr. 35:1-8; Sec. Ex. 2, first set, at 9. *See also* Sec. Ex. 4, at 14 (inspection notes from Dec. 13, 2022, containing a similar drawing). As he explained: "the Page 9 drawing shows the J-1 gate road Entry 1 from Crosscut 41 going up to 42, then to 42 and a half where the longwall face tailgate and the roof fall occurred." Tr. 35:14-17.

Inspector Yarko's Page 9 drawing contained circles representing "pumpable cans or cribs" (also known as "J-cans") which he explained provided "additional roof supports for the tailgate." Tr. 36:5-10; 36:13-18 (further describing a pumpable can as "like a nylon film bag" extended "from the floor to the roof" and filled "with a pumpable material . . . to make it solid for the roof support."), Sec. Ex. 12 (four photos of pumpable cans); Tr. 36:19 – 37:6 (identifying the photos).[14] Referring to his Page 9 drawing, Inspector Yarko testified:

> four [pumpable] cans *near the [roof] fall* were crushed out or beginning to fail. They were starting to fail and being crushed by the weight of the fall, along with it appears to be one crushed and split eight-by-eight prop or wooden timber [depicted on the drawing by "the box with an X in it."]

Tr. 37:20 – 38:4 (emphasis added), 38:5-8. While he agreed it would be typical to use pumpable cans in the tailgate, Tr. 38:9-12, Inspector Yarko explained that the crushing of a pumpable can indicated "failure of the roof[.]" Tr. 39:11-14. *See also* Tr. 39:15-21 ("the cans are showing failure due to the stress of the roof falling . . . they're not holding up the roof as intended.") Inby the crushed cans, Inspector Yarko observed "a failure of the roof and [a] blocking [of] the tailgate." Tr. 42:20-21. *See also* Tr. 43:2-5 (testifying he observed "[f]ractures in lamination in the roof allowing separation. And the roof support not holding and maintaining the roof. There's failures in the roof.")

d. Direct Examination of Inspector Yarko: **Citation No. 9705670**

Inspector Yarko issued **Citation No. 9705670** under Section 75.202(a) "[d]ue to the cans that are set in place to protect the roof from falling, the failure of those *and* blocking the tailgate from egress." Tr. 41:4-16 (emphasis added). He designated the gravity as "reasonably likely" because he deemed it "reasonably likely that the roof failure[,] . . . if persons were back there

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[13] Section 15 (Area or Equipment) was left blank on **Citation No. 9705670**.

[14] *See also* Tr. 83:18 – 84:2 (Inspector Yarko explaining on cross-examination that he considers pumpable cans and pumpable cribs to be the same thing).

conducting normal work such as air readings or examinations, that an accident were to occur . . . of falling material from the roof." Tr. 41:17 – 42:14; Sec. Ex. 1. He designated the injury as "lost workdays or restricted duty" because he anticipated injuries from a roof fall to be "[a]t the minimum, lost workday, restricted duty due to falling material" and "bumps, bruises, scrapes, broken bones, if not . . . permanent or fatal injuries." Tr. 42:9-14. He designated the violation as "significant and substantial" based on:

> the reasonable likelihood of the injury – persons are back there working and conducting examinations, air readings, proper installing of additional supports, whatever normal mining conditions or what operator tasks would have been – that it was reasonably likely that lost workdays, at a minimum, were to occur from the failure of the roof and falling material.

Tr. 43:6-18; Sec. Ex. 1. He designated the negligence as "moderate" because "the operator did at the time comply with the roof control plan by setting and installing cans along with the original roof support[,] a primary support for roof bolts. . . . It was supported before the failure happened per plan." Tr. 43:19 – 44:9, Sec. Ex. 1 (**Citation No. 9705670** providing "The section has th[eir] egress plan active and an action plan is in place.")

Inspector Yarko designated the number of persons affected as 07 and testified the number would include "persons on the longwall . . . the shearer operators, shield pullers, additional labor, cleaning, maintenance, foreman, and also . . . whoever the operator designates to conduct the air reading on the tailgate side and examine." Tr. 44:10-20; Sec. Ex. 1. He explained a miner could be in that area of tailgate Entry No. 1 to conduct a weekly examination "due to it being a return air course" and because "you would have to conduct a T-split air reading off of the longwall as part of an air reading for pre-shift/on shift." Tr. 45:1-7. He described a T-split reading as an "air reading in the tailgate to ensure that the air coming from the longwall goes back into the bleeder and also goes back into Entry [No.] 2 to provide air sweeping into the bleeder," Tr. 45:16-19, and said such an air reading would need to be taken "[t]ypically once or twice a shift, depending on how pre-shifts are set up, or as needed, due to ventilation changes or just to double-check" for "low air anywhere else along the longwall." Tr. 45:20 – 46:4, 4-6 ("Minimum two . . . It just varies per situation."). *See also* Sec. Ex. 7, at 2 (Phase 1, No. 2, referring to "Pre-shift examinations of the J-1 #1 Entry").

The termination date for **Citation No. 9705670** was identified as Dec.14, 2022, 0900, i.e., the same day as issuance. Sec. Ex. 1.

e. Direct Examination of Inspector Yarko: Egress

Tailgate Entry No. 1 of the J-2 longwall was on egress on Dec. 13 and Dec. 14, 2022, when Inspector Yarko conducted his inspections. He described "egress" as a term used in roof control plans which "typically means that the passage of escape is blocked and unsafe through the tailgate" such that miners can "only leave the longwall area face through the headgate." Tr. 47:1-5. He identified Sec. Ex. 10 as the Mine's approved Roof Control Plan, and Section 9.7 therein as related to "egress." Tr. 48:5-15. That section provided:

9.7 Longwall Egress Procedures

1. When a ground failure prevents travel out of the tailgate side of the section, miners will be:

    a) Notified that the tailgate is blocked and the egress plan will remain in effect until the tailgate is cleared.

    b) Re-instructed in escapeway and escape procedures.

    c) Re-instructed in the use and availability of self-contained self-rescuer devices (SCSR), located along the face, at the tailgate and headgate areas.

    d) Re-instructed in the use of the two-way communication systems located along the panline from the headgate to the tailgate drive and from the headgate to the communication office on the surface.

    e) Nobody will be down wind of the shearer while it is cutting.

    f) A mantrip or other means of mechanical transportation will be provided at the long wall section.

    g) Additionally, the air entering the longwall section will be monitored and evaluated. A supervisor or a qualified person designated by the supervisor will monitor the air entering the longwall section with a hand held CO detector or monitored with low level CO sensors spaced every 1,000 feet.

Sec. Ex. 10, at 15. Inspector Yarko testified that when the tailgate was on egress, air readings of the T-split would still need to be taken to ensure "proper air flow and directional air flow." Tr. 49:12-17. He did not know how long the tailgate had been on egress but recalled issuing a citation in October 2022 "due to loose roof bolts not secured to the roof on the tailgate." Tr. 50:7-12. *See also* Tr. 50:13-17 ("[T]hey did not have anything in their exam books about being on the egress, so I issued a citation on that, putting them on egress due to the loose roof bolts being over the tailgate, not supporting or controlling the roof in that aspect.") Asked how a mine could exit egress, Inspector Yarko testified:

> . . . typically, in longwall, you would advance forward and continue mining while monitoring that tailgate, or I suppose on a long term, you could rehabilitate the area and clean it up and rebolt it and go through that extensive process. But typically, you would just mine through that area to get the fall behind you and the gob behind the shield line.

Tr. 51:3-13.

f. Direct Examination of Inspector Yarko: Post-Citation Events

As documented in Inspector Yarko's inspection notes, **Citation No. 9705670** was terminated on Dec. 14, 2022, at 9:20 a.m. because the Mine had "completed phase 1 of the action plan submitted on 12-13-2022 to support the roof fall at the J-2 Longwall Section MMU 017 and J-1 gateroad, Ent. 1 XC 42." Sec. Ex. 2, second set, at 4.

Inspector Yarko returned to the area of Entry No. 1, Crosscuts 41-42 ½ numerous times after issuing **Citation No. 9705670**. Tr. 52:9-12.[15] At the Hearing, he testified using a map of area upon which he had made additional handwritten notes during inspections conducted on Jan. 6 and Jan. 30, 2023. Sec. Ex. 14 (diagram bearing handwritten dates Jan. 6, 2023 & Jan. 30, 2023, labelled "J-1 E1 XC 41-42.5 Additional Floor to Roof Supports"). Using that map, he testified that the roof had subsequently fallen on tailgate Entry No. 2 as well as along the Crosscuts between tailgate Entries Nos. 1 and 2.[16] Tr. 53:6-9; Sec. Ex. 14. The roof had also fallen on Entry No. 1 inby the J-2 longwall face at the 42½ area, at the point where a cluster of props was depicted on the map. Sec. Ex. 14. Inspector Yarko explained that, in blue handwritten callouts added to the map, he marked the props he observed on Jan. 6, 2023, to be "damaged, busted, split, and failed." Tr. 53:12-18, Sec. Ex. 14. In red handwritten callouts added to the map, he marked the props he observed on Jan. 30, 2023, to be "mushroomed out, bowed, split" or "busted."[17] Tr. 53:19 – 54:2, Sec. Ex. 14. The blue circles on the map depicted existing cans and the reddish/pink circles depicted additional proposed cans. Tr. 54:9-13. Based on observations he made on Jan. 6, 2023, and Jan. 30, 2023, Inspector Yarko: "didn't feel safe back there, so [he] didn't think that a miner should have to go back there, whether it be a laborer, management, state and federal [inspectors], anybody. It would be too unsafe." Tr. 61:8-16. He "proposed to the

[15] Respondent's counsel characterizes Inspector Yarko's testimony related to inspections conducted *after* Dec. 14, 2022 (i.e., the day **Citation No. 9705670** was issued and terminated) as irrelevant. Resp. Br. at 13 n.12. I deem the following testimony relevant for the limited and specific purpose of providing context for my assessment of "work or travel" as required by Section 75.202(a) at the time **Citation No. 9705670** was issued. I also note that, in admitting Sec. Ex. 8 (MSHA Approval Letter for Action Plan Update, dated Feb. 3, 2023), Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2023) and Sec. Ex. 14 (diagram, bearing handwritten dates, Jan. 6, 2023 and Jan. 30, 2023 and containing Inspector Yarko's handwritten callouts), I overruled the objection of Respondent's counsel that these exhibits were irrelevant as involving events occurring after **Citation No. 9705670** was issued and terminated. I deem these exhibits relevant for the same limited and specific purpose of providing context for my assessment of "work or travel" at the time **Citation No. 9705670** was issued. *See infra*. Analysis, Section A.3.

[16] The map contained in Sec. Ex. 14 depicted only Crosscuts 41 and 42 in full between Entry No. 1 and Entry No. 2, with yellow highlighting (depicting fallen roof) extending beyond Crosscuts 41 and 42 both inby and outby along Entry No. 2.

[17] As Inspector Yarko explained, he took the same map "back to check after [the Mine] had put additional supports in," Tr. 53:19-22, differentiating between his observations on Jan. 6, 2023, and Jan. 30, 2023, by using two different colors, blue and red. *See* Tr. 53:10 – 54:2

district" that the operator "should come up with . . . a barrier, barricade" to create "an evaluation point . . . that would be the last point that the examiner can go under the safe and stable roof." Tr. 59:5-11.

Inspector Yarko testified that Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2023), consisting of a transmittal letter from Respondent to MSHA, a 1-page "Action Plan Update" and a 1-page map labelled "J-1 E1 XC 41-42.5 Additional Floor to Roof Supports," contained an Update to the original Action Plan that had been submitted on Dec. 13, 2022, in response to the 103(k) Order. Tr. 59:20 – 60:1. He read from the "Action Plan Update" proposed by the Mine:

> 1. A Physical Barrier will be installed in the J-1 #1 Entry as close as practicable to the outby corner of the Crosscut 42 intersection.
>
> 2. Pre-shift and on-shift examinations of the J-1 #1 Entry, with records of these examinations recorded in a book on the surface, will be made to the Physical Barrier outby the Crosscut 42 intersection and approximately two (2) crosscuts outby the longwall face, until a t-split examination can be made from the J-2 Longwall face.

Sec. Ex. 9, at 2; Tr. 60:9-20.[18] Inspector Yarko explained that the proposed physical barrier would be the "evaluation point," Tr. 60:21, and confirmed the Action Plan Update dated Feb. 3, 2023, related to conditions he had observed during his inspections on Jan. 6 and Jan. 30, 2023, when he added the callouts to the map contained in Sec. Ex. 14. Tr. 60:22 – 61:7. Prior to the issuance of that Action Plan Update, miners were able to, and would have had to, travel in the area to conduct air readings, perform examinations, and to "apply additional floor to roof support or just roof support." Tr. 66:3-8; 58:22 – 59:4 ("the weekly examiner, for instance, he has to conduct an examination in its entirety, which means he would have to go through all the way up [the tailgate, i.e., Entry No. 1] until he could . . . [g]o no more"). After the Action Plan Update, dated Feb. 3, 2023, miners performing such tasks would need to travel only to the evaluation point provided by the physical barrier placed "as close as practicable to the outby corner of the Crosscut 42 intersection." Tr. 66:9-12.

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[18] The Action Plan Update also provided:

> 3. A breaker row of a minimum of three (3) cribs and/or pumpable cribs and two (2) rows of three (3) timbers or props will be installed in the J-1 #1 Entry as close as practicable to the Crosscut 42 intersection. After these are installed, a new Physical Barrier will be made at the outby edge of the breaker row.

Sec. Ex. 9, at 2. On the map attached to Sec. Ex. 9, I understand the callout for "existing Physical Barrier" to refer to the barrier referenced in No. 2 of the Action Plan Update and in Inspector Yarko's testimony; I understand the callout for "proposed Physical Barrier" to refer to the "New Physical Barrier" to be placed at the "outby edge of the breaker row" referenced in No. 3 of the Action Plan Update. In other words, the plan was to move the evaluation point further outby the continuing deteriorating roof in tailgate Entry No. 1.

g. Cross-Examination of Inspector Yarko

On cross-examination, Inspector Yarko confirmed he had never worked at a longwall mine prior to becoming an MSHA inspector. Tr. 67:17-19. He also confirmed that an out-of-district inspector with the initials "RT" inspected the Mine on Dec. 11, 2022 (i.e., two days before Inspector Yarko's E08 inspection) and had produced typewritten inspection notes. Tr. 69:1 – 70:12, R-I.[19] Inspector Yarko acknowledged that these inspection notes stated "Reviewed pre shift J2 longwall NVO," and defined "NVO" as "No violations observed." Tr. 71:14-22. He also agreed these notes stated: "Traveled the face of the longwall to the tailgate. The tail gate has been under egress since October 25th [, 2022]. The top around the tailgate is down which does not allow entry into the tailgate entry. The operator is following the roof control plan when it comes to Egress. NVO." Tr. 72:1-10, R-I. Inspector Yarko believed these inspection notes referred to the same area he inspected two days later. Tr. 72:11-13.

The Mine had previously operated a longwall known as "the J-1," but Inspector Yarko had never seen it operate. Tr. 73:9 –74:1. He acknowledged the Mine's two longwalls must have operated simultaneously at some point because he knew the Mine's Roof Control Plan dictated "a distance they had to stay apart;" he also knew the J-1 had "finished up." Tr. 74:2 – 75:5.

Inspector Yarko agreed the tailgate is not part of the longwall face, at least "not until the longwall shearer cuts through the block of coal into the tailgate," and that the T-split is not on the longwall face. Tr. 75:6-19. He also confirmed that upon reviewing the Pre-Shift Examinations from the J-2 longwall on Dec. 13, 2022, he issued a citation because those exams "didn't list a hazardous condition in the record book for the egress." Tr. 75:20 – 77:11.

Vis-à-vis the drawing Inspector Yarko had made in his inspection notes from Dec. 13, 2022, depicting fall on the shields, Sec. Ex. 4 at 21, he testified shields do provide "roof support for the longwall due to the longwall doesn't put up roof bolts or primary supports like a continuous miner section." Tr. 78:3-21. He also agreed that shields provide roof support for miners "from the shield to the pan line or to the shearer" as they work and walk along the face provided there are no gaps and the shields are not off-angle. Tr. 79:1-10. He agreed there are no roof bolts in the roof of a longwall face and that the expectation in longwall mining is that the roof will fall "behind the shields." Tr. 79:11-21 (twice stressing that the expectation is for roof to fall "behind the shields.")

Inspector Yarko confirmed he had performed other accident investigations in his career and agreed 30 C.F.R. § 50.2 defines "accident" and includes a provision pertinent to roof falls.

[19] Inspector Yarko also acknowledged these inspection notes bore Supervisor Initials ("TC") and date "12-20-22." Tr. 70:13-15. He identified Thomas Chatham as the then-field office supervisor and agreed it would be common for a field office supervisor to review inspection notes. Tr. at 70:18 – 71:10. *See also infra* n. 25.

Tr. 80:4-11.[20] He acknowledged "anchorage zone" refers to roof bolts ("that's a part of this, yes"), but also refers to other criteria for a roof fall including "impairs ventilation" or "impedes travel [passage]." Tr. at 80:15 – 81:3. Inspector Yarko also agreed that egress made it so that miners could not get off the face of the J-2 longwall into the tailgate and that MSHA had approved a Roof Control Plan for the Mine containing an egress provision to account for times when the tailgate was impassable. Tr. 81:4-21; Sec. Ex. 10 (containing § 9.7 (Longwall Egress Procedures)).

Inspector Yarko acknowledged he had written by the drawing contained on page 21 of his inspection notes from Dec. 13, 2022: "Fall of face from T.G. [tailgate] to Shield #145. Roof/face [is] glued from approximately Sheild 120 to T.G. (#176)" and explained that "glued" meant the Mine had "put an adhesive compound into the roof . . . to bond the roof together; to glue it, essentially." Tr. 82:11-19; Sec Ex. 4, at 21. He agreed gluing would be a relatively common occurrence in longwall mining "if you have failures of the roof" or "for preventative measures," Tr. 82:20 – 83:6, and testified the time required to glue "[d]epends on the surface area of the roof you're trying to glue and how big the voids are and how wide it is." Tr. 83:11-15.

Inspector Yarko agreed pumpable cans may be placed in an area adjacent to where longwall mining is occurring because such cans are "designed to help hold the roof up," including when it is giving way. Tr. 84:6-20 (clarifying "I suppose you could say that, yes" vis-à-vis Respondent counsel's use of the phrase "giving way").

Inspector Yarko reiterated that he did not know what the conditions were to activate egress because such was not identified in the Mine's examination book. Tr. 85:11-13. He also acknowledged designating negligence on **Citation No. 9705670** as moderate because he considered egress to be a mitigating circumstance and identified it as such in his inspection notes. Tr. 85:1 – 86:5; Sec. Ex. 4, first set, at 13; *see also* Sec. Ex. 1.

Inspector Yarko terminated **Citation No. 9705670** soon after issuing it on Dec. 14, 2022, at 9:20 AM, acknowledging the termination in his inspection notes. Tr. 87:1-11; R-J(3), at 4; *see also* Sec. Ex. 2, first set, at 1, 4 ("Action taken: The operator has completed phase 1 of the [A]ction [P]lan submitted on 12-13-2022 to support the roof fall at the J-2 Longwall Section MMU 017and J-I gate road, Ent. 1, XC 42").

Finally, Inspector Yarko confirmed that, during his inspection on Dec. 13, 2022, after inspecting tailgate Entry No. 1, he exited the tailgate, entered and went up the headgate, entered the J-2 longwall face from the headgate and walked the length of the face. Tr. at 87:20 – 88:5. He could not "get to the tailgate itself" from the face because "it was blocked." Tr. 88:6-10.

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[20] The specific provision implicated by this line of questioning provides:

> An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage[.]

30 C.F.R. § 50.2(h)(8).

h. Redirect, Recross, and Further Redirect of Inspector Yarko

Inspector Yarko confirmed on redirect examination that he returned to the area underlying **Citation No. 9705670** to conduct inspections on Jan. 6 and Jan. 30, 2023, and knew that, in the interim, the J-2 longwall face had advanced not at all or "very little." Tr. 89:8-13; Sec. Ex. 14. He assumed the failure to advance was "due to the failure of the roof," Tr. 89:14-21, and testified it was unusual for a longwall not to advance. Tr. 90:3-8. He explained a mine would want to keep a longwall moving "[s]o the failure of the roof remains behind the shields as it's intended to in any longwall mine" and opined that leaving a longwall idle creates risk because "you're allowing the roof to continue to be unstable and fall where the shields and the miners are working[.]" Tr. 90:10 – 91:2. Asked if a roof fall would impact surrounding roof, he testified that when roof falls are occurring in adjacent areas, the roof "typically deteriorates due to the pressures." Tr. 91:5 – 92:11.[21] Inspector Yarko also explained that had normal mining been occurring, the Mine could have lifted egress by "getting through the area that [triggered] egress . . . and having that [area] back behind the shields, by continuing to mine, [by] hopefully getting away from that bad area[,] getting in front of it. Opening up that tailgate to support the roof, [and provide] safe access." Tr. 92:20 – 91:3. Asked to examine Sec. Ex. 11 (On-Shift Examiner's Reports from Dec. 7-14, 2022), Inspector Yarko testified he understood "TG under egress" and "mining through" to mean the Mine was "trying to mine through that fall area. . . . trying to advance the longwall." Tr. 93:20 – 94:8. *See also* Tr. 94:9-13 (confirming his understanding of how the Mine could lift egress as consistent with his understanding of "mining through.")

On recross examination, Inspector Yarko acknowledged **Citation No. 9705670** was terminated "[d]ue to Phase 1 [of the initial Action Plan] being implemented" weeks before he conducted subsequent inspections on Jan. 6, 2023, and Jan. 30, 2023, and added callouts and notes to the map contained in Sec. Ex. 14. Tr. 94:20 – 95:8, 96:2-5. He also acknowledged **Citation No. 9705670** referred to Entry No. 1, Crosscut 42½ (as opposed to Entry No. 2, Crosscut 41, *see supra* n. 21, about which he had testified on direct examination). Tr. 95:9 – 96:1.

On further redirect examination, Inspector Yarko testified that during inspections on Jan. 6, 2023, and Jan. 30, 2023, the Mine was still having an issue with control of the roof in the area underlying **Citation No. 9705670**. Tr. 100:12-16.

[21] As part of this testimony, Inspector Yarko explained the shaded areas on the diagram contained in Sec. Ex. 14 represented roof fall on Crosscuts 41 and 42 in Entry No. 2 heading toward Entry No. 1 and explained that the stopping between Entries Nos. 1 and 2 at Crosscut 41 was also crushing, indicating failure of the roof along Crosscut 41 as it headed toward Entry No. 1. Tr. 91:10 –92:6; Sec. Ex. 14.

2. Longwall Face Boss Piper

a. Direct Examination of Piper

Piper, who holds Alabama Mine Foreman papers and has worked in the mining industry for 16 years, was responsible at the Mine for "mining operations on the longwall[,] taking ventilation readings and preshifting." Tr. 107:17 – 108:2, 10-14. At the time of the hearing, he had held the Longwall Face Boss position for 3 years, including in December 2022. Tr. 108:3-9.[22]

Piper described the Mine's longwall as a "thousand-foot coal block" mined by working outby which he characterized as "modern-day retreat mining." Tr. 108:20 – 109:1. He explained a longwall is developed by having "two miner sections" (i.e., a headgate and a tailgate) that "drive units" with "the thousand foot coal block between them." Tr. 109:2-11. Using R-E(1), he identified the J-2 longwall as having three headgate entries (depicted at the top) and three tailgate entries (depicted at the bottom), with tailgate Entry No. 1 located closest to the J-2 longwall face. Tr. 109:12 – 110:11. Piper labelled the mined-out area as "gob . . . behind the shield line," Tr. 110:15-22, and testified that as a longwall advances "the roof and the gob come[] down behind . . . to keep ventilation on the face." Tr. 111:21 – 112:2. He also testified that headgate Entry No. 3 and tailgate Entry No. 1 "will come down[] as well, as you mine the coal block out." Tr. 112:8-15.

Asked if there are any particular measures for roof support taken in the entries that border a longwall, Piper testified "[t]he only time that you would have any extra measures is if your top comes past the shield line, and then you would go under what would be an egress plan." Tr. 112:18 – 113:2. Asked if there are measures for roof support placed in the tailgate entry as a longwall is being developed, Piper identified the roof control plan, bolting pattern, and "added support which is pumpable cribs." Tr. 113:3-9. He described a pumpable crib as "a round cylinder, concrete filled," placed "on ten-foot centers, double rope," Tr. 113:11-13, and testified they are made special for entries bordering a longwall and are designed to have a weight rating, meaning they are "supposed to help keep the weight distributed out from in front of you," allowing "the area to support more loaded weight." Tr. 113:14 – 114:3.

Piper testified the Mine was operating two longwalls (the J-1 and the J-2) in the fall of 2022, situated such that the J-1 headgate entries served as the J-2 tailgate entries. Tr. 114:4 – 116:2; R-E(1).[23] He testified an egress plan is activated if conditions stop travel out of the tailgate entry and characterized such conditions as common in longwall mining because "your weight can shift, and your geological top conditions can actually . . . outrun your shield line." Tr. 116:5-17. He explained egress would be implemented by a pre-shift examiner or face boss making a report which identified the tailgate as on egress, thereby triggering added measures, including notification to the crew, provision of an emergency ride, and additional CO readings.

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[22] Thus, the events pertinent to **Citation No. 9705670** would have occurred when Piper was newly in this position.

[23] A copy of R-E(1) is attached to this Decision and Order, as Attachment B.

Tr. 117:2-8; 118:4-12. *See also* Sec. Ex. 10 at 15. He further explained that when the tailgate is on egress, it cannot be accessed from the longwall face and therefore the additional CO readings would be taken at the last shield (i.e., Sheild 176 for the J-2). Tr. 117:13-20. To lift egress, the Mine would need to "mine through the condition to outrun the bad area." Tr. 117:21 – 118:3.

Piper testified that, during a pre-shift exam, air readings measuring the "velocity of air coming down the face" would be taken at the headgate, midface and tailgate, and the "work area from the headgate to the tailgate" would be examined. Tr. 118:15 – 119:9. He explained "[y]our normal area for an air reading at the tailgate is not more than a hundred foot from the last shield and not less than 50 foot from the last shield" as per the Mine's ventilation plan. Tr. 119:10-22. Piper testified that because these air readings would be taken on the face, there is no reason to go into the tailgate for purposes of the pre-shift exam under normal conditions; thus, when the tailgate is on egress, the required pre-shift exam readings can still be taken. Tr. 120:9-19.

Piper testified tailgate Entry No. 1 was put on egress on Oct. 25, 2022, second shift, according to R-A(1), and was never taken off. Tr. 121:1 – 122:22. He identified R-E(2) (XC 42 – 42 ½ diagram) as depicting the "top [having] come down into the tailgate entry," and identified such as the condition which triggered egress. Tr. 123:13 – 124:3. He further testified R-E(2) depicted the J-2 longwall face situated at "Crosscut 42 and a half, 42 and a quarter," and explained the face never made it past Crosscut 42 on its way outby. Tr. 124:4 – 125:1.

Piper testified that once both longwalls were no longer mining, examinations of tailgate Entry No. 1 were performed weekly by an examiner travelling tailgate Entry No. 1 to Crosscut 42 where a date board sat in the intersection of Entry No. 1 and Crosscut 42. Tr. 125:2-18. The examiner, who recorded his presence on the date board, was not required to travel further inby. Tr. 125:19 – 126:3. Piper testified that when the J-2 longwall was on egress no one from the longwall crew would be in the tailgate Entry No. 1 because "[i]t's under egress. You're unable to make it there." Tr. 126:4-10.

Piper, who worked on the J-2 longwall in the days before Inspector Yarko issued the 103(k) Order on Dec. 13, 2022, testified roof conditions had not changed in the time leading up to the order. Tr. 126:11-20. Examining production reports contained in R-G for Dec. 12, 2022, and Dec. 13, 2022 (owl and day shifts), Piper testified the tailgate end of the J-2 longwall face had not advanced. Tr. 127:12 – 130:8; R-G.[24]

b. Cross-examination of Piper

On cross-examination, Piper testified the J-2 longwall did not stop producing coal, although it did encounter a "delay" or a "slow[ ] down" due to "geological conditions that hindered [the Mine] from producing." Tr. 132:19 – 133:6, 134:2-6. He further testified such conditions were encountered in October 2022 and never resolved, although the Mine tried "to

[24] Piper explained he knew this because the starting and finishing footage numbers for the J-2 longwall at tailgate Entry No. 1 were the same, i.e., 6325 for all four shifts. Tr. 128:2-14; R-G.

mine through" them. Tr. 133:7 – 134:1, 18-19; *see also* Tr. at 134:20 – 135:3 (Piper testifying the condition had not been mined through and normal production on the J-2 never resumed).

Asked to identify what initially placed tailgate Entry No. 1 on egress, Piper testified "[t]he top conditions at the tailgate," which he described as "[t]he top came down past your shield line, making it where you're unable to make it into the tailgate entry." Tr. 135:7-14. Piper opined such an occurrence was not unusual in longwall mining and that it was not generally unusual for such conditions to prevent resumption of production. Tr. 135:15-21. He also testified that, in his 16-year career, what happened on the J-2 longwall was the only time he had ever witnessed such conditions causing production to cease and never resume. Tr. 135:22 – 136:19.

Piper identified pre-shift examiner Gary Miles as having placed tailgate Entry No.1 on egress in October 2022. Tr. 136:20 – 137:5. Asked to identify the longest time he had ever seen a longwall section on egress, Piper identified the Mine's J-2 and testified that, typically, egress lasts "[a] couple shifts." Tr. 137:13-21. Asked to examine Sec. Ex. 11 (On-Shift Examiner's Reports from Dec. 7 – 14, 2022), which reports he had signed, Piper acknowledged "HS" (for Violation of Mandatory Health and Safety Standard) was checked next to "TG under Egress" and testified he should have checked "HC" (for Hazardous Condition) instead. Tr. 138:3 – 140:7.[25] Asked to identify what the hazardous condition would have been, Piper stated, "Your tailgate is under egress" and explained "[o]n a longwall . . . if your tailgate is blocked, there's only one way in and one way out" (i.e., through the headgate). Tr. 140:8-22.

Presented with R-E(1), Piper agreed tailgate Entry No. 1 served as a return air course, Tr. 141:18 – 142:5, and testified a return air course must be examined weekly in its entirety. Tr. 142:6-11. He explained that, assuming no issue with roof control on the longwall face, a weekly examiner would travel up tailgate Entry No. 1 to Crosscut 42, stopping before the face line which was halted at approximately Crosscut 42½. Tr. 142:12 – 143:10 ("They would travel to 42 because your face line being at 42 and a half, you wouldn't – you're not going to continue on into the gob."). He identified the distance between Crosscut 42 and 42½ as "less than a hundred foot." Tr. 143:19-22.

Piper testified that when **Citation No. 9705670** was issued, the tailgate was inaccessible from the J-2 longwall face, and that methane readings of the tailgate were taken from the last shield (i.e., Sheild 176). Tr. 144:9 – 145:3. He testified that if miners were travelling to the area between Crosscuts 41 and 42 to install additional supports, that area would need to be pre-shifted or on-shifted, Tr. 145:4-16, and said he knew of the Action Plan developed in response to the 103(k) Order, but not what it required. Tr. 145:17 – 146:3. Piper had been involved in implementing the Action Plan, explaining at Crosscut "41, travelling outby [to Crosscuts 40, 39, 38], we set two timbers against every stopping." Tr. 146:6-17.

[25] Piper acknowledged most of the On-Shift Examiner's Reports in Sec. Ex. 11, bearing dates from Dec. 7 –14, 2022, showed HS (and not HC) checked and testified there had been no discussion as to how to fill out these reports, "other than [the tailgate] needing to be on egress." Tr. 141:1-12.

Asked to identify conditions in tailgate Entry No. 2, Piper testified: "You had your T-split at [Crosscut] 42, and Entry [No.] 2 is the area not traveled from that point on[,]" meaning from "42 inby." Tr. 149:10-16. Piper did not recall roof conditions in Entry No. 2, Crosscut 42 outby. Tr. 149:17-19.[26] He agreed it would be important to keep the roof stable in tailgate Entry No. 1 so it could function as a return air course. Tr. 149:21 – 150:2.

c. Redirect and Recross of Piper

On redirect examination, Piper testified he did not believe placing the tailgate on egress constituted a violation of any kind, egress had been implemented consistent with the approved Roof Control Plan, and he had helped set timbers in tailgate Entry No. 1 in response to the 103(k) Order. Tr. 150:12 – 151:1. He identified the T-split as located at Entry No. 1, Crosscut 42, and described the T-split as "a point that your air leaves the face," explaining "in this situation, your return air split [with] [s]ome of it [going to Entry No.] 2 and the rest of it travel[ling] outby." Tr. 151:2-10. According to Piper, a person taking a weekly air course reading would not need to go inby the T-split, and that was why a date board had been placed at the intersection of Entry No. 1 and Crosscut 42. Tr. 151:11-16.

On recross examination, and referring to R-E(1), Piper confirmed the T-split was located at the intersection of Entry No. 1 and Crosscut 42, explaining the "T-split would be an open crosscut where . . . [t]he stopping was knocked out." Tr. 152:10 – 153:8; 153:11-17 (confirming that, as shown on R-E(1), Crosscuts 41, 40, 39 and 38 had stoppings depicted by a dark bar parallel to Entry No. 1). Piper testified the T-split, under the Mine's ventilation plan, was examined weekly and that such was the same as the weekly air course reading. Tr. 154:11-21.

3. Safety Supervisor Moore

a. Direct Examination of Moore

Moore, with 18½ years of experience in the mining industry, serves as the Mine's Safety Supervisor and, in that role, he escorts MSHA inspectors on Mine property, and assists with training, the work force, "tasks" and "whatever comes up." Tr. 156:15 – 157:7. Moore accompanied MSHA Inspector Tom Tulinowski at the Mine on an inspection conducted on Sunday, Dec. 11, 2022.[27] Tr. 157:8-20; 163:7-9. Specifically, he accompanied Inspector

[26] Due to placement of the J-1 and the J-2 longwalls, the J-2 tailgate Entry No. 3 was gob from the J-1. *See* R-E(1), Tr. 148:8-14.

[27] During cross-examination, Respondent's counsel had Inspector Yarko read from the inspection notes of "R.T." dated Dec. 11, 2022, and offered as R-I. Tr. 69:14 – 72:13, *see also supra* Section B.1.g. Counsel for the Secretary objected to the admission of R-I at that point, noting the lack of testimony offered as to who had created the notes. Tr. 96:22-16. Respondent's counsel, after identifying R-I as a document produced by the Secretary in discovery, promised to have the company escort from Dec. 11, 2022, offer testimony placing the notes in context. Tr.

(continued…)

Tulinowski to investigate a complaint on the J-2 longwall face, and they were able to reach the tail drive on the face,[28] but not the tailgate "[b]ecause of the – the roof shift where your mining process happens. The longwall had come to a halt, and the weight transfer transferred into the entry behind us and caught up and caused us to go under egress making the tailgate unpassable." Tr. 157:21 – 158:22. Moore explained tailgate Entry No. 1 was impassable due to material, including "rash gob," that had fallen, agreeing that such could be characterized as "material that falls in longwall mining." Tr. 159:5-12.

Moore took his own notes during Inspector Tulinowski's inspection, identified as R-F,[29] and explained that "Phone In: Bad top at L/W T/G" in his notes meant there had been a "phone in complaint on the E04, bad top on the longwall and the tailgate, and bad top at the tailgate." Tr. 160:11-22; R-F. Moore confirmed Inspector Tulinowski had found that complaint to be negative, Tr. 161:1-4, and further identified R-I as describing inspection activity consistent with what Moore also recalled and recorded. Tr. 162:2 – 163:1; *see also* n. 27.

Two days later, on Dec. 13, 2022, Moore accompanied Inspector Yarko on his E08 inspection, during which they travelled down tailgate Entry No. 1, investigated "that area," exited the tailgate, and then travelled to and down the J-2 longwall face. Tr. 163:10-22. Moore testified he and Inspector Yarko travelled tailgate Entry No. 1 to "[r]ight in about 42 crosscut," and observed the pumpable cribs placed in that area. Tr. 164:1-10. Asked to identify the condition of those pumpable cribs, Moore testified: "Some cribs were taking weight, as they're designed to do. Some of the ones back towards the tailgate where the weight had shifted were starting to yield . . . They'll mushroom out and let you know they are taking weight." Tr. 164:11-20. Asked if the pumpable cribs were still providing support, Moore testified: "Somewhat, yes." Tr. 164:21-22. He identified the pumpable cribs that had mushroomed as located "right inby [the] 42 area . . . [r]ight at the 42 crosscut area," Tr. 165:1-8, identified a distance of about 15 feet between Crosscut 42 and the halted J-2 longwall face, and said the "gob pile" was located another 5 feet beyond that. Tr. 165:9-16. Moore testified no one would ever go to where the gob pile was because "[t]hat's where we were mining through." Tr. 165:17-20.

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[27] (…continued)
97:19 – 98:21 ("I don't have the inspector testifying, but I do have the company escort testifying.") As Moore escorted Inspector Tulinowski, the implication is that R-I contains Inspector Tulinowski's notes. After Moore's testimony, I admitted Exhibit R-I over the Secretary's continued objection, Tr. 168:10 – 169:4, subject to my assessment of its probative weight. Tr. 170:2-4. *See also infra* Analysis Section A.2.

[28] Moore identified the tail drive as located "one or two shields in from the gob plate." Tr. 158:11-14.

[29] Moore took his own notes to identify the date, inspection type, inspector, escort, inspection progression, whether citations were issued, and "any compliance issues that needed to be addressed." Tr. 160:4-10. His notes identify another complaint investigated by Inspector Tulinoski on Dec. 11, 2022—described as shields "[n]ot having markings on them to prevent people from venturing underneath them"— which complaint was determined to be positive, but did not implicate the tailgate. Tr. 161:5-22.

After leaving tailgate Entry No. 1 and entering the J-2 longwall face from the headgate, Moore and Inspector Yarko walked the length of the face, stopping at the "tail drive area" because they could not access the tailgate. Tr. 165:21 – 166:8. Moore testified conditions had not changed as between his journey to that same area on the face on Dec. 11, 2022, with Inspector Tulinowski, and with Inspector Yarko two days later. Tr. 166:12-16. Moore testified he had expressed his disagreement with the 103(k) Order issued on Dec. 13, 2022, telling Inspector Yarko:

> we were following our [roof control] plan that was approved. Under our egress, whenever our tailgate gets a disturbance blocked, we mine through it. And we were following our plan. And I did not agree that a fall had occurred at all . . . [b]ecause it's normal mining practice. It falls in the sequence of mining. Whenever the weight transfer stops, it all catches with you. You have to continuously mine.

Tr. 167:3-14; 15-17 (Q: "An[d] is *that* what you were observing in the . . . Entry No. 1 tailgate entry? A: Yes, sir.") (emphasis added).

b. Cross-examination of Moore

On cross-examination, Moore agreed the area between the J-2 longwall face and tailgate Entry No. 1 was impassable and explained such was because material "[f]rom a normal mining condition" had fallen into tailgate Entry No. 1 from the roof. Tr. 170:16 – 171:2. He agreed the roof in Entry No. 1 is normally supported and that material from the roof is not supposed to fall on and block the tailgate. Tr. 171:5-11. He testified the material which had fallen had come from tailgate Entry No. 1, more specifically "from the shield line. It could have come from the shield line back," and that it had come from the roof. Tr. 171:20 – 172:8. Asked how high the material was when viewed from the face, Moore testified "[n]ine feet," extending from the floor to the roof. Tr. 172:12-19.

Moore confirmed he and Inspector Tulinowski did not travel in tailgate Entry No. 1 on Dec. 11, 2022; rather, they only went down the J-2 longwall face to view the tailgate from that vantage point. Tr. 173:21 – 174:9. Moore did, however, travel in tailgate Entry No. 1 with Inspector Yarko on Dec. 13, 2022, to "in and around Crosscut 42," until they could go no farther due to the "same material" Moore identified as having made the tailgate impassable. Tr. 174:10-21. He testified this area (i.e., "in and around Crosscut 42") should be examined weekly, by an exam which included rip pins, gas, and ventilation hazards. Tr. 174:22 – 175:6. He also agreed Entry No. 1 was a return air course and that, while an examiner would never travel beyond the face, an inspector would be expected to weekly travel the entirety of Entry No. 1 to the face. Tr. 175:7 – 176:8.

Asked to examine Sec. Ex. 2, set 1, page 9 (i.e., Inspector Yarko's Page 9 drawing), Moore agreed the four cans located just inby Crosscut 42 (depicted in the Page 9 drawing as

"crushed out" by an X) were "starting to mushroom." Tr. 177:10 – 178:12.[30] He also agreed there would have been cans inby those four cans and that it would be fair to say those cans had "either crushed off completely, or material had fallen all around them such that [Moore] could not view them." Tr. 178:17 – 179:4. Moore testified that, under normal mining conditions, one *should* be able to pass through tailgate Entry No. 1. Tr. 179:10-17. Asked more specifically about the two cans located closer to the area Inspector Yarko depicted in his Page 9 drawing as the "Fall," Moore testified he could not recall if those cans were in any worse condition than his earlier description, i.e., "starting to mushroom." Tr. 179:18 – 180:10.

After describing a timber as a "six-by-six wood" put in place "to hold up a slab of rock that's . . . leaking down or in place of a rib pan that's missing" or doubled up "for a . . . roof pin that is out," Moore acknowledged one of the props in the area off to the side of Crosscut 42 was "taking a little weight," and showing splinters. Tr. 180:18 – 181:11. He further described the roof in that area: "It actually looked like just a chunk of the ribs. It was the corner brow was what that was supporting, and it looked like that's what was leaning on it." Tr. 181:16-19. Moore recalled observing "just sloughage" on the rib in terms of taking weight. Tr. 181:20-22.

c. Redirect of Moore

On redirect examination, Moore testified he was a certified examiner but had never performed a weekly examination in tailgate Entry No. 1. Tr. 182:8-12. He testified there are "date boards in multiple locations" in tailgate Entry No. 1, and believed the furthest one inby was "right around [Crosscut] 42[.]" Tr. 182:13-21. He identified a T-split as where the brattice is knocked out between Entries Nos. 1 and 2, confirmed he did not know where the T-split was in the tailgate at the time **Citation No. 9705670** was issued**,** and testified an examiner performing the weekly air course reading would not need to go beyond the T-split to the face. Tr. 183:3-21. On Dec. 13, 2022, when he accompanied Inspector Yarko, Moore recalled walking inby from Crosscut 42 "probably five, seven feet." Tr. 183:22 – 184:3.

4. Rebuttal Witness - Inspector Yarko Recalled

Recalled on rebuttal and asked how far inby he travelled with Moore on tailgate Entry No. 1 on Dec. 13, 2022, Inspector Yarko testified: "I think we stopped right after [the] first set of damaged cans. I wouldn't have gone past that. It's no different than any loose or damaged roof

[30] Secretary's counsel referred to Sec's Ex. 2, page number 18; that page, hand-marked as Page No. 9 in Inspector Yarko's inspection notes, is also labelled MSHA-018. *See* Tr. 177:12-13; 186:15-17; Sec. Ex. 2, set 1, page 9. The referenced drawing is contained on page 9.

fall or hanging rock or anything. You don't put yourself in a position and expose yourself to hazards. Therefore, we stop before that." Tr. 186:18 – 187:4.[31]

BASIC CONTENTIONS OF THE PARTIES

The Secretary requests **Citation No. 9705670** be affirmed, contending the Secretary has proven (1) a violation of Section 75.202(a), (2) that violation was "significant and substantial" and (3) that Respondent exhibited "moderate" negligence. The Secretary, contending the assessed penalty of **$2,561.00** is appropriate, seeks a penalty of at least that amount.

Respondent argues no violation of Section 75.202(a) occurred because (1) the Mine was complying with the egress plan contained in its MSHA-approved Roof Control Plan with respect to the cited area when **Citation No. 9705670** was issued, (2) the Mine's compliance with 30 C.F.R. § 75.215(b) (a specific standard) demonstrates compliance with Section 75.202(a) (a general standard), and (3) no work or travel occurred in the cited area (which Respondent characterizes as including *only* tailgate Entry No. 1, Crosscut 42½). Alternatively, if a violation is found, Respondent contends the "significant and substantial" designation, the "reasonably likely" designation, and the "moderate" negligence designation are each inappropriate, and thus, the assessed penalty should be reduced.

ANALYSIS

To prevail, the Secretary must prove the violation by a preponderance of credible, relevant 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).

A. The Secretary Has Proven a Violation of Section 75.202(a)

Citation No. 9705670 was written as a violation of Section 75.202(a), which provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise

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[31] Due to audio interference experienced by the court reporter, the question was re-asked (and slightly re-posed as "how far down Entry No. 1" did Inspector Yarko recall travelling with Moore. Tr. 187:5-22. Inspector Yarko testified:

> I would have stopped short of the first set of damaged cans that we came upon or that prop. . . . And those cans being mushroomed or crushed, hindered in any way, what I would consider damage or faulty roof support, supplemental or primary. And so you would not go past that. I would stay in a good supported area.

Tr. 187:5 – 188:14.

controlled to protect persons from hazards related to falls of the roof, face, or ribs and coal or rock bursts."

Mine roofs, including those in entries which border a longwall face, are inherently dangerous, and roof falls have been the leading cause of death in underground mines for years. *Consolidation Coal Co*., 6 FMSHRC 34, 37 (Jan. 1984); *Big Laurel Mining Corp*., 37 FMSHRC 2001, 2014 n.13 (Sept. 2015) (ALJ) ("MSHA and the Commission have repeatedly recognized that roof falls rank among the most serious dangers in the mining industry"). *See also Elk Run Coal Co., Inc*., 27 FMSHRC 899, 904 (Dec. 2005) ("The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor . . . The intent of [30 U.S.C. § 862(a)] was to afford comprehensive protection against roof collapse[,] the leading cause of injuries and death in underground coal mines.") (internal quotation omitted).

1. The Applicable Analysis

In *Jim Walter Res., Inc*., 37 FMSHRC 493, 495 (March 2015), the Commission held that, where a roof fall has occurred, the Secretary, in order to establish a violation of Section 75.202(a), must prove: (1) the roof or ribs were not supported to protect persons from hazards related to roof falls, and (2) the insufficiently supported roof or ribs were located in an area where persons work or travel. Where a roof fall has not yet occurred, the Commission uses the following test to assess an alleged Section 75.202(a) violation:

> 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 purpose of the standard, would have provided in order to meet the protection intended by the standard.

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co*., 9 FMSHRC 667, 668 (April 1987) (as cited in *Helen Mining Co*., 10 FMSHRC 1672, 1675 (Dec. 1988)).[32]

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[32] In *Jim Walter*, the Commission rejected that the occurrence of a roof fall establishes a *per se* violation of Section 75.202(a) and instead used the two-part test set forth therein to assess the alleged Section 75.202(a) violation in a situation where the roof fall had fatally injured a miner. 37 FMSHRC at 494, 495. *See also Peabody Gateway North Mining*, *LLC*, 46 FMSHRC 1076, 1095 (Dec. 30, 2024) (ALJ) (applying the *Jim Walter* two-part test where an occurred roof fall injured a miner); *Canyon Fuel Company, LLC*, 45 FMSHRC 328, 341 (May 23, 2023) (ALJ) (applying the *Jim Walter* two-part test where an occurred rib burst injured a miner), DFR (granted June 30, 2023). Commissioner Cohen, concurring separately in *Jim Walter*, observed that the Commission's disposition effectively overruled *Canon Coal, Co.*, 9 FMSHRC 667 (April 1987), a case in which the Commission had used a reasonably prudent person standard to assess an alleged violation of Section 75.200, the predecessor to Section 75.202(a). 37 FMSHRC 498 (Commissioner Cohen, concurring). Commissioner Cohen also observed that the

(continued…)

Here, the Secretary contends two sets of conditions existed on Dec. 13, 2022, which support the issuance of **Citation No. 9705670** under Section 75.202(a): (1) "the roof fall itself" as observed by Inspector Yarko at tailgate Entry No. 1, Crosscut 42½ for which he issued both the 103(k) Order on Dec. 13, 2022, and **Citation No. 9705670** on Dec. 14, 2022, and (2) "the continuing deteriorating conditions" on tailgate Entry No. 1. Sec. Br. at 8. For this second condition, I understand the Secretary to be referring to Inspector Yarko's concern when issuing **Citation No. 9705670** that the roof in and around the specific area of the roof fall was deteriorating, i.e., tailgate Entry No. 1, Crosscut 42 to 42½ near where the roof fall had already blocked Entry No. 1 from the J-2 longwall face as well as fall along the face extending from Sheild 145 to Sheild 176 at the tailgate. *See* Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing); Sec. Ex. 4, at 14 (similar drawing to Inspector Yarko's Page 9 drawing), 21 (drawing depicting fall along the J-2 longwall face).

On this record, I agree with the Secretary that these two conditions converged to prompt the issuance of **Citation No. 9705670** under Section 75.202(a). *See* Tr. 41:12-16 (Inspector Yarko identifying both conditions when explaining why he issued a citation under Section 75.202(a): "Due to the cans that are set in place to protect the roof from falling, the failure of those *and* blocking the tailgate from egress.") (emphasis added). The roof fall already present at Entry No 1, Crosscut 42 ½ (which was also the condition prompting egress), coupled with Inspector Yarko's observation of comprised pumpable cans and a compromised prop located in the area of Entry No. 1, Crosscut 42 to 42½, suggested to him—as an MSHA roof control/ground control specialist—that the roof had already failed in one area and was exhibiting signs portending future failure in the surrounding area. Tr. at 37:21 – 38:4-8 (Inspector Yarko referring to his Page 9 drawing and testifying "four [pumpable] cans near the fall were crushed out or beginning to fail. They were starting to fail and being crushed by the weight of the fall, along with it appears to be one crushed and split eight-by-eight prop or wooden timber [depicted on Inspector Yarko's Page 9 drawing by "the box with an X in it"] near Crosscut 42); 28:17-20, 29:5-10 (Inspector Yarko testifying to fall along the longwall face); Sec. Ex. 4, at 21 (identifying material falling towards the face area of the shields from Sheild 166 to Sheild 176 (i.e., the shield closest to tailgate Entry No.1) along the longwall face); 91:5 – 92:11 (Inspector Yarko explaining that roof falls have an effect on surrounding roof which "typically deteriorates due to the pressures").

Despite the effort of Respondent's witnesses to avoid characterizing the material that had already fallen from the roof and blocked the tailgate at Entry No. 1, Crosscut 42½ as a "roof fall," I find that what Inspector Yarko observed at that location is appropriately characterized as

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[32] (…continued)
Commission had relied on *Canon Coal* in *Harlan Cumberland*, wherein the Commission used a reasonably prudent person standard to assess an alleged Section 75.202(a) violation where a roof fall had not yet occurred. *Id.* He then opined that use of the two-part test in *Jim Walter*—wherein a miner had been fatally injured by an occurred roof fall—did "not disturb *Harlan Cumberland*" in a situation where a roof fall had not yet occurred. The continued validity of using a reasonable person standard after *Jim Walter* has been briefed in the *Canyon Fuel* case (WEST 2021-0188, *et. al*), presently before the Commission. No one was injured by the occurred roof fall implicated in the case now before me.

a roof fall based on his credible testimony, *see e.g.*, Tr. at 25:6-18; 32:9-12; 41:14-16, Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 8-9, Section 103(k) of the Mine Act, and 30 C.F.R. § 50.2(h)(8) (defining "accident" as an "unplanned roof . . . fall in active workings that impairs ventilation or impedes passage").[33] I also find, based on Inspector Yarko's credible testimony and documented observation of compromised pumpable cribs, a compromised prop, and material that had fallen onto Shields 145-176 along the face, that the roof in the surrounding area was exhibiting signs of continuing deteriorating conditions.

To the extent Respondent seeks to characterize the material which had fallen from the roof and blocked Entry No. 1, Crosscut 42 ½ as material expected to fall due to "weight transfer" in the normal course of longwall mining, I reject that characterization here as the record belies any effort to portray the roof fall observed by Inspector Yarko as planned or expected. Respondent's own witnesses testified: (1) the roof in tailgate Entry No. 1 is normally supported and is not supposed to fall and block the tailgate creating the "hazardous condition" of preventing miners from being able to exit the longwall face into tailgate Entry No. 1, Tr. 171:5-11, 172:12-19 (Moore, cross-examination); Tr. 139:20 – 140:22 (Piper, cross-examination); and (2) failure of the J-2 longwall to advance after the roof fall triggered egress, despite persistent efforts to "mine through," was, at the very least, out-of-the ordinary. Tr. 133:7-12, 18-21, 134:18-19; 134:20 – 135:3; 135:7 – 137:21; 135:22 – 136:19 (Piper, cross-examination).[34] *See also* Tr. 89:14-21, 90:3-6-8, 90:12 – 91:2 (Inspector Yarko explaining it was unusual for a longwall not to advance, and leaving a longwall idle creates risk because "you're allowing the roof to continue to be unstable and fall where . . . miners are working."). A roof control plan, by providing for egress, does not thereby prevent material which has *fallen from the roof* of a tailgate entry from being characterized as a "roof fall" and cited as, or in conjunction with other conditions indicating continuing deterioration of the roof, a violation of Section 75.202(a).

Here, where the occurred roof fall did not injure anyone and where the inspector observed other conditions in the surrounding area that suggested continuing deterioration of the roof, in order to continue my assessment of the alleged Section 75.202(a) violation, I next address whether the roof was "supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs," under *Jim Walter* and *Harlan Cumberland*, respectively.

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[33] Section 103(k) of the Mine Act also refers to "accident" and the Commission has held that "accident" for purposes of Section 103(k) is not limited to the definitions set forth in 30 C.F.R. § 50.2(h). *Revelation Energy, LLC*, 35 FMSHRC 3333, 3338 (Nov. 2013).

[34] I recognize Piper testified that headgate Entry No. 3 and tailgate Entry No. 1 are expected to "come down" as the coal block is mined out. *See* Tr. 112:3-15. I credit that testimony but note other portions of his testimony, especially when coupled with Inspector Yarko's testimony, suggest that the normal expectations in longwall mining were not necessarily in play here due to the roof fall that had already occurred and the Mine's inability to "mine through" the condition that had prompted egress and failure to resume normal production on the J-2 longwall.

2. Roof Not Supported or Otherwise Controlled under Section 75.202(a)

Tailgate Entry No. 1 was indisputably on egress when **Citation No. 9705670** was issued. *See e.g.*, Sec. Ex. 1; Sec. Ex. 2, first set, at 8, 13; Tr. 30:16 – 31:2. As such, I will address Respondent's two arguments related to the impact of egress on the Section 75.202(a) analysis before assessing whether the roof was "supported or otherwise controlled" under that section.

Respondent contends no violation of Section 75.202(a) occurred here for two interrelated reasons: (1) because at the time **Citation No. 9705670** was issued, the Mine was complying with the egress plan contained in its MSHA-approved Roof Control Plan for the discrete location identified on the citation (i.e., tailgate Entry No. 1, Crosscut 42½); and (2) because the Mine was complying with 30 C.F.R. § 75.215(b) (pertinent to "[t]he procedures that will be followed" when the tailgate is on egress), it was perforce complying with Section 75.202(a). Resp's Br. at 10-12. I reject both arguments and begin with the second one first.

Section 75.215(b), entitled "Longwall mining systems," provides:

> For each longwall mining section, the roof control plan shall specify—
>
> (a) The methods that will be used to maintain a safe travelway out of the section through the tailgate side of the longwall; and
>
> (b) *The procedures that will be followed* if a ground failure prevents travel out of the section through the tailgate side of the longwall.

(emphasis added). *See also* 30 C.F.R. § 75.222(g)(2) (identifying what a roof control plan must address when "a ground failure prevents travel out of the section through the tailgate side of the longwall section"). Here, the Mine's Roof Control Plan does contain procedures consistent with Section 75.215(b). Such is the egress plan which was active when Inspector Yarko inspected the Mine on Dec. 13, 2022, and Dec. 14, 2022; he acknowledged the egress on **Citation No. 9705670** as well as in his related inspection notes. Sec. Ex. 1 ("The section has the[ir] egress plan active and an action plan is in place"); Sec. Ex. 2, first set, at 8, 13; *see also* Sec. Ex. 10, at 15, § 9.7 ("Longwall Egress Procedures").

The inclusion of such procedures in a roof control plan (which is what Section 75.215(b) requires) does not mean, however, that an operator is perforce "support[ing] or otherwise control[ing]" the roof within the meaning of Section 75.202(a). Part 75, Subpart C (Roof Support) of Title 30, C.F.R., "sets forth requirements for controlling the roof, face, and ribs . . . in underground coal mines," § 75.200 ("Scope"), and critically, Section 75.202(a) contains the overarching mandate: "The roof, face and ribs of areas where persons work or travel *shall be* supported or otherwise controlled to protect persons" from related hazards." (emphasis added). Every subsequent section contained in Subpart C aims to achieve that overarching mandate, and roof control plans, under Sections 75.220-223, partake of the same aim. But compliance with the sections in Subpart C or with a roof control plan approved thereunder does not necessarily mean that what Section 75.202(a) requires is being achieved in every instance wherein those sections are, or that plan is, being followed. Other sections contained in Subpart C make that clear. *See*

§ 75.220(a) ("Additional measures shall be taken to protect persons if unusual hazards are encountered"), § 75.223(a)(1) ("Revisions of the roof control plan shall be proposed by the operator [w]hen conditions indicate that the plan is not suitable for controlling the roof . . ."), § 75.223(a)(2) ("Revisions of the roof control plan shall be proposed by the operator [w]hen accident and injury experience at the mine indicates the plan is inadequate"). *See also So. Ohio Coal Co*., 10 FMSHRC 138, 140-41 (Feb. 1988) (compliance with an approved roof control plan does not preclude liability for failure to comply with a generally applicable regulation requiring adequate roof support). Thus, what Section 75.202(a) requires is related to, but also necessarily separate from, what Section 75.215(b) requires.

Respondent cites *Twentymile Coal Co*., 32 FMSHRC 628 (June 17, 2010) (ALJ), in support of its Section 75.215(b) argument, Resp. Br. at 12-13, but that case cannot be read to embrace the generic proposition that "the specific governs the general" such that compliance with Section 75.215(b) necessarily demonstrates compliance with Section 75.202(a). Rather, *Twentymile* reinforces the need to understand what each standard requires in context when assessing whether satisfaction of one can be used to demonstrate satisfaction of the other.[35] Moreover, the roof fall which triggered egress—and served as one of the two converged conditions prompting issuance of **Citation No. 9705670**—occurred *before* tailgate Entry No. 1 was placed on egress. Thus, it would be illogical to accept that compliance with Section 75.215(b) demonstrates compliance with Section 75.202(a).

Respondent's other contention—that Section 75.202(a) was not violated because, at the time **Citation No. 9705670** was issued, the Mine was complying with its egress plan for the discrete location identified on the citation (i.e., Entry No. 1, Crosscut 42 ½)—contains several moving parts. First, to the extent Respondent contends that following its egress plan necessarily demonstrates compliance with Section 75.202(a), I reject that argument. Even assuming an egress plan, as well as Section 75.215(b) and 75.222(g)(2) upon which it would be based, are all

[35] In *Twentymile*, the ALJ determined "*the particular lifeline* present in the alternate escapeway" at the mine, which served to satisfy Section 75.380(d)(7) (requiring an escapeway to be provided with "a continuous, durable directional lifeline or equivalent device"), simultaneously served to ensure the escapeway was "[c]learly marked to show the route and direction of travel to the surface" as required by Section 75.380(d)(2). 32 FMSHRC at 638 (emphasis added). The ALJ vacated a citation issued under Section 75.380(d)(2) for red reflectors in the alternative escapeway which were "completely covered with dust and could not be seen," *id.* at 636, where the operator argued that the escapeway was *still* "clearly marked to show the route and direction of travel to the surface" via the lifeline. The ALJ reasoned: "I see no reason why a lifeline should *per se* be incapable of satisfying [Section 75.380(d)(2)]. To say that something is incapable of satisfying one standard because it satisfies another standard defies logic and finds no support within Commission case law." *Id.* at 640. He then identified three reasons why "a lifeline, in many situations, may provide an even better means of 'clearly marking' the escapeway than reflectors hung from the roof," and concluded "[a]ll of these factors, combined with [the issuing inspector's] testimony that the miners at this mine are well trained and that the operator had effective escapeway policies, lead me to believe that the lifeline clearly marked the route and direction of travel to the surface, thereby satisfying [Section 75.380(d)(2)] in spite of the fact that the roof reflectors may not have done so." *Id.* at 641.

premised on a recognition that the process of longwall mining may cause material to fall and prevent travel at the tailgate, such does not mean that Section 75.202(a) has no role to play where a roof fall and/or continuing deteriorating conditions in the area of a roof fall suggest the roof is not being "supported or otherwise controlled" to protect persons who work and travel in the area from hazards related to roof falls.[36] Again, other sections contained in Subpart C, including §§ 75.220(a), 75.223(a)(1), and 75.223(a)(2), make that clear. And again, because the roof fall that triggered egress obviously occurred *before* tailgate Entry No. 1 was placed on egress, it would be illogical to accept that honoring egress demonstrates compliance with Section 75.202(a).

Second, Respondent argues that when a mine is following egress because the process of longwall mining has created conditions requiring the imposition of egress,[37] a reasonably prudent person familiar with the mining industry and the protective purpose of Section 75.202(a) would conclude that the mine *is* complying with Section 75.202(a). Respondent further contends that, here, a representative reasonably prudent person familiar with the mining industry, i.e., Inspector Tulinowski, reached that very conclusion when he inspected the Mine on Dec. 11, 2022, observed "[]the top around the tailgate is down which does not allow entry into the tailgate entry," observed that "[t]he operator is following the roof control plan when it comes to Egress" and concluded "NVO" (no violation observed). Resp. Br. at 11; Tr. 71:21 – 72:13; R-I. Respondent, referencing testimony that roof conditions were the same two days later when Inspector Yarko conducted his E08 inspection, and that the J-2 longwall had not moved in the interim, *see* Tr. at 127:17 – 130:8 (Piper), 166:12-16 (Moore), argues: "[i]f no violation existed on [Dec.] 11, no violation existed on [Dec.] 13 for the same condition." Resp.'s Br. at 11. I reject this argument as well.

"An individual inspector's decision not to issue a citation (or failure to notice a violation) does not create a binding interpretation on behalf of the Secretary." *Canyon Fuel Company, LLC*, 39 FMSHRC 1578, 1585 n. 9 (Aug. 2017) (opinion of Commissioners Jordan & Cohen in 2:2 decision) (further noting "District Manager Riley should be commended for recognizing the potential danger to miners" which MSHA inspectors had overlooked for years). Inspector Tulinowski did not testify at the hearing. While his inspection notes were produced by the Secretary and admitted into evidence, Tr. 169:14-15; 170:2-7; R-I, and while Moore's recollection of Inspector Tulinowski's activity during the Dec. 11, 2022, inspection corroborated the activity recorded therein, *see* Tr. at 157:10 – 163:9; R-I; R-F, the record contains no testimony about the reasoning behind Inspector Tulinowski's "NVO" conclusion or what he thought about what he observed on Dec. 11, 2022, but for the 4 terse lines contained in his

[36] I recognize egress is relevant also to Section 75.202(a)'s requirement that persons "work or travel" in the area of unsupported roof and address that issue *infra* in Analysis Section A.3.

[37] In this situation, while the process of longwall mining did create the condition which triggered egress, acknowledging that does not necessarily mean that the roof fall which occurred and blocked the tailgate at Crosscut 42½ where the J-2 had come to rest, was a normal or expected condition in longwall mining. Again, I note the record before me belies that characterization.

inspection notes (which Counsel for the Secretary obviously could not cross-examine). It is hard to give these unamplified inspection notes, much, if any, probative weight.

More critically, however, Inspector Tulinowski did not travel *in* tailgate Entry No. 1 beneath the roof at Crosscut 42-42 ½ on Dec. 11, 2022; he only travelled down the J-2 longwall face, observing the fallen material at the tailgate from *that* vantage point. Tr. 173:21 – 174:9 (Moore, cross-examination); R-I; R-E(2). Inspector Yarko, on the other hand, travelled up tailgate Entry No. 1 to approximately Crosscut 42 ½, observing "an unplanned roof fall" which prompted him to issue a 103(k) Order. Sec. Ex. 3. In his notes from Dec. 13, 2022, documenting issuance of that order, he drew a diagram of the fall observed from *his* vantage point beneath the roof in Entry No. 1, which drawing also depicted four crushed pumpable cribs and a "prop split" indicating to Inspector Yarko that the roof in Entry No. 1 was compromised in the area near the roof fall; he then reproduced that diagram with slight variation in his notes from Dec. 14, 2022, documenting issuance of **Citation No. 9705670**. *See* Sec. Ex. 4, at 14 (diagram); Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing); Tr. at 35:1-5, 36:5-10; 37:16 – 39:21 (Inspector Yarko testifying, *inter alia*, vis-à-vis his diagram in Sec. Ex. 2, first set, at 9, that "the cans are showing failure due to the stress of the roof falling . . . they're not holding up the roof as intended"); 41:12-16, 42:15-21 (explaining the conditions he observed in tailgate Entry No. 1 on Dec. 13, 2022, violated Section 75.202(a) due to the roof fall combined with the failed and failing pumpable cans).[38] *See also* Tr. 135:7-14 (Piper, on cross-examination, describing the conditions that put the tailgate on egress as "top conditions at the tailgate"); *id.* at 170:20 – 172:18 (Moore, on cross-examination, testifying the tailgate was impassable because material from the roof had fallen into Entry No. 1, the roof of the tailgate is normally supported, and he had no way of knowing, when he accompanied Inspector Tulinowski down the face of the J-2 longwall, whether the roof in the tailgate was compromised because he "couldn't go under there to see it" due to the material which had fallen from the roof and completely blocked his view); 178:11 – 179:4 (Moore, on cross-examnionation, testifying the four pumpable cans (shown as closest to the roof fall on Inspector Yarko's Page 9 drawing) were "starting to mushroom" and that it was fair to say cans inby had already been crushed).

Inspector Tulinowski did not observe the roof fall from inside tailgate Entry No. 1, nor did he observe the compromised pumpable cans and prop beneath the roof in Entry No. 1, at Crosscut 42-42½. Thus, even if the conditions existing on Dec. 11, 2022, and Dec. 13, 2022, *were* the same in that the tailgate was on egress and the J-2 longwall had not advanced, Inspector Tulinowski's notes do not undermine Inspector Yarko's conclusion that what *he* observed from his vantage point *inside* Entry No. 1 (and later from the face of the J-2 longwall) was a roof fall

[38] Respondent suggests Inspector Yarko "concluded that a violation existed before inspecting the area." Resp's Br. at 11, n. 10. While the record does not identify exactly what brought Inspector Yarko to the Mine on Dec. 13, 2022, to conduct the E08 inspection, he testified: "I do believe it was a possibility of a roof fall on the J-2 longwall tailgate." Tr. 20:15-18. *See also id*. at 22:18-19; R-F (documenting Inspector Tulinowki's inspection on Dec. 11, 2022, had been in response to a phoned in report of bad top at the J-2 longwall tailgate). I reject Respondent's suggestion of pre-judgement as unsupported and note that, whatever prompted the E08 inspection, the record fully supports Inspector Yarko's discovery of an unplanned roof fall blocking access to tailgate Entry No. 1 from the J-2 longwall face.

coupled with signs of continuing deteriorating conditions in the surrounding roof. Thus, I have considered Inspector Tulinowski's inspection notes from Dec. 11, 2022, as contained in R-I, and have given them little probative weight in my assessment of Section 75.202(a).

I turn now to whether the roof was "supported or otherwise controlled to protect persons" from hazards related to falls of the roof under *Jim Walter* and *Harlan Cumberland*, respectively.

As to the roof fall which had already occurred at Entry No 1, Crosscut 42½, which did not injure anyone, I find the Secretary has proven that the roof was unsupported or otherwise uncontrolled. Here, as all three witnesses testified, material had fallen from the roof, blocking tailgate Entry No. 1. Tr. 25:6-9, 17-18, 41:14-16 (Inspector Yarko); 123:17-19 (Piper identifying R-E(1)), 135:7-14 (Piper, cross-examination); Tr. 171:5 – 172:8 (Moore, cross-examination). The fallen material extended from the floor to the roof, approximately 9 ft. in height. Tr. 172:9-19 (Moore, cross-examination). While the fall of material from the mine roof was not of the same magnitude as that which had occurred in *Jim Walter*, 37 FMSHRC at 494, or in *Big Laurel Mining*, 37 FMSHRC at 2003 (involving citations for multiple failures), it was not insignificant; it blocked the tailgate (thereby creating a hazardous condition) and the Mine was apparently unable to "mine through" it. Thus, I find that the roof at tailgate Entry No. 1, Crosscut 42½ was not supported or otherwise controlled under the second prong of the *Jim Walter* test for a roof fall that has already occurred.

As to the continuing deteriorating conditions observed by Inspector Yarko in the surrounding area, i.e., Entry No. 1, Crosscut 42-42½ and from Sheilds 145 to 176 along the face, I find the Secretary has proven that the roof was unsupported or otherwise uncontrolled. When Inspector Yarko travelled tailgate Entry No.1 to approximately Crosscut 42, he observed the roof fall, plus "four [pumpable] cans near the [roof] fall" that were "crushed out or beginning to fail" as well as "one crushed and split eight-by-eight prop or wooden timber" near the top corner of Crosscut 42. Tr. 37:20 – 38:4, 5-8; *see also* Sec. Ex. 2, first set at 9 (Inspector Yarko's Page 9 drawing). Additionally, when Inspector Yarko travelled down the longwall face, he observed fall extending from Shield 145 to Sheild 176, the shield immediately adjacent to the tailgate. Tr. 28:17-20, 29:5-10; Sec. Ex. 4, at 21 (Inspector Yarko's drawing of fall on the shields). *See also* Tr. 82:11 – 83:15 (Inspector Yarko, on cross-examination, acknowledging his drawing of fall on the shields also noted "Roof/face glued from approximately Sheild 120 to T.G. (#176)" and testifying that gluing would be a relatively common occurrence in longwall mining "if you have failures of the roof" or "for preventative measures"). Notably, Respondent's witness Moore did not deny the existence of concerning signs of deteriorating roof in the area; rather, he sought to give those signs a more benign characterization. *See* Tr. 164:11-22 (Moore testifying "Some cribs were taking weight, as they're designed to do. Some of the ones back towards the tailgate where the weight had shifted were starting to yield . . . They'll mushroom out and let you know they are taking weight."); 165:1-8 (Moore identifying the pumpable cribs that had mushroomed as "right inby [the] 42 area . . . [r]ight at the 42 crosscut area"). When asked if the pumpable can were still providing roof support, Moore testified "Somewhat, yes," Tr. 164:21-22 —a rather lukewarm response. On this record, I credit the characterization embraced by Inspector Yarko: that the crushing of the pumpable cans indicates ""failure of the roof . . . [t]hat the cans are showing failure due to the stress of the roof falling . . . they're not holding up the roof as intended." Tr. 39:11-21.

I further find that a reasonably prudent person familiar with the mining industry (including the use of pumpable cans in the tailgate entries of a longwall) and the protective purposes of Section 75.202(a) would have: (1) upon observing a roof fall extending 9 ft. from the floor to the roof and blocking the tailgate at Entry No. 1, Crosscut 42½, sought to observe and assess roof conditions on both sides of that fall from the vantage points achieved by Inspector Yarko, i.e., from *in* the tailgate Entry No. 1, Crosscut 42-42½, and from the tailgate end of the longwall, and (2) from these two vantage points, (a) recognized the objective signs of continuing deteriorating conditions as documented in the diagrams produced by Inspector Yarko in his inspection notes, and (b) sought to provide additional support for the roof. *See* Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing). Also relevant is the fact that the tailgate had been placed on egress weeks beforehand and that efforts to "mine through" were not meeting with success. While Respondent appears to have glued portions of the roof/face along the longwall, Sec. Ex. 4, at 21, I find that, on this record, a reasonably prudent person would have taken further steps to support or control the roof so as to meet the standard of protection intended by Section 75.202(a).

Thus, I find the Secretary has proven, under both *Jim Walter* and *Harlan Cumberland*, that the roof was not "supported or otherwise controlled" within the meaning of Section 75.202(a).

3. Areas Where Persons Work or Travel under Section 75.202(a)

Next, I address whether "persons work[ed] or travel[ed]" in the area of unsupported and/or uncontrolled roof as required by Section 75.202(a). The Secretary contends this requirement is "easily met" in this case, Sec. Br. at 9, whereas Respondent contends "no work or travel occurred" in the area and thus the Secretary cannot prove a Section 75.202(a) violation. Resp. Br. at 13.[39]

The text of Section 75.202(a) plainly requires that persons must "work or travel" in the area where the roof, face, or ribs are unsupported or otherwise uncontrolled for the standard to be violated. The Commission has interpreted "work or travel" in Section 75.202(a) "to be circumstance specific[,]" *Jim Walter*, 37 FMSHRC at 495, and in *Cyprus Empire Corp*., 12 FMSHRC 911, 917-918 (May 1990), the Commission reversed a violation of Section 75.202(a) where the record contained "no evidence that at any time during the existence of the dangerous roof conditions, other than during the attempt to install additional roof support, any miner worked or traveled in the cited area." The Commission has also deemed it sufficient for one person to "work or travel" only once in the area of unsupported roof for the "work or travel" requirement to be met. *Faith Coal Co.*, 19 FMSHRC 1357, 1359 (Aug. 1997) (affirming Section

[39] Respondent offers a particularly crabbed interpretation of "area" for purposes of "work or travel" under Section 75.202(a), arguing it encompasses only Entry No. 1, Crosscut 42½. Resp' s Br. at 13. I reject that interpretation. That area was already physically blocked by the roof fall at Entry No. 1, Crosscut 42½ and here, as explained above, **Citation No. 9705670** was premised on *two* conditions, only one of which was the roof fall itself. That said, I do recognize that egress necessarily impacted "work or travel" in the area of "continued deteriorating conditions" and address that impact below.

75.202(a) violation where mine operator admitted he crawled through the relevant area one time).

As explained above, **Citation No. 9705670** is premised on two conditions which converged: (1) "the roof fall itself" at Entry No. 1, Crosscut 42½, and (2) "the continuing deteriorating conditions" in and around the area of the roof fall (i.e., tailgate Entry No. 1, Crosscut 42 to 42 ½ as well as fall on the face from Sheild 145-176). Thus, it is necessary to assess "work or travel" in the specific area of the roof fall as well as in the area of continued deteriorating conditions.

At the Hearing, Inspector Yarko identified "persons on the longwall," including "shearer operators, shield pullers, cleaning, maintenance, foreman" as persons who may be in the affected area. Tr. 44:15-18. While Inspector Yarko was uncertain exactly when the roof fall had occurred and when tailgate Entry No. 1 was placed on egress, Respondent's witnesses testified the fallen material at Entry No. 1, Crosscut 42½—now characterized as the roof fall—was the condition that triggered egress in October 2022. Tr. 133:1– 134:8 (Piper, cross-examination); 174:10-21 (Moore, cross-examination). At that time, the J-2 longwall was operating, so tailgate Entry No. 1 *would* have been accessible and serving as an escapeway, Tr. 19:18-21 (Inspector Yarko); Tr. 140:15-20 (Piper, cross-examination), and as a return air course requiring (at a minimum) a weekly exam under 30 C.F.R. § 75.364(b)(2).[40] *See* Tr. 45:3-4 (Inspector Yarko); 142:3-8 (Piper, cross-examination); 175:2, 7-9 (Moore, cross-examination). This exam requires that the return air course be travelled "in its entirety." § 75.364(b)(2); Tr. 142:9-11 (Piper, cross-examination, acknowledging such); 175:10 – 176:8 (Moore, cross-examination, acknowledging such and testifying an examiner would be expected to go "up to the face in the No. 1 [E]ntry" but never past the face into the gob, and agreeing such was his understanding of "entirety"); *see also* Tr. 149:21 – 150:2 (Piper, cross-examination, acknowledging it would be important to keep the roof in Entry No. 1 stable so it could serve as a return air course); Tr. 179:16-17 (Moore, cross-examination, acknowledging "[u]nder normal mining circumstances, yes, you should be able to pass through the tailgate"). Thus, I find that miners, including, at a minimum, members of the longwall crew and the weekly air course examiner, would be working or traveling in, and/or required by their job duties to work or travel in, the area of the occurred roof fall at tailgate

[40] Section 75.364(b)(2) provides:

> At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations . . . (2) In at least one entry of *each return air course, in its entirety, so that the entire air course is travelled*.

(emphasis added)

No. 1, Crosscut 42 ½ when the roof fall occurred (which, again, was *before* the tailgate was placed on egress).[41]

At the Hearing, the parties offered a good deal of testimony aimed at identifying who might be working or travelling in the cited area *after* the tailgate was placed on egress due to the roof fall and more specifically, where exactly those persons would be travelling to in relation to Crosscut 42- 42½. Inspector Yarko testified that "whoever the operator designates to conduct the air reading on the tailgate side and [to conduct] examin[ations]," Tr. 44:18-20, could be in Entry No. 1 near the area of the roof fall and he identified the pertinent examinations as including:

- "a weekly examination due to [tailgate Entry No. 1 serving as] a return air course" Tr. at 45:3-4, and

- "a T-split air reading off of the longwall as part of an air reading for preshift/on shift" examinations. Tr. 45:5-7.[42]

See also Tr. at 42:1-2 (Inspector Yarko testifying "if persons were back there conducting normal work such as air readings or examinations"); 43:12-16 (explaining he marked the citation as "significant and substantial" due to the reasonable likelihood of injury to "persons . . . back there working and conducting examinations, air readings, proper installing of additional supports," and other operator-assigned tasks). Respondent argues that neither of these examinations would take an examiner to Crosscut 42 *and a ½*, because (1) for a preshift examination, while an examiner is required to take air readings along the face at the headgate, midface and tailgate, the examiner would not enter the tailgate to take the required reading at the tailgate because such readings are taken "not more than 100 feet nor less that 50 feet from the last shield per the [M]ine's approved

[41] I acknowledge Piper's testimony that when the tailgate was on egress, no one from the longwall crew would be in the tailgate because they could not get there physically from the longwall face, Tr. 126:4-10, and note Inspector Yarko's understanding that, at the time he inspected the Mine on Dec. 13 and Dec. 14, 2022, members of the longwall crew could not enter the tailgate from the longwall face due to egress. *See e.g.*, Tr. 46:11-14; 47:1-5.

[42] Inspector Yarko explained a T-split reading as an air reading taken in tailgate Entry No. 1 "to ensure that the air coming from the longwall goes back into the bleeder and also goes back into [tailgate] Entry [No.] 2 to provide air sweeping into the bleeder." Tr. 45:15-19. *See also* 151:6-10 (Piper, explaining the T-split as "a point [at which] your air leaves the face" and splits, with "some of it" travelling into Entry No. 2, and "the rest of it travell[ing] outby"). The parties appear to agree the T-split was located at Crosscut 42. *See* Sec. Br. at 7 n.5; Resp. Br. at 14; *see also* Tr. 153:6-17 (Piper, explaining the T-split as "an open crosscut where [the stopping] was knocked out" and identifying Crosscuts 38, 39, 40 and 41 as depicted on R-E(1) as crosscuts parallel to tailgate Entry No. 1 where stoppings were still in place); 154:6-10 (Piper confirming the T-split is the crosscut that does not have stopping (i.e., Crosscut 42 as depicted on R-E(1)) because "that's the point that your intake air would become mixed with the face air"); Tr. 183:3-4 (Moore, on redirect examination, identifying the T-split as where the brattice is knocked out between Entries Nos. 1 & 2).

ventilation plan," and (2) a weekly air course examiner would travel only to Crosscut 42—the location of the T-split and a date board—and not beyond. Resp. Br. at 14.

It is a nonstarter to argue that neither of the examinations identified by Inspector Yarko would take an examiner to Crosscut 42 *and a ½* when *that* area was already physically blocked by the roof fall. As explained above, I have rejected Respondent's effort to limit the cited area to *only* tailgate Entry No. 1, Crosscut 42½ where the roof fall had already occurred to block access to the tailgate from the J-2 longwall face.

As for the T-split examinations, including how often they would occur,[43] and where they would occur,[44] I acknowledge the existence of conflicting testimony as between Inspector Yarko on the one hand and Piper on the other. I see no need to resolve whether a T-split reading would occur more often than weekly, or whether a T-split reading can be taken from the face without entering tailgate Entry No. 1 because, even if I assume that neither a preshift or onshift examiner would be under the area of continued deteriorating conditions in Entry No. 1 to take air readings, the record fully supports that a weekly air course examiner—whether travelling to the T-split or simply to a date board at the intersection of Entry No. 1 and Crosscut 42—would be under that area.

Respondent's witnesses testified there was a date board located at Crosscut 42 beyond which the weekly air course examiner would not go. Tr. 125:9 – 126:3 (Piper); Tr. 142:12 – 143:20 (Piper testifying on cross-examination "42 and a half is your face line, so 42 is where you would stop"); 182:13-21 (Moore testifying on redirect examination, "I'm pretty sure there's [a

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[43] Inspector Yarko's testimony appears to conflict with Piper's testimony as to how often a T-split reading would be taken. Inspector Yarko testified a T-split reading would be taken as part of preshift and on-shift examinations, Tr. 45:5 – 46:4, and thus would be conducted at least once or twice per shift as well as on an as-needed basis "due to ventilation changes or just to double-check if [there is] low air anywhere else along the longwall." Tr. 45:20 – 46:6. Piper testified that per the Mine's ventilation plan, the T-split would be examined weekly; he also testified that such would be the same as the "weekly air course" reading. Tr. 154:11-21. I note the Action Plan, Sec. Ex. 7, at 2, seems to assume preshift examinations include a T-split reading. *See also* Sec. Ex. 9, at 2 (Action Plan Update, from Feb. 3, 2023) (same).

[44] Inspector Yarko's testimony also appears to conflict with Piper's testimony as to where air readings for purposes of a preshift examination would occur. Inspector Yarko testified that T-split readings—which he testified were required for preshift and on-shift examinations—would still need to be taken while tailgate Entry No. 1 was on egress "to make sure there's proper air flow and directional air flow," Tr. 49:12-17, and explained that, to take a T-split reading during egress, the examiner would have to travel up tailgate Entry No. 1 because the tailgate was inaccessible from the longwall face. Tr. 46:11-19. Piper testifying that for pre-shift examinations, air readings measuring the velocity of air coming down the face would be taken on the face at the headgate, mid-face and tailgate, and there was no reason to enter the tailgate to take any of those readings or, in normal operations, to conduct a preshift examination. Tr. 118:15 – 119:9, 119:10 – 120:19. *See also* Tr. 176:9-17 (Moore acknowledging on cross-examination that he did not know where methane readings for shift examinations are taken).

date board] right around 42 . . . but I can't tell you that for absolute certain"). They also testified that the T-split was located at Crosscut 42, at which a T-split air reading would be taken at least once a week. Tr. 151:5 (Piper identifying on redirect examination the T-split at Crosscut 42); 154:11-21 (Piper testifying on re-cross examination that the T-split is to be examined weekly); Tr. 183:10-21 (Moore testifying on redirect examination that the weekly T-split examiner need not go beyond Crosscut 42).

As for the distance between Crosscut 42 and Crosscut 42½, Piper testified it was "less than a hundred foot," Tr. 143:19-22, and Moore testified "between 42 crosscut where the edge of that crosscut is to where the tailgate was, you're probably talking 15 feet" with an additional 5 feet to what Moore referred to as "the gob pile" which the Mine was trying to "mine through." Tr. 165:12-20. In that space, Inspector Yarko had observed two sets of two pumpable cans and a prop which had already been compromised indicating failure of the roof. Sec. Ex. 4, at 14; Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing), Tr. 39:11-14, 39:15-21 ("the cans are showing failure due to the stress of the roof falling . . . they're not holding up the roof as intended"). He also testified, and I specifically credit his testimony, that when roof falls are occurring in adjacent areas, the roof "typically deteriorates due to the pressures." Tr. 91:5 – 92:11. *See also* Tr. 66:3-7 (Inspector Yarko testifying that, prior to issuance of the Action Plan Update on Feb. 3, 2023, with its physical barrier set up just outby Crosscut 42, miners would have had to travel into the area of Crosscut 42 to conduct air readings and perform examinations).

Thus, I find that an air course examiner who stopped at the date board located at Crosscut 42 and/or stopped at Crosscut 42 as the location of the T-split, would be a person working or travelling in the cited area at the time **Citation No. 9705670** was issued for purposes of Section 75.202(a).[45] *Contra Cyprus Empire*, 12 FMSHRC at 912 (reversing a finding that Section 75.202(a) had been violated because the Secretary failed to prove that "while the area was dangered-off, the job duties of any miners required them to enter the affected area").

For all of the reasons explained above, I find the Secretary has proven a violation of Section 75.202(a) by a preponderance of the evidence.

B. "Significant and Substantial"

Section 104(d) of the Mine Act identifies a "significant and substantial" ("S & S") violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). Under Commission case law, a violation is properly designated S & S if, "based upon the particular

[45] Explaining why he designated the violation as "significant and substantial," Inspector Yarko also identified "persons . . . back there . . . installing . . . additional support." Tr. 43:6-14. Miners installing additional support would also be working or travelling in the cited area, and Piper acknowledged that if miners were going into the area between Crosscut 41 and 42 to install additional supports, that area would need to be preshifted and/or onshifted, Tr. at 145:11-16, thereby placing at least one other person (if not more), in or very near the cited area to fulfill job duties.

facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four steps required to support an S & S designation are:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step set forth in *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016)).[46]

The Secretary bears the burden of proving a violation is S & S by a preponderance of credible evidence, *Consolidated Coal Co.*, 39 FMSHRC 1737, 1742 (Sep. 2017), and an S & S determination must be based on the assumed continuation of normal mining operations. *Consol Pennsylvania Coal Co*., 43 FMSHRC 145, 148 (Apr. 2021) ("A determination of [S & S] must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.") (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). For the following reasons, I find the test for S & S as set forth in *Peabody Midwest* to be met, and thus conclude **Citation No. 9705670** was properly designated S & S.

1. Step 1: Underlying violation of a mandatory safety standard

As discussed above, the Secretary has proven a violation of Section 75.202(a), which is a mandatory safety standard. Thus, Step 1 of the test for S & S is met.

2. Step 2: Reasonable likelihood of the occurrence of the discrete hazard

Step 2 requires a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy*, 38 FMSHRC at 2037. A finding at Step 2 must be based on "the particular facts surrounding the violation." *Northshore Mining Co*., 38 FMSHRC 753, 757 (Apr. 2016). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Eng'g., Inc.,* 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

[46] The Secretary argues the *Newtown*/*Peabody* reformulation is inconsistent with the Mine Act's definition of S & S, stressing that Section 104(d)(1) is satisfied if the violation *could* contribute to the hazard, not whether it is reasonably likely to contribute. Sec. Br. at 12. I need not reach this argument to conclude that the test for S & S is met here.

The specific hazard which Section 75.202(a) aims to prevent is the hazard of a roof fall as well as the increased danger thereof. Here, where a roof fall has already occurred, that which has already occurred is necessarily also reasonably likely to occur. Additionally, I find that the continuing deteriorating conditions documented by Inspector Yarko in his inspections notes and testimony further support that a roof fall as well as the increased danger of a roof fall in tailgate Entry No. 1, Crosscut 42-41½ as well as along the tailgate side of the longwall face, was reasonably likely to occur. Thus, Step 2 of the test for S & S is met.

3. Step 3: Occurrence of the hazard reasonably likely to result in an injury

For Step 3, I assume the occurrence of the hazard (not the violation) and determine whether, based on the facts surrounding the violation, that hazard is reasonably likely to cause an injury. *Newtown Energy, Inc.*, 38 FMSHRC at 2037. The evaluation of reasonable likelihood at Step 3 is made on the further assumption of "continued normal mining operations," *Texasgulf Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (citing *U.S. Steel Mining Co., Inc*., 6 FMSHRC at 1574), and an inspector's judgment is an important factor in determining whether there is "a reasonable likelihood that the hazard contributed to will result in an injury." *Harlan Cumberland*, 20 FMSHRC at 1278-79 (citing *Mathies*, 6 FMSHRC at 5).

As the Commission has repeatedly recognized, mine roofs are inherently dangerous and the Commission's case law documents that roof falls have killed and seriously injured countless miners. *See e.g., The Doe Run Co*., 42 FMSHRC 521, 521 (Aug. 2020) (involving fatality); *Jim Walter*, 37 FMSHRC at 493 (same). Inspector Yarko testified that the hazard contributed to here—i.e., failure of the roof and falling material—would be reasonably likely to cause injury, and I credit his judgment as an inspector and MSHA roof control/ground control specialist. Thus, the occurrence of the hazard is reasonably likely to result in an injury, and Step 3 of the test for S & S is met.

Respondent contends the S & S designation (as well as the "reasonably likely" designation, *see infra*) was based on a mistaken premise, i.e., that persons would be exposed to and potentially injured by the hazard at which Section 75.202(a) is aimed, i.e., a roof fall. In making this argument, Respondent is essentially re-offering its argument that no persons "work[ed] or travel[led]" under the area of unsupported roof as required by Section 75.202(a). More specifically, Respondent argues: (1) due to egress, no one from the longwall face could access tailgate Entry No. 1 at the time **Citation No. 9705670** was issued; (2) a preshift examiner need not enter the tailgate to take air readings because, under normal circumstances or due to egress, those readings would be taken from the longwall face per the Mine's ventilation plan; and (3) an examiner examining the return air course need not travel tailgate Entry No. 1 beyond the T-split located at Crosscut 42. Resp. Br. at 18-19.[47] I reject Respondent's argument that "there was no exposure" to the hazard such that the occurrence of the hazard would not be reasonably

[47] Realistically Respondent's argument is aimed at all four steps of the test for S & S. I have opted to address it in relation to Step 3 because only those persons exposed to the hazard because they "work or travel" in the area under the unsupported/uncontrolled roof are reasonably likely to be injured by it.

likely to result in an injury for purpose of Step 3 of the test for S & S, having already concluded in Section A.3, *supra*, that "work or travel" did occur in the cited area.

4. Step 4: Reasonable likelihood the injury would be reasonably serious

For Step 4, the Secretary must prove a reasonable likelihood that the potential injury would be of a "reasonably serious nature." *Peabody Midwest*, 42 FMSHRC at 383. As previously noted, the Commission has repeatedly recognized that mine roofs are inherently dangerous and Commission case law readily documents that roof falls have killed and seriously injured countless miners. *See e.g., Doe Run*, 42 FMSHRC at 521 (involving fatality); *Jim Walter*, 37 FMSHRC at 493 (same); *LJ's Coal Co.*, 14 FMSHRC 1225, 1229 (Aug. 1992) (reversing ALJ's determination that violation of Section 75.220 was not S & S where record supported that the injury resulting from a roof fall would be of a reasonably serious nature). Additionally, Inspector Yarko testified that injuries from a roof fall can include "[b]umps, bruises, scrapes, broken bones, if not . . . permanent or fatal injuries," Tr. 42:11-14, and this testimony was controverted by Respondent. Thus, the injury caused by a roof fall is very likely to be of a "reasonably serious nature," and Step 4 of the test for S & S is also met.

Thus, I affirm the S & S designation.

C. Injury "Reasonably Likely"

Inspector Yarko designated gravity on **Citation No. 9705670** as "reasonably likely" to cause lost workdays or restricted duty. Sec. Ex. 1. He testified "[i]t's reasonably likely" that, if the roof failed and persons were "back there conducting normal work such as air readings or examinations" there would be, at a minimum, the injury of lost workdays or restricted duty. Tr. 41:17 – 42:8. *See also* Tr. 42:9-14 (Inspector Yarko identifying the type of injuries from exposure to a roof fall); *id.* at 45:11-18. Inspector Yarko testified that the hazard contributed to here—i.e., failure of the roof and falling material—would be reasonably likely to cause injury, and I credited his judgment as an inspector and MSHA roof control/ground control specialist for purposes of Step 3 of the test for S & S, Analysis Section B.3 *supra*. I do here as well for the designation on **Citation No. 9705670** that injury was "reasonably likely" to occur.

Respondent contends the "reasonably likely" designation was based on the same mistaken premise identified above, i.e., that persons would be exposed to and potentially injured by the hazard at which Section 75.202(a) is aimed. In making this argument, Respondent is essentially re-offering its argument that no persons "work[ed] or travel[led]" under the area of unsupported roof as required by Section 75.202(a). Resp. Br. at 18-19; *see also* Analysis Section B.3, *supra* (identifying Respondent's more specific reasons in support of this argument). I reject Respondent's argument that "there was no exposure" to the hazard such that the occurrence of the hazard would not be reasonably likely to result in an injury, having already concluded in Section A.3, *supra*, that "work or travel" did occur in the cited area.

Thus, I affirm the "reasonably likely" designation.

D. Negligence

Respondent contends the designation of "moderate" negligence on **Citation No. 9705670** was inappropriate, and argues the appropriate designation was "none" because the Mine was complying "at all times" with its approved Roof Control Plan." Resp. Br. at 19-20. More specifically, Respondent argues (1) the Mine complied with its Roof Control Plan "in installing the original roof support as it developed the tailgate entries" and in implementing its egress plan, *id.* at 20, and (2) Inspector Yarko acknowledged both of these facts at the Hearing. *Id.* at 20 (citing Tr. 44, 85-86, Sec. Ex. 2, at 13).[48] Counsel for the Secretary presents no argument specific to the negligence designation in his post-hearing brief.

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. . . . A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions

---

[48] Specifically, Inspector Yarko testified, "I marked it as moderate negligence [because] the operator did at the time comply with the roof control plan by setting and installing cans along with the original . . . primary support [of] roof bolts." Tr. 44:2-6. During cross-examination of Inspector Yarko, the following exchange occurred:

> Q: You mentioned on direct when talking about the negligence designation . . . [that] you considered it a mitigating circumstance that [the Mine] had been complying with the roof control plan when [it] developed this tailgate entry, correct?
>
> A: Correct. That's why it's moderate.
>
> Q: But [the Mine was] also complying with [its] roof control plan when [it] enacted the egress plan after the condition presented itself, right?
>
> A: I don't know what the conditions were to activate egress. It was not in the examination book.
>
> Q: Well, I'm going to show you . . . [Sec. Ex. 2] which are your notes from [Dec. 14, 2022]. . . . you list it as 'mitigating circumstances; section was put on egress,' correct?
>
> A: Yes.
>
> Q: So [the Mine was] following [its] egress plan at the time?
>
> A: Correct. Yeah. The roof control plan. Yes.

Tr. 85:1 – 86:5, *See also* Sec. Ex. 2, first set, at 13 (identifying "Section was put on egress" as a mitigating circumstance).

or practices." 30 C.F.R. §100.3(d). According to the Secretary's Part 100 Penalty Table, negligence is considered by MSHA to be moderate when the "operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d), Table X. Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and may consider "the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-1702 (Aug. 2015).

Respondent correctly points out that Inspector Yarko testified the Mine had complied with its Roof Control Plan when it installed the original roof support in tailgate Entry No. 1; he also testified repeatedly that the tailgate was on egress when he inspected the Mine on Dec. 13 and 14, 2022. *E.g.*, Tr. at 30:21 – 31:2; 46:11-14. Inspector Yarko took these items into consideration as mitigating circumstances for the Section 75.202(a) violation. *See* Sec. Ex. 1; Sec. Ex. 2, first set, at 13; Tr. 44:2-6 ("I marked it moderate negligence due to the fact that the operator did at the time comply with the roof control plan by setting and installing cans along with the original roof support"). *See Liggett Mining, LLC*, 36 FMSHRC 15, 20, 29-30 (Jan. 2014) (ALJ) (sustaining moderate negligence finding for Section 75.202(a) violation where inspector considered operator's compliance with approved roof control plan as a mitigating circumstance).

But again, as explained above, neither compliance with a roof control plan nor egress (which again, was triggered by the roof fall that already occurred at Entry No. 1, Crosscut 42½ before **Citation No. 9705670** was written), precludes a Section 75.202(a) violation. And here, I have also found, under *Harlan Cumberland*, that a reasonably prudent person familiar with the mining industry (including the use of pumpable cans in the tailgate entries of a longwall mine) and the protective purposes of Section 75.202(a) would have: (1) upon observing a roof fall extending 9 ft. from the floor to the roof and blocking the tailgate at Entry No. 1, Crosscut 42½, sought to observe and assess roof conditions on both sides of that fall from the vantage points achieved by Inspector Yarko, i.e., from *in* the tailgate Entry No. 1, Crosscut 42-42½, and from the tailgate end of the longwall face, and (2) from these two vantage points (a) recognized the objective signs of continuing deteriorating conditions as documented in the diagrams produced by Inspector Yarko in his inspection notes, and (b) sought to provide additional support for the roof before being required to do so by the 103(k) Order. *See* Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing).

Thus, I affirm the moderate negligence designation as appropriate under the totality of the circumstances viewed holistically.

E. Penalty

The Secretary proposed a regular penalty of $2,561.00 for **Citation No. 9705670** and now submits that this penalty is appropriate, asking me to assess a penalty of "at least" $2,561.00." Sec. Br. at 14-15. Assuming a violation of Section 75.202(a) is found, Respondent asks that the penalty be reduced in conjunction with the non-S & S and lower likelihood of injury and negligence designations Respondent advocates. As explained above, I have sustained the

S & S, "reasonably likely," and "moderate" negligence designations as appropriate on this record.

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

> [T]he 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.

Id. See also Sellersburg Stone, Co., 5 FMSHRC 287, 292-293 (Mar. 1983) (directing Commission judges to make findings of fact on the statutory penalty criteria), *aff'd*, 736 F.2d 1147 (7th Cir 1984). Once factual findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, bounded by proper consideration of the statutory criteria and the Mine Act's deterrent purposes. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising discretion to determine the amount of a penalty, an ALJ is not bound by the penalty proposed by the Secretary. *See e.g.*, *Hidden Splendor Res*., 36 FMSHRC 3099, 3101 (Dec. 2014).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held all six of the statutory criteria in Section 110(i) should be considered in a *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc*., 32 FMSHRC at 1289, the Commission explained that, generally, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. A civil penalty must be "of an amount which is sufficient to make it more economical for an operator to comply with the [Mine] Act's requirements than it is to pay the penalties assessed and continue to operator while not in compliance." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 41 (1977).

According to the Assessed Violation History Report (date range Sept. 14, 2021 – Dec. 13, 2022), contained in Sec. Ex. 15, the Mine has been issued 808 citations, 260 of which were designated S & S. *Id.* at 19. The Report documents that 69 of those 808 citations alleged violation of Section 75.202(a). *Id.* at 2-3. *See also* Sec. Ex. 1 (**Citation No. 9705670**, noting Section 75.202(a) "cited 79 times in two years" to the operator). According to Exhibit A to the Secretary's Petition for Assessment of Civil Penalty, Respondent's "Controller Tonnage" was 134,149,006 tons for 2021, and the "Mine's Tonnage" was 117,126 tons for 2021. *See also* Sec. Br. at 14. Peabody is thus a large operator and the parties have stipulated the proposed penalty will not affect its ability to stay in business. Jt. Ex. 1, ¶ 6. I have determined that Respondent exhibited "moderate" negligence (as mitigating circumstances were present and accounted for) and that a serious injury was reasonably likely to occur. *See* Analysis Sections B, C & D, *supra*. I note also that **Citation No. 9705670** was terminated soon after it was issued on Dec. 14, 2022, after the Mine completed phase 1 of the Action Plan submitted in response to the 103(k) Order,

see Sec. Ex., second set, at 4, and that the Mine received a 10% reduction for good faith abatement. *See* Exhibit A, S. Pet.

On this record, having considered the six statutory penalty criteria and the Mine Act's deterrent purposes, I see no reason to deviate from the Secretary's proposed penalty, and thus I find the proposed penalty of $2,561.00 to be appropriate.

ORDER

In accordance with the foregoing, I **AFFIRM Citation No. 9705670** and **ORDER** Respondent to pay a penalty of $2,561.00 within 30 days of this order.[49]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

[49] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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Attachments:

Attachment A: Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022)

Attachment B: R-E(1) (longwall diagram)

ATTACHMENT
A

Peabody Southeast Mining, LLC Shoal Creek Mine
Camp Creek Portal
654 Camp Creek Portal Rd. Oakman, Alabama 35579
205-497-8147

December 13, 2022

Ms. Mary Jo Bishop, District Manager
Mine Safety and Health Administration
1030 London Drive, Suite 400
Birmingham, Alabama 35211

RE: J-1 El XC 41-42.5 Action Plan
Peabody Southeast Mining LLC, Shoal Creek Mine
MSHA ID. 01-02901

Dear Ms. Bishop:

Peabody Southeast Mining, LLC respectively submits the attached J-1 El XC 41-42.5 Action Plan for Shoal Creek Mine ID #01-02901 in response to K-Order #9705667.

It is requested that the proposed action plan be reviewed and approved in a timely manner to allow Shoal Creek Mine to return to operation.

If you should have any questions or need any additional information, please feel free to contact me at your convenience at (205) 497-8260 (office) or (205) 435-4074 (cell).

Sincerely,

Ed A. Davis

Austin Davis
Senior
Engineer
Peabody Southeast Mining, LLC

Cc: Eric Maitin
Curt Taylor
Nick Boeclanann
Billy Davis
Kyle Yeilding
Charlie Lilly
Austin Davis

EXHIBIT 7
MSHA-003

Peabody Energy Southeast Mining, LLC
Shoal Creek Mine, MSHA I.D. No. 01-02901
J-1 El XC 41-42.5 Action Plan

Peabody Energy Southeast Mining, LLC respectfully submits the following J-1 El XC 41-42.5 Action Plan.

Phase 1

1. Props and/or timbers (8" x 8" or 6" x 6") will be installed as shown on the attached map working from outby and supporting the way inby.
2. Pre-shift examinations of the J-1#1 Entry, approximately two (2) crosscuts outby the longwall face, will be required until at-split examination can be made from the J-2 Longwall face.
3. Once the twelve (12) – 8" x 8" or twenty-four (24) – 6" x 6" props and/or timbers have been installed, checked by MSHA, and a pre-shift examination performed in the J-1 #1 Entry, production may resume on the J-2 Longwall.

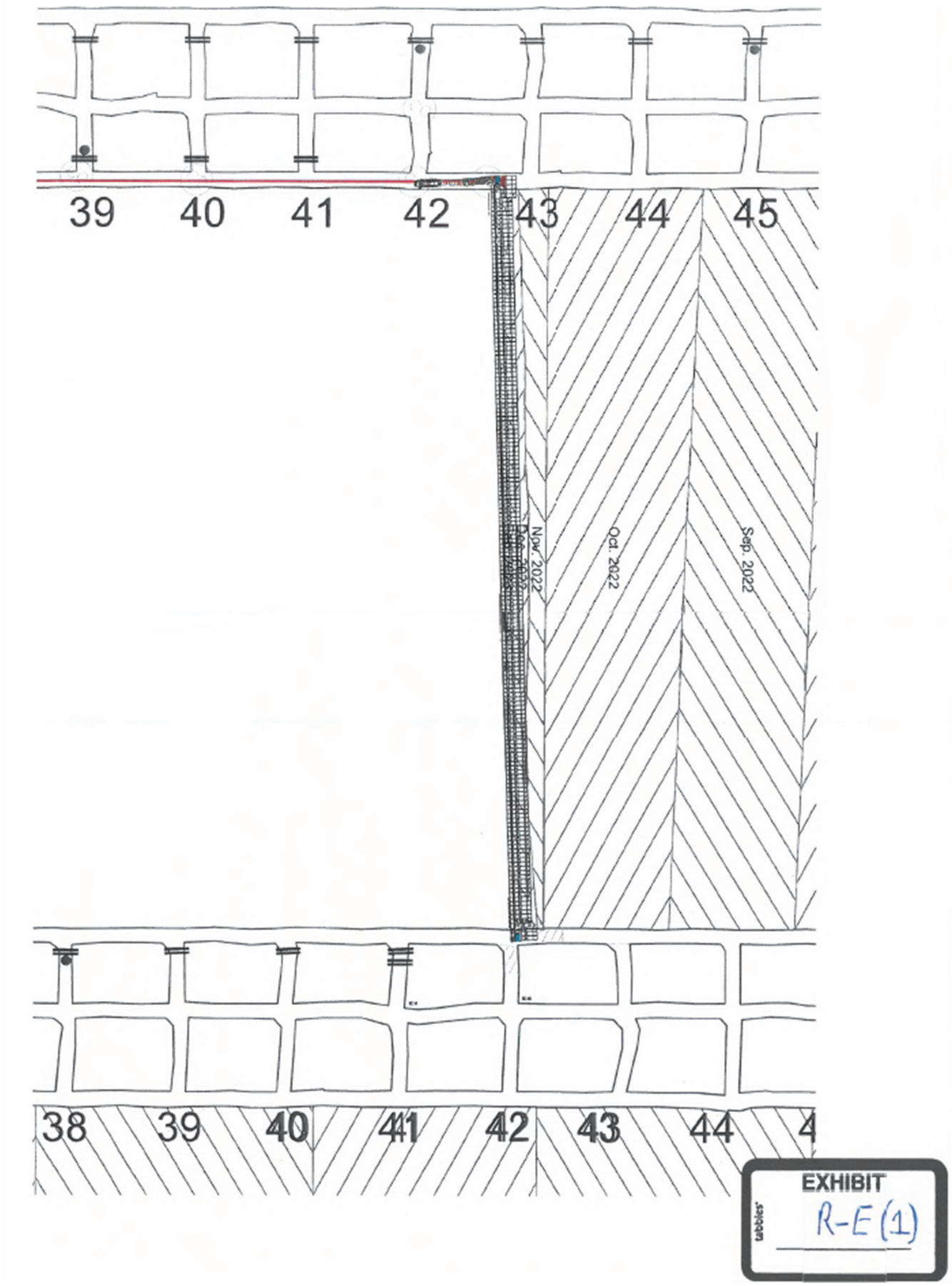
Phase 2

1. Pumpable cribs will be installed as shown on the attached map to a minimum of XC 41.
2. Additional supports will be installed in the intersection of XC 41 as shown on the attached map.
3. Once the t-split examinations can be made from the J-2 Longwall face normal operations will resume.


J-1 E1 XC 41-42.5
Additional Floor to Roof Supports
J-2 LW Face
10 ft
10 ft
10 ft
10 ft
Existing
Proposed additional
Compromised Pumpable Cribs
Existing Prop
Proposed Prop or Timber
Compromised Prop
XC 41
XC 42

MSHA-005

ATTACHMENT
B



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900

July 15, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION ("MSHA"), O/B/O CAESAR MIRANDA, Complainant, v. DIXON ROCK AND MATERIALS, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2025-0253-TR MSHA No. RM-MD-2025-03 Mine: Dixon Rock and Materials Mine ID: 02-03504

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Rose Meltzer, Esq.; Joshua Falk, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for the Secretary of Labor;

Donna Vetrano Pryor, Esq., Husch Blackwell LLP, Denver, Colorado, for Dixon Rock and Materials, LLC.

Before: Judge Bulluck

This matter is before me upon the Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on May 23, 2025, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2), seeking an order requiring Dixon Rock and Materials, LLC ("Dixon Rock") to temporarily reinstate Caesar Miranda to his position of laborer at Dixon Rock.

On June 3, 2025, pursuant to 29 C.F.R. § 2700.45(c), Dixon Rock requested a hearing on the Secretary's Application. A virtual hearing was conducted on June 20 via the Zoom platform, and the parties' Post-hearing Briefs, filed July 2, are of record.

For the reasons set forth below, and consistent with Section 105(c)(2) of the Mine Act, I grant the Secretary's Application and order Temporary Reinstatement of Miranda.

I. Joint Stipulations

The parties have stipulated as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the temporary reinstatement proceeding.

2. Dixon Rock and Materials, LLC, is the operator, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

3. Dixon Rock and Materials, LLC, has products that enter commerce or has operations or products that affect commerce and is, therefore, a mine, as defined in sections 3(b), 3(h), and 4 of the Mine Act, 30 U.S.C. §§ 802(b), (h), and 803.

4. Caesar Miranda is a miner, as defined under section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

Tr. at 6-7.

II. Factual Background

Caesar Miranda was employed by Dixon Rock, an aggregate surface mine with approximately 25 employees, from March 31 to April 18, 2025; John Dixon and Carol Ptak are co-owners, and Dixon is also the foreman. Tr. at 13, 103, 166. Miranda was employed as a general laborer in a full-time position, in which his duties included clearing debris and shoveling under conveyor belts. Tr. at 13-14, 40.

On April 17, Miranda filed a Discrimination Complaint with MSHA, in which he alleged that on April 8, after being assigned to clear sticks and other debris from a rock pile, and being told by Dixon to work at a faster pace, he raised concerns with Dixon that working faster posed a safety hazard to himself and other miners. Additionally, he claimed that he requested a respirator due to his concern about high dust levels. Shortly thereafter, according to Miranda, Dixon dismissed him early from work and, subsequently, removed him from the work schedule through April 15. When Miranda returned to work on April 15, Dixon allegedly told him to leave and, in so doing, caused Miranda to believe that he was terminated. See generally, Ex. C-1.

On May 23, the Secretary, pursuant to her investigation and preliminary finding that Miranda's Discrimination Complaint was not frivolously brought, filed an Application for Temporary Reinstatement of Miranda. Sec'y App. at 2-3. The Secretary's Application alleges that Miranda was discharged on April 15 for having raised two safety complaints with Dixon Rock.[1] Sec'y App. at 2.

III. Testimony

A. Caesar Miranda

Complainant, Caesar Miranda, testified that he began working for Dixon Rock on March 31 as a general laborer on a full-time basis, 40 hours per week. Tr. at 13, 40. He stated that he had six years of experience as a miner, and specialized in heavy equipment operation. Tr. at 15.

[1] By Dixon Rock's account, Miranda was separated from employment on April 18. Resp. Br. at 12; Tr. at 198.

He identified his supervisor as the mine's foreman and owner, John Dixon, who was also responsible for managing his work schedule through the Workforce Application ("Workforce App"). Tr. at 14-15.

In illuminating the circumstances giving rise to his alleged termination, Miranda stated that he was concerned about the mine's lack of drinking water, its locked entries and exits, lack of barriers or signage around the conveyer belt, dusty work conditions, and not being provided with a respirator upon request. Tr. at 19, 29-31. According to Miranda, on April 8, when he was picking up sticks and debris in rock piles and under the conveyor belt, he requested a respirator from Dixon, who gave him a dust mask instead. Tr. at 20-21. He explained that he asked for a respirator because he was concerned about the dust, and that he had been experiencing nose bleeds after work due to dust inhalation. Tr. at 21-22, 29. He also testified that he took a photograph of the dust, falling rock, and flying debris hazards. Tr. at 29-31; see Ex. C-2 at 2. On cross-examination, Miranda also stated that he did not report his concerns about lack of signage and barriers, or lack of access to drinking water to anyone in management.[2] Tr. at 41.

Miranda testified that on April 8, following his request for a respirator, he was told to leave the mine before the end of his shift. Tr. at 22. According to him, Dixon "wanted [him] out of there early. He just said you're done for the day. Go home." Tr. at 46. He could not recall precisely when he was told to leave, but believed it to be before the end of his workday. Tr. at 49. Additionally, he testified that on April 9, his schedule on the Workforce App changed, with the remaining days that he was set to work that week blacked-out, indicating that he was no longer scheduled to work on those days. Tr. at 25; Ex. C-6 at 6-7. He stated that he was also taken off the work schedule for the following week, including Monday, April 14, although initially, he had been scheduled to work that day. Tr. at 25. He testified that he did not come to work on April 14, and expressed his belief that his schedule was changed because he had requested Personal Protective Equipment ("PPE") from Dixon. Tr. at 27-28. Miranda stated that, eventually, his Workforce schedule for April 15 switched to "green," indicating that he was scheduled to work. Tr. at 27. According to him, he arrived at the mine at approximately 5:30 am on April 15, and went to the morning meeting in the scale house. Tr. at 26. When Dixon showed up at the meeting, he stated, Dixon asked him why he had not reported to work on April 14, and what he was doing there now. Tr. at 26-27. Miranda testified that he responded that Dixon had taken him off the work schedule. Tr. at 27. On cross-examination, Miranda also stated that, in an ensuing heated exchange between him and Dixon, he called Dixon some profane names. Tr. at 57-60; see Ex. C4 at 4. By his account, Dixon then ordered him to leave the mine, which Miranda understood to mean that he was fired. Tr. at 74, 103-04. He stated that he left the mine, and never returned to work thereafter. Tr. at 74. Miranda also testified that he was on the phone with Bob while he and Dixon were arguing, and that Bob heard the argument, and said to him, "I

[2] The Secretary concedes that Miranda's other concerns that are not related to his pace of work and respirator request are outside the scope of his April 17 Discrimination Complaint. Sec'y Br. at 8, n.2.

can hear what's going on. It's safe for you to leave. You've got to leave because he could do whatever he wants; it's his property." Tr. at 57, 62, 68.[3]

B. Danny Cooper

MSHA Inspector and Special Investigator Danny Cooper, the Secretary's witness, testified that he is in the process of investigating Miranda's Discrimination Complaint filed with MSHA. Tr. at 110-14. He testified that he conducted interviews with Dixon, other mine employees, and Miranda, and that he also received photographs from Miranda. Tr. at 118; Exs. C-2, C-3, C-4, C-5. Cooper stated that, in the first of two interviews, Miranda told him that he brought safety concerns to Dixon's attention, including the use of PPE and being required to work around conveyors discharging falling rock. Tr. at 122-23; Ex. C-3 at 4. Miranda also stated that Dixon told him that he was not picking up sticks and debris from the rock pile fast enough, to which he responded, "I was going at this speed because of tripping hazards and watching [t]he boom of the excavator, so I didn't get smacked; he didn't like that. I told him I had to go at a safe pace, and I had to watch for the rocks coming off the conveyor and the boom of the excavator." Ex. C-3 at 4. Additionally, during that interview, Cooper stated that he asked Miranda about his interaction with Dixon on April 15:

> Question 39: How did JL Dixion [sic] respond when you arrived back at work on April 15, 2025?
>
> Answer: Just walked into the meeting spot, and he asked why I was there. I told him because I was scheduled. He said he was the Owner, and he became very combative and hostile. He kept questioning me why I was here, he's the one who does the schedule; he should know I was scheduled to work on Tuesday.
>
> Question 40: What slurs did JL Dixion [sic] say to you when you tried to leave the mine site?
>
> Answer: He was cussing. His main thing while I was on the phone was I'm right here, like he wanted to fight, as I was walking though, he was yelling and pointing at himself saying I'm right here, not while I was in the meeting but while I was on

[3] Miranda recalled that it was Bob Mannery whom he called, an MSHA Mesa District employee. Tr. at 57, 62. He testified that he had reported his safety concerns by calling in a hazard complaint to the MSHA hotline prior to April 15, and that Bob had contacted him in response. Tr. at 62-64. Additionally, MSHA inspectors had come to the mine on April 14, in response to an anonymous hazard complaint that PPE was not being provided to miners upon request. Tr. at 202-04. Miranda has not alleged that his anonymous hazard complaint was protected activity or connected to his termination, or that Dixon Rock was aware that he had made the complaint.

> the phone with Bob, he heard that, I just wanted him to know the situation, he said just to leave, it's their land, and as I was trying to leave.

Ex. C-3 at 5. Miranda admitted, in this second interview, to calling Dixon profane names during the heated exchange on April 15, and also attributed his belief that he was fired on April 15 to Dixon telling him "to go home, you're done . . . I don't want you here, you're done," and instigating a fight. Ex. C-4 at 4.

Cooper testified that during his interview with John Dixon, he was told that Miranda was not fired, but that he no longer worked for Dixon Rock because he was a "no-show." Tr. at 124-25; Ex. C-5 at 4. Cooper also stated that he interviewed additional employees who had heard the argument between Dixon and Miranda on April 15, including Miranda swearing at Dixon and saying "fuck this place," as he was leaving. Tr. at 156-59.

Cooper identified one of Miranda's photographs as depicting a high amount of dust at the worksite, and rocks falling from a discharge conveyor with a person working near it at the base of the rock pile. Tr. at 114-15; see Ex. C-2 at 2.

C. Carol Ptak

Carol Ptak, Dixon Rock's sole witness, is co-owner and business administrator of Dixon Rock. Tr. at 165. Ptak testified that Dixon Rock hired Miranda as a laborer based on a skill evaluation, but paid him the higher equipment operator wage, hoping that he could be trained to run the heavy equipment used at the mine. Tr. at 173-74. She explained that a laborer does anything that is required on the ground, including pulling sticks out of rock product. Tr. at 174.

Ptak testified that Miranda was supervised by co-owner and foreman John Dixon, who also coordinates all rock product and monitors safety at the mine. Tr. at 168. She stated that she discussed Miranda's work performance with Dixon, who explained to her that the problem with Miranda was not his work speed, but his tendency to hide behind rockpiles and the scale house, that he had to be reminded several times to get back to work, and that he intended to work directly with Miranda on April 8 because of this problem. Tr. at 183-84. Ptak confirmed that Miranda asked Dixon for a respirator, and that he was given a dust mask. Tr. at 184. She testified that Miranda was not sent home early on April 8, as evidenced by his Workforce App timesheet showing that he was paid for 9.75 hours that day. Tr. at 184-87; Exs. R-8, R-9. She also testified that Miranda was not scheduled for work from April 7 to 13 because of reduction in customer orders. Tr. at 193; see Ex. R-7. Ptak explained that Dixon Rock has large contracts with commercial companies, and that decreased customer demand for product during any given week requires the company to scale back its operations at the mine, beginning with cutbacks to unskilled labor hours. Tr. at 169. She also noted that Miranda was not scheduled to work on April 7 and 8, but that Dixon Rock "cut him a break" by allowing him to work those days since he had shown up at the mine. Tr. at 195-96; see Ex. R-7.

Ptak explained that all employee work schedules are communicated through the Workforce App that all Dixon Rock miners have installed on their cell phones and that, as soon as any schedule change occurs in the Workforce App, the miners receive an immediate

notification on their cell phones. Tr. at 170, 174. She stated that Miranda was scheduled to work on April 14 in the Workforce App, but that he did not come to work or call in. Tr. at 195-96; Ex. R-7. Ptak testified that she talked to Dixon about his argument with Miranda on April 15, and that she was told that Dixon had confronted Miranda about being a no-show on April 14, and Miranda had called Dixon some vile names, had thrown up his hands and said "I'm out of here," and then had left the mine. Tr. at 196-97. She stated that following this incident, Dixon did not remove Miranda from the Workforce App schedule for April 16 and 18, but that Miranda never showed up on those days or called the mine or Dixon directly to confirm his employment status. Tr. at 197-98; Ex. R-7. According to Ptak, after two days of not reporting to work, Miranda was deemed to have abandoned his job, "so his employment with Dixon Rock was terminated, effective the 18th, because of no call/no show." Tr. at 198. Ptak also explained that Dixon Rock's Employee Handbook sets forth its attendance policy, and states that failure to report to work for two consecutive days, without notifying the company, is considered a voluntary resignation; all employees, including Miranda, were required to read the Handbook and sign a confirmation before beginning work. Tr. at 179-81; Exs. R-5 at 4-5, R-6 at 1-2.

IV. Legal Standard

The Mine Act provides protection to miners from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). Pursuant to section 105(c)(2), "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources*, the 11th Circuit Court of Appeals explained the standard as follows:

> The legislative history of the Act defines the 'not frivolously brought' standard as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.'
>
> . . . .
>
> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his workforce under section 105(c) is only a *temporary* one that can be rectified by

> the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

Jim Walter Res., Inc. v. FMSHRC, 920 F.2d 738, 747-48 n.11 (11th Cir. 1990) (citations omitted) (footnotes omitted).

The scope of temporary reinstatement proceedings is narrow and limited to determining whether the evidence establishes that the complaint is nonfrivolous, not whether the complainant can establish a *prima facie* case of discrimination. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 45 FMSHRC 912, 915 (Nov. 2023); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987). During a temporary reinstatement proceeding, a judge does not make credibility determinations, resolve testimonial conflicts, or weigh the operator's evidence against the Secretary's evidence. *Sec'y of Labor on behalf of Cook v. Rockwell Mining*, 43 FMSHRC 157, 162 (Apr. 2021). Rather, the judge simply evaluates the Secretary's evidence and determines whether the miner's complaint appears to have merit. *Id.* at 161 (citing *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009)).

Although the Secretary need not prove a *prima facie* case of discrimination, the Commission has found it useful to review the elements of a discrimination claim to assess whether the evidence at the temporary reinstatement stage meets the nonfrivolous test. *Cook*, 43 FMSHRC at 161. To establish a *prima facie* case, a Complainant must establish that he engaged in a protected activity and suffered an adverse action because of the protected activity.[4] *Id*.; *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1211 (9th Cir. 2021). Evidence that a causal nexus exists between the protected activity and the adverse action may be shown by circumstantial evidence, including the operator's knowledge of the protected activity, its temporal proximity to the adverse action, the operator's hostility or animus towards the miner regarding the protected activity, and disparate treatment of the miner. *See Sec'y on behalf of Hoover v. Moseneca Mfr. LLC d/b/a American Tripoli*, 46 FMSHRC 1, 3-4 (Jan. 2024).

V. Disposition

A. Protected Activity

The Secretary's Application identifies two instances of protected activity. Sec'y App. at 2. First, on April 8, Miranda requested a respirator from Dixon, and he was provided with a dust mask in response. Dixon Rock does not dispute this contention, but asserts that this is not

[4] In cases subject to review by the Ninth Circuit, as in the instant matter, the term "because of" is construed to incorporate a "but-for" causation standard. *See CalPortland Co.*, 993 F.3d at1211; *see also Sec'y of Labor on behalf of Saldivar v. Grimes Rock*, *Inc.*, 43 FMSHRC 299, 302-303 (June 2021).

protected activity because Miranda lacked a reasonable belief that he needed a respirator.[5] However, the record suggests that Miranda was subjected to work in a dusty environment, and casts his safety concern and request for PPE in a reasonable light. Tr. at 143, 199. Expressing concerns about the need for respiratory protection has been found to constitute protected activity. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co*, 34 FMSHRC 1461, 1468, 1471 (June 2012) (ALJ), *aff'd* 34 FMSHRC 1580 (July 2012); *see also Sec'y of Labor on behalf of Bungard v. GMS Mine Repair & Maint.*, 38 FMSHRC 2664, 2676 (Oct. 2016) (ALJ) (request and subsequent actions to obtain a dust mask are protected activities).

Second, the Secretary contends that Miranda raised a safety concern on April 8 about performing manual labor at an unsafe speed around heavy machinery and falling rock. Sec'y Br. at 9. At hearing, Dixon Rock did not address that Miranda communicated this concern to Dixon, but instead, presented evidence suggesting that Miranda was prone to hiding when he should have been working. Accordingly, I find that the Secretary has established reasonable cause to believe that Miranda also complained about work pace expectations and, therefore, that he had engaged in two instances of protected activity.

B. Adverse Action

The Secretary has sufficiently established that Miranda suffered three adverse actions. First, the Secretary's evidence suggests that Dixon told Miranda to go home from work prematurely on April 8 on the heels of Miranda's safety complaints. Next, the Secretary's contention that Dixon made changes to Miranda's Workforce App schedule for the weeks of April 7 and April 14 is supported by the record. Lastly, given the contentious events that occurred over the three work weeks of Miranda's employment, the evidence is adequate to establish reasonable cause to believe that Miranda was terminated on April 15.

Dixon Rock's challenges to the alleged adverse actions, i.e., that there was no early dismissal; that Workforce App schedule changes were based on customer product demand only; and that Miranda voluntarily abandoned his job, cannot be addressed at this juncture, as they pose evidentiary disputes appropriately addressed in a proceeding on the merits of Miranda's discrimination claim. *See Cook*, 43 FMSHRC at 162 (a judge should not resolve testimonial conflicts or make credibility determinations in a temporary reinstatement decision). Consequently, I find that the Secretary has sufficiently demonstrated that Miranda suffered adverse actions, including termination of his employment.

C. Causal Nexus

The Secretary has sufficiently established a causal nexus between Miranda's protected activities and the adverse actions, as evidenced by Dixon Rock's knowledge, temporal proximity, and animus on the part of Dixon. Miranda made safety complaints directly to Dixon, the company's co-owner and manager, and the fact that a mere eight days passed between

[5] Dixon Rock presented evidence that silica tests by MSHA on May 6 were compliant with applicable standards, and that MSHA's April 14 spot inspection of Dixon Rock's on-site PPE resulted in no citations. Tr. at 150-51; Ex. R-10.

Miranda's protected activities and his ultimate separation from Dixon Rock establishes temporal proximity. Furthermore, Miranda's alleged early dismissal from work on April 8 occurred on the same day that he had raised safety complaints with Dixon, followed by his alleged termination only a week later. The temporal proximity, alone, between his protected activities and adverse actions, creates a reasonable inference of a discriminatory motive. The Secretary also provided evidence of Dixon's hostility towards Miranda, which can reasonably be attributed to Miranda's protected activities. Considering this circumstantial evidence, the Secretary has sufficiently established that the alleged causal nexus between Miranda's protected activities and the adverse actions is nonfrivolous. *See Id.* at 161 (operator's knowledge and temporal proximity can, by themselves, in the absence of evidence of alleged hostility, be sufficient to support a nonfrivolous motivational nexus).

In contending that there is no causal connection between any alleged protected activity and Miranda's separation from the company, Dixon Rock was permitted a full and fair opportunity to present testimonial and documentary evidence at hearing, consistent with the Commission's recognition that a temporary reinstatement hearing must be a full evidentiary process that permits all relevant evidence relating to the adverse employment action. *Id.* at 165-66. However, "resolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's *prima facie* case" are simply inappropriate during a temporary reinstatement proceeding. *Williamson*, 31 FMSHRC at 1089 (citing *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). While Dixon Rock's evidence may be dispositive in a later discrimination proceeding, it serves the limited purpose in this proceeding of providing an alternative theory as to why Miranda's employment ended. *See, e.g., Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (a judge is not required to consider respondent's evidence of alternative, non-discriminatory reasons for complainant's termination). Consequently, having concluded that the evidence presented by Dixon Rock clearly creates evidentiary conflicts and credibility issues that cannot be resolved here, Dixon Rock has not shown Miranda's Discrimination Complaint to be frivolous.

D. Conclusion

The documentary and testimonial evidence presented by the Secretary demonstrates that there is reasonable cause to believe that Miranda engaged in protected activities and suffered adverse employment actions, including termination, because of his protected activity. Inasmuch as the Secretary has established that Miranda's Discrimination Complaint appears to have merit and, therefore, was not frivolously brought, Miranda is entitled to temporary reinstatement, as provided by the Mine Act.

VI. Economic Temporary Reinstatement

In granting the Secretary's Application, I am obligated to restore Miranda to the full-time laborer position to which he was hired and occupied until his separation from employment, or to an equivalent position with similar duties at the same rate of pay and benefits. Dixon Rock has requested that Miranda be placed on economic temporary reinstatement, and that he be paid for only 20 hours of work per week, to reflect that he was never guaranteed a 40-hour work week.

See Resp. Br. at 13. The evidence of record establishes that the mine's weekly operations and laborer work hours fluctuate according to customer product demand, and that Miranda had averaged less than 40 hours per week over the course of his employment. Tr. 169, 193; Ex. R-8.

In *Gray v. North Fork Coal*, the Commission cautioned that "Commission judges do not decide the terms of economic reinstatement agreements," and reasoned that, if the operator wanted a specific term in the economic temporary reinstatement, it should have negotiated it as part of its agreement rather than request the Commission to modify the agreement. *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589, 592-93 (Mar. 2011). Multiple Commission judges have interpreted *Gray* "to severely limit the ability of a judge to order economic reinstatement without a clear agreement between the parties." *See Sec'y of Labor on behalf of Terry v. Prospect Mining & Development Co.*, 41 FMSHRC 142, 146 (Feb. 2019) (ALJ); *see also Sec'y of Labor on behalf of Garcia v. Veris Gold U.S.A.*, 36 FMSHRC 1883, 1894 (July 2014) (ALJ) ("this Court does not have the authority to order economic reinstatement without the prior express agreement of both the miner and the operator"); *Sec'y of Labor on behalf of Wilder v. Private Investigation & Counter Intelligence Services, Inc.*, 33 FMSHRC 2031, 2032 (Apr. 2011) (ALJ) (the operator could not unilaterally decide to economically reinstate complainant where temporary reinstatement had already been granted, and there was no negotiated agreement on terms of economic temporary reinstatement). Consequently, economic temporary reinstatement is only a viable option available to Dixon Rock should the Secretary agree and the parties reach an agreement as to its terms, including Miranda's weekly wages. In the absence of such an agreement, I am constrained to order Dixon Rock to temporarily reinstate Miranda by returning him to work at the mine, under its normal operating conditions.

VII. Order

WHEREFORE, the Secretary's Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that Dixon Rock and Materials, LLC **TEMPORARILY REINSTATE CAESAR MIRANDA** to the full-time position of laborer**,** or to an equivalent position, at the same rate of pay and benefits, and subject to the mine's normal fluctuating workforce requirements, **EFFECTIVE IMMEDIATELY.** Should the parties subsequently reach an agreement on the terms to economically temporarily reinstate Miranda, they may jointly file a motion to modify this Order.

THIS ORDER SHALL REMAIN IN EFFECT until such time as a final determination on Caesar Miranda's Discrimination Complaint is rendered, by a decision on the merits or other order of the undersigned or the Commission.

I RETAIN JURISDICTION OVER THIS TEMPORARY REINSTATEMENT PROCEEDING. 29 C.F.R. § 2700.45(e)(4). Counsel for the Secretary shall promptly notify the undersigned of any settlement or determination on filing Miranda's Discrimination Complaint with the Commission.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 30, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MORTON SALT, INC. Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0248 Docket No. CENT 2022-0264 A.C. No. 000560680 Mine: Weeks Island Mine and Mill Mine ID: 16-00970

DECISION AND ORDER

Appearances: W. Tyler Nash, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor;

Allyson Gault, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor;

Donna Pryor, Esq., Denver, Colorado, for Morton Salt, Inc.;

Party Representatives: Brandon Olivier, Safety Specialist, MSHA, Broussard, Louisiana, for the Secretary of Labor;

Nathan Boles, for Morton Salt, Inc.;

Fadi Qutaish, for Morton Salt, Inc.;

Witnesses: Brandon Olivier, MSHA Inspector;

O'Neal Robertson, MSHA Inspector;

Colin Francis, Store Room Worker, Morton Salt, Inc.;

Dalton Gary, Miner, Morton Salt, Inc.;

Eddie Jean-Louis, Hoistman, Morton Salt, Inc.;

Fadi Qutaish, Environmental Health and Safety Manager, Morton Salt, Inc.;

Heath Segura, Maintenance General Foreman, Morton Salt, Inc.;

Landon Olivier, Safety Trainer, Morton Salt, Inc.;

Lee Franks, Supervisor, Morton Salt, Inc.;

Reggie Provost, Production Supervisor, Morton Salt, Inc.;

Scott Frith, Production Supervisor, Morton Salt, Inc.;

Troy Rabeaux, Load Operator, Morton Salt, Inc.;

Before: Administrative Law Judge, Thomas P. McCarthy

I. INTRODUCTION

These two cases are before the undersigned upon a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d).

The cases involve twenty-three citations issued to Morton Salt, Inc. ("Morton Salt" or "Respondent") by the Secretary of Labor between June 13 and 28, 2022 by MSHA inspectors Brandon Olivier and O'Neal Robertson. The Secretary issued the citations for alleged violations found at sites regulated as Mine ID 16-00970 and known as the Weeks Island Mine and Mill. Seventeen of these twenty-three citations were settled by the parties during the prehearing process. The parties presented testimony and evidence concerning the six remaining citations at a hearing held in Lafayette, Louisiana, and subsequently submitted post-hearing briefs. For the reasons discussed below, the undersigned affirms Citation Nos. 9649750, 9649752, 9649757, 9649758, 9673091, and 9649769, as modified. The undersigned assesses a total penalty of $39,900.00 for the six citations that were litigated at hearing.

II. PREHEARING STIPULATIONS

1. The parties have settled Citation Nos. 9649743, 9649744, 9649747, 9649748, 9649753, 9649756, 9649764, 9649765, 9673084, 9673085, 9673082, 9673090, 9673092, and 9673099.

2. This docket involves an underground salt mine known as the Weeks Island Mine and Mill (the "Mine"), which is owned and operated by Morton Salt.

3. Morton Salt has been the "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the mine at which the citations at issue in this proceeding were issued at all relevant times.

4. The assessed civil penalty would not affect Morton Salt's ability to remain in business. However, given the mine's POV [Pattern of Violation] status, these citations could result in the mine's temporary or permanent closure.

5. The citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Morton, on or about the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

III. HEARING EXHIBITS

Petitioner's Exhibits

P-1. Citation/Order No. 9649750 - 104a Order [DOL0101-0102]

P-2. Brandon Olivier's General Field Notes from June 14, 2022 [DOL0224-0237]

P-3. MSHA Mounted Photos for Citation/Order No. 9649750 [DOL0434-0435]

P-5. MSHA Photo related to Citation/Order No. 9649750 [DOL0641]

P-6. MSHA Photo related to Citation/Order No. 9649750 [DOL0642]

P-11. MSHA Photo related to Citation/Order No. 9649750 [DOL0668]

P-12. MSHA Photo related to Citation/Order No. 9649750 [DOL0669]

P-14. Morton Excel Schedule for June 13, 2022 [MORTON 00744-0745

P-15. Morton Excel Schedule for June 14, 2022 [MORTON 00746-0747]

P-17. Citation/Order No. 9649752 - 104a Order [DOL0105-0106]

P-18. MSHA Mounted Photos for Citation/Order No. 9649752 [DOL0437-0438]

P-19. MSHA Photo related to Citation/Order No. 9649752 [DOL0671]

P-20. MSHA Photo related to Citation/Order No. 9649752 [DOL0672]

P-21. MSHA Photo related to Citation/Order No. 9649752 [DOL0673]

P-24. Citation/Order No. 9649757 - 104a Order

P-27. MSHA Photo related to Citation/Order No. 9649757 [DOL0715]

P-28. MSHA Photo related to Citation/Order No. 9649757 [DOL0716]

P-30. MSHA Photo related to Citation/Order No. 9649757 [DOL0774]

P-31. MSHA Photo related to Citation/Order No. 9649757 [DOL0775]

P-32. MSHA Photo related to Citation/Order No. 9649757 [DOL0776]

P-33. MSHA Photo related to Citation/Order No. 9649757 [DOL0777]

P-34. MSHA Photo related to Citation/Order No. 9649757 [DOL0778]

P-35. MSHA Photo related to Citation/Order No. 9649757 [DOL0779]

P-36. MSHA Photo related to Citation/Order No. 9649757 [DOL0780]

P-37. MSHA Photo related to Citation/Order No. 9649757 [DOL0781]

P-46. Morton Workplace Inspections [MORTON 00503-00515]

P-47. Morton Workplace Inspections [MORTON 00516-00529]

P-48. Morton Workplace Inspections [MORTON 00530-00533]

P-50. Morton Workplace Inspections [MORTON 00538-00565]

P-51. Morton Workplace Inspections [MORTON 00566-00580]

P-52. Morton Excel Schedule for June 2, 2022 [MORTON 00754-0755]

P-53. Morton Excel Schedule for June 2, 2022 [MORTON 00756-0757]

P-56. Morton Workplace Inspection [MORTON 00248-00249]

P-57. Morton Mucking Diagram [MORTON 00462]

P-58. Citation/Order No. 9649758 - 104a Order [DOL0119-0121]

P-59. Brandon Olivier's General Field Notes from June 17, 2022 [DOL0238-0241]

P-66. Morton Workplace Inspection [MORTON 00581-00582]

P-87. Citation/Order No. 9649767 - 104a Order [DOL0141-143]

P-88. Brandon Olivier's General Field Notes from June 28, 2022 [DOL0273-0279]

P-90. Morton Map [MORTON 00742]

P-92. Citation/Order No. 9673091 - 104a Order [DOL0164-0166]

P-94. MSHA Mounted Photos for Citation/Order No. 9673091 [DOL0461-0462]

P-97. Assessed Violation History Report [DOL0907-0922 (Pages 915 to 922)]

P-98. Morton Workplace Exam/Equipment Training Presentation [MORTON 00363-00402]

P-109. Morton Workplace Inspection PowerPoint [MORTON 00699-00670]

P-117. Morton Rel-Tek SOP [DOL0923-0935]

Respondent's Exhibits

R-2. Production Report [MORTON 744-745]

R-4. New Employee Training Program [MORTON 403-412]

R-6. Safety meeting minutes [MORTON 214-217; 222-233; 659-671; 677-680; 697]

R-8. Morton Employee Awards Program [MORTON 00759]

R-9. Corrective Action Review Forms [MORTON 234-243]

R-12. Mine Maps [MORTON 741-743]

R-14. Diagram [MORTON 00462]

R-15. Workplace Exams [MORTON 00518-519; 00578-579; 00527; 00533; 00528-529; 00248-249; 00580; 00532]

R-17. R2900G Underground Mining Loader Technical Specifications [MORTON 00464-471]

R-18. Sandvik LH621 Mass Mining Loaders Technical Specifications [MORTON 00472-480]

R-21. Production Reports [MORTON 00756-757; 00744-745; 00746-747; 00748-749]

R-22. Blasting Summary June 2022 in 21 G&F, 22 G [MORTON 00758]

R-24. Training records [MORTON 436-442; 444-446; 448-459]

R-25. List of miners [MORTON 460-461]

R-30. Citation 9649767 [DOL 142]

R-32. Workplace Exams [MORTON 00285-286; 00284-285; 00361-362; 00271-272]

R-37. Demonstrative exhibits

R-39. Drawing by Lee Frank

IV. SETTLED CITATIONS

On March 13, 2024, the Secretary filed a motion to approve partial settlement for this docket, proposing a reduction in the total proposed penalties for seventeen of the twenty-three citations from $59,986.00 to $38,320.00. The Secretary proposes no changes to Citation Nos. 9673082, 9649743, 9673085, 9649744, 9649748, 9649759, 9649760, and 9673099. The Secretary has agreed to vacate Citation No. 9649765. *See Secretary v. RBK Construction, Inc*., 15 FMSHRC 2099 (1993).[1] The Secretary proposes a reduction in the assessed penalties for Citation Nos. 9673084, 9649747, 9673090, 9649753, 9649761, 9673092, 9649764, and 9649756. For Citation Nos. 9649753, 9649761, 9649764, and 9649756, the Secretary proposes reducing the assessed negligence level from 'high' to 'moderate'. For Citation Nos. 9673084, 9649747, 9673090, 9649761, 9673092, and 9649756, the Secretary proposes (1) modification of the likelihood of injury or illness from 'reasonably likely' to 'unlikely' and (2) removal of the significant and substantial designation. In support of these proposed modifications, the Secretary cites legitimate factual disputes concerning the assessed levels of gravity and negligence.

The Secretary contends that she has exercised her prosecutorial discretion to remove the designation of significant and substantial from Citation Nos. 9673084, 9649747, 9673090, 9649761, 9673092, and 9649756. *See* Mot. to App. Settlement at 3-4 (citing *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996)). Yet, the Secretary presents an overbroad reading of *Mechanicsville*. In *Mechanicsville*, the Commission addressed whether a Commission administrative law judge could sua sponte designate a violation as significant and substantial when the Secretary had not designated a violation as significant and substantial. The Commission ruled that there is "no material difference between the Secretary's discretion . . . on the one hand to vacate a citation and her discretion on the other hand not to issue a citation in the first instance or not to designate a citation as [significant and substantial]." *Mechanicsville*, 18 FMSHRC at 879. The Commission iterated that the designation of a violation as significant and substantial "in the first instance" is a prosecutorial decision akin to the decision to vacate a citation. *Id*. at 880.

However, *Mechanicsville* does not address situations—such as here—where the Secretary has already exercised her discretion to designate a violation as significant and substantial and the parties are now before a Commission judge to approve a settlement. The current situation fits squarely within the plain language of section 110(k) of the Mine Act. Section 110(k) states that

[1] The Commission has recently held that the Secretary's authority to vacate citations is not "unfettered." *Secretary v. Crimson Oak Grove Resources*, WL 4185861, at *9. Under these facts, the undersigned concludes that the parties' proposal to vacate Citation No. 4649765 is fair, reasonable, appropriate under the facts, and protects the public interest under the test set forth in *The American Coal Co*., 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act.

"[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." 30 U.S.C. § 820(k). The matter before the undersigned involves the parties' request for "the approval of the Commission" to compromise, mitigate, or settle" a violation already designated as significant and substantial. *Id*. That's a far cry from supplanting the Secretary's discretion through an authorized representative to designate a violation as significant and substantial in the first instance. Accordingly, the undersigned rejects the contention that the removal of a designation of significant and substantial is an exercise of the Secretary's discretion.

The Commission has recently endorsed the above reasoning and held that the Secretary does not possess the unilateral discretion to vacate an S&S finding. *See Secretary v. Knight Hawk Coal, LLC*, 2024 WL 4252697, at *1. Consequently, the undersigned evaluated the settlement agreement absent the arguments rejected above.

The undersigned considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
9673082	$296.00	$296.00
9673084	$1,471.00	$381.00
9649743	$133.00	$133.00
9673085	$7,285.00	$7,285.00
9649744	$133.00	$133.00
9649747	$2,194.00	$477.00
9649748	$273.00	$273.00
9673090	$1,471.00	$318.00
9649753	$4,884.00	$1,586.00
9649759	$16,213.00	$16,213.00
9649760	$7,285.00	$7,285.00
9649761	$7,285.00	$1,064.00
9649765	$442.00	$0.00
9673092	$987.00	$214.00
9649764	$7,285.00	$2,364.00
9673099	$155.00	$155.00
9649756	$2,194.00	$143.00
	$59,986.00	$38,320.00

WHEREFORE, the motion for approval of partial settlement is **GRANTED**, and it is **ORDERED** that the operator pay an assessed penalty of $38,320.00 for Citation Nos. 9673082, 9673084, 9649743, 9673085, 9649744, 9649747, 9649748, 9673090, 9649753, 9649759, 9649760, 9649761, 9649765, 9673092, 9649764, 9673099, and 9649756 within thirty days of this order.

V. PRINCIPLES OF LAW

a. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden to prove, by a preponderance of the evidence, that a violation of the Mine Act occurred. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is generally held strictly liable for violations that occur at its mine. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011). An operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

b. 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 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard 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, e.g.*, *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 affected. The Commission has recognized that an assessment of 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).

c. Significant and Substantial Designation

A violation is properly designated as significant and substantial ("S&S") if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). 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, 500 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The four elements required for an S&S finding are expressed as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease."). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

d. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach 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 if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (internal citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and 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. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id*.

Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," despite mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

e. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each criterion but must provide an explanation for any substantial divergence of the proposed penalty by MSHA based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

VI. BACKGROUND FACTS

The Weeks Island mine is located outside of New Iberia, Louisiana, near the coast of the Gulf of Mexico (now America). Tr. 1041:5-1042:13. Weeks Island was acquired by Stone Canyon Holdings in 2021 and has been in operation for over one hundred years. Tr. 1042:17-1043:15, 1047:20-1053:20. Respondent currently mines 1.6 to 2 million tons of salt annually at Weeks Island. Tr. 1042:17-1043:15.

Weeks Island is a large, class II-A domal salt, gassy mine under 30 C.F.R. § 57.22003. It is roughly two miles in diameter and 1,600 feet in depth, with eight miles of drift or roadway. Tr. 534:14-535:5; 612:25. Class II applies to domal salt mines where "the history of the mine or geological area indicates the occurrence of, or the potential for, an outburst."[2] 30 C.F.R. § 57.22003. Subclass II-A applies to a domal salt mine where "an outburst that results in 0.25 percent or more methane in the mine atmosphere" has occurred. *Id.*; 30 C.F.R. § 57.22004.

As Weeks Island is a class II-A mine under 30 C.F.R. § 57.22003, its operations are subject to section 103(i) spot inspections by MSHA every 15 days. Tr. 257:10-14, 613:10-21, 614:16-615:3; 687:20-21; *see* 30 U.S.C. § 813(i). This class of mine presents unique safety hazards from "scales"[3] and the accumulation of methane. Class II-A Mines can release methane unpredictably and thus present substantial explosion hazards. Tr. 613:7-21; 615:22-616:6; 687:2-5. The accumulation of methane is an inherent concern at Class II-A mines because of its volatility. Miners working in such mines rely on specialized equipment to track ambient methane levels as the presence of methane, which is naturally colorless and odorless, is otherwise difficult to detect. Tr. 257:3-21; 616:1-9. To mitigate the hazards that heightened methane levels would present, Respondent monitors the presence of methane (and other dangerous gases) with an atmospheric monitoring system ("AMS"). Tr. 264:15-24.

[2] An outburst is a "sudden, violent release of solids and high-pressure occluded gases, including methane in a domal salt mine." 30 C.F.R. § 57.2.

[3] "Scaling" is the "removal of insecure material from a face or highwall," and is defined generally as "[t]he plucking down of loose stones or coal adhering to the solid face after a shot or a round of shots has been fired," or the "[r]emoval of loose rocks from the roof or walls." 30 C.F.R. § 57.2; Dictionary of Mining, Mineral, and Related Terms.

The other primary safety concern at Weeks Island is the presence of "scales", which are pieces of loose, cracked salt that are not firmly attached to the body of the salt dome. Tr. 419:4-9. Scales are created by natural geophysical forces such as gravitational pressure, or by movement of salt within the Mine caused by blasting and other mining processes. Tr. 259: 19-24; 536:12-16; 616:22-617:22; 1183:17-1184:7.

If not properly removed or secured, scales create hazardous loose ground conditions that present safety hazards to miners. Tr. 75:1-25; 76:6; 357:2-12, 358:4-13, 419:4-9. Indeed, miners at Weeks Island are taught that "the most dangerous thing in the mine is a scale." Tr. 418:15-17. At least one miner at Weeks Island has been injured by a falling scale, resulting in injuries of sufficient severity to require his removal from the mine for a substantial, indeterminate period. Tr. 358:2-359:1. Accordingly, Respondent's miners are trained to conduct daily workplace inspections for hazardous ground conditions, including for the presence of scales. Tr. 1185:1-10.

At hearing, Respondent presented extensive testimony concerning steps taken, following its acquisition of the Stone Canyon facility in 2021, to mitigate ground conditions that presented safety hazards. For example, Respondent expanded the required ground control training for its miners and implemented refresher safety training; created a safety superintendent role and hired contractors focused on ground conditions; invested in new physical and mechanical scaling equipment; and implemented a daily compliance sheet to track and ameliorate ground condition issues. Tr. 1047:20-1054:22; 1141:9-1142:4. According to one witness at hearing, 312 days had passed without a recordable loss of time incident occurring at Weeks Island. Tr. 1056:5-18.

At the time of hearing, Weeks Island operated on a 24-hour basis and had five subterranean levels – the 1000', 1200', 1400', 1500', and 1600' levels. Tr. 534:14-535:5, 612:24-25, 1043:16-1044:3, 1044:6-18, 1055:4-17. The designated number for each level corresponds with that level's respective depth below the earth's surface. Tr. 535:1-5. Only the 1500' and 1600' levels had active mining operations at the time the citations in question were issued, and there were active benches on the 1500' level at sections 22G East, West, and North, 21G West, 21F West, and 21F North. Tr. 76:15-22; 963:9- 964:14; Ex. R-22.

To extract salt, Respondent drills deep into areas of salt in the benches[4] and faces[5] within the active mine complex, loads these areas with explosives, "blasts" the explosives, "mucks"[6] the blasted salt with Load Haul Dump ("LHD") loaders, and then hauls the salt away from the

[4] A "bench" is defined generally as a "steeply sloping mass of any earthy or rock material rising above the digging level from which the soil or rock is to be extracted from its natural or blasted position in an open-pit mine or quarry." Dictionary of Mining, Mineral, and Related Terms.

[5] "Face" or "bank" means that part of any mine where excavating is progressing or was last done. 30 C.F.R. § 57.2. The term is generally applied "to ledges of all kinds of rock that are shaped like steps or terraces." Dictionary of Mining, Mineral, and Related Terms.

[6] "Mucking" is defined as "the operation of loading broken rock by hand or machine, usually in shafts or tunnels." Dictionary of Mining, Mineral, and Related Terms.

extraction site and up to the earth's surface for further processing. Tr. 77:19-78:1-25; 1045:3-24. The force of the explosives used while blasting is powerful enough to be felt at the surface of the mine. Tr. 617:19-22. Prior to blasting a bench, a miner will drill vertical holes and load explosives into the bench surface. Tr. 77:18-78:25, 82:13-19; Ex. P-57. Each blast results in a muck pile of dislodged salt that can cover the entire bench area to a height of up to three to five feet below the bench ledge and the face. Tr. 1167:18-1169:4.

After blasting the bench and prior to extracting the muck pile from the bench area by "mucking" it, the benchtop area is debrided of scales and cleaned. Tr. 337:23-338:7, 349:18-350:24; *see*, Ex. P-48 at 00533. The LHD operator are required to undertake a workplace examination before mucking the area to check for hazards related to ground conditions. Tr. 978:22-981:24, 1035:8-14. During this examination, the operator inspects for any existing scales from the bottom of the bench, including loose sections within the ceiling and ribs. Tr. 218:15-220:20, 239:17-241:12. The operator's headlamp is bright enough to provide some illumination to the top of a 60-foot-tall bench face when that operator is looking up from near the bottom of the bench face. Tr. 299:18-24. If the operator is unable to obtain sufficient line of sight to the top of the bench, he or she can contact a supervisor to bring a spotlight with better luminosity. Tr. 404:15-25. Additionally, the operator or a supervisor will travel to the top of the bench during the pre-mucking inspection in an effort to locate and examine any suspected scales. Tr. 218:15-220:20, 1143:24-1144:1146:5. Any scales uncovered during this inspection are removed from the mine ceiling and ribs with scalers. Tr. 239:17-241:12; 365:12-368:16-369:2; 394:24-395:19; 402:7-404:16. Once mucking is commenced, the operator continues to monitor the muck site for hazardous ground conditions, including scales. Tr. 1149:17-1150:10.

Respondent presented extensive testimonial evidence concerning its recent efforts to improve and effectuate safety standards at Weeks Island. For example, Respondent requires that any miner who discovers a scale that cannot be readily removed with a manual or mechanical scaler, must report the location of the scale to a supervisor and block off the area from access with a physical barricade or other barrier. Tr. 1189:9-15. Respondent provides specific scaling training to its miners, has acquired new scaling equipment, and has hired contractors specialized in scale removal. Tr. 1185:11-1187:16.

VII. PENDING CITATIONS

Five of the six unresolved citations were issued by MSHA inspectors Brandon Olivier and O'Neal Robertson during an E01 quarterly inspection conducted in June 2022. Sec'y Br. at 3. MSHA issued three of these citations under 30 C.F.R. § 57.3200 for failure to correct dangerous ground conditions and two citations under 30 C.F.R. § 57.3401 for failure to examine the areas where the dangerous conditions were located. Inspector Olivier issued the remaining citation during an investigation initiated after MSHA's receipt of section 103(g) hazard complaints made by miners at Weeks Island. *See* 30 U.S.C. § 813(g)(1).

A. Citation Number 9649750: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 *[Failure to Correct Hazardous Ground Conditions]*

Findings of Fact

During his routine inspection conducted on June 14, 2022, inspector Olivier discovered a potential scale at the corner of a bench area in the 21N section of the mine. Ex. P-1, p.1-2. During this portion of the inspection, inspector Olivier was accompanied by MSHA assistant district manager Nick Gutierrez and MSHA field supervisor Mike Tefertiller, as well as by miner Landon Olivier and miner representative Colin Francis. Tr. 426:12-15, 486:7-19, 811:16-812:11, 1079:19-1081:9. This inspection team initially passed through the 21N section twice before observing the allegedly hazardous ground condition on a third pass. Tr. 426:12-15, 486:7-19.

The scale in question was located on a rib near the top of a bench area approximately "10 [to] 20 feet high next to the travelway." *Id*.; Tr. 689:16-19, 711:11-712:1, 712:19-713:5. Inspector Olivier did not know the precise dimensions or weight of the scale, but he estimated that it was approximately five feet in length and two to three feet in width. Tr. 713:7-714:15. Inspector Olivier observed that pre-existing mechanical scale marks were present on the rib face, suggesting that the area had been scaled during a prior inspection by Respondent. Tr. 813:15-814:2.

Inspector Olivier testified that the base of the scale was about 10 to 15 feet above the bottom of the bench. Tr. 816:3-818:1. Miner representative Francis similarly estimated the height of the scale's base to be between eight and ten feet above the ground. Tr. 441:1-12. A five-foot-high, spray-painted 21N marker is visible in inspection photographs, and provides a visual reference point as to the height of the purported scale. P.3; P. 5; P. 6; Tr. 714:1-9; *see* Sec'y Br. at 14. The crack forming the delimiting edge of the scale starts multiple feet above the 21N marker, corroborating inspector Oliver's and Francis' testimony. *See id*.

Following his discovery of this ground condition, inspector Olivier issued Citation No. 9649750, which alleges a violation of 30 C.F.R. § 57.3200 for failure to correct dangerous ground conditions. This citation specifically alleges that:

> "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. There was loose ground found on the corner of 21N in the bench area. The loose was observed approximately 10-20 feet high next to the travel way. Small vehicle tracks were observed within 2 feet from the rib where the loose was observed. This condition exposes miners to serious injuries if the loose was to fall on the miners or equipment while they are in the area."

Ex. P-1.

In part due to small vehicle tracks being found "within 2 feet from the rib where the loose was observed," inspector Olivier assessed this alleged violation as being (1) of moderate

negligence, (2) reasonably likely to result in a "lost workdays or restricted duty" injury, and (3) a significant and substantial infraction. Ex. P-1 at DOL0101.

The travel way had last been inspected by Respondent on June 13, 2022, the date prior to inspector Olivier's inspection. Ex. R-2; Tr. 1097:21-23, 1217:4-1218:6. Inspector Olivier was unsure whether the observed track marks were created prior to or after Respondent's inspection, and testified that some of the tracks were from LHDs, while others were from smaller, all-terrain vehicles, without overhead protection. Tr. 806:23-808:1; *see* Exs, R-17 (R2900G Technical Specifications); R-18 (Sandvik LH621 Technical Specification).

To terminate Citation No. 9649750, a contractor hand scaled the loose ground with a scaling bar. Ex. P-1. Respondent contends that this caused the loose to fall approximately two to three feet from the rib and break into smaller pieces, though inspector Olivier testified that the scale fell as far as ten feet into the travel way. Tr. 713:23; 1193:6-1195:4. Multiple witnesses testified that removing a scale with a scaling bar might result in the scale falling further away from the rib face than if the scale has been allowed to fall off on its own. *See* Tr. 522:23-523:11; 1089:3-14; 1195:10-20.

The parties agree that on June 14, 2022, no miners were working in the immediate area of 21N, and the loose ground was discovered in an area that was not an active worksite. *See* Tr. 803:2-8; 1085:11-1086:10. However, 21N was used by miners as one of two possible travel ways to access nearby benchtops, and 21N was both a primary and secondary escapeway should miners need to exit to the surface. Ex. P-90A; Tr. 8-13; 427:7-429:2; 709:20-711:10; 1092:3-1095:22; 1121:3-12. At the time of inspection, active mining operations were in progress at the 19-O, 21-GW, 22-GW, 22-GE, and 22-GN sections of the mine. Sec'y Br. at 12 (citing Exs. P-14, p. 1; P-15, p.1; P-16, p. 1; P-52, p.1; P-53, p. 1). Miners would also have reason to enter 21N to access a distribution box and inspect cables that provide power to the fans and drills in the 19-O section. Ex. P-90A; Tr. 100:14-15; 102:4-8; 704:3-25; 709:20-23; 711:10.

Violation

The Secretary bears the burden to prove, by a preponderance of the evidence, that the alleged violation of the Mine Act occurred as charged. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *Sec'y of Labor v. Wyoming Fuel Co*., 14 FMSHRC 1282, 1294 (Aug. 1992); *Sec'y of Labor v. Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (Nov. 1989). The preponderance of the evidence standard requires that the trier of fact "believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Citation No. 9649750 alleges that Respondent violated 30 C.F.R. § 57.3200, which requires that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The Secretary submits that the "scale" discovered by inspector Olivier could have fallen on a miner and constituted a hazardous ground condition violative of 30 C.F.R. § 57.3200. Sec'y Br. at 12; Tr. 429:913; 689:17-19; 702:7. The Secretary points to Francis' testimony that the scale was "protruding" and could potentially fall from the wall and strike a nearby miner. Sec'y Br. at 12; Tr. 426:8-15; 429:15-20; 433:19-434:2. The Secretary further contends that the Respondent failed to fulfill its regulatory obligations under 30 C.F.R. § 57.3200 by (1) failing to remove the scale, and (2) not installing warning signs or physical barriers, thereby allowing unrestricted access to the 21N area. Sec'y Br. at 12-13; Exs. P-3; P-5; P. 6; Tr. 433:25-434:2; 693:9-18.

The Respondent counters that this scale was "tied in" and would not have fallen on its own. Resp. Br. at 8, 21, 27; *see* Tr. 1079:3-1082:14, 1083:19-1084:16, 1116:1-4. According to the Respondent, a tied-in scale can be "broken open on one side but [is] otherwise connected to the rib with no breakage or flaky material." Resp. Br. at 8. In support of this position, Respondent cites inspector Olivier's testimony that he was not certain whether the scale would have fallen on its own, as well as miner Landon Olivier's testimony that he "[didn't] think it would've [come] down on it's [sic] own." Tr. 809:22-810:10, 1083:23-24. The Respondent also argues that, even if inspector Oliver's description of this condition as a "scale" was proper, the scale was not a reasonably detectable hazard because MSHA inspectors passed the 21N section on a couple of occasions before the scale was discovered. Resp. Br. at 22; *see Sec'y of Labor v. ASARCO, Inc.,*14 FMSHRC 941 (June 1992).

For the reasons set forth below, the undersigned concludes that the Respondent's arguments are not persuasive. Considering Respondent's reliance on Landon Olivier's testimony, the undersigned finds that though Mr. Olivier was a generally credible witness, his testimony on whether the loose ground discovered by inspector Olivier can be properly categorized as a scale was equivocal. Mr. Olivier first testified that a "tied in" scale is open "on one side, but if you look at the other side, if it is continued into the hard rock to where there's no breakage or loose flaky material from the actual hard rock." Tr. 1082:2-6. However, upon questioning by the undersigned, he clarified that loose with multiple cracks or openings on three of its four sides is "definitely" a scale, loose with cracks or openings on two sides has the "potential to be a scale," and loose with a crack or opening on one side may or may not be a scale, and "it's hard to determine" whether it is a true scale. Tr. 1082:18-1083:17. Indeed, Olivier testified that "[i]t just depends, Judge. It's just really loose, flaky material. It just really depends." Tr. 1083:11-13. Mr. Olivier then opined that, based on his own experience, he did not believe that the loose would have fallen on its own. Tr. 1083:23-1084:4. Mr. Olivier provided no clarification on what might make loose with cracks or openings on only one side any more or less likely to fall, or what characteristics would make loose unbounded on one side qualify as a true scale. *See id*.

For her part, the Secretary has presented substantial evidence supporting the conclusion that the loose discovered by inspector Olivier was a scale and thus represented a ground condition hazard. *See* 30 C.F.R. § 57.3200; *Asarco*, 14 FMSHRC at 951. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Asarco*, 14 FMSHRC at 951 (quoting *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1137 (May 1982); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

In evaluating whether the Secretary has met her burden to establish that a loose ground condition was present in a given area of a mine, an ALJ should consider such factors as "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *Asarco*, 14 FMSHRC at 952; *Amax Chemical Corp.*, 8 FMSHRC 1146, 1149. A scale may be loose and therefore hazardous when it can be readily scaled by hand with scaling bars. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ) (upholding violation where "loose" material was scaled down by hand, while vacating violations where material was brought down by a large mechanical scaler).

Here, the evidence before me reflects that two of the *Asarco* factors – the presence of visible factors and the operating experience of the mine – support a finding that the scale referenced in Citation No. 9649750 was indeed a ground hazard. Inspector Olivier credibly testified that there was loose ground "on the corner of 21N where employees were still passing, mobile and foot traffic. That was not removed." Tr. 693:4-6. Inspector Olivier also testified that, as of the date of hearing, he had performed approximately 75 inspections at Weeks Island, including regular inspections, hazard complaints, special visits, and spot inspections. Tr. 688:7-12. Accordingly, inspector Olivier is well familiar with the miners and members of management that work at Weeks Island and has extensive, on-site experience in evaluating potentially hazardous ground conditions at a domal salt mine like Weeks Island. Tr. 688:13-24. Given the breadth and depth of inspector Oliver's experience, the undersigned finds that his opinion on whether a potential scale qualifies as a ground hazard should be afforded substantial probative weight. *See Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Moreover, inspector Olivier's testimony is corroborated by that of Colin Francis, who testified that this scale was of a 'nice size' and thickness, was in "bad condition," and presented a hazard to any miners passing through the travel way. Tr. 438:14-20, 440:17-441:3. Francis testified that, given his role as a powder man, he has had many opportunities to observe scales of various sizes within the Weeks Island Mine. Tr. 439:22-25. Francis has also received training from Respondent concerning identification and removal of potential scales. Tr. 440:4-9. Although Respondent has counseled that most scales have cracking or openings on three sides, any potential material that appears to be separating from the domal salt body should be identified and flagged for removal. Tr. 440:9-16. Here, the scale in question was easily removed by hand with scaling bars, supporting inspector Olivier's and Francis' observation that the scale was beginning to come loose and was therefore hazardous. Tr. 709:18-710:2; *see Springfield Underground*, 17 FMSHRC 613, 619.

Further, based on my own independent review, photographs taken of the scale in question readily show a significant degree of cracking within the rib and initial separation of the scale from the larger salt body. *See* Exs. P-3; P-5; P-6; Tr. 713:24-714:6. Considering these "visible fractures," as well as the "operating experience of the mine" – which was cited 69 times for alleged violations of 30 C.F.R. § 57.3200 in the two years prior to June 14, 2022 – the undersigned concludes that the Secretary has met her burden to establish that this ground

condition was indeed hazardous. *See Asarco, Inc.*, 14 at 952; *Jim Walter Res., Inc.*, 28 FMSHRC at 992.

Neither party disputes that Respondent did not install any barriers or otherwise restrict access to 21N. *See* Sec'y Br. at 11-12, Resp. Br. at 21-22. Therefore, the final consideration in assessing whether the Secretary has met her burden of proof is whether this hazardous scale was "reasonably detectable." *See* Resp. Br. at 22; *see ASARCO, Inc.,*14 FMSHRC at 951. As identified above, the Respondent contends that this scale was not reasonably detectable because it was not discovered by MSHA inspectors during the first two passes through the 21N section. This argument is unavailing.

First, as a general matter, a Respondent is on notice of its obligations and responsibilities under the Mine Act regardless of whether it has been previously cited for a violative condition. *Cactus Canyon Quarries, Inc. v. FMSHRC*, 64 F.4th 662 (5th Cir. 2023), aff'g 44 FMSHRC 289 (Apr. 2022). Further, an operator with an extensive history of violating a given standard, like Respondent here, is on notice of the need for greater compliance efforts to meet its regulatory obligations. *IO Coal Co*., 31 FMSHRC 1346, 1351 (Dec. 2009). The Respondent's own internal policies support the need for achieving greater compliance with the cited standard. Indeed, in training miners on how to detect hazardous ground conditions, Respondent has described the uncertainty about when and how scales will come to form, and has acknowledged the need for targeted, ongoing inspection efforts and miner training to combat scales at Weeks Island. *See e.g.*, Tr. 1185:11-1187:16.

The Respondent cites *Asarco* for the proposition that a scale that is overlooked by MSHA during the initial stages of its inspection is not reasonably detectable. Br. at 21-22; *ASARCO*, 14 FMSHRC at 951. But the facts in *Asarco* are readily distinguishable from the facts applicable to this citation. In *Asarco*, the Commission concluded that the Secretary failed to meet her burden of proof where she presented no evidence that any visible loose ground conditions existed prior to a roof fall. *ASARCO*, 14 FMSHRC at 951-52; *see also Master Aggregates TOA Baja Corp*., 28 FMSHRC 835, 839-840 (Sept. 2016) (ALJ) (vacating a citation issued under section 56.3200 where the Secretary presented no probative, direct evidence of hazardous conditions that existed prior to a fatal fall of ground).

Here, by contrast, a scale was found prior to the occurrence of any fall, and the scale was located on a rib near a maintained, travel-way marker. *See* Ex. P-1. The Respondent also cites evidence of a recent past inspection, including mechanical scale marks, as supporting the conclusion that the scale at issue was not reasonably detectable. Resp. Br. at 21; *see* Tr. 813:15-814:2, 816:3-818:1; Ex. P-3. However, the undersigned finds that this evidence better supports a conclusion that the Respondent, for whatever reason, overlooked a scale that was loose enough to be readily removed by hand scaling, while removing other loose in the area with a mechanical scaler. *See id*.

In sum, the undersigned concludes that the Secretary has met her burden, by a preponderance of the evidence, to establish a violation of 30 C.F.R. § 57.3200. Citation No. 9649750 is therefore AFFIRMED, as modified below.

Gravity

The Respondent alternatively argues that, even if the violation of 30 C.F.R. § 57.3200 is sustained, the gravity level was over assessed, and this violation was improperly designated as significant and substantial. The undersigned agrees with the Respondent's position.

Under the Commission's refined framework for establishing a significant and substantial violation, the Secretary bears the burden to establish the following:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

Step 1 of this framework is clearly met here based upon my finding that Respondent's failure to remove the loose ground condition in 21N constituted a violation of 30 C.F.R. § 57.3200.

Further, the Secretary has carried her burden concerning the second step of the modified *Mathies* test. *See Newtown Energy*, 38 FMSHRC at 2038 (holding that "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations.") Pursuant to *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*. Therefore, under step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 57.3200 is that miners could be exposed to "ground conditions that create a hazard to persons." 30 C.F.R. § 57.3200. The record is replete with testimony that failing to remove or secure a scale creates a hazardous ground condition that presents a safety hazard to miners. *See e.g.*, Tr. 75:1-25; 76:6; 357:2-12, 358:4-13, 419:4-9. Indeed, miners at Weeks Island are taught that "the most dangerous thing in the mine is a scale." Tr. 418:15-17. Given the fragile, flaky nature of scales within domal salt mines, the undersigned finds that Respondent's failure to remove a developing scale presented a reasonable likelihood of exposing miners to a hazardous ground condition.

However, despite carrying her burden at steps 1 and 2, the Secretary has not established that a miner's exposure to this hazardous scale would be reasonably likely to cause an injury. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. At hearing, inspector Olivier testified that his decision to assess this violation as significant and substantial was based on several factors, including (1) that the scale's location within 21N was within an active travel way and escapeway, (2) the presence of vehicle tracks in the immediate area, (3) the ease with which the

scale was removed before the citation was terminated, and (4) the risk of being struck from overhead to any minor inspecting trench cable on foot, or to a miner driving through the travel way in an all-terrain vehicle, without overhead protection. Tr. 702:6-14, 704:1-25, 709:12-710:22, 711:18-712:18, 714:16-25. However, inspector Olivier admitted that he was unsure when the tire tracks were created, and whether the tire tracks he observed closest to the rib were created by a LHD or a smaller vehicle. Tr. 806:23-808:1.

Moreover, Landon Olivier credibly testified that miners passing through this area generally travel in the center of a travel way and would not have a reason to navigate a vehicle close to the rib in question. Tr. 1084:17-1085:2. The undersigned credits this testimony and concludes that the Secretary has not presented sufficient evidence that it is *reasonably likely* that a miner exposed to the hazardous ground conditions created by this scale when entering the travel way would experience an injury upon that scale falling. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383 (describing step 2 of the significant and substantial analysis as being whether "the violation was *reasonably likely* to cause the occurrence of the discrete safety hazard against which the standard is directed." (emphasis added)).

In light of the above considerations, the undersigned MODIFIES Citation No. 9649750 to a non-significant and substantial offense, with a 'low' likelihood of injury or illness.

Negligence

Under the Mine Act, operators are held to a high standard of care and must "be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d).

Commission ALJs may evaluate whether an operator has met its duty of care using a traditional negligence analysis, considering the "totality of the circumstances holistically," including "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

In the instant matter, Respondent held a duty of care to remove any potentially hazardous ground conditions from active mining areas and travel ways. *Brody Mining, LLC*, 37 FMSHRC at 1702. Respondent breached this duty of care by failing to remove or otherwise block off the scale in the 21N travel way. Ex. P-1. However, several factors serve to mitigate Respondent's level of negligence. *See* 30 C.F.R. § 100.3(d). Respondent was unaware of the existence of this scale until it was discovered by the MSHA inspection team, and Respondent had recently endeavored to mechanically scale other visible scales in the vicinity of 21N. This mechanical scaling was undertaken as part of a broader initiative to utilize newly acquired scaling equipment operated by contractors specialized in scale removal. Tr. 1185:11-1187:16.

Given the above considerations, the undersigned concludes that it is more appropriate to reduce the negligence level for this citation from 'moderate' to 'low.'

Penalty

For Citation No. 9649750, the Secretary proposed a regularly assessed penalty of $1,471.00, calculated from total points of $1,635.00, with a ten percent reduction for good faith. Sec'y Ex. P-1.

It is well established that Commission Administrative Law Judges have the authority to assess civil penalties de novo for violations of the Mine Act. *See e.g. Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). When assessing civil monetary penalties, a Commission ALJ must consider the following statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In evaluating the appropriateness of the Secretary's proposed penalty, the undersigned first considers the factors weighing against the Respondent. Morton Salt's history of violating this legal standard is extensive, having been cited 69 times at Weeks Island in the two years preceding the issuance of Citation No. 9649750. Ex. P-1; 30 U.S.C. § 820(i)(1) ("the operator's history of previous violations"). Also weighing against Morton Salt is the size of the Weeks Island operation. 30 U.S.C. § 820(i)(2)("the appropriateness of such penalty to the size of the business of the operator charged"). Respondent mines 1.6 to 2 million tons of salt annually at Weeks Island and employs about 170 miners. Tr. 1042:17-1043:15, Tr. 1047:18.

A factor that basically is neutral in the analysis is that the parties have stipulated that the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. *See supra*, Prehearing Stip. 4; 30 U.S.C. § 820(i)(4)("the effect on the operator's ability to continue in business".); *see also John Richards Constr*., 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect, absent proof that imposition of penalty will adversely affect operator's ability to continue in business).

Factors weighing in favor of a reduction in penalty are the operator's low level of negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. 30 U.S.C. § 820(i)(3), (5)-(6). As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and is the result of Morton Salt's low level of negligence. Furthermore, the record reflects that the violative scale was removed with a scaler immediately after being ordered removed by inspector Olivier. Ex. P-1; Tr. 713:23; 1193:6-1195:4.

In light of these factors, the undersigned finds that a penalty of $900.00 is appropriate under the circumstances. Accordingly, Citation No. 9649750 is AFFIRMED, as modified.

B. Citation Number 9649752: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 [Failure To Correct Hazardous Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

On June 15, 2022, inspector Olivier issued a second citation under 30 C.F.R. § 57.3200. Ex. P-17. After uncovering purportedly loose ground conditions "on the ceiling in between 25E and 26E along the belt line," inspector Olivier issued Citation Number 9649752, which alleges:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. There was loose ground found on the ceiling in between 25E and 26E along the belt line. The loose was observed [approximately] 25ft high. This area is traveled by miners daily on each shift. This condition exposes miners to serious [injuries] if the loose was to fall on the miners or equipment while they are in the area.

Ex. P-17.

Inspector Olivier testified that he issued this citation because he identified a scale approximately 24 or 25 feet high on the ceiling in between the 25E and 26E sections of the 1500' level of the mine. Tr. 737:25-738:13. Although no miners were actively working in the area at the time of his inspection, inspector Olivier believed that miners would have several different reasons to access this area. *See* Tr. 818:12-19, 819:2-8. For example, miners would naturally use this area as a passageway when travelling between the 25E and 26E sections. P.90-A; Tr. 733:8-11. Respondent did not physically barricade this area or post signage limiting miner access, and miners could readily enter the allegedly hazardous area through a strip curtain located at the edge of the 25E section. Tr. 41:4-8; 109:2-23; 547:13-19; 736:22-737:5; *see* Ex. P 90-A. The vehicles that travelled through this narrow area either lacked overhead protection, or had limited overhead protection that was rated insufficiently to protect from falling scales. Tr. 113:12-13; 738:22-739:2.

A miner would also have reason to pass by this area to access a nearby FEMCO[7] phone to contact the surface. P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6. The next closest FEMCO phone was located around 1,000 feet away, increasing the likelihood that a miner would access this phone if he or she needed to communicate with a supervisor at the surface. Tr. 107:20-21.

A miner might also enter this area to access a transformer and methane monitor. Tr. 114:5-115:5-8; 733:18-23. Transformers are used by Weeks Island miners to power equipment, and the next closest transformer to the 25E/26E junction was located approximately 800 feet

[7] A FEMCO phone is a stationary phone located at set intervals within the mine that allows miners located underground to communicate with their counterparts at the surface. *See generally*, P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6.

away. Tr. 114:5-115:5-8. A miner would need to access the methane monitor monthly for required calibrations. Tr. 733:22-23.

To terminate this citation, "the loose was hand scaled and fell in the middle of [the] roadway. The loose ground fell as solid pieces and broke into smaller pieces when it hit the floor." Ex. P-17. Miners' representative Eddie Jean Louis testified that the scale was cracked, separating from the salt body, and could "fall at any time." Tr. 540:7-541:3; Ex. P-19. Jean-Louis did not recall the precise size of the scale but testified that a small amount of material fell when it was scaled with a hand scaler. Tr. 538:23-539:4, 593:10-594:16. Miner Lee Franks testified that the scale was "a little bit larger" than a dinner plate – or around six to eight inches thick – and was brittle. Tr. 1210:16-1212:4.

Inspector Olivier testified that he did not assess this citation as an "unwarrantable failure" because Respondent presented some documentation of recent improvements to their workplace safety protocols. Tr. 739:13-20. However, inspector Olivier assessed this citation as the result of high negligence because the condition was "open and obvious" and within an area that was an "open travelway for all miners to access." Tr. 739:5-7. Indeed, the scale in question had already begun to exfoliate small pieces onto the passageway floor when it was discovered. Tr. 740:1-7. Though Respondent designates all employees as competent to conduct a workplace safety examination, nobody was able to provide inspector Olivier with documentation reflecting the most recent examination of this section. Tr. 739:7-12. In part because of the height of the scale above the travelway, inspector Olivier assessed this condition as being reasonably likely to result in a permanently disabling injury and as a significant and substantial violation.[8] Tr. 738:11-24; *see* Ex. P-17.

Violation

Citation Number 9649752 alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." 30 C.F.R. § 57.3200.

Respondent does not challenge that it violated 30 C.F.R. § 57.3200 as alleged in the citation. Resp. Br. at 31-33; *see* Ex. P-17. Rather, Respondent contends that the assessed level of gravity and negligence were over evaluated. Resp. Br. at 31.

The Secretary submitted ample evidence in support of the charged violation. Inspector Olivier testified credibly about the presence of a loose scale in the ceiling between the 25E and 26E sections. Tr. 737:25-738:13. His testimony is corroborated by miner Jean Louis' testimony

[8] During direct examination of inspector Olivier, counsel for the Secretary erroneously referred to the assessed gravity level as being "fatal" rather than permanently disabling. Tr. 738:14-15.

that the scale had nearly separated from the ceiling entirely, and by the Secretary's photographic evidence showing remnants of scaled material of a dinner-plate-sized diameter. Tr. 540:7-541:3; Exs. P-18, P-19, P-20, and P-21; *see also* Tr. 1210:16-1212:4. After considering these factors and reviewing the totality of the evidence before me, the undersigned finds that the Secretary has met her burden to prove the alleged violation of 30 C.F.R. § 57.3200. *See Jim Walter Res., Inc.*, 28 FMSHRC at 992; *RAG Cumberland Res. Corp.*, 22 FMSHRC at 1070.

Gravity and Significant and Substantial Finding

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S as follows:

> (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 at 3-4.

More recently, the Commission restated *Mathies* step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574

(Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.").

In the instant matter, step 1 of the Commission's significant and substantial analysis is resolved by my finding that Respondent's failure to remove the loose scale between 25E and 26E constituted a violation of 30 C.F.R. § 57.3200.

Turning to step 2 of the analysis, the Commission has held that "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Newtown Energy*, 38 FMSHRC at 2038. Under the modified *Mathies* test, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*.

The discrete safety hazard contributed to by a violation of 30 C.F.R. § 57.3200 is the exposure of miners to potentially hazardous ground conditions capable of causing bodily injury. Respondent's failure to remove or restrict access to a section of the mine containing a loose flaking scale stood directly odds with this purpose and contributed to the foregoing safety hazard. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Moreover, the fact that this scale was located in an area of the mine that was readily accessible to miners and to which miners would have good reason to access on a regular basis should that miner (1) be travelling between active areas of the mine, (2) need to access a FEMCO phone or transformer, or (3) need to read or calibrate a methane monitor, supports the conclusion that the violation would be "reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed. *Id*.; Tr. 105:16-106:4; 114:5-115:5-8542:16; 733:4-6, 18-23; Ex. P-90A.

The Respondent does not dispute that a Weeks Island miner would have reason to enter this area in order to access equipment but challenges the Secretary's position that a miner would have reason to utilize this area as a travel way. Resp. Br. at 32; *see* Tr. 452:9; 542:16; 546:23. The Respondent cites the testimony of miner Lee Franks as support for a conclusion that miners generally avoid driving through this area "given dust in the area and because the overlapping curtain was difficult to go through." Resp. Br. at 32 (citing Tr. 1199:2-1200:15, 1206:11-22). But that was not Franks' testimony. Rather, Franks testified that *he* generally avoids driving through that area, stating that "it's cleaner to go around and then go through it," and that "I choose not to [drive through it]". Tr. 1200:9-15. Franks testified that another person could drive through the area if they wished, and did not clarify whether other miners were known to or preferred to drive through this potential shortcut. *Id*. Although Franks testified that most of the technicians would prefer to drive around this section rather than walk past the feeder breaker, he did not indicate whether a technician would ever drive past the feeder breaker in a suitably sized vehicle. Tr. 1210:10-11. Notably, neither Franks nor any other witness testified that Respondent in any way restricted or otherwise discouraged access to the 25E/26E junction. Tr. 1199:2-1200:15, 1206:11-22; *see* Exs. R-12, R-39. Thus, Franks testimony is of limited probative value in

resolving the frequency with which miners access this area of the mine for reasons other than accessing equipment and does little to obviate concerns that miners could (or did) travel through an area with unscaled, hazardous ground conditions present. *See id*.

Notably, the Respondent does not contest that a miner had multiple other reasons to be in this area. As inspector Olivier credibly testified, miners have reason to enter the area "to access the transformers and power equipment. There's also right next to the transformer, "there's a methane monitor that electricians have to calibrate and access monthly." Tr. 733:20-23. Further, a miner needing to contact the surface – for any reason – would have reason to enter the area to utilize the only FEMCO phone within 1,000 feet. *See* P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6.

Given the above considerations, the undersigned concludes that "the violation [of 30 C.F.R. § 57.3200] was reasonably likely to cause the occurrence of the discrete safety hazard [of miner exposure to hazardous ground conditions] against which the standard is directed." *Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. According, the Secretary has met her burden concerning step 2 of the modified *Mathies* test.

Turning to the third and fourth modified *Mathies* steps, the undersigned must determine whether the discrete hazard identified in step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No. 9649752, the undersigned must determine whether the Secretary has established that (1) it is reasonably likely that a miner would be struck from overhead and injured by the scale in question, and (2) that any resulting injury would be reasonably serious in nature. *Id.*

I consider first whether the Secretary has established that it is reasonably likely that a miner would have been injured by this scale had inspector Olivier failed to discover the condition and ordered the scale to be removed.

The Secretary argues that it was reasonably likely that this scale would strike a miner and result in an injury of a 'permanently disabling' degree of severity. Sec'y Br. at 16. First, the Secretary argues that miners had multiple reasons to be in proximity to this scale, including to use equipment and access the beltline or "a primary escapeway [which]runs just to the west of the curtain and the area of the scale." Sec'y Br. at 16 (citing Tr. 733:7-734:4).

Second, the Secretary argues that, as a general matter, scales and other loose ground conditions present "one of the most dangerous conditions at Weeks Island." *Id*.; *see* Tr. 418:15-19. The Secretary cites inspector Olivier's uncontroverted testimony that the loose scale was located approximately 25 feet above the mine floor and presented a risk of injury to a miner's head or shoulder, and further argues that the scale could cause "life-altering damage" were it to hit a miner. *Id*. (citing Tr. 738:13, 16-21). The Secretary also references the size of the scale which, after falling and breaking apart, "consumed much of the travel way, indicating it was large before it fell." *Id*.; *see* Ex. P-20. Finally, the Secretary points to the small dimensions of the passageway. Less than half of the vehicles able to navigate this corridor are equipped with

overhead protections, and those vehicles that are so equipped are not rated to prevent an injury from a scale falling from overhead. Tr. 113:12-13, 738:22-739:2.

The Respondent counters that "there was no active mining on the 1500' development level when the citation was issued, meaning there would be less need for miners to be in the area." Resp. Br. at 32 (citing Tr. 1249:23-1250:18). The Respondent also cites (1) Franks' testimony that only minor injuries would be expected because "only small stuff" came down when the scale was removed, and (2) that neither inspector Olivier nor miner Jean Louis knew the precise dimensions of the scale. Resp. Br. at 32 (citing Tr. 593:10-594:16, 818:12-19, 819:2-8, 1213:18-1216:23). Finally, Respondent cites miner testimony that they never saw a scale fall on its own or fall and injure a miner. Resp. Br. at 32 (Tr. 411:20-21, 478:15-23, 525:10-14, 558:12- 560:24).

I am unpersuaded by the Respondent's argument that a visibly large scale would present a diminished risk of injury to a miner simply because that scale broke into pieces after falling approximately 25 feet onto the solid rock floor of the mine. *See* Resp. Br. at 32. Indeed, the Respondent's own witnesses acknowledge the brittle nature of domal salt scales, and it stands to reason that a scale of any size might break upon falling such a significant distance given the lack of rigidity of the rock. *See e.g.* Tr. 1083:11-13; 1210:16-1212:4. As discussed above, miners had several discrete reasons to be in this area, and I credit inspector Olivier's testimony that the scale presented a significant risk of harm to any miner in the area. Tr. 738:13, 16-21. Considering this testimony, in conjunction with the photographic evidence of record, I conclude that the Secretary has met her burden to prove the reasonable likelihood that a miner would suffer a reasonably serious injury should the scale break loose and fall from 25 feet above with sufficient force to hit a miner in the head or shoulder. *See* Exs. P-18 to P-21. Accordingly, the undersigned upholds MSHA's gravity findings and designation of this violation as significant and substantial.

Negligence

Respondent argues that MSHA and the Secretary failed to acknowledge "considerable mitigating factors" in assessing this violation as the result of of high negligence. Resp. Br. at 33. Accordingly, Respondent submits that the negligence level for this citation should be reduced from 'high' to 'moderate.' I disagree.

Under MSHA's practice pursuant to Part 100, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. By contrast, the level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*.

However, the undersigned is not bound by the Part 100 framework in my consideration of Respondent's degree of negligence in this instance, and I am not limited to a specific evaluation of the presence of any mitigating circumstances in evaluating whether Respondent's conduct exhibited a 'high' degree of negligence. *See Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). A high level of negligence may be properly found if, despite mitigating circumstances, a Respondent's conduct reflects "an aggravated lack of care

that is more than ordinary negligence" under the totality of the circumstances. *Id*.; *Mach Mining*, 809 F.3d at 1263-64.

The Secretary asserts that "Respondent's culpability rises above ordinary or moderate negligence" given the open and obvious nature of this violation and the presence, at the time of inspection, of broken pieces of scale that had already broken away from the passageway ceiling. Sec'y Br. at 16; *see* P-20; Tr. 739:6-740:7. The Secretary also maintains that there are "little circumstances mitigating this violation and no excuse for exposing miners to this unnecessary danger." Sec'y Br. at 16.

Respondent counters that it has presented "considerable" evidence of factors mitigating its level of negligence, including (1) "the extensive training Morton Salt provides employees on identifying and examining loose ground hazards," (2) "Morton Salt's efforts to encourage safe practices through progressive discipline and a popular rewards program," and (3) a June 13, 2022 Production Report suggesting that travel ways and escapeways throughout the mine had recently been inspected. Resp. Br. at 33; *see* Tr. 739:14-20, 1072:15-1076:22, 1189:16-1192:21); Exs R-2, R-8, R-9. Given these submissions, Respondent argues that this citation should be lowered to moderate negligence "with a commensurate penalty reduction." Resp. Br. at 31, 33.[9]

The undersigned finds that the Respondent's description of the "considerable" nature of the evidence mitigating its degree of negligence is inaccurate, and that there are minimal circumstances mitigating Respondent's generally high level of negligence here. Resp. Br. at 33, Sec'y Br. at 16. Though the verisimilitude of Respondent's evidence that it conducted an inspection of all travel ways and escapeways two days prior to the issuance of this citation has not been challenged, this evidence makes no specific reference to the scope or thoroughness of any inspection conducted at the 25E/26E junction. *See* Ex. R-2. As referenced above, Respondent has argued that this passageway was not routinely used by miners as a preferred travel way, which belies its position that it would have nonetheless considered that area as a travel way when conducting a regular, mine-wide inspection for hazardous ground conditions. *See* Resp. Br. at 32; Exs. R-12, R-39; Tr. 1199:2-1200:15, 1206:11-22. Moreover, while Respondent's recent efforts to improve workplace safety conditions at Weeks Island are commendable, these efforts apparently did not contribute towards meaningful compliance

[9] Respondent cites inspector Olivier's testimony that "[Respondent does] have some mitigating factors that they are providing some type of training to the working miner" as a purported admission that factors exist which offset a finding of high negligence. Resp. Br. at 33; *see* Tr. 739:17-20. This argument misstates the inspector's testimony. Inspector Olivier testified that he considered some evidence of mitigating factors in deciding not to assess this violation as an unwarrantable failure, rather than in his consideration of Respondent's negligence as a more general matter. Tr. 739:13-20; *see Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987) (defining an unwarrantable failure as "aggravated conduct constituting more than ordinary negligence."). A high negligence finding does not, standing alone, support an unwarrantable failure finding, as an unwarrantable failure is such conduct that demonstrates "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*., 52 F.3d 133, 136 (7th Cir. 1995).

regarding this particular violation. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. 30 C.F.R. § 100.3(d). Here, Respondent presented testimony that a miner who discovers a potential scale is required to either seek assistance with manually or mechanically removing the scale, or must report the location of the scale to a supervisor and block physical access to the area. Tr. 1189:9-15; *see* Ex. P-17. Respondent also presented testimony that it provides scaling training to its miners, has hired contractors who specialize in removing scales, and has acquired new scaling equipment to prioritize hazardous scale removal. Tr. 1185:11-1187:16. Even when taking this testimony at face value, these efforts are of little use and not true mitigation if the Respondent does not – and here has not – prioritized removing scales from an area of the mine containing necessary equipment that is only accessible every 800 or 1,000 feet, including Femco phones and transformers. *See* P. 90-A; Tr. 105:16-106:4; 114:5-115:5-8; 542:16; 733:4-6.

After considering the totality of the evidence presented, the undersigned concludes that the Respondent's conduct fell at the lower threshold of a 'high negligence' designation, and therefore sustains MSHA's negligence designation, as issued.

Penalty

For Citation No. 9649752, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00, with a ten percent reduction for good faith. Sec'y Ex. P-17.

As with Citation No. 9649750, a factor weighing neutrally against Respondent here is the parties' prehearing stipulation that this proposed penalty will not affect Respondent's ability to remain in business. *See supra*, Prehearing Stip. 4; 30 U.S.C. § 820(i)(4) ("the effect on the operator's ability to continue in business".). Weighing in favor of Respondent is its immediate efforts to achieve compliance after being ordered to scale the loose by inspector Olivier. Ex. P-17; 30 U.S.C. § 820(i)(6). Weighing against the Respondent are the large size of its operation, a history of 70 prior citations for alleged violations of 30 C.F.R. § 57.3200 in the two years prior to the issuance of Citation No. 9649752, the Respondent's negligence – which fell at the low end of a high negligence designation, and the fact that this citation was properly designated as significant and substantial. 30 U.S.C. § 820(i)(1)-(3), (5).

After careful consideration of the above factors, the undersigned reduces the Secretary's proposed penalty to $6,500.00 and otherwise AFFIRMS Citation No. 9649752, as issued.

C. Citation Number 9649757: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 [Failure To Correct Hazardous Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

Inspector Olivier issued a third citation under 30 C.F.R. § 57.3200 on June 15, 2022. Ex. P-24. As he traveled along the ledge of 22G East, he noticed alleged loose ground conditions on the top of the bench and issued Citation No. 9649757, which alleges, in relevant part that:

> There was loose ground found along the ledge of 22G east top of bench. The loose [ground] was observed approximately 60 feet high from the lower level. This room was shot on 6/2/2022 and had been mucked by the LHD operators. This condition exposes the operators and others to serious injuries if the loose [material] was to fall while they are in the area.

P-24 at 1.

Inspector Olivier credibly testified that he issued this citation for "loose ground found on the edge of 22G that was left unattended…[where] miners were allowed to continue working at the bottom of the bench without correct[ing] [the] issue." Tr. 743. At the time the citation was issued, no one was working in the area. Tr. 756-57, 823. However, Olivier explained that he conversed with miners and observed the Load Haul Dump (LHD) down at the bottom of the bench, which led him to believe that the machine was being serviced. Tr. 745. Olivier recalled observing a piece of equipment at the bottom of the bench area. Tr. 745. During this time, Olivier also noticed that the room had started to be mucked but had not yet been fully completed. Tr. 745. Based on his experience and knowledge, he estimated that approximately 20 additional feet of the area had to be mucked. Tr. 745-46. In addition to mucking, the miners would access the areas beneath the bench ledges to scale. Tr. 561, 767.

Olivier expressed about the size of the loose material. While referring to Ex. P-27, Olivier explained that the photograph depicts the loose ground on top of the ledge on the bench side of 22G East. Tr. 749, 753. He pointed out two separate cracked pieces along the edge but could not tell the exact size of the pieces as they were buried further down than shown in the photographs. Tr. 753. Olivier estimated that the pieces ranged possibly to ten feet in total from the edge on the bottom of the photograph to the piece that is leaning out by the crack to the top of the photograph. Tr. 754. The other photographs submitted by the Secretary reveal the same cracked pieces and loose ground but at slightly different angles and magnification. Ex. P-28; P-30; P-31; P-32; P-33; P-34; P-34; P-35; P-37 Tr. 749, 752. Specifically, P-36 reveals a side view of the ledge showing the same crack. The crack runs north along the edge and the separated piece to the right of the crack is around one to two feet down. P-36; Tr. 754. As it runs north, the crack widens which further reveals the thickness of the scale to be about five feet. In another area of the photograph, there is separation along the crack from the bottom base all the way up. Tr. 755.

Based on his experience, Olivier charactered the loose as "large scale[s]." Tr. 753-54. He concluded that the height of the ledge, which measured sixty feet, exacerbated his concerns with

the "hazard." Tr. 756. He determined it to be hazardous because the size of the loose material along the ledge, coupled with the height of the ledge could, if dislodged, fall and crush someone. Tr. 746, 756. This concern was shared by Eddie-Jean Louis, who testified that he was worried about miners working in the areas beneath the ledge. Tr. 549-552.

Shortly after noticing these cracks and alleged loose ground conditions, Olivier questioned supervising miner Lee Franks about whether there had been any recent blasting. Tr. 755. Franks then radioed either Reggie Provost, the production supervisor, or another miner Jack Maxie, who later informed Olivier that the area was blasted or shot on June 2. Based on this information and the visible ground conditions, Olivier issued citation No. 9649757, with no mention of any signage. Tr. 741, 743, 995-96.

To terminate the citation, Morton used a mechanical scaler. Lee Franks testified that "[i]t took a good while. We had to reposition it multiple times. We picked at it and got in the crack a few different times, but had to keep moving and rolling and kind of physically guiding [it], trying the best we could by radio so we could get in and get the right leverage on it to pull it." Tr. 1219-20.

It is necessary to examine the timeline of events regarding alleged inspections and examinations of the area leading up to the citation before assessing whether there has been a violation. The area of 22G East initially had been blasted or shot on June 2, 2022. Tr. 756, 57-58. Olivier testified that Reggie Provost was the fire boss that night, but he only went to the room to check on the gas or methane levels—not to inspect the ledge. Tr. 757-58. Olivier suggested that Respondent provided no documentation showing that the ledge had been examined at some point after the blast and before his inspection. Tr. 759. However, the record reveals that the bench area underwent a secondary blast on June 8. Ex. P-52; P-53; R-22; Tr. 122-23, 135-36, 338. Production supervisor Scott Frith testified that he fire-bossed 22G East after this secondary blast. He could not recall exactly whether he went to the bench top as part of the inspection but suggested that he would have gone. Tr. 912-17. He testified that in any case, he observed no hazard. Tr. 915-17. Similarly, Colin Francis testified that he did not recall seeing the large, cracked pieces shown in Ex. P-27, on June 8, when he loaded the shots and conducted the workplace examination at the top and bottom of the bench ledge that day. Tr. 475-78, 519-20. Respondent also presented evidence that Stephen Herbert conducted a workplace examination in which a mechanical scaler had been used to scale the bench top and ledge in 22G North and East on June 10, 2022. Ex. P-48; Tr. 217-21.

The day before the citation was issued on June 15, 2022, Respondent blasted approximately 3000 pounds of nitrate for three lines in a nearby bench area, 22G West. Tr. 974-76; P-15. Frith and Dalton Gary both testified that the active benches in 22G West were close enough to 22G East that a blast in that area could affect the ground conditions nearby and create a scale. Tr. 965-73, 978,1161-62. Miner representative Colin Francis and miner Eddie-Jean Louis testified that the conditions depicted in Ex. P-27 were likely caused by recent blast as there was loose salt present on the top area. Tr. 443-45, 552-55.

Gary mucked in 22G East during the next graveyard shift running from 11:30pm to 7:30am on June 13, 2022. P-15; P-56; Tr. 522, 952-54. Following that shift, Gary noted in his

workplace examination that he had completed his mucking and found no hazards after checking the bench ledge at the top. Tr. 955, 1153-56. No intervening blast had occurred between his examination and the time Olivier completed his routine inspection. P-54.

Violation

Citation No. 9649757 alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry, and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 57.3200.

The Secretary asserts that Respondent violated the standard by instructing miners to commence work in 22G East after failing to ensure that the cited ground conditions were safe after blasting on June 2. Sec'y Br. at 17. She suggests that Respondent issued work orders for cleaning, scaling, bolting, and mucking, without removing or supporting the scale or posting any barriers or warning signs. Sec'y Br. at 18. Respondent maintains that the evidence establishes that the area had been inspected numerous times since the June 2 blast, that the cracks did not form until after all work was completed, and that any cracks on the bench ledge of 22G had been caused by blasts occurring in areas nearby on the night shift of June 13, 2022. Resp't Br. at 23, 24. I find the testimony and evidence presented by Respondent to be potential mitigating circumstances but conclude that 30 C.F.R. § 57.3200 has been violated.

Under a plain reading of the regulation, there are three requirements for a violation. First, a ground condition that creates a hazard. Second, that hazardous condition must be removed or supported before work *or* travel may occur in the area. And third, the area must be posted with a warning against entry and when left unattended, a barrier must be erected. 30 C.F.R. § 57.3200. As a preliminary matter, the third requirement is not at issue here. Neither party contests that the area had not been posted with a warning sign or dangered off with a barrier. Tr. 995-96. Therefore, the remaining issues are: (1) whether the Secretary proved the presence of a ground condition constituting a hazard; and (2) whether that condition had not been removed or supported before work or travel commenced.

Loose Ground Hazard

The Commission has adopted a series of factors to consider in determining whether "loose ground" is present. *See Asarco*, 14 FMSHRC at 952-53 (citation omitted). These factors include, "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *Id.* The Commission, in another context, approved the definition of "hazard" as a "possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility

of loss." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (citing *Webster's Third New International Dictionary* 104 (1971)).

Morton Salt does not seem to contest that the cracks depicted in P-27 and P-36 constituted ground hazards. Rather, Respondent argues that such cracks did not appear until right before Olivier's inspection. On the other hand, the Secretary presents ample photographic evidence that there were ground conditions present. These photographs, along with the inspector's credible testimony, help prove the existence of a ground condition that creates a hazard.

Under either approach, *Asarco* or the Commission's broader definition of hazard under *Enlow Fork*, these "large scales" satisfy the first requirement. Two *Asarco* factors—the presence of visible factors and the operating experience of the mine—support a finding that the cracks and scale referenced in Citation No. 9649757 constitute hazardous ground conditions. Olivier testified that there was visible loose ground found on the ledge of 22G East. Tr. 743. Such visibility or obviousness is buttressed by the numerous photographs submitted, specifically P-27 and P-36. P-27 depicts two, separated, cracked pieces along the ledge edge that Olivier estimated to be approximately ten feet in total. Tr. 754. P-36 reveals the side view of the same cracks, showing that as the crack runs north it becomes wider, further highlighting the thickness of the scale. Additionally, P-36 depicts some separation along the crack near the bottom base. Tr. 755. As mentioned previously, Olivier testified that he had performed around 75 inspections at the mine, including regular inspections, hazard complaints, special visits, and spot inspections. Tr. 688. Due to his familiarity with miners, management, and on-site experience identifying potentially hazardous conditions at Weeks Island, the undersigned again credits his opinion that the conditions cited qualify as a ground hazard. *See e.g., Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Alternatively, given the size of the cracks ranging from about 10 feet long to 5 feet wide and forming large, heavy slabs of salt separating from the face of the bench, these conditions clearly qualify as a "possible source of peril, danger…" *Enlow Fork*, 19 FMSHRC at 14. As Olivier testified, the ledge was approximately sixty feet high so if any of the material fell below to the area where Gary had been mucking or working and where the piece of equipment was located, there would be cause for concern or danger. Ex. P-27; Tr. 756, 374-75, 444, 551, 914. I thus find that the first requirement is satisfied.

Removal or Support of Ground Conditions

The next issue is whether the hazardous ground conditions were removed or supported before work or travel commenced. This is a closer call and heavily depends on the timeline of events. Based on the evidence, the cited area of 22G East had been blasted on June 2, 2022. Tr. 756, 757-58. Olivier testified, with no meaningful rebuttal, that Provost, who fire bossed that night, admitted that he had not inspected the ledge. Tr. 757-58. The record further shows that the area underwent a secondary blast, which is typically completed to break up rock at the base of the bench that had not broken correctly during the initial blast. Tr. 209. Frith performed that fire boss but admitted that he generally would only give the ledge a "glance." Tr. 917. These facts

show that neither fire boss acknowledged the presence of any cracks or scales given their cursory inspection or failure to closely examine the area. If they had no acknowledgment of these conditions, it follows that they had no reason to remove or support them prior to any work or travel commencing. The evidence suggests that there was continuous mucking and scaling occurring in the area up until the day of the inspection. One miner used a mechanical scaler to scale the bench top and ledge in 22G East on June 10, 2022. Ex. P-48; Tr. 217-21. The day before the citation had been issued, Gary mucked the area. P-15; P-56; Tr. 522, 952-54.

An issue arises whether the scale had been present when mucking occurred after June 2, 2022, before work commenced in the ensuing days. However, it is enough that a blast occurred on June 13 nearby in 22G West. Though the Respondent suggests that this weighs against a finding of a violation, it in fact confirms a violation. Respondent presents evidence that it blasted approximately 3000 pounds of nitrate for three lines in a nearby bench area, 22G West. Tr. 974-76. Two of its witnesses agreed that blasting the active benches in that area could affect the ground conditions nearby and create a scale. Tr. 965-73, 978. Both miner representatives similarly concluded that the conditions depicted in Ex. P-27 likely were caused by a more recent blast than that of June 2, 2022. Tr. 443-45, 552-55. Based on this timeline, Gary still mucked in 22G after the more recent and nearby blast that occurred on June 13 had been completed, so the cracks as depicted in inspector Olivier's photographs were at least more likely than not present during Gary's mucking. Furthermore, Olivier testified that equipment had been located at the bottom of the bench when he conducted his routine inspection, which could in itself provide evidence sufficient to satisfy the "travel" portion of the regulation.

While it may be true that Gary did not observe any hazardous conditions when he checked the bench ledge at the top of 22G on June 13, 2022, it is clear that hazardous ground conditions existed on June 15 when the citation was issued, and that miners had been mucking and operating equipment post-blast leading up to the time the inspector issued the citation. *See* P-15; P-56; Tr. 522, 952-54.

After carefully considering the *Asarco* factors and reviewing the record testimony and submitted evidence, the undersigned concludes that the Secretary has satisfied her burden to prove the alleged violation of 30 C.F.R. § 57.3200.

Gravity and Significant and Substantial Finding

When inspector Olivier issued Citation No. 9649757, he designated it as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-24. Respondent contests the S&S designation and specifically challenges step two and four of the Commission's refined *Mathies* test, alleging that the defined hazard, a falling piece of scale or slab hitting a miner, and a reasonably serious injury, were unlikely to occur. Resp't Br. at 28-30. Respondent first argues that no miner would be affected by the hazard as the crack was formed after miners had stopped working in the area. Resp't Br. at 28. It next contends that a reasonably serious injury would not be reasonably likely given the unlikelihood of a scale striking an LHD operator, the completely bolted mine ceiling, and the protective specifications of the Sandvik LHD present at Weeks Island. Resp't Br. at 29-30. Assuming normal continued mining

conditions, the piece of equipment at the bottom of the bench would need to be moved. At that point, the miners would be traveling to, or perhaps as Olivier suggests, servicing the LHD. Tr. 745.

The Secretary disagrees and maintains that all four of the *Mathies* elements are met and that there was a reasonable likelihood for the loose ground conditions to separate and fall and strike a miner resulting in a reasonably serious injury. For the reasons below, I agree with the Secretary and uphold the S&S designation.

For starters, the inspector assessed the loose ground hazard as reasonably likely to cause a fatal injury or illness to a miner. Ex. P-24. The single miner that would have been affected either would be Gary, who recently mucked the area, or someone traveling below to operate or move the piece of equipment. Tr. 952-54, 955. As will be discussed in the S&S analysis, the record shows that there is a reasonable likelihood of the hazard to cause a fatal or reasonably serious injury to that single miner. These gravity designations are therefore upheld.

Mandatory Safety Standard

Turning to the first *Mathies* element, in the preceding section, I concluded that Respondent violated section 57.3200, a mandatory safety standard, when it failed to remove or support hazardous ground conditions before miners were allowed to travel, access, muck, and scale the affected area. This element is satisfied.

Reasonably Likely to Cause the Defined Hazard

As previously mentioned, the discrete safety hazard contributed to by a violation of 30 C.F.R. § 57.3200 is the exposure of miners to potentially hazardous ground conditions that could cause bodily injury, including loose scales falling from ledges of sixty plus feet onto a miner. While the inspector did not witness a miner under the scales, the likelihood of the occurrence of the hazard is determined by assuming continued mining operations. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). It is disputed whether the mucking process of the cited room area had been completed. Olivier testified that it was not completed and needed another twenty feet. Tr. 745-46. Crediting his position would result in prolonged exposure to miners who would be instructed to muck that area. However, according to Respondent, Gary had completed his mucking process of 22G and completed a workplace inspection that found no hazards. Resp't at 23; Ex. P-56; Tr. 248-51, 1153-56. Additionally, Respondent notes that Olivier acknowledged that no miners had been working at the base of the bench when he issued the citation. Tr. 756-57. Regardless of whether a miner would continue to muck in the area, Olivier had observed a piece of equipment down at the bottom of the bench that he believed was being serviced. Tr. 745. As noted above, miners would be traveling to and potentially servicing the LHD. Tr. 745.

Given this exposure of miners at the base of the bench to slabs and cracks separating from the ledge above, there is a reasonable likelihood that such scales could eventually fall and strike a miner in the area. P-27; P-36. This conclusion is supported by the fact that Gary was in the area mucking in 22G East during the graveyard shift on June 13, and the recent blasting activity in the area that evening. As Frith and Gary both testified, blasting of the nearby benches

in 22G West could affect the ground conditions in the cited area and create additional scaling. Tr. 965-73, 1161-63. Crediting their testimony means that the already cracked areas of 22G East could be exacerbated by continued normal blasting schedules, which increases the likelihood that the loose ground hazards would fall. I ultimately find this second element satisfied as there is evidence that miners were close to the scales presenting a hazardous condition prior to the citation and because there was a piece of equipment still at the bottom of the bench.

Reasonably Likely to Cause a Reasonably Serious Injury

Turning to the final two *Mathies* elements, assuming the occurrence of the specific hazard, that is, loose ground conditions falling on a miner, it is reasonably likely that a miner mucking below or accessing the area to move the LHD would be injured and that the injury would be reasonably serious. Respondent primarily argues that even if there was a hazardous condition when the bench area was being mucked, a serious injury would not be reasonably likely to occur. Resp't Br. at 28. Respondent relies on Troy Rabeaux's testimony for support. He testified that the LHD operators who muck in front of a bench face are "never really close enough" to the bench face to be hit by any loose debris that could fall from above. Tr. 364-65. Another miner, Eddie Jean-Louis, explained that if a scale fell when the LHD was perpendicular to the bench face, the scale would hit the LHD bucker rather than the miner. Tr. 556-57. Additionally, Respondent emphasizes miner training to examine the ribs, roofs, or ground conditions during the mucking process. Resp't Br. at 29. Lastly, the Respondent highlights the safety rating for the Sandvik LHDs at the Weeks Island Mine and Mill. It asserts that the LHDs have laminated windows that are shatter resistant and cabs that provide overhead protection. Though I consider Respondent's arguments helpful, they are ultimately unpersuasive in reversing the S&S designation.

The circumstances cited by Respondent may lessen the likelihood of an injury, but Respondent fails to consider whether a miner would be traveling or working in the area below without an LHD. Specifically, it ignores the possibility that it is reasonably likely that a miner could be struck by a falling scale while attempting to get into their LHD vehicle, when exiting the vehicle, or performing hand scaling. As discussed, during continued mining operations, miners had numerous reasons to be in the bench area to scale, finish the mucking process, and ensure that the piece of equipment was eventually moved or serviced. I credit Olivier's persuasive testimony that the large scale presented a significant risk of harm to any miner in the area. Tr. 756; Tr. 374-75, 444, 551, 745, 753-54. Olivier testified in general that loose ground conditions can result in roof collapse, and that the danger associated with scales on the loose ground can be fatal by falling on someone or damaging equipment. Tr. 689. Olivier explained that the specific loose ground conditions at issue and the exposure to miners in the area below the bench was "alarming." Tr. 756. He characterized the cracks as significant being around 10 feet long and 5 feet wide. These cracks formed large and heavy slabs of salt that separated from the face of the bench about a foot or two. Ex. P-27; P-36. As these cracks ran north along the 22G East ledge, the pieces of cracked salt widened. P-36; Tr. 754. The sixty foot height of the ledge also adds to the gravity of the danger and risk for a fatal injury. Tr. 756. Again, even though there was no miner currently at the base when Olivier issued his citation and took his photographs, The Secretary has established that it was reasonably likely that a miner would be in the area with during continued normal mining operations at Weeks Island. Tr. 756-57.

In sum, the record reveals that if a scale or a piece of the "large scale" were to fall, a serious or fatal injury to a miner below would be reasonably expected. I therefore find this element satisfied. Since I conclude that the four *Mathies* elements are satisfied, the S&S designation for Citation No. 9649757 is upheld.

Negligence

With respect to this citation, Respondent contests the high negligence designation and seeks a reduction to "moderate" negligence. It specifically lists four "considerable" mitigating factors. The factors cited include: "(1) the extensive training Morton Salt provides employees on identifying and examining loose ground hazards; (2) documented workplace inspections for 22G East during the relevant period… (3) the fall-protection LHDs provide operators; and (4) the testimony of multiple miners that show workplace inspections are conducted before and during the mucking process…" Of these four factors, I find somewhat persuasive the documented workplace inspections and the testimony that the large scales and cracks could have been created by a nearby blasting of section 22G West a day prior to the inspection rather than by a blast from June 2. But these are not necessarily dispositive of the issue.

The Secretary maintains that Respondent was highly negligent because it was aware that blasting into bench areas can cause dangerous ground conditions, yet Provost failed to check the ledge for dangerous conditions during his fire boss. Provost further testified that he could not name a single miner who had gone to the top of the ledge to check for the loose ground. Tr. 301, 747. The Secretary views this as bordering on "recklessness." Sec'y Br. at 27. If there were no examinations or evidence that other blasting occurred after June 2, then the Secretary would have a stronger argument for recklessness. But there is record evidence that suggests there had been a secondary blast on June 8, 2022, and blasting in a nearby bench area had occurred only a day before with some form of inspections or examinations. Nonetheless, after consideration of the testimony and entire record, I affirm the high negligence designation.

Here, Olivier assessed the negligence as high because the room and ledge should be checked after blasting and Respondent, or any reasonable operator, should be aware that blasting into benches can cause dangerous loose ground conditions that could injure miners working and traveling below. It is clear from Olivier's conversation with Provost that the top of the bench had not been inspected post-blast on June 2, 2022. The record also reveals a series of workplace examinations taking place after June 2, all of which do not mention any hazardous condition. P-47; P-48; P-51. Olivier testified that most of the workplace examination documents concerning 22G East failed to include any hazard identification pages. *Id.* A reasonable operator would have ensured that these hazard identification pages were adequately used and attached to the relevant workplace examinations as these pages notify management and other miners of the hazards in the area. Additionally, given the size and risk of the loose scales or material falling from sixty feet high, management should be inspecting the ledges from above and below before miners are allowed to muck, scale, or travel in the area. Testimony from the miners reveals that they are not instructed to inspect from above and Provost and Frith both confirmed that they had only done cursory examinations. Tr. 209, 917. Based on the foregoing, high negligence is warranted.

Penalty

For Citation No. 9649757, the Secretary proposed a regularly assessed penalty of $16,213.00, calculated from total points of $18,015.00 with a 10% reduction for good faith.

In the fifteen months preceding the issuance of Citation No. 9649757, MSHA issued 49 violations of section 57.3200 to Morton Salt, Inc., at its Weeks Island Mine and Mill. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited July 17, 2025). The parties stipulated that payment of the total proposed penalties in this matter would not affect Morton's ability to continue in business. *See supra*, Prehearing Stip. 4. I assessed Respondent's negligence as high. Regarding the gravity, I found that the violation was S&S, affected one miner, and was reasonably likely to result in a fatal injury. Respondent demonstrated good faith by timely abating the loose ground conditions using a mechanical scale. Tr. 1219-22. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a reduced penalty of $15,000.00.

D. Citation Number 9649758: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3401 [Failure To Inspect Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

On June 17, 2022, inspector Olivier issued a related citation to the previous one. After discovering the loose ground conditions and developing an alleged reasonable belief that no one properly examined or tested the bench top area of 22G East, the inspector issued Citation No. 9649758. That citation states in relevant part that: "[t]he bench top of 22G was not examined nor tested after blasting. There was loose ground found along the top ledge and miners were allowed to muck out the room in this condition." Ex. P-58. Olivier designated the citation as a significant and substantial violation that was reasonably likely to cause an injury that would reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's high negligence. Ex. P-58.

The loose ground referenced here is the same as the violation found in Citation No. 9649757. Tr. 762. Because the operative, relevant facts regarding the loose ground are similar for both citations, the above fact section for Citation No. 9649757 is incorporated by reference in this section and will apply in my subsequent analysis.

Violation

This citation alleges that:

> Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. The bench top of 22G east was not examined nor tested after blasting. There

was loose ground found along the top ledge and the miners were allowed to muck out the room in this condition.

Ex. P-58.

Inspector Olivier found that the alleged facts set forth in the citation, when taken as a whole, demonstrate a violation of 30 C.F.R. § 57.3401. That regulation requires in relevant part that, "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift." 30 C.F.R. § 57.3401.

Respondent challenges the citation on two distinct grounds. It first argues that the citation should be vacated because it is duplicative of Citation No. 9649757. As legal support, Respondent asserts that citations must impose separate and distinct legal duties on an operator to avoid being qualified as duplicative. *Sec'y of Labor v. JWR, Inc.*, 29 FMSHRC 212, 222 (Mar. 2007) (ALJ). Additionally, Respondent contends that a citation for a specific standard can be duplicative of a charge for violating a more general standard when identical evidence is used. *See e.g., Sec'y of Labor v. Western Fuels Utah Inc.*, 19 FMSHRC 1005 (June 1997).

I disagree that these citations are duplicative. There are two separate duties imposed by the two regulations. The first regulation addresses a duty to remove identifiable hazardous ground conditions before work or travel can occur while the latter regulation requires a duty to examine and test for ground conditions in any area where work is to be performed, or after blasting. *Contrast* 30 C.F.R. § 57.3200 *with* § 57.3401. This sort of framework is hardly restricted to ground conditions-related violations, as the Mine Act imposes multiple duties to correct potential safety hazards and to conduct regular inspections for the existence of discrete hazards. *See e.g.* 30 C.F.R. § 57.14107 (Moving machine parts) and 30 C.F.R. § 57.14100 (Safety defects; examination, correction and records); 30 C.F.R. § 57.19019 (Guide ropes) and 30 C.F.R. § 57.19023 (Examinations); 30 C.F.R. § 75.202 (Protection from falls of roof, face and ribs) and 30 C.F.R. § 75.211 (Roof testing and scaling); 30 C.F.R. 75.334(d) (Worked-out areas and areas where pillars are being recovered) and 30 C.F.R. 75.364(a)(2)(iii) (Weekly examination of methane and oxygen concentrations and air quantity).

"The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards, it does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 40 (Jan. 1981); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1300-01 (11th Cir. 2014)(quoting *Cyprus Tonopah Mining Corp.,* 15 FMSHRC 367, 378-79 (1993) ("although the [operator's] violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator."). The undersigned finds that 30 C.F.R. § 57.3200 imposes a duty to remove which is corrective in nature, while 30 C.F.R. § 57.3401 imposes a duty to examine, which can be seen as preventative or proactive. Similarly, as shown by the plain language of both regulations, one is not a more specific standard of the other. In other words, one

does not encapsulate the other since if one is violated, it does not per se mean that the other is violated as well. For these reasons, I find no duplicative citations.[10]

Respondent next argues that the citation should be vacated because the cited area of 22G East had been properly and regularly examined for hazards and multiple workers documented that no hazards were present. Resp't Br. at 37. As support, Respondent cites to several miners who performed tasks in the area between June 1 and June 13, and who either conducted workplace examinations or were supervised by someone who confirmed that prior, proper inspections had been completed. Because of this, Respondent claims that the Secretary has failed to carry her burden.

In opposition, the Secretary maintains that Respondent violated the standard because there is no concrete documentation that the top of the bench area had been properly examined before work commenced in the area, and the size and severity of the cracks and scales demonstrate that an adequate examination had not been conducted. Sec'y Br. at 22. After carefully considering both parties' arguments and the relevant testimony and evidence, I conclude that Respondent violated the standard.

At hearing, Olivier testified that he identified loose ground conditions and significant cracks along the ledge of 22G East. Tr. 689, 743, 745. When he investigated further, he discovered that the scales were located sixty feet above the ground from the bench area below. The record shows that miners accessed this area to scale. Tr. 561, 767. While Respondent trains its miners to inspect for ground conditions,[11] the large scales indicate that the area was not sufficiently examined after blasting occurred either on June 2, 8, or at the nearby bench area during the graveyard shift of June 13. With respect to the June 2 blasting, Olivier testified that Reggie Provost, the production supervisor, performed the fire boss that evening but only checked the room for gas conditions and did not check the ledge for hazardous ground conditions. Tr. 757. During the hearing, Provost could not recall whether he checked the ledge. Tr. 307.

Olivier later explained that when he followed up concerning whether any miner or designated official adequately checked the ledge, Respondent could not provide clear documentation. Tr. 759. The documents provided include workplace inspections of 22G East, but

[10] To the extent that the Respondent argues that it is important to consider that inspector Olivier could not recall whether he had ever issued a citation for a violation of Section 57.3401 in his approximately 75 previous inspections of Weeks Island prior to June 2022, the undersigned finds that the Respondent is on notice of the requirements under the Act regardless of whether it has been cited previously for a violation of this regulation. *See Cactus Canyon Quarries, Inc. v. FMSHRC*, 64 F.4th 662 (5th Cir. 2023); Tr. 862:3-863:23.

[11] There is testimony by Mr. Rabeaux explaining that a mucker is trained to use their headlamps and lights from their LHD equipment to "see what [they] can see" from the bottom of the bench looking upward. Tr. 368. This is problematic because Morton failed to train miners to go to the top of the bench and inspect for the loose ground and scales. Tr. 368-71; Tr. 448 (Francis testifying to the same). Provost also testified that the miners could look at the bottom or take their LHD to the top "if they need to." Tr. 298-99.

only four out of the fifteen included hazard identification pages, which are sections that notify management of any hazards. P-47; P-48; P-51. None of the documents clearly indicate that a miner or designated official checked the ledge. Regarding the June 8 blast, Frith, who performed the fire boss that evening, explained that he gave the ledge a "glance." Tr. 917. A glance is insufficient to satisfy the examination requirement under 30 C.F.R. § 57.3401. Based on the record evidence and testimony, I find that there was a violation of the cited standard. *See Sec'y of Labor v. Sunbelt Rentals, Inc.; Lvr, Inc.; and Roanoke Cement Co., LLC*, 38 FMSHRC 1619, 1627 (July 2016) (holding that, under 30 C.F.R. § 56.18002(a), examination of working places "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.").

Gravity and Significant and Substantial Designation

When inspector Olivier issued this citation, he designated it as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-58. Respondent does not specifically contest these designations. The Secretary argues that the likelihood and gravity arguments and evidence are the same as for Citation No. 9649757. She further argues that there is a heightened element of danger present when there is no adequate examination of the ledge. Sec'y Br. at 26-27. In sum, the Secretary argues that if miners are relying on the management and fire boss to check and identify these hazardous, loose ground conditions, then the miners are more vulnerable to those hazards as they would be operating under a false sense of security. Sec'y Br. at 27. Overall, I agree with the Secretary that the cited gravity and S&S designations are appropriate.

For starters, the inspector assessed the loose ground hazard as reasonably likely to cause a fatal injury or illness to a miner. Ex. P-58. Olivier credibly testified that the scales, one of which ranged from an estimated 10 feet long to 5 feet wide, was located approximately sixty feet above the bench area that had equipment below and had been recently mucked. Based on the size and thickness of the cracked material depicted in P-27 and P-36, along with the fact that Gary had mucked the area and there was a piece of equipment present below, these gravity designations are affirmed.

Next, the S&S analysis is similar to that for Citation No. 9649757, and for this reason, my analysis is concise. Here, the first step of the refined *Mathies* test is satisfied because I have found that a violation of a mandatory safety standard, section 57.3401, has occurred. Second, the cited standard is meant to prevent hazardous ground conditions including scales and cracked pieces from falling onto miners. Tr. 763-64. Olivier expressed concern that the failure to adhere to the mandatory safety standard by not examining the area or testing the loose ground conditions, greatly endangered miners who traveled or scaled near the ledge. Tr. 763, 764-65. Given the loose nature and size of the cracked and scale material and the exposure of miners mucking, scaling, or operating equipment below during continued mining operations, it is reasonably likely that the safety hazard would occur, satisfying the second *Mathies* step. Tr. 764. As with Citation No. 9649757, the record reveals that if a scale or a piece of the "large scale" that extended 10 feet long to 5 feet wide were to fall from sixty feet above, a serious or fatal injury to a miner working or traveling below would be reasonably expected during continued

mining operations. Therefore, the remaining two elements of *Mathies* are also satisfied. Based on the foregoing, the S&S designation is upheld.

Negligence

Inspector Olivier designated this citation as resulting from the operator's high negligence. Respondent does not specifically contest this designation but argues that the citation should be vacated, as discussed above, because the Secretary failed to prove that a violation of the standard or issued it as a duplicative citation. The Secretary argues that high negligence is appropriate because Provost, who was in the best position to check the ledge for dangerous ground conditions during his fire boss, failed to do so. Sec'y Br. at 27. Because Respondent fails to present any contradictory evidence or argument, and Respondent allowed miners to muck and scale work in the cited area shortly after the June 2 blast, I affirm the Secretary's high negligence designation.

Here, as with Citation No. 9649757, the record shows that at least one supervisor or designated official, Provost, failed to adequately inspect or examine the ledge for ground conditions after the June 2 blast. Tr. 266, 304, 305, 349. His imputed negligence arises from admitting to Olivier that he had only gone to the top of the bench to check on gas or methane levels. Tr. 266. Provost testified that he had not instructed miners to check at the top of the ledge, meaning that it squarely falls on management to inspect from above to ensure safe working and traveling conditions. Tr. 304-05, 349. Instead of conducting an adequate examination or inspection following the June 2 blast, Provost directed miners to begin mucking the area with knowledge that he never checked the ledge for loose materials. Tr. 301, 757. I find these actions highly negligent and affirm Olivier's designation by imputing Provost's negligence to Respondent.

Penalty

For Citation No. 9649758, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00 with a 10% reduction for good faith.

In the fifteen months preceding the issuance of Citation No. 9649758, MSHA issued one violation of section 57.3401 to Morton Salt, Inc., at its Weeks Island Mine and Mill. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited July 16, 2025). Again, the parties stipulated that payment of the total proposed penalties would not affect Morton's ability to continue in business. *See supra*, Prehearing Stip. 4. As outlined above, I determined Respondent's negligence to be high. Regarding gravity, I found the violation to be S&S and reasonably likely to cause a fatal injury to a miner. Respondent demonstrated good faith by providing adequate training to the personnel that would conduct ground control examinations, and by using the mechanical scale to abate the underlying condition. Ex. P-58. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a reduced penalty of $6,500.00.

E. Citation Number 9673091: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3401 [Failure To Inspect Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

Prior to and on June 22, 2022, MSHA inspector O'Neal Robertson issued multiple ground condition citations during an E01 regular inspection. On June 14, 2022, inspector Robertson issued Citation No. 9673085, which alleges that:

> Poor ground conditions were found along the rib next to the maintenance/production supervisor office in the 1400' level. A scale was found on the west rib approximately 20 feet from the floor over the parked side by sides. A miner comes to the area as needed to inspect the vehicle before use and throughout the day. Footprints were found in the impact area of the scale. The scale came down by hand scaling and broke up when it contacted the ground, the average piece of salt was approximately 2' long X 3' wide 6 - 8 inch thick. The lose (sic) ground condition exposes a miner to receiving a disabling injury.

The parties have settled that citation, as issued. *See supra*, Section IV; Ex. P-92.

Inspector Robertson testified that, on June 22, 2022, he also issued three citations to correct hazardous scales within the underground maintenance shop area. Tr. 624:4-625:20; 635:21-23. Three separate sets of scales were discovered by Robertson in the machinery assembly section of the shop, over a parking area where side-by-side ATVS were actively parked, and over a refuse dumpster. *Id*.; *see* Sec'y Br. at 32-33.

After issuing these three citations, Robertson asked maintenance general foreman, Heath Segura, whether a pre-work inspection was conducted in the shop area. Tr. 622:18-625:20. Segura informed Robertson, "no", an inspection had not been performed, and that "they don't do it at all." *Id*. Segura also could not produce documentation that a pre-work inspection was conducted on June 22, 2022, nor could he produce any documentation of any inspections conducted over the several days prior to June 22, 2022. Tr. 622:21-25.

Following this conversation with Segura, Robertson issued Citation No. 9673091. *See* Exs. P-92, P-94. This citation alleges a violation of 30 C.F.R. § 57.3401 and was assessed as the result of high negligence and reasonably likely to result in a fatal injury.[12] The violation was also designated as significant and substantial.

More specifically, Citation No. 9673091 alleges that:

> Appropriate supervisors or other designated persons shall examine and test ground conditions in areas where work is to be performed, prior to work commencing, after

[12] Though the gravity was assessed as 'fatal,' the condition or practice section for this citation describes the likelihood of injury as 'lost workdays or restricted duty.' *See* Ex. P-92.

> blasting, and as ground conditions warrant during the work shift. There were several travel/work areas in the underground maintenance shop where scales were found that [were] not examined or tested by a miner experienced in examining and testing loose ground conditions. These areas were found open and allowed during the inspection and allow[ed] miners to enter these areas with lose (sic) ground conditions. Miners access these areas daily as part of the mining process. A miner could receive at least a lost workday/restricted duty injury from entering these areas.

Ex. P-92 at DOL0164.

Violation

> 30 C.F.R. § 57.3401 mandates the following:
>
> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Inspector Robertson testified that he issued this citation after discovering three different sets of scales near the maintenance shop, which presented ground-condition hazards for which Robertson issued separate citations under Section 57.3200. Tr. 622:18-625:20; *see* Ex. P-94. Respondent does not contest that scales were indeed discovered by Robertson in and around the maintenance shop, nor does Respondent contest that the discovered scales were hazardous. *See* Resp. Br. at 14, 38-39. Rather, Respondent contends that I should credit Segura's hearing testimony that he conducted an examination of the maintenance shop prior to commencing work on June 22, 2022. Resp. Br. 38-39; *see* Tr. 1262:7-11, 1263:24-1264:3. I decline to do so.

Inspector Robertson testified that Citation No. 9673091 was issued following a conversation with Segura regarding whether anyone conducted an examination of the shop. Tr. 622:18-625:20. According to Robertson, Segura, who was the active underground maintenance general foreman, told him that nobody had conducted an examination, and further stated that "they don't do it at all." *Id*. However, Segura testified at hearing that he had misinterpreted Robertson's question as concerning whether records for inspection of the shop were kept, not whether an inspection had been completed as a more general matter. Tr. 1262:7-11, 1263:24-1264:3. Segura further testified that he informed inspector Robertson that he could not readily provide any documentation, but that he did complete formal inspections of the shop every week, as well as ad hoc inspections for any bad ground conditions whenever he was working in the maintenance shop. Tr. 1263:23-1264:14.

The Secretary argues that "[t]his Court should not afford Mr. Segura's testimony at trial any credibility" given the readily obvious inconsistencies between his hearing testimony and testimony provided during a prehearing deposition. Sec'y Br. at 33. I agree.

On direct examination at hearing, Segura first testified that he believed that Robertson had inquired only about any records pertaining to an examination of the shop rather than whether the inspection occurred. Tr. 1263:24-1264:2. However, Segura had testified previously, again on direct examination, to only "very vaguely" remembering speaking to inspector Robertson about this citation. *Id*. Apparently, despite his hazy memory on the subject, Segura could recall with specificity his own representations to Robertson that he had conducted both weekly and ad hoc inspections of the shop area. Tr. 1262:1-6.

Then, on cross-examination, Segura admitted that he had previously testified during his deposition (1) that he had no memory of the specific facts of Citation No. 9673091, and (2) that, at the time of the deposition, he would not be able to provide testimony about the underlying facts of the citation if he were called to do so at hearing. Tr. 1262:12-1263, 1266:6-11. Finally, upon questioning by the undersigned, Segura testified to the purported details of a conversation with Robertson *after* the citation was issued. Tr. 1267:6-10. Segura testified to remembering that Robertson initiated the conversation and that after being asked whether he had conducted an inspection, he informed Robertson that "I did not document an exam. I [did an] exam throughout the shop as I passed through it." Tr. 1267:22-23, 1268:3-6. Yet Segura could recall anything said by Robertson other than the question about whether an exam had been completed, and he could not recall any of his own representations to Robertson other than his confirmation that he had completed an undocumented examination of the area. *See* Tr. 1268:7-22.

The Respondent provides no persuasive reasons why I should credit Segura's limited but seemingly convenient recollections of the circumstances surrounding this citation, including his partial memory of the nature and substance of his conversation with Robertson. *See* Resp. Br. 38-39. Nor does the Respondent provide any argument for how Segura's hearing testimony is not impugned by his prior testimony under oath that he had no recollection of the citation at all. *See* Tr. 1262:12-1263, 1266:6-11. Accordingly, I do not credit Segura's hearing testimony on the nature of the inspection he conducted (if any), and instead credit Robertson's more persuasive, internally consistent, testimony that an examination of the maintenance shop was not conducted on June 22, 2022. Based on the record evidence and Robertson's credible testimony, the undersigned finds that there was a violation of the cited standard.

Gravity and Significant and Substantial Designation

This citation was designated as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-92. As with Citation No. 9649758, Respondent has not specifically contested these designations on brief. For her part, the Secretary argues that a heightened gravity finding, and significant and substantial designation are appropriate under these facts. Sec'y Br. at 33-34.

In evaluating whether the facts before me are sufficient to carry the Secretary's burden for this citation, the undersigned first finds that step 1 of the modified *Mathies* step is met here

based on my finding that a violation of section 57.3401, which imposes a mandatory safety standard to examine for hazardous ground conditions, has occurred. As found above, the intent of this standard is to prevent hazardous ground conditions, including scales and other cracked rock fragments, from falling, striking, and potentially injuring miners. *See* Tr. 763-64.

Concerning step 2, the presence of loose ground conditions in the area that were overlooked due to the lack of an adequate inspection has been established. On June 22, 2022, Robertson observed miners working in and around the shop and in close proximity to visible, hazardous scales. Tr. 660: 16-21; 625:23. One set of these scales was observed in the travel way adjacent to the shop. Tr. 660:19-21, 662:15-17. Another set of scales was found in the parking area and, at the time of inspection, Segura was performing vehicle maintenance nearby these scales, despite supposedly having inspected the area before beginning work. Tr. 626:2-6; 662:1-665:19. Other miners had reason to enter the parking area as well, either to relocate a vehicle or access safety equipment, such as fire extinguishers, that was stored in the parked vehicles. Tr. 640:14-16.

Turning to Steps 3 and 4, it is apparent that injury to a miner would be reasonably likely had inspector Robertson not intervened, and any resulting injury would almost certainly be reasonably serious in nature. The Secretary puts forth inspector Robertson's undisputed testimony that any scales present in the maintenance shop are likely to be encountered by one or more miners. Tr. 623-628; *see* Sec'y Br. at 33-34. The maintenance shop is the default working area for mechanics, and other miners travel through the maintenance shop throughout the day whenever repairs to equipment are needed. Tr. 623:10-11,628:1-3. Non-mechanic miners may spend at least two hours of an eight-hour shift within the maintenance shop. Tr. 1262:23-1263:14.

The scales in the parking area were so prevalent that parked vehicles had to be relocated so the ceiling could be fully scaled. Tr. 638:8-22; 640:4-9; Ex. P-94. Restrictive netting intended to provide miners with protection from these scales was actively torn at the time of inspection, and the netting did not prevent the scales from falling to the mine floor during scaling. Tr. 641:22-23, 675:18-19. This was despite the large size of the scales, which were approximately two feet by two and a half feet by 8-10 inches. Tr. 643:18-23. It thus appears that these minimal protective measures would have likely been ineffective at providing overhead protection to a miner had any of these scales fallen on their own. *Id.*

Based on the foregoing, the MSHA's S&S and gravity designations are upheld for this citation.

Negligence

Inspector Robertson designated this citation as resulting from the Respondent's high degree of negligence. As with Citation No. 9649758, the Respondent has not presented a specific argument regarding the assessed level of negligence. Rather, the Respondent argued summarily that this Citation should be vacated given Segura's (non-credible) hearing testimony that he did, in fact, conduct the requisite inspection prior to beginning work in the maintenance shop on June 22, 2022.

The Secretary argues that a finding of high negligence is appropriate because "multiple sets of scales existed in the maintenance shop, indicat[ing] Respondent showed little initiative in protecting its miners." Sec'y Br. at 34. The record evidence supports the Secretary's assertion. Indeed, Respondent concedes that scales were present and visible in and around the maintenance shop on June 22, 2022, and that the scales were not removed or barricaded off prior to inspector Robertson's inspection. Resp. Br. at 14; *see* Exs. P-92, P-94.

Moreover, the Secretary has submitted uncontroverted evidence establishing that the vehicles in the parking area of the maintenance shop belonged to Morton Salt supervisors, which supports an inference that Respondent should have been aware of the presence of scales in the area and the need to conduct ameliorative pre-work inspections. Tr. 647:2-19; *see* Sec'y Br. at 34.

Though not framed specifically as an argument to lower the assessed level of negligence, Respondent has submitted some evidence that travel ways outside of the maintenance shop are generally inspected by Morton Salt supervisors on a weekly basis. *See* Tr. 1019:10-1020:23; 1097:12-20; Ex. R-2. Lee Franks also testified that all travel ways, including the travel way through the maintenance shop, are inspected by Morton Salt supervisors. Tr. 1243:14-1244:13. Franks also testified that supervisors generally conduct an inspection of the maintenance shop whenever they pass through the area but admitted that he cannot speak to whether all miners are counseled if they fail to properly complete their pre-shift inspection cards. 1244:1-1245:22. This testimony supports a finding that inspections of the maintenance shops have occurred on other occasions, but not that any inspection or recording thereof occurred on June 22, 2022. Accordingly, I find that there is no evidence of mitigating factors as to this citation, as mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated. 30 C.F.R. § 100.3(d). Failing to conduct any inspection on June 22 and failing to correct the hazardous ground conditions underlying this citation until instructed to by MSHA, are not the actions of an operator taking affirmative steps towards addressing and ameliorating the safety risks presented by these obvious ground-condition hazards. *See id*.

In sum, Respondent has failed to present sufficient contradictory evidence rebutting the testimony submitted by the Secretary supporting MSHA's high negligence finding. Accordingly, the undersigned AFFIRMS MSHA's high negligence designation.

Penalty

For Citation No. 9649758, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00 with a 10% reduction for good faith.

As referenced in the analysis for Citation No. 9649758, the parties have stipulated that payment of this proposed penalty would not affect Respondent's ability to continue in business. *See supra*, Prehearing Stip. 4. Here, the undersigned has affirmed that Respondent's negligence level was high, (2) that Respondent's conduct underlying this violation presented a reasonable likelihood of causing a fatal injury to a single miner, and that the violation was significant and substantial. Respondent has demonstrated some good faith by providing adequate training to the personnel that would conduct ground control examinations prior to the termination of this

citation. Ex. P-92. Considering the six criteria set forth under 110(i) of the Mine Act and all evidence before me, the undersigned assesses a penalty of $8,000.00.

F. Citation Number 9649767: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.22603(e) [Using an Impermissible Vehicle During a Mine Examination]

Findings of Fact

On June 28, 2022, inspector Olivier issued Citation No. 9649767 during an investigation initiated following MSHA's receipt of section 103(g) anonymous hazard complaints made by miners at Weeks Island. Tr. 868:1-23; *see* 30 U.S.C. § 813(g)(1). Section 103(g) of the Act provides that:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g)(1). According to the 103(g) hazard complaints received by MSHA, managers employed by Respondent traveled via non-permissible vehicles while conducting "fire bosses." Tr. 868:1-23; 871:2-7. A fire boss is "a post-blast examination for the presence of methane or other dangerous gases that may have been released during the blast." Sec'y Br. at 4; s*ee* Tr. 257:3-21; 574:5-21; 902:12-903:15.

During the evening shift on June 27, 2022, Respondent blasted in the 12H, 12I, and 12J sections of the 1600' level of Weeks Island. *See* P-90A; Tr. 786:9-14; 931:25-932:4; Tr. 936:8-11. Two Morton Salt employees, production supervisor Scott Frith and miner Seth Ronsanet,[13] then entered the mine to perform the fire boss. Tr. 930:16. Frith and Ronsanet entered the mine on foot via the number four shaft and walked to the blasted areas at 12H, 12I, and 12J to test for methane. Tr. 930:20-25; 931:1-2. After determining that methane levels at the blast site were

[13] The correct spelling of miner "Ronsanet's" surname is not entirely clear based on the record before me. Inspector Olivier testified that this individual's surname is spelled "Ransonet," but the transcript at various times provides the spellings "Ransonet", "Ransonee", and "Ronsanet". *See eg*, Tr. 774:9-20, 935:7-10. The Secretary has adopted the spelling "Ransonet" in her post-hearing brief, whereas the Respondent has adopted the spelling of "Ronsonet". Sec'y Br. at 30; Resp. Br. at 17. Scott Frith, who works alongside miner "Ronsanet," testified that he believes his surname to be spelled R-O-N-S-A-N-E-T. Tr. 935:7-10. Given Frith's testimony, the undersigned has utilized the spelling of "Ronsanet" herein.

within acceptable levels, Frith and Ronsanet walked to an allegedly non-permissible Kawasaki[14] four-seater mule, drove that mule through the bench tops to a Femco phone located at 15E, and then called up to the surface to "clear" the mine. Tr. 786:15-20; 789:2-21; 791:6-8; 936:2-14. Frith and Ronsanet then drove the mule from 15E through the 1600' level back to the access shaft and upwards to the surface of the mine. Tr. 931:6-8. Much of Firth and Ronsanet's travel path overlapped with the escape path of methane (and other volatile gases) fanned from the blast sites to the surface. Tr. 786:15-20; 789:2-21; 791:6-8; 936:2-14. The fire boss crew is supposed to follow the exhaust path while exiting the mine to monitor for any accumulations of methane, prior to clearing miners to work again underground. Tr. 391:19-21.

The citation issued by inspector Olivier alleges as follows:

> "Vehicles used for transportation when examining the mine shall be approved by MSHA under the applicable requirements of 30 CFR parts 18 through 36. The company used a non-permissible ATV to examine the mine during the post-blast inspection. The employees walked from the #4 shaft to 12-H, 12-I, and 12-J on the 1600 to clear the blast area. The employees then accessed a Polaris ATV that was parked in between 13-I and 13-J to travel through the exhaust on the 1500' before completing the examination. This condition exposes the employees to serious injuries if they were to encounter methane while traveling in the mine in the non-permissible cart." P. 89, p. 1.

Inspector Olivier issued this citation because the fire boss crew could encounter methane pockets in areas outside of the blast sites. Tr. 456:13-17. Inspector Olivier testified about other scenarios at the Weeks Island Mine where gases were released outside of recently blasted areas. Tr. 779:2-4.

Inspector Olivier designated the conduct of the fire boss crew as highly negligent, which presented a reasonable likelihood of a lost workdays or restricted duty injury. Further, inspector Olivier assessed this violation as being "significant and substantial". Exs. P-87, R-30.

Violation

30 C.F.R. § 57.22603 regulates surface blasting at Class II-A mines, and requires the following:

> a) All development, production, and bench rounds shall be initiated from the surface after all persons are out of the mine. Persons shall not enter the mine until the mine has been ventilated for at least 15 minutes and the ventilating air has passed over the blast area and through at least one atmospheric monitoring sensor.

[14] The citation states that the vehicle in question was a Polaris ATV, but both parties agree that it was a Kawasaki, four seat, "mule" style, all-terrain vehicle (ATV). *See* Resp. Br. at 17; Sec'y Br. at 5, 28.

b) If the monitoring system indicates that methane in the mine is less than 0.5 percent, competent persons may enter the mine to test for methane in all blast areas.

c) If the monitoring system indicates that methane in the mine is 0.5 percent or more, the mine shall be ventilated and persons shall not enter the mine until the monitoring system indicates that methane in the mine is less than 0.5 percent.

d) If the monitoring system is inoperable or malfunctions, the mine shall be ventilated for at least 45 minutes and the mine power shall be deenergized before persons enter the mine. Only competent persons necessary to test for methane may enter the mine until the methane in the mine is less than 0.5 percent.

e) Vehicles used for transportation when examining the mine shall be approved by MSHA under the applicable requirements of 30 CFR parts 18 through 36. Vehicles shall not be used to examine the mine if the monitoring system is inoperable or has malfunctioned.

30 C.F.R. § 57.22603(a)-(e).

Citation Number 9649767 alleges that Respondent violated 30 C.F.R. § 57.22603(e) when a non-permissible vehicle was used to examine the 1600' level of Weeks Island during a fire boss conducted on June 27, 2022. Tr. 771:19-772:12. Both parties agree that the Kawasaki mule used during the fire boss was a non-permissible vehicle in the recently blasted areas. Tr. 933:14-18. Frith testified that he would not have driven the Kawasaki mule to the blasted areas because "it's not permissible." Tr. 933:14-18. Frith further testified that approaching the blast areas with a non-permissible vehicle would create an "ignition source" that could ignite any methane remaining in the area, which could potentially cause an explosion. Tr. 934:3-12.

In disputing this citation, Respondent argues that the non-permissible vehicle was not operated until after the requisite post-blast methane testing had been completed. More specifically, Respondent argues for a restrictive interpretation of the word "mine" as applied within the cited section 57.22603(e) regulation, which states that "vehicles used for transportation when examining the ***mine*** shall be approved by MSHA." According to Respondent, the word "mine" in this context, refers to areas close to the recently blasted areas of the mine and not the entire active mine. 30 C.F.R. § 57.22603(e)(emphasis added); *see* Resp. Br. at 39-41. The Respondent's requested interpretation of the permissible vehicle requirement promulgated at 30 C.F.R. § 57.22603(e) would restrict this regulation to (1) the inspection team's initial approach towards recently blasted sites, and (2) any travel between blasting sites while conducting secondary methane level testing. *See* Resp. Br. at 39.

In support of this argument, the Respondent points to the language of 30 C.F.R. § 57.22603(b), which requires that the AMS (not just the AMS sensors in closest proximity to active blast sites) must indicate "that methane in the mine is less than 0.5 percent" before "competent persons may enter the mine to test for methane in all blast areas. 30 C.F.R. §

57.22603(b). Given that § 57.22603(b) references testing of methane in "all blast areas" and not testing of methane in travel ways or any area of the mine that is not actively blasted, the Respondent argues that the § 57.22603(e) vehicle requirement extends only until methane testing has been completed at the blast areas. *See* Resp. Br. at 39-41. The Respondent thus argues that Frith and Ronsanet's usage of a non-permissible vehicle after all active blast areas had been tested for methane did not violate the requirements of 30 C.F.R. § 57.22603(e).

The Secretary argues that "Respondent fails to provide any reasonable justification for this interpretation," and further argues and the requested interpretation would be directly at odds with the plain meaning of 30 C.F.R. § 57.22603(e) that "[v]ehicles used for transportation when examining *the mine* shall be approved by MSHA". 30 C.F.R. § 57.22603(e)(emphasis added). Sec'y Br. at 28. I agree with the Secretary.

If a standard has a plain meaning, that meaning must be given effect unless it would lead to an absurd result or undermine the purpose of the Mine Act. *RAG Shoshone Coal Corp*., 26 FMSHRC 75, 80 n.7 (Feb. 2004). To determine the meaning of a regulation, the Commission "utilizes 'traditional tools of construction, including an examination of the text and intent of the drafters."' *Amax Coal Co*., 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC,* 917 F.2d 42, 44-45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission "must look to the language and design of the Secretary's regulations as a whole." *New Warwick Mining Co*., 18 FMSHRC 1365, 1368 (Aug. 1996).

The Secretary submits that the word "mine" in 30 C.F.R. § 57.22603(e) applies to the entire mine rather than areas adjacent to recently blasted areas. Sec'y Br. at 28; *see* Tr. 773:23-24, 773:25-774:3. The Secretary's position is well supported by the plain text of 30 C.F.R. § 57.22603.

The Respondent admits that the § 57.22603(a) requirement that no person enter the mine for at least 15 minutes after post-blast ventilation is applicable to miners working underground throughout the mine, not just to miners assigned to specific blasting areas. Resp. Br. at 39-40. 30 C.F.R. § 57.22603 subsections (c) and (d) similarly apply throughout the mine, requiring (1) that no person enter the mine (not just the area in proximity to a specific blast area) if the AMS detects a methane level equal to or greater than 0.5 percent, and (2) if the AMS is inoperable or malfunctioning, that the mine (not just specific areas of the mine) be deenergized and ventilated for at least 45 minutes prior to "competent persons" entering the mine for additional testing. 30 C.F.R. § 57.22603(c), (d); *see New Warwick Mining Co*., 18 FMSHRC 1368 (1996) (noting the importance of considering the statutory framework as a whole).

The Respondent claims that "applying the [30 C.F.R. § 57.22603(e)] standard to blast areas (not the entire mine) is also supported by other relevant standards." Resp. Br. at 40. Respondent first points to 30 C.F.R. § 57.22304(c), which requires that "t]ests for methane shall be conducted immediately before non-approved equipment is taken to a face or bench after blasting." Resp. Br. at 40. Respondent also points to 30 C.F.R. § 57.22228(d), which states that "[a] competent person shall test the mine atmosphere at each face blasted before work is started." *Id.* Respondent asserts that these 30 C.F.R. § 57 regulations, which also impose atmospheric testing requirements at active benches, support the proposition that 30 C.F.R. § 57.22603(e)

should be construed to limit the vehicles that the safety team may use only while approaching active benches, and while "test[ing] for methane in all blast areas." *Id*.; 30 C.F.R. § 57.22603(b), (e). This argument is not persuasive. In fact, the Respondent's cited regulations support an opposite conclusion that Congress was aware of the need to delimit certain gas testing and equipment-type requirements to areas of near proximity to active benches yet elected not to incorporate such limiting language when promulgating 30 C.F.R. § 57.22603. *See Amax Coal Co*., 19 FMSHRC at 474 (including an examination of the text and intent of the drafters in the tool of statutory/regulatory construction available to the Commission).

In consideration of the above, the undersigned concludes that the plain language of 30 C.F.R. § 57.22603 requires that MSHA approved vehicles be utilized throughout the entirety of a post-blast fire boss inspection. Furthermore, the record comprehensively reflects that Respondent was aware of this requirement and yet elected to use a non-permissible vehicle "ostensibly because it believes using a non-permissible vehicle throughout the entire fire boss is inconvenient." Sec'y Br. at 28.

"The Commission has held that when 'the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.'" *Austin Powder Co.*, 29 FMSHRC 909, 919 (Nov. 2007) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)); *see also Nolichuckey Sand*, 22 FMSHRC at 1059-61. As set forth below, the evidence of record reflects that (1) Respondent maintains a policy of testing areas outside of recent blast sites during fire bosses, and (2) Morton Salt miners were aware of restrictions on using unapproved vehicles during a fire blast. The undersigned therefore finds that Respondent was on notice of the requirements of § 57.22603. *See Austin Powder Co.*, 29 FMSHRC at 919.

Scott Frith admitted that he and other production supervisors continue to monitor for methane after clearing the blasted areas. Tr. 905:9-13. During the fire boss, Respondent uses several pieces of equipment to check for methane, including MX-4 and MX-6 gas sensors. *Id*.; Tr. 161:1-10. Respondent also utilizes a "big eye" monitor affixed to a pole that can extend up to 25 feet in the air so that miners can check for methane rising closer to the mine's ceilings. Tr. 161:1-10. The fire boss crew uses this equipment to continue checking other areas of the mine for methane, including travel ways, before exiting to the surface. Tr. 175:10-11; 273:5-15; 387:3-10; 904:1-12.

Morton Salt production supervisor, Reggie Provost, testified that he understood the meaning of "mine" in 30 C.F.R. § 57.22603 to impose requirements throughout the mine, not just near active bench faces. Tr. 282:9-285:9. Load operator, Troy Rabeaux, testified that Respondent's former policy when conducting fire boss examinations was to wait to clear the mine until the blasted areas and the exhaust route were both tested for concentrated areas of methane. Tr. 286:20-382:2. Storeroom miner Colin Francis similarly testified that a fire boss is not complete until the entire mine is clear of methane and other gases. Tr. 387:13-19; 392:10-13; 453:13-17; 454:10-14.

Respondent's safety trainer, Landon Olivier, testified that Respondent's standard practice is to utilize a permissible vehicle to clear and exit the mine "[i]n the event that we encountered

any type of gas or something." Tr. 1113:21-22. Miner Eddie Jean-Louis testified that the mine is not cleared as soon as the inspection of the blast face because the fire boss team must "make sure that we don't have any gas because sometime (sic) gas can come afterwards. Gas pocket[s] can sit in a corner [for] some time in the front of a facing and it's not really moving at that – at that particular time. But then it can move eventually out. So we made sure we – everything was clear before we – that's the way I was taught, before we go back into the mine." Tr. 584:16-25.

In light of the foregoing evidence, the undersigned concludes that the Secretary has met her burden to prove, by the preponderance of the evidence, that Respondent violated 30 C.F.R. § 57.22603(e). *See Jim Walter Res., Inc.*, 28 FMSHRC at 992.

Gravity and Significant and Substantial Designation

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S as follows:

(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 at 3-4.

More recently, the Commission restated *Mathies* step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).

More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued."). Additionally, redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Secretary of Labor v. Acha Construction, LLC*, 38 FMSHRC 3025, 3032 (Dec. 28, 2016)(ALJ) (determining berm standard violation to be S&S after refusing to consider equipment's rollover protection and seatbelts because they were redundant safety measures).

In the instant matter, step 1 of the Commission's significant and substantial analysis is satisfied based on my finding that operating an impermissible vehicle while exiting the mine following a fire boss constituted a violation of 30 C.F.R. § 57.22603(e).

As to step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 57.22603(e) is straightforward. *See Newtown Energy*, 38 FMSHRC at 2038. As held by the Commission, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*.

The purpose of 30 C.F.R. § 57.22603(e) is to protect miners from being exposed to explosive conditions by ensuring that any vehicle operated in an environment with potentially heightened levels of methane does not introduce an active ignition source. *See* Tr. 934:6-10. In a methane-rich domal salt mine, heat from a diesel or gasoline-powered vehicle could ignite any lingering methane and potentially result in an explosion. Tr. 651:1-652:1. Diesel-powered equipment cannot be used in areas where methane might accumulate following a blast because

this equipment creates heat, and heated diesel particles burn through the exhaust system and enter the surrounding air. *Id*; 258:7-17. Respondent's decision to utilize an impermissible vehicle introduced potential ignition sources to areas of the mine where higher than normal levels of methane may have been encountered. *See id*.; Tr. 777:12-21; 933:19-934:2. Respondent's conduct thus stands at odds with the purposes of 30 C.F.R. § 57.22603(e) and contributed to the discrete safety hazard of a methane explosion. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Thus, step 2 of the modified *Mathies* test is met here.

The third and fourth modified *Mathies* steps require an analysis of whether the discrete hazard(s) identified in step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No 9649767, the question becomes whether (1) it is reasonably likely that the introduction of an ignition source to the 1600' level of Weeks Island would result in an explosion and associated injury to a miner, and (2) whether any resulting injury would be reasonably serious in nature. *Id.*

It is axiomatic that an explosion resulting from ignited methane (or another volatile gas) could result in an injury up to and including a fatality. *See* Tr. 613:7-21; 615:22-616:6; 687:2-5 As a fatality would inherently be reasonably serious in nature, the undersigned next considers whether the Secretary has established that it is reasonably likely that an explosion would have resulted from Respondent's introduction of an ignition source within the Weeks Island mine. *See Newtown Energy*, 38 FMSHRC at 2038.

An experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). However, when evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990); *Enlow Fork Mining Co*., 5 FMSHRC 5, 9 (Jan. 1997); *Amax Coal Co*., 18 FMSHRC 1355, 1358 (Aug. 1996).

Respondent's ventilation system is designed to circulate fresh air into the mine to displace bad, potentially methane-rich air upwards to the surface and out of the mine. Tr. 291:14-292:11; 455:10-12. A primary surface fan blows fresh air down into the intake shafts, while secondary subterranean fans continue to push the fresh air further underground. Tr. 587:17-25; 779:17-20. A system of curtains helps guide the fresh air through the mine and push the bad air out along the exhaust path. Tr. 392:6-9.

Despite the presence of this ventilation system, gas can get caught in a pocket or the periphery of the upward air flow and not exit the mine. Tr. 584:5-25, 779:6-8. However, most gas pockets detected at Weeks Islands were found only after Respondent had identified malfunctioning safety equipment. Tr. 451:23-452:19; 647:25-648:5; 869:6-12. Inspector Robertson testified that he has observed malfunctioning AMS systems in other mines, including

systems malfunctioning due to dead batteries or system-wide failure. Tr. 648:18-23; 649:9-13; 872:1-22. Here, however, inspector Olivier admitted that the AMS at Weeks Island did not malfunction, and no heightened methane gas levels were detected during the fire boss in question. Tr. 883:3-9.

The Secretary has presented some evidence of scenarios where methane (or other gas) monitoring equipment has failed at Weeks Island. For example, hand-held gas monitors can malfunction. Tr. 388:22-24. Rabeaux experienced one such situation when, during a fire boss, his monitoring equipment indicated that there was no nitrous oxide in the benches. Tr. 389:1-4. Miners reentering the mine noticed that the lighting appeared yellow, which can occur in a mine environment with heighted levels of nitrous oxide. Tr. 389:6-13. After his monitor continued to reflect no presence of nitrous oxide, Rabeaux borrowed another monitor, which promptly alarmed and consequently required a mine evacuation. Tr. 389:10-390:22.

The Secretary has also pointed to other, hypothetical scenarios where the Weeks Island menthane monitoring system could remain operational but nonetheless (1) fail to detect rising methane levels, or (2) provide a less than instantaneous alarm response upon detecting the presence of methane.

As to the first scenario, the Secretary's evidence establishes that the Weeks Island AMS is not "fool proof." Methane pockets can emerge unpredictably, and AMS monitors are located only above transformers. Tr. 262:23-263:7, 779:23-780:3. Accordingly, any methane pockets that arise away from a transformer would not be detected immediately. *Id*. While an initially undetected methane pocket would generally be expelled by the mine's ventilation system, a pocket could remain below the surface if the ventilation system were ever inoperable, or if the pocket were to emerge at the periphery of a ventilation shaft. *See* Tr. 291:14-292:11; 392:6-9; 455:10-12; 584:5-25; 587:17-25; 779:6-20.

As to the second proposed scenario, the AMS computer at Weeks Island is in a control room on the surface, so any alert for local methane levels above 0.25 percent is first received by an above-ground miner. *See* Ex. P-117; Tr. 569:9-17, 572:9-575:8. Since miners performing a fire boss must turn off their radios to avoid creating an ignition source, the only means of direct communication with the surface is by using a FEMCO phone. Tr. 289:19-290:6-11; 352:17-22; 582:8-18. A subsurface alarm is emitted if underground methane levels reach 0.5 percent, but this alarm is only audible in the No. 3 hoist building and change house, and it takes 30 seconds for the mine to de-energize if power is cut off at the surface. *See Ex.* P-117; Tr. 575:1; 580:18-581:1; 910:1-14.

The Secretary's evidence concerning these two scenarios is undisputed, and the undersigned finds that there is therefore *some* likelihood that an undetected methane pocket would have been present in the mine during the fire boss at issue. However, the Secretary has presented insufficient evidence to carry its burden to prove that the ignition of any present methane pockets was reasonably likely.

Respondent, for its part, has presented similarly undisputed evidence which demonstrates that the Weeks Island AMS sensors and ventilation system were functional on the date the

citation was issued, and that heightened gas levels were not detected anywhere in the mine during the fire boss. Ex. P-87 at DOL0143; *see* Tr. 839:13-840:12, 883:3-9; 1012:15-18. While the hypotheticals presented by the Secretary are plausible and somewhat compelling, the Secretary points to no specific evidence that either a failure in the AMS system or an encounter with an isolated methane pocket presented anything beyond a relatively remote possibility. *See* Sec'y Br. at 30. Therefore, the undersigned finds that there exists insufficient evidence to support a conclusion that it is reasonably likely that either hypothetical would occur. Certainly, the Secretary's concerns with Respondent's conduct in exposing a potential ignition source into a potential methane-emitting environment are well received. *See Consol of Kentucky, Inc*., 30 FMSHRC 1 (Jan. 2008) (finding that, in the context of an imminent danger order, the critical question in determining whether an accumulation of methane presents an imminent danger is whether there is an ignition source that might reasonably be expected to cause an explosion, resulting in death or serious injury within a short period of time); *see also Island Creek Coal Co*., 15 FMSHRC 3339, 346-247 (Mar. 1993); *Texasgulf*, Inc., 10 FMSHRC 498, 501 (Apr. 1988). However, without more, a significant and substantial designation is inappropriate under these facts.

In light of the above, the undersigned concludes that the Secretary has not proven that the Respondent's violation of 30 C.F.R. § 57.22603 represented a significant and substantial violation. Accordingly, the undersigned MODIFIES this citation to non-significant and substantial and reduces the assessed gravity to reflect a "low likelihood" of a fatal injury.

Negligence

The Commission has made clear that "where agents are negligent, that negligence may be imputed to the operator for penalty purposes." *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (1997) *Southern Ohio Coal Co. (SOCCO)*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-95, 198 (1991), the Commission clarified that an examiner may constitute an agent of the operator when it is "charged with responsibility for the operation of…part of the mine." *See also* 30 U.S.C. § 802(e). In other words, when carrying out the required examination duties for an operator, an examiner may be viewed as being "charged with responsibility for the operation of part of a mine." *Id.* at 194. If violative intentional misconduct is within the "scope" of the examiner's employment or authority as an agent, then negligence may be imputed. *Id.* at 196-97, 198; *see also Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (1977), *aff'd sub nom. Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979).

On the other hand, if the miner at issue is "rank-and-file," his negligence generally cannot be imputed to the operator for the purposes of penalty assessment. *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64. In such circumstances, the operator's negligence, fault, or lack thereof, must be determined by an examination of the operator's own conduct, which includes supervision and training. *SOCCO*, 4 FMSHRC at 1464-65; *see also Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986).

Here, Frith's status as a supervisor charged with fire boss responsibilities forecloses any argument that he was a rank-and-file miner whose negligent acts cannot be properly attributed to

Respondent. *Whayne Supply Co*., 19 FMSHRC at 453. In addition, I find credible and unrebutted the testimony of inspector Olivier that on June 26, 2022, he instructed Morton Salt safety team members Landon Olivier and Josh Morrow that a non-permissible vehicle cannot be used while conducting a fire boss. Tr. 780:8-15.

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), they may be persuasive in evaluating whether Respondent's negligence was properly assessed as "high." According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. Further, MSHA regulations provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and 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. 30 C.F.R. § 100.3(d). Respondent identifies no mitigating factors relevant to this citation in its post-hearing brief, and the record is silent about mitigative efforts made by Respondent. *See* Resp. Br. at 16-17, 39-41. The Secretary presented credible testimony establishing that Respondent's safety team was instructed not to use a non-permissible vehicle for conducting a fire boss examination a mere day prior to Respondent's violation of 30 C.F.R. § 57.22603(e). Tr. 780:8-15. Considering Respondent's awareness of the violative condition and apparent intentional violation of a known safety regulation, the undersigned affirms MSHA's high negligence designation.

Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9649767, the Secretary proposed a regularly assessed penalty of $2,573.00. The parties stipulated that this penalty will not affect Morton Salt's ability to continue in business. Pre-hearing Stip. 4. Morton Salt has no documented prior history of violating 30 C.F.R. § 57.22603(e). Morton Salt demonstrated high negligence in violating this standard, especially considering that it had been given prior, specific guidance from MSHA that operating a petroleum-fueled vehicle during a fire boss would constitute a citable offense. Despite this high degree of negligence, the undersigned found that this violation is not significant and substantial and presents a low likelihood of injury. Morton Salt demonstrated good faith by abating the

condition the following day. Given these considerations, I find it appropriate to increase the assessed penalty to $3,000.00.

VIII. ORDER

For the reasons set forth above, **IT IS ORDERED THAT** Citation Nos. 9649752 and 9673091 be **AFFIRMED**, with a modification of the proposed penalty amount;

IT IS FURTHER ORDERED THAT Citation No. 9649757 be **AFFIRMED**, with a reduction in the proposed penalty amount, because of **RESPONDENT'S FAILURE TO CORRECT THE VIOLATIVE CONDITION AFTER JUNE 13, 2022**;

IT IS FURTHER ORDERED THAT Citation No. 9649758 be **AFFIRMED**, with a reduction in the proposed penalty amount, because of **RESPONDENT'S FAILURE TO CORRECT THE VIOLATIVE CONDITION AFTER JUNE 13, 2022;**

IT IS FURTHER ORDERED THAT Citation Nos. 9649767 be **MODIFIED** to reduce the likelihood of injury or illness from 'reasonably likely' to 'unlikely', remove the significant and substantial designation, and reduce the assessed penalty, but is otherwise **AFFIRMED** as issued;

IT IS FURTHER ORDERED THAT Citation Nos. 9649750 be **MODIFIED** to reduce the likelihood of injury or illness from 'reasonably likely' to 'unlikely', remove the significant and substantial designation, reduce the assessed negligence level from 'moderate' to 'low', and reduce the assessed penalty, but is otherwise **AFFIRMED** as issued;

The total proposed penalties for Citation Nos. 9649752, 9673091, 9649750, 9649769, 9649757, and 9649758 have been reduced from $42,112.00 to $39,900.00. The total settled penalty amount for Citation Nos. 9673082, 9673084, 9649743, 9673085, 9649744, 9649747, 9649748, 9673090, 9649753, 9649759, 9649760, 9649761, 9649765, 9673092, 9649764,

9673099, and 9649756 is $38,320.00. Accordingly, Morton Salt, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $78,220.00 within thirty (30) days of the date of this decision.[15]

SO ORDERED.

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

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[15] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

July 31, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WARRIOR MET COAL MINING, LLC,, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0182 A.C. No. 01-01401-571548-01 Docket No. SE 2023-0183 A.C. No. 01-01401-571548-02 Mine: No. 7 Mine

DECISION

Appearances: Tyler K. L. Hurst, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

Guy W. Hensley, Esq., Counsel for Warrior Met Coal, LLC, Brookwood, Alabama & Brock Phillips, Esq., Maynard Nexsen, P.C., Birmingham, Alabama, for Respondent.

Before: Judge Paez

This case comes before me upon the Petitions for the 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, 30 U.S.C. § 815(d) ("Mine Act"). In dispute are three section 104(a) citations issued to Warrior Met Coal Mining, LLC ("Warrior Met" or "Respondent") at its No. 7 Mine.

To prevail, the Secretary must prove any cited violation "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 quotations omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Glynn F. Voisin assigned me Docket Nos. SE 2023-0182 and SE 2023-0183, and I consolidated them for hearing. The Secretary initially issued Warrior Met eight citations under section 104(a) of the Mine Act for alleged violations of health

and safety standards. I issued my Decision Approving Partial Settlement on January 25, 2024, after the parties settled five of the eight citations. Three section 104(a) citations remain at issue.

Docket No. SE 2023-0182 involves two citations. First, Citation No. 9701033 alleges a violation of 30 C.F.R. § 75.342(a)(4) for failing to maintain a methane monitor on a continuous mining machine in proper operating condition. The Secretary designated the violation as significant and substantial ("S&S")[1] and determined Warrior Met's negligence to be "moderate." The Secretary proposes a penalty of $1,152.00 for this citation. Second, Citation No. 9706551 alleges a violation of 30 C.F.R. § 50.12 for altering an accident site before MSHA completed an investigation of the accident. The Secretary did not designate the violation as S&S but did mark Warrior Met's negligence as high. The Secretary proposes a penalty of $606.00 for this citation.

Citation No. 9706550 in Docket No. SE 2023-0183 alleges a violation of 30 C.F.R. § 50.10(b) for failing to contact MSHA within fifteen minutes once the operator knew or should have known that an accident occurred involving an "injury of an individual at the mine which has a reasonable potential to cause death." The Secretary designated the violation as S&S and determined Warrior Met's negligence to be "moderate." The Secretary proposes the statutory minimum penalty of $7,133.00 for this citation.

After proper notice to the parties, I held a hearing in Birmingham, Alabama. The Secretary presented testimony from the following witnesses: Miner Randy Nichols; MSHA Supervisor Sammy Elswick; and MSHA Inspector Miller Craig. Warrior Met presented testimony from the following witnesses: Warrior Met Director of Compliance Edward ("Ed") Boylen; the No. 7 Mine Manager Craig Dickerson; Warrior Met CO Operator Charles Dickey; Miner John Hackney; Miner Colton Hallman; Foreman Jonathan Pippin; Warrior Met Maintenance Coordinator William Michael Coleman; and Warrior Met Safety Manager Eric Barnes. The parties each filed post-hearing briefs and reply briefs.[2]

II. ISSUES

The Secretary asserts that the three citations should be affirmed as issued. (Sec'y Br. at 1; Sec'y Reply Br. at 1.) Warrior Met argues that the gravity and negligence designations for Citation No. 9701033 should be reduced, and the citation should be classified as non-S&S. (Resp't Br. at 1; Resp't Reply Br. at 1.) Warrior Met also contends Citation Nos. 9706550 and 9706551 should be vacated. (Resp't Br. at 1; Resp't Reply Br. at 1.)

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[1] 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."

[2] In this decision, volume one of the hearing transcript, volume two of the hearing transcript, the Secretary's exhibits, Warrior Met's exhibits, the Secretary's Post-Hearing Brief, Warrior Met's Post-Hearing Brief, the Secretary's Reply Brief, and Warrior Met's Reply Brief are abbreviated, respectively, as: "I Tr.," "II Tr.," "Ex. S–#," "Ex. R–#," "Sec'y Br.," "Resp't Br.," "Sec'y Reply Br.," and "Resp't Reply Br." The parties also agreed to a list of stipulations admitted at hearing as a joint exhibit and abbreviated as "Ex. Jt.–1."

Accordingly, I determine that the following issues are before me: (1) whether the Secretary's gravity determination was properly designated as S&S for the methane monitor violation in Citation No. 9701033; (2) whether Warrior Met's negligence is properly designated as "moderate" for Citation No. 9701033; (3) whether Warrior Met violated MSHA's 15-minute accident notification requirement under 30 C.F.R. § 50.10(b) as alleged in Citation No. 9706550; (4) whether the Secretary's gravity determination was properly designated as S&S for Citation No. 9706550; (5) whether Warrior Met's negligence is properly designated as "moderate" for Citation No. 9706550; (6) whether Warrior Met altered an accident site in violation of 30 C.F.R. § 50.12 as alleged in Citation No. 9706551; (7) whether Warrior Met's negligence is properly designated as "high" for Citation No. 9706551; and (8) whether the Secretary's proposed penalties are appropriate for each of the three alleged violations.

For the reasons set forth below, Citation Nos. 9701033, 9706550, and 9706551 are **AFFIRMED** and **MODIFIED** as discussed below.

III. PRINCIPLES OF LAW

A. Significant and Substantial

Section 104(d)(1) of the Mine Act describes the S&S designation to mean a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 USC § 814(d)(1). A violation is 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 Commission has held that to establish an S&S violation, the Secretary must meet the four elements of the *Mathies* test, which are:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016); *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 the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving 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 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Additionally, the presence of safety measures designed to mitigate the likelihood of a hazard's occurrence, or the likelihood of injury

from the hazard is irrelevant for the S&S inquiry. *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312–14 (June 2016); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1028–29 (D.C. Cir. 2013); *Buck Creek Coal, Inc. v. Fed. Mine Safety and Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995).

B. Negligence

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Am. Coal Co.*, 39 FMSHRC at 14 (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions a reasonably prudent person familiar with the mining industry would have taken under the same circumstances, the relevant facts, and the protective purpose of the regulation. *Id*. In making a negligence determination, a Commission Judge is not limited to an evaluation of allegedly "mitigating" circumstances but may consider the "totality of the circumstances holistically." *Id.*

C. Penalty

The Commission is not bound by the Secretary's proposed penalty but reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). 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).

IV. FINDINGS OF FACT – PARTIES' STIPULATIONS

At the hearing the parties stipulated in a joint exhibit to the following items verbatim:

A. Respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission;

B. The presiding Administrative Law Judge has the authority to hear this case and issue a decision;

C. Respondent was the operator of the above-captioned mine at all times relevant to this matter;

D. The above-captioned mine is a "mine" as defined in the Federal Mine Safety and Health Act;

E. The products and operations of the above-captioned mine entered and/or affected commerce;

F. True and accurate copies of the Citations in these dockets may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein;

G. A true and accurate copy of the inspector's notes for the Citations identified in Paragraph F may be admitted into evidence for the purpose of establishing their existence and not for the purpose of establishing the accuracy of any statements asserted therein;

H. According to the information provided by Respondent to MSHA's Mine Data Retrieval System, Respondent mined 4,755,684 tons of bituminous coal in 2022 at No. 7 Mine;

I. The Citations in these dockets were properly served on Respondent by a duly authorized representative of the Secretary on the dates stated therein;

J. The penalties proposed in this docket by the Secretary would not affect Respondent's ability to remain in business; and

K. Respondent abated the 104(a) citations involved herein in a timely manner and in good faith.

(Ex. Jt.–1; I Tr. 10:1–15.)

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW – CITATION NO. 9701033 NO. 9701033

A. Facts Relevant to the Methane Monitor Violation – Citation No. 9701033

1. Methane Detection at the No. 7 Mine

Warrior Met's No. 7 Mine is on a five-day spot inspection due to the large amount of methane liberated from the mine in a 24-hour period. (I Tr. 163:2–4, 174:1–6; II Tr. 190:8–15.) Specifically, the No. 7 Mine liberates approximately 13,858,143 cubic feet of methane during a 24-hour period. (II Tr. 229:14–20.) Maintenance Coordinator William Michael Coleman testified that at least one ignition has occurred at the No. 7 Mine since 2012. (II Tr. 196:4–197:10.)

A methane monitor is an air quality device that detects and reports in real time the methane concentration present in the environment. (II Tr. 155:19–2.) If the methane monitor detects 1.0 percent methane in the atmosphere, it will display a flashing warning and Warrior

Met will de-energize the machine and improve ventilation as required by 30 C.F.R. sections 75.342(b)(1) and 75.323(b)(1). (I Tr. 189:11–190:12; II Tr. 156:21–22, 163:11–20, 178:1–18, 191:18–22, 208:5–209:14.) If the monitor reads 1.5 percent methane, Warrior Met kills power at the power source for the affected area as required by section 75.323(b)(2)(ii). (II Tr. 163:20–22, 209:15–211:5.) If the methane monitor detects 2.0 percent methane in the environment, it automatically turns off the machine as required by section 75.342(c)(1). (II Tr. 157:4–5, 163:14–15, 178:21–179:10, 192:2–9, 209:20–210:12.)

Warrior Met calibrates its methane monitors on a weekly basis. (I Tr. 196:1–8; II Tr 164:21–22.) MSHA Inspector Miller Craig explained that Warrior Met began calibrating its methane monitors on a weekly basis, rather than monthly as required by law, because it was experiencing calibration issues. (I Tr. 195:15–196:8.) Additionally, Warrior Met "bump tests" its methane monitors, meaning it tests the monitors before every shift. (II Tr. 164:12–165:8.)

2. April 13, 2022, Inspection and Citation

On April 13, 2022, MSHA Inspector Miller Craig traveled to Warrior Met's No. 7 Mine to perform a spot, or methane liberation, inspection. (I Tr. 162:17–163:2.) Upon arrival at the No. 7 Mine, Inspector Craig met with Warrior Met Safety Supervisor Mike Carroll and inspected the exam books for the No. 12 Section of the mine. (I Tr. 163:12–21, 165:6–9; Ex. S–2.) Inspector Craig then traveled underground with Warrior Met Safety Supervisor Matt Lane. (I Tr. 165:6–22; Ex. S–2.) Maintenance Coordinator Coleman joined Craig and Lane underground. (II Tr. 173:14–16, 189:12–16.)

After coming upon continuous miner[3] CM137, Inspector Craig tested the calibration of its methane monitors. (I Tr. 167:7–12.) Two methane monitors are mounted on either side of the CM137 continuous miner, one for each sniffer head.[4] (II Tr. 158:14–161:15, 185:17–21.) Two sniffer heads are installed on the CM137 continuous miner because the levels of methane can differ on either side of the machine. (II Tr. 186:19–187:12, 198:9–13.) To test a methane monitor's calibration, a cap with a hose is placed on the sniffer head and the hose is connected to a canister tank with a known methane concentration of 2.5 percent. (I Tr. 169:6–170:9, 185:14–20, 186:19–187:6.) If the monitor is properly calibrated, it should detect an increasing amount of methane until it reaches 2.5 percent. (I Tr. 169:13–22; II Tr. 156:3–5.) According to the manufacturer of the continuous mining machine, a monitor that reads two/tenths (0.2) above or below 2.5 percent when tested with a canister of 2.5 percent methane concentration is still considered properly calibrated. (I Tr. 181:13–22, 189:4–10; II Tr. 156:6–16.)

At the time of his inspection, Inspector Craig did not detect any methane in the surrounding environment. (I Tr. 187:10–14, 188:2–6; II Tr. 181:20–22.) Inspector Craig

[3] "A continuous miner is a remote-controlled machine that extracts the coal and rock from the working face" and is operated by a miner who stands behind the machine. (I Tr. 179:13–180:14; II Tr. 157:16–18.)

[4] The sniffer heads are the pieces of equipment that detect the level of methane in the air, which is displayed on the methane monitors. (II 158:3–10.)

explained that this was because no mining was occurring at the time of his inspection. (I Tr. 187:15–188:1, 188:7–15, 192:20–193:4, 195:3–5; II Tr. 186:14–18.) During this inspection, one of the methane monitors for the CM137 continuous mining machine accurately reflected 2.5 percent methane concentration when tested. (II Tr. 174:12–20.) However, the other monitor inaccurately reflected only 2.2 percent methane concentration when tested, indicating improper calibration. (I Tr. 170:12–171:2; II Tr. 174:12–175:11.) Inspector Craig explained that even though this monitor read 2.0 percent at the time it killed power, the CM137 machine was actually exposed to 2.3 percent methane due to the faulty calibration.[5] (I Tr. 170:13–14, 171:11–172:9, 191:4–12; II Tr. 178:19–179:19.)

Accordingly, Inspector Craig issued Citation No. 9701033 to Warrior Met on April 13, 2022, in which he wrote the following:

> Methane monitors shall be maintained in proper operating condition. When tested with a known air/gas mixture of 2.5% the methane monitor on the National Mine Services methane monitor that is mounted on the Joy Continuous Miner C/N CM-137 would only read 2.2%. The methane monitor would de-energize the machine at 2.0%. The continuous miner was in service at the time of the inspection on the E-18 #12 Section. This exposes miners to not knowing the amount of methane that they are encountering due to the methane monitor only reading to 2.2%. Miners would receive injuries associated with a[n] ignition happening at the face. This mine is on a five day methane spot. The last exam was conducted on 4-6-2022.

(Ex. S–1; I Tr. 171:5–10.)

Inspector Craig assessed the likelihood of injury to be "reasonably likely" based on the large amounts of methane the No. 7 Mine liberates and the mine's history of ignitions. (Ex. S–1; I Tr. 172:19–11.) Inspector Craig determined miners could suffer smoke inhalation or burns during an ignition or mine explosion caused by the violation, which could lead to "lost workdays or restricted duty." (Ex. S–1; I Tr. 175:6–14.) He determined that two miners could be affected by the violation because both a mine operator and a coal hauler operator would likely be working at the time methane is liberated using the CM137 continuous mining machine. (Ex. S–1; I Tr. 179:13–180:14.)

Inspector Craig designated the violation as S&S based on the expected amount of coal dust in the air while the continuous miner cuts the coal, which increases the likelihood of an ignition. (Ex. S–1; I Tr. 176:13–178:16.) He determined Warrior Met to be moderately negligent because it tested the methane monitor weekly, even though the law only requires monthly methane monitor testing. (Ex. S–1; I Tr. 178:17–179:12.) Inspector Craig terminated the citation

[5] During the test when the methane monitor read 1.0 percent methane, the monitor's alarm went off; thus, based on the testimony of Inspector Craig as well as Warrior Met's Coleman and Barnes, I determine that the CM137 continuous mining machine was actually exposed to 1.3 percent methane when the alarm went off. (I Tr. 171:11–172:9, 191:4–12; II Tr. 178:17–18, 192:10–16, 235:9–14.)

fifteen minutes after it was issued when Warrior Met recalibrated the system and retested the calibration. (II Tr. 175:10–177:12.)

B. Analysis and Conclusions of Law: Citation No. 9701033 – Methane Monitors

1. Violation of 30 C.F.R § 75.342(a)(4)

Warrior Met acknowledges that one of the methane monitors on the continuous mining machine was off by 0.3 percent and, therefore, was not properly calibrated as required by the standard. (Resp't Br. at 23.) Consequently, Warrior Met does not contest the fact of a violation of 30 C.F.R. § 75.342(a)(4)[6] as cited in Citation No. 9701033. (Resp't Br. at 23.) Accordingly, I conclude that Warrior Met violated 30 C.F.R. § 75.342(a)(4).

2. S&S Analysis for Violation of 30 C.F.R § 75.342(a)(4)

a. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984). Given that Warrior Met does not contest the fact of a violation of 30 C.F.R. § 75.342(a)(4), I determine that the Secretary has satisfied the first element of the *Mathies* test.

b. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard is Directed

For the second *Mathies* element, the Secretary must establish that "based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).[7] In assessing this element, "[t]he Commission . . . defines the

[6] Section 75.342(a)(4) states, "[m]ethane monitors shall be maintained in permissible and proper operating condition and shall be calibrated with a known air-methane mixture at least once every 31 days. To assure that methane monitors are properly maintained and calibrated, the operator shall: (i) Use persons properly trained in the maintenance, calibration, and permissibility of methane monitors to calibrate and maintain the devices. (ii) Maintain a record of all calibration tests of methane monitors. Records shall be maintained in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration. (iii) Retain the record of calibration tests for 1 year from the date of the test. Records shall be retained at a surface location at the mine and made available for inspection by authorized representatives of the Secretary and the representative of miners." 30 C.F.R. § 75.342(a)(4).

[7] I reject the Secretary's argument that the Commission's analysis of step two of the *Mathies* test in *Newtown Energy* is inconsistent with the Mine Act's definition of S&S. (*See* Sec'y Br. at 5–6.) Because *Newtown Energy* is the most recent case addressing the elements of S&S decided by the Commission, I must follow its directives.

'hazard' in terms of the prospective danger the cited safety standard is intended to prevent." *Id.* Section 75.342 seeks to prevent mine explosions. *See* Safety Stands for Underground Coal Mine Ventilation 61 Fed. Reg. 9,764, 9,836 (Mar. 11, 1996) ("[m]ethane monitors are a critical link in the safety protections designed to prevent mine explosions"). Here, the specific hazard posed by a violation of section 75.342(a)(4) is a spark or ignition occurring among undetected, elevated methane levels, causing an explosion in the mine.

The Commission has held that—

> [w]hen examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a 'confluence of factors' exists to create such a likelihood . . . Some of the factors to be considered include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area.

Excel Mining, LLC, 37 FMSHRC 459, 463 (Mar. 2015) (citations omitted).

The Secretary asserts that the monitor at issue on the CM137 continuous miner liberates methane when in operation, thereby creating a hazard of methane ignition at the face where active mining occurs. (Sec'y Br. at 8.) The Secretary also alleges that the No. 7 Mine liberates a large amount of methane and has had at least one prior methane ignition since 2016. (Sec'y Br. at 8.) Specifically, the Secretary notes that the mine is on the most frequent testing schedule, five-day spot tests, due to its high level of methane liberation. (Sec'y Br. at 10.) The Secretary argues that these risk factors satisfy the confluence-of-factors test for a methane ignition hazard. (Sec'y Br. at 8.)

In contrast, Warrior Met raises several arguments to support its contention that the violation was not S&S. These arguments pertain to the second element of the *Mathies* test, which I address below.

First, Warrior Met argues that given the various methane mitigation measures in place at the time of the inspection, the violation was not reasonably likely to cause an explosion. (Resp't Reply Br. at 16.) However, "[w]hen deciding whether a violation is S&S, courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation." *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). Warrior Met notes in its brief that these mitigation measures are required by other MSHA regulations. (Resp't Br. at 23–24.) Consequently, Warrior Met's compliance with these other regulations is irrelevant to any determination of whether its violation of section 75.342(a)(4) was S&S.

Second, Warrior Met asserts that because one of the two methane monitors on the CM137 continuous miner was perfectly calibrated, the likelihood of any hazard decreases considerably. (Resp't Reply Br. at 17.) In making this argument, Warrior Met cites Maintenance Coordinator Coleman's testimony explaining that the different sides of the continuous miner can experience different levels of methane while in operation. (II Tr. 158:17–159:6.) Indeed, it is precisely because of this variation in methane levels that the CM137 continuous miner has two

methane detectors placed on either side of the machine. Consequently, the continuous miner operator would not have discovered that the monitor at issue was 0.3 percent out of calibration as Warrior Met argues, because there is no base-line assumption that the dual monitors should detect the same amount of methane. Each methane monitor detects levels independent of the other, so Warrior Met's argument fails logically.

Third, Warrior Met argues that because the methane monitor was off by 0.3 percent, which is only 0.1 percent outside the permissible range for the methane monitor, the violation was not S&S. (Resp't Br. at 23.) But the relevant time frame for determining whether a violation is S&S "includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986) (holding that "[t]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed"); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (holding that "[t]he Judge erred by limiting his consideration of the violative conditions as they existed at the time of the inspection, taking a 'snapshot' approach to the issue"). Even though the methane monitor was 0.3 percent out of calibration at the time of the violation, nothing guarantees that the monitor would remain at this interval under continued normal mining conditions. In fact, Maintenance Coordinator Coleman explained that Warrior Met "bump tests" the continuous mining machines every shift precisely because the methane monitors can go further out of calibration over time, meaning methane monitors could go higher out of calibration. (II Tr. 198:16–199:3.)

Fourth, Warrior Met contends that the violation did not pose a hazard because the CM137 continuous miner was not used during the shift the inspection took place and Inspector Craig did not detect any methane in the No. 12 section of the mine at the time of the violation. (Resp't Reply Br. at 17.) However, in making this point Warrior Met cites Inspector Craig's testimony explaining that the continuous miner cannot operate during his inspection of the methane monitors, because he "wouldn't be able to test it with it actually extracting material at the time." (I Tr. 183:16–19.) Inspector Craig also pointed out that "[i]t is not usual[] that you encounter large [amounts] of methane being liberated in idle faces." (I Tr. 188:2–12.) Furthermore, the Commission previously rejected another operator's similar "contention that because mining was not taking place at the precise moment the citation was issued, the violation posed no hazard." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1869 (Aug. 1984). Rather, "[t]he Commission has clearly held that . . . Judges must consider the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal mining operations continued." *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (citations omitted). Indeed, section 75.342(a)(4) does not, as it might, require methane monitors to be functioning only when the equipment they are attached to is in use. While Inspector Craig detected no methane in the No. 12 section of the mine at the time he issued the citation, logic dictates that the concentration of methane would increase once Warrior Met resumed cutting into the coal face with the CM137 continuous miner. Thus, "had normal mining operations continued," Warrior Met's violation of section 75.342(a)(4) would have posed a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1869.

In evaluating the second *Mathies* element and the confluence-of-factors test, the amount of methane a mine emits is a decisive factor in determining whether a violation of section 75.342(a)(4) is S&S. Here, Warrior Met's No. 7 Mine liberates approximately 13,858,143 cubic feet of methane in a 24-hour period, and the mine is subject to five-day methane spot inspections. (I Tr. 163:2–4, 174:1–6; II Tr. 190:8–15, 229:14–20.) *Cf. Mach Mining, Inc.*, 38 FMSHRC 1379, 1410 (June 2016) (ALJ) (holding that a violation of 75.342(a)(4) was S&S after finding that the mine was "on a five-day spot inspection schedule" and "liberate[d] over two million cfm methane in a 24-hour period"); *Ohio Cty. Coal Co.*, 32 FMSHRC 220, 224 (Feb. 2010) (ALJ) (holding that "[w]hile the cutting head of a continuous miner would present an ignition source, there would have had to have been a significant quantity of methane present to result in an explosion or fire" and only "12,000 to 13,000 cubic feet of methane was liberated at the . . . mine in a 24-hour period"). Additionally, the CM137 continuous mining machine is designed to cut into the coal face, which liberates methane and creates possible ignition sources. Given those facts and considering the discussion above, I determine that Warrior Met's failure to maintain the methane monitor on the CM137 continuous miner in permissible and proper operation was reasonably likely to result in an explosion under the confluence-of-factors test. (I Tr. 174:1–175:5; II Tr. 229:14–20.) Accordingly, I conclude that the Secretary has satisfied the second element of the *Mathies* test.

c. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). Thus, the Secretary must establish that based upon the particular facts surrounding this violation, the occurrence of an explosion would be reasonably likely to result in an injury. The Secretary argues that "'federal . . . appellate law and Commission precedent have sufficiently established that a methane explosion is reasonably likely to result in injuries.'" (Sec'y Br. at 8 (citing *Mach Mining, Inc.*, 38 FMSHRC 1168,1199 (May 2016) (ALJ)).)

Warrior Met does not dispute that a methane explosion is reasonably likely to result in injuries but rather continues to assert that the Secretary has not shown that a methane explosion as a result of the violation was reasonably likely in the first place. (Resp't Reply Br. at 18.) Yet, as the Commission noted in *Newtown Energy, Inc.*, "'[e]very federal appellate court to have applied *Mathies* has also assumed the existence of the relevant hazard when analyzing the test's third [step].'" *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citations omitted). In light of the case law, I agree with the Secretary that a methane explosion is reasonably likely to result in injuries such as burns and smoke inhalation. Accordingly, I conclude that the Secretary has satisfied the third element of the *Mathies* test.

d. Likelihood Resulting Injury Would Be of a Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury would be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984). An injury of a "reasonably serious nature" does not require a specific

type of injury, and a mere muscle strain, sprained ligament, or fractured bone may be "reasonably serious." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element); *see also Buffalo Crushed Stone, Inc.,* 19 FMSHRC 231, 238 n.9 (Feb. 1997) (reversing the ALJ's finding of non-S&S and concluding that a finger or a wrist fracture are "reasonably serious injuries").

The Secretary argues that Inspector Craig and Maintenance Coordinator Coleman's testimony demonstrate that the injuries from an ignition would be serious. (Sec'y Br. at 8.) Specifically, the Secretary highlights Inspector Craig's testimony that if a mine explosion or ignition occurred, miners could suffer "smoke inhalations or burns." (Sec'y Br. at 8.) The Secretary also emphasizes Coleman's testimony in which he agreed that ignition of methane can kill a miner and cause burns. (Sec'y Br. at 9.) I determine that smoke inhalation and burns due to a mine explosion are certainly reasonably serious injuries under the Commission's standard in *S&S Dredging Co.* and could be fatal. Thus, I determine that the Secretary has satisfied the fourth *Mathies* element.

Accordingly, because the Secretary has satisfied all four elements of the *Mathies* test, I conclude that the violation in Citation No. 9701033 is appropriately designated as S&S.

3. Negligence Determination for Violation of 30 C.F.R § 75.342(a)(4)

Inspector Craig designated Warrior Met's negligence as "moderate." (I Tr. 178:17–179:12; Ex. S–1.) The Secretary asserts that "Warrior Met knew or should have known that the methane monitor was out of calibration." (Sec'y Br. at 9–10.) The Secretary argues that Warrior Met's mitigation efforts, including testing the methane monitors every shift and calibrating the monitors weekly, were taken into consideration by Inspector Craig in his assessment of "moderate" negligence. (Sec'y Br. at 10.)

Warrior Met disputes the "moderate" negligence designation and in support notes that it calibrates its methane monitors on a weekly basis, four times as frequently as the law requires. (Resp't Br. at 24; Resp't Reply Br. at 19.) Warrior Met highlights that it engages in "bump testing," meaning that if any methane monitor does not function properly at the beginning of a shift, it recalibrates the methane monitor on the spot. (Resp't Reply Br. at 19.) Warrior Met also argues that the Secretary fails to explain how Warrior Met knew or should have known that the methane monitor at issue was out of calibration. (Resp't Reply Br. at 20.)

I agree with Warrior Met that the Secretary provides no support for her assertion that Warrior Met knew or should have known that the methane monitor at issue was out of calibration. During the week of April 9, 2022, one of the methane monitors on the CM137 continuous miner detected 2.2 percent methane instead of 2.5 percent methane during a test. (II Tr. 171:21–172:7; Ex. R–4.) Warrior Met recalibrated the methane monitor and afterwards had no reason to believe the monitor was not working properly. (II Tr. 172:7–20.) Additionally, I determine that the Secretary did not give enough weight to the fact that Warrior Met tested its methane monitors at the start of every shift (II Tr. 164:12–165:8) and recalibrated its methane

monitors on a weekly, rather than monthly, basis (II Tr. 164:21–22). Therefore, I conclude that Warrior Met exhibited a low level of negligence.

C. Penalty: Citation No. 9701033 – Methane Monitors

The Secretary proposes a penalty of $1,152.00 for Citation No. 9701033. (Sec'y Br. at 10.) In the fifteen-month period preceding Citation No. 9701033, Warrior Met was cited nine times for a violation of section 75.342(a)(4). (Sec'y Br. at 11.) Warrior Met is a large operator, mining 4,755,684 tons of coal at the No. 7 Mine in 2022. (Ex. Jt.–1.) The parties stipulated that the penalties proposed by the Secretary in this case would not affect Warrior Met's ability to remain in business. (Ex. Jt.–1.) Warrior Met timely abated Citation No. 9701033 by immediately recalibrating the monitor. (II Tr. 175:10–177:12.) Regarding gravity, I agree with the Secretary that the violation is reasonably likely to result in injury that could cause lost workdays or restricted duty for two miners. I also determined that Warrior Met's violation was S&S. *See* discussion *supra* Part V.B.2. However, I determined that Warrior Met exhibited a low level of negligence. *See* discussion *supra* Part V.B.3. Thus, in considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $600.00.

VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW – CITATION NOS. 9706550 & 9706551

A. Facts Relevant to the Elevator Accident – Citation Nos. 9706550 & 9706551

1. Falling Ice Hits Elevator at the North Portal

On December 25, 2022, the No. 7 Mine did not run its regular shifts as it was Christmas Day. (I Tr. 25:16–17, 249:1–2.) Instead, Warrior Met offered miners the opportunity to come in and work if they wished. (I Tr. 25:16–17.) Having no family close by, miner Randy Nichols decided to work. (I Tr. 25:17–26:1.) Nichols was assigned to assist Electrician John Hackney and Belt Foreman Colton Hallman underground. (I Tr. 27:15–20.) The No. 7 Mine has three portals – North Portal, East Portal, and West Portal. (Ex. R–1.)

Shortly after their shift began at 6:00 p.m., Nichols, Hackney, and Hallman descended 1,500 feet down the elevator hoist into the mine's North Portal. (I Tr. 27:16–28:16, 35:7–15; II Tr. 72:8–9.) During their decent, the miners observed large blocks of ice on the sides of the elevator shaft. (I Tr. 28:17–29:1, 105:6–110:17; II Tr. 73:5–74:11; Exs. S–13, S–14.) As the elevator cage neared the bottom of the shaft, a large piece of ice broke off[8] and fell down the 1,500-foot shaft, striking the top of the elevator cage, some time between 6:10 p.m. and 6:16 p.m. (I Tr. 29:20–30:1, 95:17–96:9, 113:19–115:10; II Tr. 9:11–12, 72:12–15, 86:12–14.) The force of the ice's impact caused the elevator's metal roof, which is composed of two panels, to hinge open and partially cave in, striking all three miners. (I Tr. 29:22–30:1, 246:22–247:5; II Tr. 9:11–13, 39:15–40:11, 72:12–15, 102:8–16.) The force of the elevator's roof collapsing knocked

[8] MSHA Supervisor Elswick later determined that the piece of ice that broke off the elevator shaft was roughly 50 feet below the surface of the North Portal elevator shaft, or 1,450 feet above the bottom of the elevator shaft. (I Tr 109:17–20, 110:13–16.)

Nichols and Hackney's hard hats off their heads and knocked the light off Hallman's hard hat. (I Tr. 42:5–19; II Tr. 19:13–19, 41:1–8, 87:2–4, 92:13–16.)

Nichols briefly lost consciousness after the metal elevator roof collapsed from the force of the falling ice and hit him. (I Tr. 29:20–30:2, 33:16–22, 35:3–6.) Nichols also suffered a deep laceration inside his mouth after biting down on his cheek during the accident and was spitting up blood afterwards. (I Tr. 32:13–14, 33:12–15, 36:13–37:7, 72:22–73:19; II Tr. 10:16–17, 11:7–8, 19:3–6, 46:9, 75:10–12, 88:6–10, 93:5–6, 94:1–6, 119:7–8, 233:21–234:8.) Additionally, the elevator's roof cut Nichol's left arm when it fell. (I Tr. 36:13–14.)

The collapsing roof cut Hackney's forehead, drawing blood. (I Tr. 35:20–21, 19:10–11, 19:20–22, 41:9–10, 54:11–17, 66:11–12, 75:9–10, 87:5, 118:19–119:4, 126:14–15; Ex. S–17.) The falling roof also hit Hackney's left arm and right leg, causing bruises later. (II Tr. 8:9–10, 19:11–12, 20:1–6, 54:18–21, 75:9–10; Ex. S–17.) Hackney later testified that the roof hitting him felt "like somebody opened the door on you real hard." (II Tr. 20:1–3.) Lastly, the roof hit Hallman's arm, scraping it and causing bruises later. (II Tr. 8:14–16, 12:9–12, 75:2–3, 77:22–78:1, 118:18–19.)

2. Injured Miners and Warrior Met's Initial Response to the Accident

a. Injured Miners' Exit Elevator

After the impact, the miners rode the remaining short distance to the bottom of the elevator shaft. (I Tr. 30:10; II Tr. 74:17–18, 87:6–8.) Then the miners exited the elevator cage to avoid being struck by further ice debris. (I Tr. 31:3–14; II Tr. 9:16–18, 43:9–13.) To exit the elevator cage, the miners had to climb over some ice, as well as the cargo net attached to the elevator cage because they could not open the gate at the bottom of the elevator shaft. (II Tr. 9:19–22, 15:4–6, 42:12–18, 66:5–67:13, 72:16–21, 89:22–90:3.) The miners then walked approximately thirty feet towards a phone and a cache of first aid materials. (II Tr. 12:21–13:12, 43:16–17, 44:13–14, 90:22–91:2.)

Nichols testified that once he exited the elevator and sat down his adrenaline wore off and he started to feel immense pain, particularly in his knee, neck, and head. (I Tr. 30:13–31:2, 32:4–5, 32:11–17, 37:8–17, 69:2–20.) Hackney testified that Nichols was "screaming and squalling" and complaining about his knee. (II Tr 10:14–15, 11:5–8, 12:5–20, 15:8–16, 20:17–21:1, 44:2, 49:6–10, 64:20–65:2, 93:9–12.) Similarly, Hallman testified that Nichols said his knee was bothering him and he was emitting sounds of pain. (II Tr. 75:10–19, 76:16–22, 93:20–94:15.)

b. Hackney Notifies Warrior Met Management of the Accident

Between approximately 6:11 p.m. and 6:15 p.m., Hackney called North Portal Shift Foreman Tim Jenkins who was on the surface of the North Portal, to notify him that ice had hit the elevator cage, that he and the other miners sustained some injuries, and they needed help. (I Tr. 32:11–12, 79:1–13; II Tr. 17:22–18:8, 22:11–24:8, 43:1–8, 44:16–45:15, 63:15–20, 80:4–15, 91:6–16.) Jenkins responded that some miners at the West Portal could come help them. (II

Tr. 18:2–5, 22:21–23:3.) Jenkins also stated he needed to go call "Carbon Monoxide" or "CO" Operator Charles Dickey, a member of Warrior Met management at the East Portal, to alert Dickey of the accident as well as call an ambulance. (II Tr. 18:7–8, 23:2–5.)

While Hackney was talking on the phone with Shift Foreman Jenkins, Hallman testified that the North Portal elevator cage was pulled up to the surface, but personnel on the surface reported that the cage could not be used to exit the mine due to its condition. (II Tr. 74:19–21, 76:4–6, 78:21–79:15, 95:9–11.) Nichols similarly testified that during Hackney's phone call, Jenkins initially suggested that the injured miners get back on the North Portal elevator to exit the mine, but Hackney refused to get on the elevator again. (I Tr. 44:22–45:7, 45:15–46:9, 74:11–17.)

After receiving Hackney's call, Shift Foreman Jenkins[9] called Foreman Jonathan Pippin at the West Portal at approximately 6:10 p.m. shortly after Pippin's shift began. (II Tr. 114:3–22, 131:3–6.) Jenkins informed Pippin that an incident occurred involving the North Portal elevator cage with injured miners who needed help. (II Tr. 114:12–115:16.) After the call, Pippin and other miners at the West Portal prepared to go underground and meet the injured miners. (II Tr. 114:12–115:19.) Upon arriving underground, Pippin and the other miners gathered a stokes basket, used to carry injured miners, and a first-responder kit containing first aid materials and took two man buses to travel towards the North Portal. (II Tr. 115:20–116:17, 139:19–22.)

After speaking with Shift Foreman Jenkins, Hackney checked on the other miners; Hallman told him he was fine, aside from his arm hurting, while Nichols was still complaining about his knee. (II Tr 12:5–20, 15:8–16, 20:17–21:1, 21:12–16, 22:8, 46:6–13, 49:6–10, 64:20–65:2, 93:9–12.) Hackney offered to put an air splint on Nichols's leg but warned that it could cause more pain, so Nichols rejected the splint. (II Tr. 11:9–12:2, 15:17–16:5, 19:7–9.) Hackney gave Nichols some paper towels to absorb the blood coming from his mouth. (II Tr. 19:3–6.) Hallman also offered Nichols an instant cold pack from the first aid kit, but Nichols did not use it. (II Tr. 95:4–6, 103:21–104:9.)

c. CO Operator Dickey's Response to the Accident

At approximately 6:16 p.m., CO Operator Dickey sitting in his office on the surface of the East Portal, called Hackney, and asked what had happened. (I Tr. 242:14–19, 275:3–276:4; II Tr. 23:6–7, 80:14–18.) Hackney told Dickey that ice fell down the elevator shaft of the North Portal and dislodged part of the elevator's roof, hitting Hackney and two other miners. (I Tr. 246:22–248:2, 263:4–12, 266:8–18; II Tr. 23:6–17.) Hackney specified that the roof hit his forehead and the right side of his body, Hallman's arm, and Nichols' face. (I Tr. 248:6–12, 266:19–267:5; II 46:14–47:17.) Hackney reported that the other miners were alert, walking, and talking. (I Tr. 248:3–12, 250:7–8.) Yet Dickey noticed that Hackney was speaking in an excited demeanor during the call. (I Tr. 268:4–22, 273:20–21; II Tr 52:1–15.) Indeed, Hackney testified that he experienced a burst of adrenaline after the accident occurred. (II Tr. 9:1–7.)

[9] Pippin testified that Tim "King" called him. (II 114:19–22.) However, Pippin also noted that Tim was the Shift Foreman for the North Portal, therefore I infer that he was referring to Tim Jenkins, the Shift Foreman for the North Portal the night of the accident. (II Tr. 114:10–14.)

Hackney and CO Operator Dickey ultimately agreed the miners would exit the mine by driving an electric-powered vehicle called a "man bus" towards the West Portal of the mine rather than take the North Portal elevator hoist again or wait for the miners from the West Portal to arrive at the North Portal. (I Tr. 32:18–33:5, 44:11–20, 74:15–75:6, 249:5–16, 267:14–16, 269:1–3; II Tr 25:7–15, 47:18–48:20.) The path between the North and West Portals is approximately 28,000 feet or 5.3 miles. (I Tr. 222:22–223:2; Ex. R–1.)

After talking with Hackney about the accident, CO Operator Dickey testified that he called the staff at the surface of the North Portal to report that ice had fallen on the elevator cage, and therefore they did not need to pull the elevator cage up until it was checked. (I Tr. 250:21–251:4, 251:12–18, 269:10–13.) Next, Dickey testified that he called the West Portal and asked that someone who had first-responder training go towards the North Portal to meet the injured miners on their way towards the West Portal. (I Tr. 251:5–252:9, 269:14–19.) The miner in charge of the West Portal responded that they were sending Foreman Pippin and other miners to meet the injured miners. (I Tr. 252:11–13.)

After calling the West Portal, CO Operator Dickey called Mine Manager Craig Dickerson, who was at home having Christmas dinner. (I Tr. 216:4–6, 253:12–13.) Dickey informed Dickerson that ice had fallen down the North Portal elevator shaft, knocking down part of the elevator's roof which struck three miners inside the elevator cage. (I Tr. 216:10–12, 227:8–11, 254:4–8.) Dickey shared that the three miners were injured, and they were on a man bus heading towards the West Portal. (I Tr. 227:10–11, 254:8–11.) In response, Dickerson directed Dickey to go to the West Portal and help organize the response there. (I Tr. 216:15–17.) Dickerson testified that he also told Dickey they should prepare the North Portal as a backup option for the injured miners to exit the mine, in case there were issues exiting the mine via the West Portal. (I Tr. 216:13–18, 223:17–224:8, 225:7–13, 230:7–10.) Dickerson testified that as Mine Manager, he instructed the miners at the North Portal to "get [the North Portal elevator] out, [and] get [the North Portal elevator] ready" at an unspecified time. (I Tr. 224:8.) Immediately after speaking with Dickey, Dickerson drove to the West Portal at the No. 7 Mine. (II Tr. 217:6–8, 227:12–22.)

Then after speaking with Mine Manager Dickerson, some time between approximately 6:40 p.m. and 7:00 p.m., CO Operator Dickey called Ed Boylen, the Director of Compliance, who was at home, but on-call during the holiday weekend. (I Tr. 200:12–16, 205:20–21, 254:22–255:2.) Dickey informed Boylen that ice fell down the North Portal elevator shaft, dislodging the elevator's roof which struck three miners and injured them. (I Tr. 201:8–9, 255:3–5, 259:18–260:1.) Dickey shared that the three miners were currently traveling towards the West Portal and someone from the West Portal was coming to meet them. (I Tr. 255:6, 260:1–3.) Dickey also told Boylen that he still had to call the "ambulance company." (I Tr. 273:1–8.) Upon learning the North Portal elevator cage was damaged, Boylen asked Dickey whether anyone had called

MSHA since the law[10] requires operators to report damaged elevators that are inoperable for more than thirty minutes. (I Tr. 201:12–18, 208:16–18, 211:16–212:2, 260:3–12.) Dickey responded that no one had called MSHA. (I Tr. 201:19–21.) Boylen replied that they were obligated to call MSHA because it had been over thirty minutes. (I Tr. 201:21–202:2, 260:3–6.)

At approximately 7:00 p.m., CO Operator Dickey called the MSHA hotline to report the accident. (I Tr. 278:17–19; Ex. S–8.) The MSHA operator who answered Dickey's call recorded the following notes in the escalation report:[11]

> [t]he caller, who is the Field Supervisor, is reporting the injuries of three miners. There was ice that fell down to the bottom of the service shaft, and the three men on the elevator at the time sustained injuries from the falling ice. The incident occurred at the bottom of the #7 North Service Elevator. An ambulance has been called and is en route. The miners will be staying at either Druid City Hospital in Tuscaloosa, Alabama, or at The University of Alabama, Birmingham-West, located in Bessemer, Alabama.

(Ex. S–8.) The escalation report generated by the MSHA hotline at 7:28 p.m. does not mention that the North Portal elevator was inoperable for more than thirty minutes. (Ex. S–8.) Under the section, "Information Provided to Caller," the report states "Solution: MSHA – EMERGENCY – COAL MINE – LIFE THREATENING INJURY." (Ex. S–8.)

d. Night Shift Foreman Burdette calls 911

CO Operator Dickey testified that he had Jeremy Burdette, the Night Shift Foreman for the East Portal, come to assist him with addressing the accident. (I Tr. 288:1–6, 290:11–291:3.) At an unknown time, Burdette[12] called 911 and requested that two ambulances go to the West

[10] Section 50.10 provides 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 involving: . . . [a]ny other accident." 30 C.F.R. § 50.10(d). Section 50.2 provides several definitions of "accident" including: "[d]amage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes." 30 C.F.R. § 50.2(h).

[11] If an accident is reported to the MSHA hotline it is recorded in an escalation report which is emailed to MSHA staff. (I Tr. 84:12–21.)

[12] Before counsel for the Secretary played the audio recording of the 911 call at the hearing, Dickey mistakenly believed he himself had called 911. (I Tr. 256:1–258:7, 273:1–5, 274:17–22, 281:3–16.)

Portal. (Ex. S–16; I Tr. 205:8–10, 286:7–287:18.)[13] During the call, Burdette reported that they had three injured miners with a head injury, an arm injury, and a leg injury. (Ex. S–16; I Tr. 284:5–8.) Burdette also requested the ambulances use lights and sirens to get there as quickly as possible. (Ex. S–16.)

3. Injured Miners Exit Mine

Approximately twenty to thirty minutes after the ice struck the elevator cage, or between 6:30 p.m. and 6:40 p.m., Nichols, Hackney, and Hallman boarded a man bus and headed towards the West Portal, with Hallman driving and Nichols propping his injured leg in Hackney's lap. (I Tr. 33:2–3, 38:7–14, 44:11–14, 67:6–19; 70:8–13; II Tr. 25:13–19, 26:14–21, 50:8–17, 76:6–8, 95:12–20, 96:16–97:10, 117:17–18.) When the three injured miners neared the East Portal, between Crosscuts 100 and 115, they made contact with Foreman Pippin and the other miners from the West Portal. (II Tr. 25:21–26:1, 27:16–28:7, 30:7–15, 48:21–49:5, 99:2–6, 116:21–117:6.) At approximately 6:50 p.m., Pippin radioed CO Operator Dickey to inform him they found the injured miners. (II 122:20–123:8, 131:3–132:17.)

Upon encountering the injured miners, Foreman Pippin noticed they were all alert and could talk. (II Tr. 117:14–118:8, 119:12.) Hallman informed Pippin that his arm was hurting but, overall, he was okay. (II Tr. 118:18–19, 141:22–142:5.) Pippin checked out Hackney after observing blood on his face but concluded he only had a small laceration, which had stopped bleeding. (II Tr. 118:19–119:4, 126:22–127:2, 142:6–11.) Nichols told Pippin that his knee and leg were hurting, and he had a deep cut inside his mouth. (II Tr. 119:5–8, 142:12–143:1.) Nichols testified that he struggled to remember their exit out of the mine, because he was in such intense pain during their journey. (I Tr. 66:16–67:6, 68:18–69:20; II Tr. 104:15–20.)

Foreman Pippin asked Hallman if he was okay to continue driving to the West Portal, and Hallman responded that he was fine to do so. (II Tr. 98:22–99:1, 119:21–120:2.) Pippin joined the injured miners on their man bus, and they headed towards the West Portal. (II Tr. 28:17–29:9, 98:16–21, 123:9.) During his journey with the injured miners, Pippin radioed CO Operator Dickey and told him the miners were alert; Hallman's arm was hurting; Hackney had a laceration on his face and was experiencing other general pain; and Nichols had an injured knee and mouth. (II Tr. 123:2–124:4.)

When the miners arrived at the West Portal, they splinted Nichols' leg and put him in the stokes basket to easily transport him into the elevator cage. (I Tr. 38:15–39:5, 68:2–11, 75:18–20; II Tr. 26:7–9, 33:1–5, 121:14–17, 121:22–122:14.) Afterwards, Hallman and Hackney walked into the elevator cage, and they rode up the West Portal elevator hoist along with Foreman Pippin and the other miners. (II Tr. 121:18–21, 127:11–14.)

[13] In the recording, Burdette did not request a helicopter. (Ex. S–16.) However, the 911 operator ordered a helicopter which arrived on the scene and transported Nichols to UAB hospital. (Ex. S–16; I Tr. 39:21–40:3, 58:19–22,62:3–4, 112:17 –20, 143:7–14; II Tr. 99:18–100:5, 220:19–21, 230:22–231:4.)

4. Injured Miners Transported to Hospitals and Subsequent Release

Upon the miners' arrival at the surface of the West Portal, first-responders, ambulances, and a helicopter were ready at the scene. (II Tr. 33:6–8, 51:10–15, 82:10–14, 99:15–22, 127:15–19.) Hallman did not feel he was hurt enough such that he needed to go to the hospital, but Mine Manager Dickerson requested that he go to the hospital anyway. (II Tr. 82:14–83:1, 100:6–10.) Hallman refused pain medicine during the ambulance ride. (II Tr. 101:3–7.) Hallman was released from the hospital the same night and was later cleared to work by Warrior Met's company doctor. (II Tr. 83:6–16, 100:11–19.) Hallman ultimately missed only one day of work due to the accident. (II Tr. 83:17–19.)

Hackney told the first-responders that he felt fine, but Warrior Met management also told him that he needed to go the hospital. (II Tr. 33:18–34:2.) At the hospital, Hackney was diagnosed with a closed head injury, abrasion of face, abrasion of right leg, and traumatic hematoma of upper left arm. (Ex. S–17; II Tr. 57:14–17.) Hackney was released from the hospital the same night and returned to work the next evening. (II Tr. 34:6–35:21.)

Nichols was transported to the hospital via helicopter. (I Tr. 39:21–40:3, 58:15–59:3, 62:3–4, 100:1–5.) Nichols bent the IV first-responders put in his arm due to the tight fist he made in response to his severe pain. (I Tr. 43:2–14.) Nichols testified that it was "the worst pain I ever felt." (I Tr. 43:13–14.) At the hospital, Nichols received stitches inside his mouth and got crutches for his injured knee. (I Tr. 40:4–9, 47:1.) Nichols was released from the hospital later that night. (I Tr. 40:10–14.) However, Nichols returned to the hospital two days later because he was experiencing headaches, and he was diagnosed with a concussion. (I Tr. 40:19–41:21; 57:22–58:4.) Nichols also later received an MRI which showed that the patella in his knee was injured. (I Tr. 36:12, 47:13–17.) Nichols did not return to work at the No. 7 Mine until a month and a half after the accident due to his knee injury. (I Tr. 46:14–48:21, 73:20–74:3.) Nichols testified that he still occasionally feels sharp pain in his neck and his knee hurts when it is cold outside. (I Tr. 36:9–11, 49:16–50:2, 52:10–16.)

5. MSHA Investigates Accident and Issues Two Citations

At some time between approximately 7:00 p.m. and 7:20 p.m., Warrior Met Vice President Rick Marlowe called MSHA Supervisor Thomas Chatham to inform him about the accident. (I Tr. 83:10–12.) Chatham then called MSHA Supervisor Sammy Elswick and shared the news about the accident. (I Tr. 83:12–14.) Shortly after the call from Chatham, at 7:28 p.m., Elswick received the escalation report for the incident generated by the MSHA hotline. (I Tr. 83:14–16; Ex. S–8.) Elswick then called Marlowe and asked about the accident. (I Tr. 94:8–16, 95:8–13.) Elswick told Marlowe that he would issue a section 103(k) order as soon as he arrived on site, so the scene needed to be preserved. (I Tr. 94:17–22, 112:21–113:8.) Elswick also called MSHA Supervisor Mark Schilke, who met him at the MSHA office, and they then went to the No. 7 Mine together. (I Tr. 84:2–6, 89:3–11.)

At approximately 9:45 p.m., MSHA Supervisors Elswick and Schilke arrived at the No. 7 Mine. (I Tr. 90:18–91:4; Ex. S–6.) Upon their arrival, Elswick noticed the elevator cage for the North Portal was on the surface and the lights were on, but the roof was disconnected. (I Tr.

92:8–13.) Elswick and Schilke then met with members of Warrior Met's management and learned that the accident occurred sometime between 6:10 p.m. and 6:16 p.m. (I Tr. 95:17–96:9, 113:19–115:10.) Warrior Met management also shared that a water line had frozen and busted open, causing water to leak and then freeze, which was likely the source of the ice that hit the North Portal elevator cage. (I Tr. 102:12–19, 130:12–17, 224:22–225:6, 232:10–14.)

After talking with management, MSHA Supervisors Elswick and Schilke inspected the elevator hoist operations for the North Portal. (I Tr. 96:10–97:13, 114:13–15.) Then Elswick and Schilke went to the North Portal elevator cage that had been brought to the surface. (I Tr. 100:8–11, 111:2–3.) Elswick and Schilke observed that the collapsed roof had already been removed from the elevator cage and was sitting about one-hundred feet away from the elevator shaft. (I Tr. 97:14–102:7, 110:22–111:2; Exs. S–9, S–10, S–11.) The area around the North Portal elevator hoist had also been cleaned and swept. (I Tr. 92:14–15, 97:20–22, 111:3–5, 125:17–20.) Elswick also noticed that the heaters for the elevator shaft were running, causing the remaining ice in the North Portal elevator shaft to quickly melt. (I Tr. 103:11–19, 106:7–9, 126:10–12, 129:3–7, 130:7–11; Ex. S–6.) However, when Elswick touched the side of the heaters, he felt that they were cool, leading him to believe that the heaters had only recently been turned on. (I Tr. 102:22–103:10, 104:16–22, 128:4–6; Ex. S–6.)

a. Citation No. 9706550

Three days later, MSHA Supervisor Elswick issued two section 104(a) citations to Warrior Met. In Citation No. 9706550, Elswick wrote the following:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1800-746-1553, once the operator knows or should know that an accident has occurred involving: An injury of a miner at the mine which has a reasonable potential to cause death. On December 25, 2022 at 6:16 pm the operator was notified of an accident that involved 3 miners that was entering the mine by traveling down the 7 North Mine hoist/elevator. This accident was caused by Ice that had broken loose and fell for a distance of approximately 1500 feet striking the top of the cage the miners were riding to access the mine. The ice broke the cage top and caused it to collapse on top of the 3 miners this causing injury to all 3 miners. The operator reported 1 head injury, 1 arm injury and 1 leg injury, 1 miner was transported by air and 2 by ambulance to nearby hospitals. The operator also failed to notify MSHA within the required time frame of the hoist being down and out of service. The operator was made aware of the accident at 6:16 pm and did not notify MSHA until 7:00 pm this is 44 minutes.

(Ex. S–4.)

MSHA Supervisor Elswick assessed the likelihood of injury or illness to be "reasonably likely," because there was still ice in the North Portal elevator shaft which could have fallen on miners and injured them if they used the elevator hoist. (Ex. S–4; I Tr. 116:15–117:6.) Elswick determined the violation could cause injury or illness resulting in "lost workdays or restricted duty" because "the miners were injured" and one was "airlifted out to the hospital." (Ex. S–4; I

Tr. 117:10–118:2.) Elswick concluded three people could be affected by the violation since three miners were injured. (Ex. S–4; I Tr. 117:7–9.) Elswick designated the violation as S&S since miners were injured, and other miners could have continued to use the North Portal elevator hoist and been injured before MSHA inspected it. (Ex. S–4; I Tr. 118:3–119:5.) Lastly, Elswick assigned Warrior Met a "moderate" degree negligence "because they did call it in." (Ex. S–4; I Tr. 119:6–21.)

b. Citation No. 9706551

MSHA Supervisor Elswick then issued Citation No. 9706551, in which he wrote the following:

> Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment. On December 25, 2022 at 6:16 pm the operator was notified of an accident that involved 3 miners that was entering the mine by traveling down the 7 North Mine hoist/elevator. This accident was caused by Ice that had broken loose and fell for a distance of approximately 1500 feet striking the top of the cage the miners were riding to access the mine. The ice broke the cage top and caused it to collapse on top of the 3 miners, causing injury to all 3 miners. The operator reported 1 head injury, 1 arm injury and 1 leg injury, 1 miner was transported by air and 2 by ambulance to nearby hospitals. When MSHA arrived on site it was discovered that the accident site had been altered, the hoist/elevator had been moved to the surface from the bottom where the accident occurred, the cage top had been completely removed from the cage and was laying on the surface of the mine, all ice had been swept and removed from the cage. The operator had been working on a busted water line that was located directly beside the shaft that could have been a contributing factor to the ice build up in this shaft. The cage platform and surrounding areas had been cleaned and swept. There was no way MSHA could do an adequate accident investigation due to the altered accident scene.

(Ex. S–5.)

MSHA Supervisor Elswick determined the likelihood of injury or illness as a result of the violation to be "unlikely" and not result in any lost workdays because "this is more of . . . a paperwork" violation. (Ex. S–5; I Tr. 121:15–22.) Elswick concluded three people could be affected by the violation. (Ex. S–5.) Elswick assigned Warrior Met a "high" degree of negligence because all mine management personnel are trained to preserve an accident scene, and Warrior Met was told to preserve the scene. (Ex. S–5; I Tr. 122:4–11.)

B. Analysis and Conclusions of Law: Citation No. 9706550 – Immediate Notification Under § 50.10(b)

1. Statutory and Regulatory History of 30 C.F.R. § 50.10(b)

Section 50.10(b) provides:

> The operator shall immediately contact MSHA at once and without delay and within 15 minutes at the toll–free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: . . . (b) [a]n injury of an individual at the mine which has a reasonable potential to cause death.

30 C.F.R. § 50.10(b). Standard 50.10 was derived from section 103(j) of the Mine Act which states in relevant part that—

> [i]n the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has reasonable potential to cause death, has occurred.

30 U.S.C. § 813(j).

The fifteen-minute notification requirement in section 103(j) of the Mine Act was added by the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"). MINER Act, Pub. L. No. 106-236, 120 Stat. 493 (2006). This amendment codified an MSHA emergency regulation that first imposed the fifteen-minute notification rule. S. REP. NO. 109-365, at 13 (2006); Emergency Mine Evacuation, 71 Fed. Reg. 12,252-01, 12,260 (Mar. 9, 2006) (to be codified at 30 C.F.R. pt. 50). Shortly after the MINER Act was enacted, MSHA promulgated a final regulatory version of the same notification requirement, codified at 30 C.F.R. § 50.10. Emergency Mine Evacuation, 71 Fed. Reg. 71,430-01, 71,434 (Dec. 8, 2006) (to be codified at 30 C.F.R. pt. 50). Lastly, on December 29, 2009, MSHA amended the regulation "to separately reflect the three categories of accidents in section 5 of the MINER Act, which require specific penalties for failure to report." Criteria and Procedures for Proposed Assessment of Civil Penalties/Reporting and Recordkeeping: Immediate Notification of Accidents, 74 Fed. Reg. 68,918-01 (Dec. 29, 2009) (to be codified at 30 C.F.R. pt. 50).

2. Violation of 30 C.F.R. § 50.10(b)

a. Time to Report Accident

The Secretary asserts that Hackney notified CO Operator Dickey about the accident at 6:16 p.m., at which point Warrior Met had fifteen minutes to report the accident to MSHA, or until 6:31 p.m. (Sec'y Br. at 19.) Since Warrior Met did not report the accident to MSHA until

7:00 p.m., forty-four minutes after it learned of the accident, the Secretary argues Warrior Met violated section 50.10(b). (Sec'y Br. at 19.) In contrast, Warrior Met argues that the fifteen-minute period to contact MSHA should not have begun to run until Foreman Pippin arrived on the scene to assess the three injured miners' conditions. (Resp't Br. at 15–16.) Specifically, Warrior Met asserts that it was not in a position to conduct an analysis of the miners' injuries and conditions until it had a first-responder on the scene. (Resp't Br. at 16; Resp't Reply Br. at 7.)

The preamble to section 50.10 states that "MSHA recognizes that an operator may not know instantly when an accident occurs, but emphasizes that the operator must make that determination promptly, consistent with the underlying purpose of the standard." 71 Fed. Reg. 71,430-01, 71,435–36 (Dec. 8, 2006). Similarly, the Commission has held that "[o]nce a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of whether the injury presents a reasonable potential to cause death and a determination of whether a call is required." *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015). The Commission has also held that permitting operators to wait for a medical or clinical opinion before determining whether they need to call MSHA "would 'frustrate the immediate reporting of near fatal accidents.'" *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015) (citing *Cougar Coal Co.*, 25 FMSHRC 513, 520-21 (Sept. 2003)); *see also Consol Pa. Coal Co.*, 40 FMSHRC 998, 1003 (Aug. 2018), *aff'd*, 941 F.3d 95 (3d Cir. 2019) (holding that section 50.10(b) "does not look to an opinion of a medically qualified expert"). Therefore, I agree with the Secretary that once CO Operator Dickey, a member of Warrior Met management, learned of the accident at 6:16 p.m. the clock began to run on the fifteen-minute period for Warrior Met to determine whether it needed to notify MSHA. (I Tr. 275:15–21.)

b. Whether Miners Suffered Injuries Which Had a Reasonable Potential to Cause Death

i. Regulatory Background and Case Law on Injuries with a Reasonable Potential to Cause Death

In the preamble to section 50.10, the Secretary notes that "[i]n using the 'reasonable potential to cause death' basis for injuries and entrapments, the MINER Act and the final rule retain an element of judgment." 71 Fed. Reg. 71,430-01, 71,433 (Dec. 8, 2006). Similarly, the Commission has not provided a firm definition of "reasonable potential to cause death," but has held that "[a] person with sufficient authority to call must make the decision to call based upon whether a reasonable person with the information known by him/her would have considered the injuries as creating a reasonable potential for death." *Consol Pa. Coal Co.*, 40 FMSHRC 998, 1004 (Aug. 2018), *aff'd*, 941 F.3d 95 (3d Cir. 2019).

However, given the need for prompt reporting, the Commission has held that "readily available information such as the nature of the accident and any observable indicators of trauma are relevant and proper for consideration in assessing whether an injury is reportable." *Consol Pa. Coal Co.*, 40 FMSHRC at 1003 (citing *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015)). The Commission has also endorsed consideration of the "totality of the circumstances" when assessing whether a 50.10(b) violation has occurred. *Id*.

Additionally, the Commission has held "that an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Signal Peak Energy, LLC*, 37 FMSHRC at 477. Therefore, if an operator is unable to conclusively determine, within 15 minutes, that an accident does not involve any injury that has a reasonable potential to cause death, it must notify MSHA.

Indeed, the Commission has repeatedly rejected the assertion that because a miner is conscious and alert following an accident, an operator can reasonably conclude that there was no potential for death. *See Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003); *Signal Peak Energy, LLC*, 37 FMSHRC at 476; *Consol Pa. Coal Co.*, 40 FMSHRC at 1006.

ii. Parties' Arguments Regarding whether Miners' Injuries had a Reasonable Potential to Cause Death

The Secretary alleges that "Nichols sustained a concussion, a laceration to the inside of his jaw, a neck injury, and a patella tendon injury." (Sec'y Br. at 21.) Additionally, the Secretary asserts that "Hackney sustained a closed head injury, abrasion to the face, abrasions of the right leg, and a traumatic hematoma of upper left arm." (Sec'y Br. at 21.) The Secretary argues that Nichols and Hackney's head injuries had a reasonable potential to cause death. (Sec'y Br. at 19.) The Secretary contends that Hackney's phone call with CO Operator Dickey put Dickey on notice that a large piece of ice had fallen almost 1,500 feet, or the length of five football fields, striking the elevator cage's roof which hit the miners inside, and causing head injuries to two of the miners. (Sec'y Reply Br. at 3.) The Secretary argues that the nature of the miners' injuries, the nature of the event, and the totality of the circumstances would lead a reasonable person to conclude that there was a reasonable potential for death. (Sec'y Reply Br. at 3.)

In contrast, Warrior Met argues—after the fact and well after more than 15 minutes had passed—that it was evident neither Hackney, Hallman, nor Nichols suffered any injury posing a reasonable potential to cause death. (Resp't Br. at 14.) While Warrior Met acknowledges that Hackney and Nichols sustained head injuries, it asserts that they were not life-threatening injuries. (Resp't Br. at 17.) Warrior Met also highlights that all three miners were wearing helmets at the time of the impact, and they were alert and talking with each other after the impact. (Resp't Br. at 14.) Moreover, Warrior Met notes that CO Operator Dickey learned that all three miners were alert, walking, and communicating after the accident from his phone call with Hackney at approximately 6:16 p.m. (Resp't Reply Br. at 6; I Tr. 275:15–276:4.)

iii. Head Trauma

It is undisputed that both Nichols and Hackney sustained head trauma as result of the accident. (Sec'y Br. at 21; Resp't Br. at 17.) Specifically, Nichols sustained a head injury, a neck injury, and a deep laceration inside his mouth causing him to spit up blood after the crash. (I Tr. 30:14–15, 32:13–15, 33:12–15, 34:14, 36:9–37:7, 72:22–73:19; II Tr. 10:16–17, 11:7–8, 19:3–6, 46:9, 75:10–12, 88:6–10, 93:5–6, 94:1–6, 119:7–8, 233:21–234:8.) Nichols also briefly lost consciousness after the roof hit him. (I Tr. 29:20–30:2, 33:16–22.) Moreover, Nichols returned to the hospital two days after he was initially released because he was experiencing headaches, and he was diagnosed with a concussion. (I Tr. 40:19–41:21; 57:22–58:4.) Hackney sustained a

laceration to his forehead as a result of the roof hitting him and he was diagnosed with a closed head injury at the hospital later that night. (I Tr. 35:20–21; II Tr. 19:10–12, 19:20–20:3, 41:9–10, 54:4–17, 57:3–17, 60:5–15, 75:9–10, 118:19–119:4, 126:14–15; Ex. S–17.) Additionally, while both Hackney and Nichols were wearing hard hats inside the elevator, the force of the roof collapsing knocked both of their hard hats off their heads. (I Tr. 42:5–19; II Tr. 19:13–19, 41:1–8.)

The preamble to section 50.10 states that "[b]ased on MSHA experience and common medical knowledge, some types of 'injuries which have a reasonable potential to cause death' include concussions." 71 Fed. Reg. 71,430-01, 71,434 (Dec. 8, 2006). Indeed, blunt force trauma to the head can have serious, delayed consequences that are not immediately visible. Specifically, swelling or bleeding in the cranial cavity pose a significant risk of death. Even in circumstances where a miner demonstrates stable vital signs and minimal blood loss immediately after a head injury, there is still a risk of death. Here, Nichols returned to the hospital after his initial release because he was experiencing headaches. (I Tr. 40:19–41:21; 57:22–58:4.) This fact demonstrates that the extent of injuries following head trauma will generally not be known within the required fifteen-minute reporting time. Thus, given the potential for latent fatal outcomes, operators generally should assume severe trauma to the head to be serious and report it immediately, even if the injured miner shows no obvious signs of distress in the immediate aftermath.

I therefore determine that a reasonable operator would recognize that a significant blow to the head, like those sustained by Nichols and Hackney, has a reasonable potential to cause death.

c. Whether Warrior Met Knew or Should Have Known the Miners Suffered Injuries Which Had a Reasonable Potential to Cause Death

i. 15-minute Window to Report

Section 50.10(b) requires operators to make a prompt determination of whether an accident has occurred, often under stressful and chaotic circumstances. *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Indeed, the repeated language of urgency in the standard leaves no doubt that operators must quickly decide whether to report an accident to MSHA as it states: "operator[s] shall immediately contact MSHA at once without delay and within 15 minutes." 30 C.FR. § 50.10. In the preamble to section 50.10, the Secretary explains that this language highlights "that reporting must be done promptly." 71 Fed. Reg. 71,430-01, 71,436 (Dec. 8, 2006).

Given the time constraint, operators often must decide whether to call MSHA before they can conduct a comprehensive investigation into the extent of miners' injuries. Thus, the decision whether to call MSHA must be based on a very limited knowledge of the facts surrounding the injuries and the nature of the accident. In the preamble to section 50.10, the Secretary explains that an operator often will not know "whether a person has been injured or killed or whether the event is life threatening" within the fifteen-minute window, but will know "the general character

of an event" which is sufficient to determine whether it needs to report the incident to MSHA. 71 Fed. Reg. 71,430-01, 71,435 (Dec. 8, 2006).

Here, no member of Warrior Met management was able to visually or physically assess the injured miners during the fifteen-minute reporting window. Warrior Met had to determine whether to call MSHA based solely on the information that Hackney reported to CO Operator Dickey. Dickey testified that Hackney told him that—

> ice had fallen down the shaft, and it hit the surface elevator, dislodging half of the elevator roof. It had not completely fallen, but it had dislodged it and had hit three employees at the bottom . . . [Hackney] said he had been hit in the forehead right there and – I think in his side right there . . . And the other two guys there – one guy had been hit in the arm right there, and the other guy looks like he had been hit in the face. And they were walking, and they were able to talk.

(I Tr. 246:22–248:12.) Similarly, Hackney testified that he told Dickey that "some ice came in on the cage. We're hurt and need some help." (II Tr. 23:8–10.)

Thus, CO Operator Dickey – based off his phone call with Hackney – learned that ice falling down a 1500-foot shaft struck the North Portal elevator cage's heavy, steel roof collapsing on three miners inside, specifically hitting two of the miners on their heads. Dickey may not have known other details, such as the fact that Nichols briefly lost consciousness, suffered a severe laceration inside his mouth, and injured his knee. (I Tr. 274:10–16.) However, under section 50.10, operators have a duty to adequately assess accidents to determine whether notification is required. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1189 (10th Cir. 2012) (holding that operator's ignorance of the severity of injured miner's condition did not excuse its failure to timely report the accident). Additionally, in the preamble to section 50.10, the Secretary states that injuries which have a reasonable potential to cause death can result from various indicative events, including roof instability. 71 Fed. Reg. 71,430-01, 71,434 (Dec. 8, 2006). Therefore, the circumstances of this accident should have alerted Dickey to the need for further inquiry into the gravity of the miners' injuries.

Warrior Met argues that the mere fact of a head injury, without more, does not trigger the immediate notification requirement of section 50.10(b). (Resp't Reply Br. at 6–7.) I agree that the mere fact of a head injury alone may not trigger the immediate notification requirement of section 50.10(b). However, the knowledge that a piece of ice fell nearly 1,500 feet and struck a large, heavy steel roof with such intensity that it partially caved in and crashed into the miners' heads, causing injuries, would lead a reasonable operator to conclude that the trauma to the miners' heads had a reasonable potential to cause death. Additionally, while Hackney told CO Operator Dickey that he and the other miners were alert, walking, and talking after the accident, Dickey also noticed that Hackney was speaking in an excited manner during their call, which can be a possible indicator of shock. (I Tr. 248:3–12, 250:7–8, 268:4–22, 273:20–21, 275:15–276:4; II Tr 52:1–15.)

The Commission has held that operators must resolve any reasonable doubt in favor of notification when determining whether they need to notify MSHA of an accident. *Signal Peak*

Energy, LLC, 37 FMSHRC at 477. Under this presumption, I determine that the information CO Operator Dickey learned was sufficient for him to reasonably conclude the miners may have suffered injuries, like head trauma, which had a reasonable potential to cause death. Therefore, Dickey was obligated to follow the requirements of section 50.10(b) and notify MSHA of the accident.

ii. Warrior Met's Response to the Accident

The Secretary argues that CO Operator Dickey's response to the accident proves Warrior Met's awareness that the miners' injuries had a reasonable potential to result in death. (Sec'y Br. at 23.) In support, the Secretary notes that Dickey testified that the severity of the injury dictates his response and for severe injuries he ensures that first aid is readily available. (Sec'y Br. at 21–22.) The Secretary also highlights that Warrior Met ultimately reported the accident to MSHA. (Sec'y Br. at 23.)

Warrior Met disputes that it reported the accident to MSHA because it believed the miners suffered injuries with a reasonable potential to cause death. (Resp't Br. at 19.) Rather, Warrior Met asserts that it only reported the accident because the elevator hoist was down for more than thirty minutes, and thus it was a reportable accident to MSHA under 30 C.F.R. § 50.2(h)(11). (Resp't Br. at 19.) However, CO Operator Dickey's call to MSHA belies Warrior Met's assertion that it only reported the accident to MSHA due to the damaged elevator hoist not being operable for more than thirty minutes. The escalation report indicates Dickey focused on reporting the injuries that occurred because of the accident and makes no mention that the elevator hoist was down for more than thirty minutes, as Warrior Met claims. (Ex. S–8.) From the escalation report one could reasonably infer that Warrior Met knew it needed to report the accident under section 50.10(b) but failed to do so within the fifteen-minute window; the lack of any mention of the elevator hoist being down for more than thirty minutes looks to be a post-hoc justification for its section 50.10(b) violation under the guise of 30 C.F.R. § 50.2(h)(11).

Warrior Met also argues that it only brought the North Portal elevator cage to the surface to prepare it as an alternative exit. (Resp't Br. at 21–22.) Indeed, Mine Manager Dickerson testified that after speaking with CO Operator Dickey on the phone, at some time between approximately 6:45 p.m. and 7:00 p.m., he ordered the North Portal elevator to be brought to the surface and prepared as a backup option for the miners to exit the mine, in case any issues arose exiting via the West Portal. (I Tr. 216:13–18, 223:17–224:8, 225:7–13, 230:7–10.) However, Hallman testified that while he and the other injured miners were still at the bottom of the North Portal, at some time between approximately 6:11 p.m. and 6:35 p.m., "Hackney called on the phone outside and told them what happened. They pulled the cage up and said the cage was down . . . it couldn't be rode, that we would have to go to the West side." (II Tr. 78:21–79:10.) Similarly, Nichols testified that Shift Foreman Jenkins suggested in his call with Hackney that the miners exit the mine via the North Portal elevator, but Hackney refused to ride the elevator since it did not have a roof. (I Tr. 44:22–45:7, 45:15–46:9, 74:11–17.)

I credit Hallman and Nichols' testimony as they were present at the scene of the accident and observed the elevator cage being moved to the surface of the mine. (I Tr. 44:22–45:7, 45:15–46:9, 74:11–17; II Tr. 74:19–21, 76:4–6, 78:21–79:10.) Accordingly, I find that upon first learning of the accident around 6:15 p.m., Warrior Met believed the miners' injuries could be

dire enough that the miners should exit the mine through the quickest method—the North Portal elevator—and therefore it brought the North Portal elevator cage to the surface to assess its functionality. However, after inspecting the North Portal elevator cage on the surface and deliberating with Hackney, Warrior Met directed the injured miners to exit the mine via the West Portal. Given this longer journey, Warrior Met also ordered miners with first-responder training to meet the injured miners along the way, further indicating its concern for the injured miners. (I Tr. 251:5–252:9, 269:14–19.) Accordingly, I determine that Warrior Met's handling of the damaged elevator cage demonstrates that it believed the injured miners could be in grave danger.

For the reasons discussed above, I conclude that based on the totality of the circumstances, a reasonable mine operator would have at the very least resolved any doubts regarding the severity of the injuries caused by the accident in favor of notification, as required by Commission case law. Accordingly, I conclude that Warrior Met violated section 50.10(b) by failing to report the accident to MSHA within 15 minutes after learning about it at 6:16 p.m.

3. S&S Analysis for Violation of 30 C.F.R. § 50.10(b)

a. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984). I concluded that Warrior Met violated section 50.10(b). *See* discussion *supra* Part VI.B.2. Thus, I determine that the Secretary has satisfied the first element of the *Mathies* test.

b. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that "based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In assessing this element, "[t]he Commission . . . defines the 'hazard' in terms of the prospective danger the cited safety standard is intended to prevent." *Id.*

In the preamble to section 50.10, the Secretary states that "[t]imely reporting can be crucial in emergency, life-threatening situations to activate effective emergency response and rescue." 71 Fed. Reg. 71,430-01, 71,435 (Dec. 8, 2006). The Secretary adds that "[e]ven where MSHA does not activate an emergency response, the Agency conducts an investigation. Prompt notification enables MSHA to secure an accident site, preserving vital evidence that can otherwise be easily lost. In addition, prompt notification provides MSHA with data to accurately determine trends and means of prevention." *Id.* Thus, the Commission has held that "[w]hile immediate rescue efforts are a significant concern, section 50.10 is also intended to facilitate MSHA's ability to investigate and remedy the cause of an accident." *Signal Peak*, 37 FMSHRC at 480; *see also Consol Pa. Coal Co. v. FMSHRC*, 941 F.3d 95, 105 (3d Cir. 2019) (holding that the purpose of the notification requirement in 50.10(b) is "to encourage rapid notification so that MSHA can respond effectively in an emergency and preserve evidence to facilitate later investigation").

Two ambulances and a helicopter along with first-responders arrived on site by the time Nichols, Hackney, and Hallman were evacuated to the surface, so Warrior Met's failure to timely notify MSHA did not impair otherwise mobilized MSHA rescue efforts. (II Tr. 33:6–8, 51:10–15, 82:10–14, 99:15–22, 127:15–19.)

However, the Secretary argues that Warrior Met's failure to timely report the accident could have resulted in injuries to additional miners who may have continued to use the North Portal elevator after the accident. (Sec'y Br. at 23; I Tr. 118:8–19.) Indeed, as I previously found, after the accident Warrior Met moved the North Portal elevator cage to the surface to determine whether the injured miners could use it to exit the mine. *See* discussion *supra* Part VI.B.2.c.ii. Nichols testified that Warrior Met suggested that the injured miners use the North Portal elevator to exit the mine, but Hackney refused to get on the elevator again since it did not have a roof. (I Tr. 44:22–45:7, 45:15–46:9, 74:11–17.) Yet, had the injured miners agreed to use the damaged North Portal elevator hoist to exit the mine as Warrior Met initially suggested, they would have faced the potential hazard of more ice[14] hitting them without a proper roof to protect them this time. Thus, due to MSHA's impeded ability to secure and assess the accident scene, I determine that a reasonable likelihood existed that the miners could have used the North Portal elevator to exit the mine and been severely injured by additional ice snapping off and hitting them.

Additionally, Warrior Met moved the North Portal elevator cage to the surface and removed the elevator's damaged roof as well as the ice that hit the elevator before MSHA personnel arrived at the scene. (I Tr. 224:8–12; II Tr. 74:19–21, 76:4–6, 78:21–79:10.) During his inspection, MSHA Supervisor Elswick noticed that the area around the North Portal elevator hoist had also been cleaned and swept. (I Tr. 92:14–15, 97:20–22, 111:3–5, 125:17–20.) Consequently, Elswick testified that he "was not able to perform an investigation because the scene had been changed." (I Tr. 138:19–20.) Furthermore, because Elswick did not learn of the accident until approximately 7:20 p.m.—over one hour after it occurred—he was not able to conclusively determine whether the heaters for the North Portal elevator shaft were on at the time of accident by seeing if heat was still radiating from the heaters during his inspection later that night. (I Tr. 83:10–12, 103:6–19, 104:9–22, 128:4–6, 226:7–10, 233:4–10.)

Thus, Warrior Met's delayed reporting and subsequent actions prevented MSHA from promptly and fully investigating the cause of the ice accumulating in the North Portal elevator shaft and, in turn, MSHA was unable to identify and remedy similar hazards that may require correction, thereby resulting in the possibility of similar accidents occurring during continued normal mining operations. Specifically, MSHA was not able to conclusively determine whether a frozen pipe, broken heaters, failure to properly use the heaters, or a combination of factors caused the ice to accumulate in the North Portal elevator shaft. Due to MSHA's impeded investigation, I determine that there exists a reasonable likelihood that another similar ice accident could occur during continued normal mining operations. Accordingly, I determine that the Secretary has satisfied the second element of the *Mathies* test.

[14] MSHA Supervisor Elswick observed and photographed the remaining ice in the North Portal elevator shaft during his inspection after the accident. (I Tr. 105:12–106:19, 126:6–7; Exs. S–13, S–14.)

c. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). Thus, the Secretary must establish that based upon the particular facts surrounding this violation, the occurrence of another ice accident would be reasonably likely to cause injury. The Secretary argues that further injury could have occurred as a result of the cited hazard. (Sec'y Br. at 23.)

I determine that there exists a reasonable likelihood that the hazard of another ice accident would result in miners sustaining injuries such as lacerations, broken bones, concussions, and internal bleeding. Thus, I determine that the Secretary has satisfied the third element of the *Mathies* test.

d. Likelihood Resulting Injury Would be of a Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury would be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984). The Secretary argues that "evidence proves that serious injury could occur as a result of the cited hazard." (Sec'y Br. at 23.) In support, the Secretary asserts that "[t]wo miners sustained potentially fatal injuries during the accident." (Sec'y Br. at 23.)

As evidenced by the injuries Nichols and Hackney sustained, ice falling and striking a miner or nearby equipment has the potential to result in an extremely serious injury. *See* discussion *supra* Part VI.B.2.b.iii. Additionally, had the miners used the damaged North Portal elevator cage without a functioning roof to protect them and additional ice hit them, it is reasonably likely their injuries would be severe. Accordingly, I determine that injuries from ice falling down a 1500-foot elevator shaft are reasonably likely to result in a reasonably serious injury or fatality. Thus, I determine that the Secretary has satisfied the fourth element of the *Mathies* test.

I therefore conclude that the Secretary has satisfied all four elements of the *Mathies* test and the violation in Citation No. 9706550 is appropriately designated as S&S.

4. Negligence Determination for Violation of 30 C.F.R. § 50.10(b)

The Secretary argues that Warrior Met exhibited a "moderate" level of negligence in violating section 50.10(b). (Sec'y Br. at 24.) Specifically, the Secretary argues that Warrior Met knew or should have known it needed to report the accident to MSHA within fifteen minutes of learning about it. (Sec'y Br. at 24.) The Secretary asserts that MSHA Supervisor Elswick considered the fact that Warrior Met reported the accident to MSHA approximately forty-five minutes after learning about it in making his negligence determination. (Sec'y Br. at 24.)

Warrior Met disputes the Secretary's designation of "moderate" negligence, arguing that, at most, it exhibited a low level of negligence under the circumstances. (Resp't Reply Br. at 9.) In support, Warrior Met notes that immediately after learning of the incident, CO Operator

Dickey called miners at the North Portal and West Portal to prompt recovery efforts. (Resp't Reply Br. at 10.) Dickey also reported the situation to Mine Manager Dickerson who provided further directives for recovering the three miners. (Resp't Reply Br. at 10.) Warrior Met also highlights that Dickey reported the accident to MSHA at 7:00 p.m. after speaking with Director of Compliance Boylen, who advised doing so. (Resp't Reply Br. at 10.) Warrior Met argues that it acted in good faith and was singularly focused on ensuring the safety of the injured miners. (Resp't Reply Br. at 10.)

I agree with the Secretary that Warrior Met should have known based on the description of the event and the miners' injuries that it needed to call MSHA within fifteen minutes of learning about the accident. While I acknowledge that Warrior Met was busy trying to address the accident, that does not account for the twenty-nine-minute delay in reporting the accident to MSHA. CO Operator Dickey made several non-essential calls before he ultimately reported the accident to MSHA. However, Warrior Met called MSHA within forty-four minutes of learning about the accident, which is significantly shorter than other cases, *see, e.g.*, *M-Class Mining, LLC*, 39 FMSHRC 1013, 1016 (May 2017) (ALJ) (finding that operator did not notify MSHA of accident until the following morning), and less egregious than cases in which the operator did not report the accident at all, *see Webster Cty. Coal, LLC*, 39 FMSHRC 1131, 1134 (May 2017) (ALJ) (finding that operator did not inform MSHA of the accident); *Red River Coal Co.*, 39 FMSHRC 368, 391 (Feb. 2017) (ALJ) (finding that operator failed to report accident to MSHA); *Clintwood Elkhorn Mining Co.*, 36 FMSHRC 1282, 1301 (May 2014)(ALJ) (finding that operator never reported accident to MSHA). In weighing all the evidence, I conclude that on a continuum of negligence Warrior Met's actions fall on the higher degree of "low" negligence.

5. Penalty: Citation No. 9706550 – Immediate Notification Under § 50.10(b)

The Secretary proposes a penalty of $7,133.00 for Citation No. 9706550. (Sec'y Br. at 24.) Under section 110(a)(2) of the Mine Act, "[t]he operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 103(j) (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000." 30 U.S.C. § 820(a)(2). Section 4 of the Federal Civil Penalties Inflation Adjustment Act (1990 Pub. L. 101–410, 104 Stat. 890; 28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–373) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, 129 Stat. 599, 28 U.S.C. 2461 note) (collectively, the FCPIA Act), requires each federal agency with statutory authority to assess civil monetary penalties to adjust its civil monetary penalties annually for inflation according to a formula described in section 5 of the FCPIA Act.

At the time the Secretary assessed a proposed penalty for Citation No. 9706550, the minimum penalty for a violation of section 103(j) of the Mine Act and thus a violation of standard 50.10(b) was $7,133.00. Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2023, 88 Fed. Reg. 2,210, 2,218 (Jan. 13, 2023). Therefore, the penalty assessed in Citation No. 9706550 is the statutory minimum for this violation. In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, as well as being constrained by the statutory minimum penalty, I hereby assess a penalty of $7,133.00.

C. Analysis and Conclusions of Law: Citation No. 9706551 – Preservation of Evidence

1. Violation of 30 C.F.R. § 50.12

Section 50.12 states, "[u]nless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment." 30 C.F.R. § 50.12.

a. Whether Warrior Met Altered the Accident Site

The Secretary argues it is uncontroverted that Warrior Met altered the accident site because Mine Manager Dickerson testified that he ordered the damaged elevator cage to be brought to the surface. (Sec'y Br. at 15–16.) The Secretary contends that this prevented MSHA's investigators from being able to examine the cage as it existed after the ice hit it at the bottom of the elevator shaft. (Sec'y Br. at 16.) Additionally, the Secretary alleges that Warrior Met not only removed the elevator cage's damaged roof, but it also removed the ice that hit the elevator cage and cleaned the area around the elevator hoist. (Sec'y Br. at 16.) In response, Warrior Met asserts that none of its actions hindered MSHA's investigation and the scene was not altered. (Resp't Br. at 22.) The Secretary disputes this claim, noting that MSHA Supervisor Elswick testified that he was not able to perform a complete investigation because the scene had been changed. (Sec'y Reply Br. at 5; I Tr. 138:19–20.)

Hallman testified that the North Portal elevator cage was pulled up to the surface while Hackney was making calls at the bottom of the North Portal. (II Tr. 74:19–21, 76:4–6, 78:21–79:10.) Mine Manager Dickerson also acknowledged that miners pulled the North Portal elevator cage up to the surface and set the elevator's roof to the side, as well as the ice that hit the elevator. (I Tr. 224:8–12.) Thus, when MSHA Supervisors Elswick and Schilke arrived at the scene, they noticed the North Portal elevator cage had already been brought to the surface and the roof of the cage had been removed and was sitting about one-hundred feet away from the elevator shaft. (I Tr. 97:14–102:7, 110:22–111:5; Exs. S–9, S–10, S–11.) Elswick also noticed that the area around the North Portal elevator hoist had been cleaned and swept. (I Tr. 92:14–15, 97:20–22, 111:3–5, 125:17–20.) Due to Warrior Met's alteration of the scene, Elswick said he and Schilke "really couldn't investigate anything. There was nothing we could really do because everything had been changed . . . I have no idea what was gone . . . everything was cleaned up and removed and done. I had no idea what I was supposed to do there." (I Tr. 111:8–10, 125:17–20.) Accordingly, I determine that Warrior Met altered the accident scene.

b. Whether Warrior Met's Alteration of Accident Scene is Exempted

Warrior Met argues that its alteration of the accident scene is exempted under section 50.12 which allows operators to alter accident scenes "to rescue or recover an individual." (Resp't Br. at 20; Resp't Reply Br. at 10); 30 C.F.R. § 50.12. Specifically, Warrior Met alleges that given the potential for issues traveling to the West Portal, Mine Manager Dickerson found it necessary to investigate whether the North Portal was an alternative option to bring the injured

miners to the surface. (Resp't Br. at 21–22; Resp't Reply Br. at 11.) Therefore, Warrior Met contends that Dickerson instructed employees at the North Portal to bring the elevator cage to the surface. (Resp't Br. at 21; Resp't Reply Br. at 10.)

Despite Warrior Met's arguments to the contrary, I previously found that upon learning of the accident, Warrior Met believed the miners' injuries could be dire enough that the miners should exit the mine through the quickest method – the North Portal elevator, and it therefore moved the North Portal elevator cage to the surface to assess its functionality. *See* discussion *supra* Part VI.B.2.c.ii. Thus, Warrior Met may have believed it necessary to bring the elevator cage to the surface to rescue or recover an individual. However, Hallman testified that Warrior Met staff on the surface of the North Portal told Hackney that the elevator "cage was down [and] it couldn't be rode." (II Tr. 78:21–79:10.) Yet, Warrior Met removed the elevator cage's damaged roof and the ice that hit the elevator cage, both of which were extra steps unnecessary to the assessment of the hoist as operational and were significant alterations to the accident scene. (I Tr. 97:14–102:7, 110:22–111:5, 224:8–2; Exs. S–9, S–10, S–11.)

Additionally, when MSHA Supervisor Elswick inspected the North Portal elevator shaft he touched the side of the heaters and felt that they were cool, leading him to believe that the heaters had only recently been turned on and likely were not on at the time of the accident. (I Tr. 102:22–103:10, 104:16–22, 128:4–6; Ex. S–6.) Nichols also testified that the heaters for the North Portal elevator shaft were not running at the time of the accident. (I Tr. 50:20–51:2.) Furthermore, Mine Manager Dickerson was not able to confirm whether the heaters for the North Portal elevator shaft were running at the time of the accident. (I Tr. 226:7–10, 233:4–9.) Dickerson also testified that the heaters produce a great deal of heat when they are running. (I Tr. 233:19–234:7.) Indeed, Elswick testified that the fact the water from the busted pipe near the elevator shaft froze demonstrates that the heaters likely were not running at the time of the accident. (I Tr. 130:16–20.) However, during Elswick's inspection following the accident the heaters were running, causing the remaining ice in the North Portal elevator shaft to quickly melt, which further inhibited his investigation of the accident. (I Tr. 103:11–19, 106:7–9, 126:10–12, 129:3–7, 130:7–11; Ex. S–6.) I determine that it was not necessary to turn the heaters on "to rescue or recover an individual" and by turning them on, Warrior Met altered the accident site.

Accordingly, I conclude that Warrior Met violated section 50.12.

2. Negligence Determination for Violation of 30 C.F.R. § 50.12

The Secretary argues that the violation of section 50.12 meets the standard for "high" negligence. (Sec'y Br. at 17.) In support of this designation, the Secretary asserts that MSHA Supervisor Elswick specifically instructed Warrior Met management to preserve the accident scene before his arrival. (Sec'y Br. at 17.) Warrior Met disputes the Secretary's designation of "high" negligence, arguing that Mine Manager Dickerson found it necessary to bring the North Portal elevator cage to the surface to determine the feasibility of utilizing the cage as an alternative means of egress from the mine. (Resp't Br. at 22; Resp't Reply Br. at 14.) Because these actions were taken to assist the injured miners by removing them from the mine as quickly as possible, and not to hinder MSHA's investigation, Warrior Met argues that any violation of

section 50.12 should reflect nothing more than "low" negligence. (Resp't Br. at 22; Resp't Reply Br. at 14.)

Warrior Met concedes that MSHA Supervisor Elswick told Vice President Rick Marlowe that he would issue a section 103(k) order once he arrived on-site, requiring the scene to be preserved. (Resp't Reply Br. at 13.) However, Warrior Met argues that there is no evidence that this conversation took place prior to CO Operator Dickey's call with Mine Manager Dickerson or that Marlowe spoke with Dickerson. (Resp't Reply Br. at 13.) Alternatively, Warrior Met argues that even if Dickerson had knowledge of the section 103(k) order, his instructions were reasonable in light of the ongoing circumstances. (Resp't Reply Br. at 14.)

MSHA Supervisor Elswick testified that he called Vice President Marlowe shortly after he received the escalation report for the incident generated by the MSHA hotline at 7:28 p.m. (I Tr. 83:14–16, 94:8–9; Ex. S–8.) Hallman testified that the North Portal elevator cage was pulled to the surface while he and the other injured miners were still waiting at the bottom of the North Portal. (II Tr. 74:19–21, 76:4–6, 78:21–79:10, 95:9–11.) Hackney and Hallman testified that they were at the bottom of the North Portal for approximately twenty to thirty minutes after the accident before they got into a man bus to go to the West Portal. (II Tr. 26:14–21, 95:12–20.) Therefore, the North Portal elevator cage was likely brought to the surface sometime between 6:11 and 6:35 p.m., and thus before Elswick called Marlowe at approximately 7:30 p.m. and told him about the pending section 103(k) order.

Nevertheless, MSHA Supervisor Elswick testified that all mine management personnel are trained to preserve accident scenes and are therefore clearly on notice of this requirement. (I Tr. 122:6–11.) Thus, as soon as Warrior Met management learned of the accident, mine management should have known they needed to preserve the accident scene. Additionally, Warrior Met's removal of the elevator cage's roof, setting aside the ice that hit the elevator cage, and turning on the heaters causing the remaining ice in the elevator shaft to melt, leads me to infer Warrior Met may have tried to rectify the cause of the accident before MSHA staff arrived to inspect the accident scene at 9:45 p.m., over two hours after MSHA's Elswick told Warrior Met he would be issuing a section 103(k) order. I therefore do not find any mitigating circumstances for Warrior Met's violation of section 50.12. Accordingly, I conclude that Warrior Met exhibited a high level of negligence.

3. Penalty: Citation No. 9706551 – Preservation of Evidence

The Secretary proposes a penalty of $606.00 for Citation No. 9706550. (Sec'y Br. at 18.) Warrior Met was not cited for a violation of section 50.12 in the fifteen-month period preceding Citation No. 9706551. (Sec'y Br. at 18.) Warrior Met is a large operator, mining 4,755,684 tons of coal at the No. 7 Mine in 2022. (Ex. Jt.–1.) I determined that Warrior Met exhibited a high level of negligence. *See* discussion *supra* Part VI.C.2. The parties stipulated that the penalties proposed by the Secretary in this case would not affect Warrior Met's ability to remain in business. (Ex. Jt.–1.) Regarding gravity, I agree with the Secretary that the violation is unlikely to result in injury or illness and therefore the gravity level is low. The parties stipulated that Warrior Met abated the citation in a timely manner and in good faith. (Ex. Jt.–1.) Thus, in

considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $606.00.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 9701033 and 9706550 both be **MODIFIED** to reduce the negligence findings from "moderate" to "low" and are otherwise **AFFIRMED** as written.

Respondent Warrior Met is **ORDERED** to pay a combined civil penalty of $8,339.00 for Citation Nos. 9701033, 9706550, and 9706551, within 40 days of this decision.[15]

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

[15] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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