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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 1, 2024

ROBERT THOMAS	
	Docket Nos. WEST 2018-0402-DM WEST 2019-0205
CALPORTLAND COMPANY	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY: THE COMMISSION

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), is on remand to the Commission pursuant to a decision of the United States Court of Appeals for the Ninth Circuit. *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021), *rev'g Thomas v. CalPortland*, 42 FMSHRC 43 (Jan. 2020) ("*CalPortland I*"). The Court rejected the Commission's application of the *Pasula-Robinette* causation standard to section 105(c) cases.[1] The Ninth Circuit then remanded the case to the Commission to apply a "but-for" causation standard.

The Commission subsequently remanded the case to the Administrative Law Judge to reexamine the facts of this case consistent with the Ninth Circuit's instructions.

On remand, the Judge concluded, as she had prior to the remand, that CalPortland had discriminated against miner Robert Thomas in violation of the Mine Act. She again awarded Thomas back pay, lost benefits, interest, attorney's fees, and any additional fees incurred during the appeals process. *Thomas v. CalPortland*, 43 FMSHRC 531, 550 (Dec. 2021) (ALJ).

[1] Section 105(c) of the Mine Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

30 U.S.C. § 815(c)(1). The Commission's *Pasula-Robinette* test is described *infra*. Slip op. at 3 n.3.

For the reasons discussed below, we hold that substantial evidence did not support the Judge's conclusion that Thomas was discharged for his protected activity. In fact, the substantial evidence can only be fairly interpreted to indicate that Thomas was discharged for unprotected activity alone. Accordingly, we reverse the Judge's decision on remand and dismiss this case.

I.

Factual and Procedural Background

The background facts are fully set forth in *CalPortland I* and are summarized here. In the months leading up to Thomas's suspension and subsequent termination, Thomas complained to his Supervisor Dean Demers about working long hours and about substitute miners not being properly trained. In January 2018, an investigator from the Department of Labor's Mine Safety and Health Administration ("MSHA") saw Thomas not wearing his personal flotation device (PFD) while over open water on a dredge. Thomas's action resulted in the issuance of an unwarrantable failure citation for violating MSHA regulations.

CalPortland subsequently suspended Thomas pending an investigation into the incident. The company later determined that Thomas had voluntarily resigned from his position after Thomas refused to communicate with CalPortland during that investigation. Thomas filed a discrimination complaint with MSHA, but MSHA declined to pursue a complaint with the Commission on his behalf. Thomas proceeded to file this complaint with the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

Following an evidentiary hearing on the merits, the Judge issued a decision finding that CalPortland had discriminated against Thomas in violation of the Mine Act. 40 FMSHRC 1503, 1517-18 (Dec. 2018) (ALJ). On review, the Commission unanimously determined that substantial evidence did not support the Judge's finding that Thomas had established a prima facie case of discrimination. The Commission reversed the Judge's decision and dismissed the case. *CalPortland I*, 42 FMSHRC at 54. Thomas appealed the Commission's decision to the Ninth Circuit.

[2] 30 U.S.C. § 815(c)(3) states that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

On appeal, the Ninth Circuit rejected the application of the Commission's 40-year-old *Pasula-Robinette* framework to cases brought under section 105(c) of the Mine Act. *Thomas v. CalPortland Co.*, 993 F.3d at 1208-09.[3] Relying on Supreme Court precedent, the Court reasoned that the framework conflicts with the Supreme Court's instruction that the ordinary meaning of "because" requires application of a "but-for" test.[4] *CalPortland Co.*, 993 F.3d at 1208-11. It determined that the Mine Act's language is clear and contained no textual or contextual indication that "because" means anything other than "but-for." *Id.* The Court then remanded the case to the Commission for further proceedings consistent with its opinion. *Id*.

The Commission subsequently remanded the case to the Judge to first consider Thomas's claim under the newly imposed "but-for" causation test. Applying the new standard of review, the Judge again found that CalPortland had discriminated against Thomas in violation of the Mine Act. 43 FMSHRC at 550. The operator now seeks review of the Judge's determination.

II.
Disposition

In the Commission's initial consideration of this case, it carefully and extensively reviewed the facts. The Commission unanimously held:

> Thomas failed to introduce *any evidence that his suspension and eventual discharge were in any way motivated by protected activity*. In fact, the available evidence strongly suggests that the adverse actions he experienced were direct results of his own unprotected and dangerous activity of failing to wear a PFD and his walking away from the operator's necessary investigation.

CalPortland I, 42 FMSHRC at 5 (emphasis added).

No additional evidence was available on remand. Of course, if a claimant does not prove protected activity motivated adverse action in any way, the claimant has not demonstrated that the adverse action would not have occurred "but-for" protected activity. The Commission has again carefully reviewed the facts and the Judge's decision to determine if Thomas proved the operator discriminated under the but-for test. As set forth below, Thomas did not carry that burden.

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[3] The *Pasula-Robinette* framework is a burden shifting test that requires a complainant to prove a prima facie case of discrimination and then provides operators an opportunity to rebut that case or provide an affirmative defense. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom; Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 805, 817-18 (Apr. 1981).

[4] Gross v. FBL Fin. Servs., 557 U.S. 167, 176-78 (2009); *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 347-48 (2013); *Burrage v. United States*, 571 U.S. 204, 212-17 (2014); *Bostock v. Clayton Cnty*., 590 U.S. 644, 656 (2020).

APPLICABLE LAW

1. But-for Causation

According to the Ninth Circuit, the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." *Thomas*, 993 F.3d at 1211. The Supreme Court has explained that the ordinary meaning of "because of" is that the protected activity or class was the "reason" the employer decided to act. *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 176 (2009). Under the but-for standard the plaintiff retains the burden of persuasion and must prove by a preponderance of the evidence (which may be direct or circumstantial), that the protected activity was the "but-for" cause of the challenged employer decision. *Id.* at 176-78.[5]

2. Substantial Evidence

When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Sec'y of Labor on behalf of Price v. JWR*, 12 FMSHRC 2418, 2420 (Nov. 1990). The record as a whole must be considered, including evidence in the record that fairly detracts. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Black Castle Mining Co*., 36 FMSHRC 323, 328 (Feb. 2014). Agency findings that are grounded upon conjecture or suspicion are unreasonable under substantial evidence review. *Bussen Quarries, Inc. v. Acosta*, 895 F.3d 1039, 1045 (8th Cir. Aug. 2018).

3. Abuse of Discretion

When reviewing a Judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1873-75 (Nov. 1995), *aff'd on other grounds sub nom Sec'y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). Abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997) (citing *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)); *Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000).

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[5] In this case, the Commission applies the but-for standard at the direction of the Ninth Circuit. *Pasula-Robinette* remains the standard in cases arising under other jurisdictions. *Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920 (Aug. 2016); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Robinette*, 3 FMSHRC at 817-18.

4. Credibility Findings

It is well settled that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly except under exceptional circumstances. *Sec'y on behalf of Riordan v. Knox Creek Coal Corp*., 38 FMSHRC 1914, 1924, (Aug. 2016) (citations omitted). However, the Commission will not affirm credibility determinations that ignore extensive record evidence that tends to call the Judge's findings into question. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391–92 (Dec. 1999).

A. ANALYSIS

In *CalPortland I*, the Commission disagreed with the Judge's findings of animus and disparate treatment. 42 FMSHRC at 51- 53. After reviewing the record in its entirety, we conclude, for the second time, that substantial evidence does not support the Judge's findings of animus or disparate treatment, and that Thomas has failed to produce any evidence to support unlawful discrimination under any causation standard.[6]

Where the Judge sought to ground her reasoning and inferences on the testimony of Thomas or his coworker Joel McMillan, she either fragmented the witnesses' testimonies or neglected to reconcile conflicting evidence elsewhere in the record. Several of the Judge's factual findings indicate that she failed to consider or weigh certain probative evidence that fairly detracted from her inferences. We will discuss the necessary instances as we address the Judge's remand findings below.[7]

1. Animus

a) Cooperation with MSHA Inspection

Thomas initially claimed that the inspection by Inspector Johnson was the only activity that he believed motivated the adverse actions against him. Thomas Ex. 46 (Discrimination Complaint); Tr. 207-08. However, Thomas presented no evidence that CalPortland interfered in any way with his participation in the MSHA discussions surrounding his PFD violation or

[6] As a general evidentiary matter, a finding of discrimination under either "but-for" or *Pasula-Robinette* still turns on a finding of causation. Accordingly, many of the same *categories* of evidence, such as animus and disparate treatment, may remain relevant as circumstantial evidence of a causal nexus.

[7] We also note that the Judge made several highly questionable credibility determinations. Among them, she generally found that Demers and McAuley were not credible witnesses, describing Demers as "rehearsed and disingenuous in his statements." 43 FMSHRC at 545-48. However, there were very few instances where the witnesses' testimonies conflicted, and nearly all the witness testimony was consistent regarding the material facts. Additionally, much of Demers's and McAuley's testimony went undisputed. Nevertheless, because CalPortland's evidence consisted of more than the testimonies of Demers and McAuley, we need not disturb the Judge's credibility determinations.

otherwise exhibited hostility towards his discussions with the inspector. In fact, Thomas admitted that the company did not display any animus regarding his participation in the inspection. Tr. 208. Beyond noting that Demers recommended Thomas's termination immediately after Thomas's PFD violation, the Judge failed to identify any signs of hostility displayed by CalPortland towards Thomas's protected activity in speaking with the MSHA inspector about the January 24 inspection. Therefore, substantial evidence does not support the Judge's finding that CalPortland was hostile toward Thomas's protected activity in speaking with MSHA.

b) Safety Complaints

There is no evidence of hostility regarding Thomas's safety complaints. In fact, Thomas provided evidence to the contrary. Thomas testified that when he complained to Demers about the long hours, Demers responded that he was "working on it." Tr. 120. According to the testimony at hearing, Thomas initially believed Demers was ignoring the miners' complaints. Tr. 120. However, Thomas went on to testify that he only believed that Demers was blowing them off because Thomas "knew [Demers] had a lot on his plate. . . . He was trying to man—take care of three barges, shorthanded, and taking care of a new item, the dredge, Sanderling." Tr. 120-21. When asked if Demers did anything to alleviate his concerns about the hours, Thomas said: "Yes, he started bringing out the rock barge guys . . . ." Tr. 121. Thomas conceded that Demers's response to his request to work less hours was not one of animosity or hostility and that Demers's solution relieved the excessive hours issue for him. Tr. 208-11. That is, rather than demonstrate animus towards Thomas's protected activity, CalPortland took Thomas's safety complaints seriously and ameliorated the condition at issue.

There is also no evidence demonstrating that Demers resented Thomas's complaint about the lack of task training for the rock barge miners or his refusal to sign task training sheets. On the contrary, Thomas testified that he did not sense animus from Demers regarding his safety complaints, and he agreed that he did not believe anything MSHA-related motivated CalPortland to take an adverse action against him. Tr. 208-11. The Judge failed to consider this uncontradicted evidence. In order to affirm a Judge on substantial evidence, the record evidence "must do more than create a suspicion of the existence of the fact to be established." *Bussen Quarries, Inc. v. Acosta*, 895 F.3d 1039, 1045 (8th Cir. 2018), quoting *NLRB v. Columbian Enameling & Stamping Co*., 306 U.S. 292, 300 (1939). We "must [also] take into account whatever in the record fairly detracts from the weight of the evidence that supports the finding." *Id*., citing *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1194 (10th Cir. 2008) (internal citation omitted). It is also persuasive that McMillan too complained of long hours and refused to sign the task training sheets, yet he did not suffer an adverse action. *See Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1827 (Aug. 2012) (finding operator lacked animus against complainant's safety-related complaints where other employees complained of the same safety issue and none of them experienced retaliation).

Finally, the Judge relies heavily on comments made by Demers during the relevant period to establish animus and timing. In particular, she notes that Thomas introduced evidence showing that, after he had complained of his hours and workload, Demers remarked to McMillan that "Rob Thomas was done, he was . . . done at CalPortland. Tr. 48." 43 FMSHRC at 544, 548. However, her finding not only takes Demers's statement out of context, but also mischaracterizes

the witness' testimony. To begin, it suggests that Demers's statement directly followed and was the result of Thomas's safety complaints in November 2017. However, undisputed witness testimony clearly indicates that the statement was made the morning after a heated argument between Demers and Thomas about the latter's request for sick leave. During that conversation, Thomas hung up the phone on Demers (his supervisor), which Thomas admitted to doing at the hearing, and which was corroborated by McMillan. Tr. 47-48, 88, 123-24. McMillan stated that he heard about the conversation from both Thomas and Demers "and both of them told me the same thing." Tr. 47.

Additionally, the argument led to a meeting between Thomas, Demers, and Candy Strickland in CalPortland's Human Resources Department to resolve the incident, which included discussing protocol, the proper way to call out sick, and how to communicate with one's manager and peers in a professional manner. Tr. 124, 445. Thomas's behavior during this phone call was not disputed. Tr. 47-48, 123-124. However, the Judge completely overlooks the evidence of Thomas's insubordinate conduct toward his manager during the relevant time period.

Next, the Judge repeatedly omits a material portion of McMillan's testimony in which he speaks directly to Demers's attitude towards Thomas. The testimony demonstrates that Demers was angered by the way Thomas talked to him on the phone rather than any protected activity. Specifically, McMillan testified that "*Dean told me that . . . after the way Rob talked to him on the phone* that Rob Thomas was done, he was . . . done at CalPortland." Tr. 48 (emphasis added). McMillan's full testimony here directly contradicts the conclusion drawn by the Judge. The Judge improperly omitted direct evidence of Demers's reason for wanting Thomas gone and then drew an improper inference that his reason was because of Thomas's protected activity. Her reliance on fragmented testimony as proof of animus towards Thomas's protected activity was an abuse of discretion.

The Judge also infers animus from Demers's remark to McMillan in March 2018 that he "got rid" of Thomas, which she believed indicated that Demers viewed Thomas as a problem that he jettisoned. 43 FMSHRC at 544, *citing* Tr. 71. However, she again failed to consider the context provided by McMillan. Specifically, McMillan testified that although Demers said that he "got rid" of Thomas for McMillan (insinuating that it was due to Thomas's alleged mistreatment of McMillan), McMillan believed that Thomas's exit from the company was because of the way Thomas had talked to Demers on the phone months earlier. Tr. 88. Thomas failed to introduce any evidence demonstrating that Demers's comment was related to any of his safety complaints made four months prior or because he spoke with the MSHA inspector in January.

Finally, the Judge concluded that Woods's "aggressive and 'pointed' approach" with Thomas during the company investigative meeting was an indication of further hostility towards the Complainant.[8] 43 FMSHRC at 544–45, *citing* Tr. 385. While Demers testified that Woods's

[8] On remand, counsel for Thomas similarly described the investigative meeting as "coercive" and an "interrogation." Thomas Resp Br. on Remand 22-23. This conflicts with Thomas's previous argument that CalPortland's investigation was inadequate because CalPortland concluded the "alleged interview" after asking only "one question." Thomas Post-Hearing Br. at 11; Thomas 1st Resp. Br. at 33. The argument on remand is tenuous at best given that "one question" hardly equates to a "coercive interrogation."

question regarding Thomas's normal PFD practices was "pointed," neither he nor Thomas testified that Woods was aggressive during the meeting. Tr. 144-45; 385-86.

c) The Threat of Legal Action

Contrary to the Judge's conclusion, substantial evidence does not support a finding that Thomas's discharge was caused by his notice that he was filing a discrimination claim regarding his suspension. Record evidence shows that CalPortland became aware of Thomas's discrimination claim on February 6, 2018, while two of the alleged discriminatory events occurred prior to the date (the January 25 suspension and January 30 accidental discharge email). Moreover, Thomas did not offer evidence that anyone in CalPortland management harbored animus towards him or terminated him due to his filing once they became aware of the claim. Thomas further conceded that he did not believe he was discriminated against because he testified in or was about to testify at an MSHA proceeding. Tr. 206-07.

We do agree with the Judge that there is sufficient evidence in the record to support a finding that Demers harbored animus towards Thomas. Contrary to the Judge's inferences, however, substantial evidence suggests that any animus was likely the result of Demers's dislike of Thomas due to what Demers saw as his insubordinate behavior during the relevant time, rather than any protected activity. There are several instances in the record where Thomas exhibited defiant conduct. For example, in November 2017, Thomas argued with Demers, refused to report to work, and hung up the phone on him. There was also Thomas's disagreement with Inspector Johnson in front of Demers about being on the ladder without his PFD, as well as his behavior during the investigative meeting.

We conclude that Thomas failed to introduce any evidence establishing a nexus between Demers's animus and Thomas's protected activity. Further, the Judge drew unnecessary and unsupported inferences of a causal nexus in the face of uncontradicted evidence that more than fairly detracted from her conclusions.

2. <u>Disparate Treatment</u>

A complainant alleging disparate treatment bears the burden of proof. *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995). To that end, the Commission has held that "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant." *Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2512 (Nov. 1981)*.

Here, the Judge determined that Thomas introduced evidence that other CalPortland employees who had committed similar PFD misconduct had not been punished equivalently. In particular, she noted that McMillan testified that Demers would routinely unfasten his PFD and remove his hardhat while working aboard the Sanderling. 43 FMSHRC at 544, *citing* Tr. 50.

Several factors distinguish this from Thomas's situation. First, Thomas did not introduce evidence that Demers was ever reported for the one dredge incident described by McMillan or that upper management or HR was otherwise aware of it. The operator cannot be found to have

disparately treated two miners when it was only actually aware of the actions of one of those miners. *See e.g. Pollock v. Kennecott Utah Copper Corp.*, 26 FMSHRC 52, 63 (Jan. 2004) (ALJ Manning). Further, and more importantly, the Judge overlooked key details of McMillan's testimony. Section 56.15020 of the Secretary's regulations states that "[l]ife jackets or belts shall be worn *where there is danger from falling into water*." 30 C.F.R. § 56.15020 (emphasis added). McMillan testified that on the day Demers worked with him, Demers boarded the dredge, took his hard hat and life jacket off, threw them on the floor in the lever room, and sat down in the operating chair. Tr. 50; 89-90. "If [Demers] got up to leave the lever room, he put his life jacket back on, he'd just toss it back on real quick, but he didn't zip it up or buckle it or anything." Tr. 50-51.

In other words, this incident did not occur on the deck of the dredge while over open water. Demers only had his life jacket off while *inside* the lever room, where there is no danger of falling into the water. McMillan further indicated that it was not uncommon for the miners to remove their PFDs in certain circumstances, including when in the lever room. Tr. 72-73. Thomas did not introduce evidence that miners working *inside* the lever room without their PFDs normally faced discipline or were reported to management. Moreover, CalPortland indicated that it had never had a miner disciplined or cited for not wearing a PFD when required so it had no comparable circumstances showing how a miner would have been disciplined under similar facts. Tr. 72-73; 280, 376.

The Judge went on to find disparate treatment when Demers and McAuley referred the matter to HR after the investigative meeting. She found that the move was unusual at that stage of dealing with an employee. 43 FMSHRC at 544. Even though the Judge generally found McAuley not credible, she appeared to rely on McAuley's testimony that involving HR at that stage was unusual. However, the Judge ignored McAuley's explanation that it was unusual because CalPortland typically completes the investigation before it starts discussing discipline and involving HR. But because of Thomas's refusal to answer questions and his behavior at the investigative meeting, they decided to get HR involved earlier than normal. Tr. 304-05. Thomas did not dispute McAuley's testimony.

The Judge next implied that Demers misrepresented Thomas's behavior as "not being cooperative" during the meeting (see 43 FMSHRC at 544) and later found "that both McAuley and Demers were not credible witnesses when it came to discussing the incidents with Thomas." *Id.* at 537. However, there is ample testimony in the record corroborating the accounts of Demers and McAuley, including the testimony of Thomas. For example, Woods asked Thomas if it was common practice to not wear his PFD. Tr. 145, 385-86. Thomas stated:

> I told him, I said I wasn't going to answer that question . . . [b]ecause it was obvious that they weren't going to listen to what I had to say, they had—only wanted to listen to what they wanted. I told them, I said I wasn't going to incriminate myself.

Tr. 145. Strickland similarly testified that after the January 29 safety investigation meeting, Woods contacted her due to "Thomas not being cooperating, refusing to answer questions."[9] Tr. 438, 448. However, the Judge does not mention this other witness testimony, which supports Demers's and McAuley's description of Thomas's behavior. The Judge also relied on the distribution of Demers's termination email, which she described as another unusual practice by the operator. However, the record shows that Demers's email was a draft recommendation distributed by accident, a fact the Judge herself seemed to accept. *See* 43 FMSHRC at 543, 547.

Furthermore, CalPortland introduced its "Attendance and Reporting to Work" policy ("ARW Policy"), which states that if an employee is absent three or more consecutive days without calling, he or she "will be considered to have voluntarily resigned in the absence of a compelling excuse for having failed to do so." Calport. Ex. FF at 3. It then submitted four examples of former employees processed out of the company as having voluntarily resigned when the employees ceased communicating with CalPortland. Calport. Exhibit FF; Tr. 468-70. The Judge did not discuss this evidence.

Regarding disparate treatment, the Judge overlooked the lack of evidence offered by Thomas. Thomas failed to introduce evidence that would show that other miners cited for failure to wear a PFD escaped a suspension pending investigation, or that any miner under suspicion of similar violative conduct or a more serious offense did not receive any form of reprimand at all. He also failed to introduce evidence showing that an employee who refused to communicate with CalPortland for seven days escaped termination from the company by voluntary resignation. In contrast, CalPortland showed that Thomas received the same treatment as other employees who refused to communicate. As with animus, based on the lack of evidence presented by Thomas, substantial evidence does not support the ALJ's conclusion that Thomas suffered disparate treatment. Accordingly, substantial evidence does not support the Judge's overall conclusion that Thomas's suspension and termination would not have occurred but for any protected activity.

3. Pretext

The ALJ's determination that CalPortland's justifications for Thomas's discharge were pretext is not supported by substantial evidence. Complainant failed to produce any substantial evidence that the legitimate, nondiscriminatory reasons for taking adverse action presented by CalPortland were pretextual.

The Judge determined that a preponderance of the evidence showed that CalPortland's explanations of events were pretextual. First, the Judge erroneously found that the only proven communications after February 1 were the "voluntary resignation" letters that were returned to CalPortland unopened. 43 FMSHRC at 546.

[9] Commission Procedural Rule 63(a) explicitly permits hearsay evidence "that is not unduly repetitious or cumulative." 29 C.F.R. § 2700.63(a); *Sec'y on behalf of Greathouse v. Monongalia County Coal Co*., 40 FMSHRC 679, 703 (June 2018); *Mid-Continent Res., Inc.,* 6 FMSHRC 1132, 1135 (May 1984).

The Judge overlooks the operator's undisputed evidence in the form of contemporaneous notes (sent via internal email communications), which detailed the company's efforts to reach Mr. Thomas between January 31 and February 2. Ex. P. In particular, Strickland asked McAuley and Demers to provide her with information on their attempted communications so that she could include it in her January 5 letter to Thomas. Tr. 453-54; Ex. P at 3-4. According to McAuley's February 2 email to Strickland, he called Thomas three times and left two voice messages. Ex. P at 2. Thomas also testified that he returned McAuley's call. Before hanging up on McAuley, Thomas told him that he had no business calling his personal cell and to contact his attorney. Tr. 156-57, 186, 318-19, 452; CalPort. Ex. P at 2; Ex. R.

According to Demers's email detailing his attempts to reach Thomas, he responded to Thomas's cancellation text asking him "[i]s there a time that is better?" Thomas did not respond. CalPort Ex. P at 4; Ex. R. In addition to several phone calls made by Demers, Strickland also sent Thomas a letter via standard mail and UPS on February 5 and 8 warning that if he did not contact human resources by Thursday, February 8, "he will be considered to have voluntarily resigned." Tr. 456-57; CalPort Ex. R at 2. Thomas refused receipt of both copies and did not forward them on to his attorney. Tr. 162, 189-91, 457-61; 40 FMSHRC at 1507-08; 43 FMSHRC at 536, n.1. Further contradicting the Judge's finding is an email sent to Demers by Thomas's own Counsel on February 13, 2018, stating that: "It is my understanding that since [February 2, 2018], you have continued to try to contact our client directly." CalPort Ex. W at 1. Although Thomas testified that he was not aware that CalPortland tried to reach him (Tr. 186), he did not dispute the attempts to reach him outlined above nor did he introduce contradictory evidence.

The Judge failed to provide any explanation as to why this undisputed evidence is not credible nor does she even acknowledge the evidence substantively in her analysis. It is reversible error for an ALJ to reject uncontradicted evidence. *Jim Walter Res. v. Sec'y of Labor*, 103 F.3d 1020, 1027 (D.C. Cir. 1997).

Next, the Judge concluded that after Thomas's suspension, he "continued to participate fully in CalPortland's investigation, . . . even submit[ing] a more-detailed written statement, as requested by the company, following the heated interview." 43 FMSHRC at 546. The Judge found that Thomas only stopped participating in the investigation because he reasonably believed that his employment was terminated. *Id*.

We find that the record cannot support these conclusions. As previously discussed, Thomas admitted that he refused to answer questions regarding his PFD practices and testified that he called the investigatory meeting "a sham" and the MSHA Inspector's statement "completely false." Tr. 145. He refused to answer questions about key details and safety practices likely not discussed in those statements for fear that he would "incriminate [him]self." *Id*. A willingness to offer only written statements that do not respond to important management questions does not constitute cooperation with an investigation. On this record, it is difficult to find that Thomas fully participated in the company's investigation solely based on his willingness to write statements.

As for the reasonableness of Thomas's belief that he had been terminated, the Judge did not consider the inconsistent nature of Thomas's evidence. She failed to reconcile Thomas's deposition admission that he received Demers's follow-up email (entitled "Please delete last e-

mail, it was sent by mistake") with his subsequent denial at trial of receiving it at all. Decl. of Laiho, Ex. A, Thomas Depo. at 175-77; Tr. 201-02. In addition, CalPortland attempted to introduce evidence at the hearing of a screenshot taken by CalPortland's Information Technology department showing that Thomas did in fact receive and open the "sent by mistake" email. This evidence spoke directly to the reasonableness of Thomas's "belief" that he had been terminated. However, the Judge excluded the evidence on the grounds that Demers testified that he sent it, and she did not believe it to be a "big deal." Tr. 477-479. This was an abuse of discretion given that the Judge relied on the reasonableness of Thomas's belief to reach her conclusion here.[10]

Additionally, during his deposition, Thomas stated that after receiving the second email, "[t]he damage ha[d] already been done," and he conceded that after that, he refused to communicate with CalPortland.[11] Thomas Depo. at 175-77. On cross-examination, CalPortland's counsel questioned McMillan about his deposition where he stated that he spoke to Thomas once after Thomas was suspended, and that Thomas was upset because he saw an email that he was not supposed to see. Tr. 84-85. If Thomas believed that he was not supposed to see the email, one could infer that he understood the communication was intended for management only and not yet a final action. In *Morgan v. Arch of Illinois*, the Commission held that before a Judge credits any testimony, he or she must reconcile all record evidence that is inconsistent with that conclusion. 21 FMSHRC at 1391–92. There is no indication that the Judge considered any of this evidence before she credited Thomas's "belief" that he was fired.[12]

The Judge went on to scrutinize the company's "threadbare investigation" into the PFD incident, which did not include statements or interviews of certain potential eyewitnesses like the tugboat captain Roger Ison. 43 FMSHRC at 547. She concluded that CalPortland failed to

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[10] Judges are granted broad discretion to decide what is, and is not, relevant to their deliberations regarding a case. *Shamokin Filler Co., Inc.*, 34 FMSHRC 1897, 1906-08 (upholding Judge's exclusion of evidence that was of "limited probative value" and would have "consum[ed] an inordinate amount of time."). However, the Judge acts unreasonably and unfairly when she precludes a party from presenting evidence because it is irrelevant and then makes a substantial finding that is predicated on the lack of such evidence. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819 (Nov. 1995), *citing Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir. 1979) (An ALJ's decision to include or exclude evidence "will usually not be disturbed unless it results in undue prejudice or fundamental unfairness").

[11] Although the Judge refused to admit Thomas's deposition at hearing, which showed his inconsistent testimony, the relevant evidence entered the record prior to hearing. *See* Decl. of Laiho, Ex. A, Thomas Depo. at 175-77.

[12] In reviewing a Judge's credibility determination, we may "'refuse to follow [it] where it conflicts with well supported and obvious inferences from the rest of the record. Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives."' *Arch of Illinois*, 21 FMSHRC at 1391, *citing NLRB v. Elias Bros. Big Boy, Inc*., 327 F.2d 421, 425-26 (6th Cir. 1964) (quoting *NLRB v. Pyne Molding Corp*., 226 F.2d 818, 819 (2nd Cir. 1955)).

explain its limited investigation. *Id*. at 545-47. However, the record shows that Thomas did not list Ison as a potential eyewitness on his Report of Incident Form. He only listed McMillan. Thomas Ex. 20. Additionally, as discussed above, CalPortland acknowledged and explained the incomplete nature of its investigation, which resulted from the fall-out at the investigative meeting with Thomas and his subsequent refusal to communicate. *Slip op* at 9; Tr. 303-04.

The Judge also spends much time discussing the apparently inconsistent justifications offered by CalPortland for why Thomas was terminated and why Thomas's PFD misconduct was insufficient to justify his termination. 43 FMSHRC at 545- 548. However, these discussions are based on a misunderstanding of the operator's arguments. The company never argued that Thomas's PFD misconduct directly caused his discharge. CalPortland has made it clear that Thomas's PFD misconduct resulted in the first adverse act of his suspension. It has consistently maintained that Thomas was discharged based on his own failure to communicate with the company, which it construed as job abandonment. See CalPort. PDR at 3; CalPort. PH Br. at 3-4, 17; CalPort. Op. Br. at 19-21; CalPort. Reply Br. at 4-5; CalPort. PDR on Remand at 15, 21. Neither party offered evidence, such as a corrective action form or change of status form, supporting the notion that CalPortland terminated Thomas based on his PFD misconduct.

However, even if the company had fired Thomas for his PFD conduct, there is sufficient evidence in the record that supports CalPortland's decision as a legitimate business justification. In fact, contrary to the Judge's summary of McMillan's testimony in this regard (see 43 FMSHRC at 546–47), McMillan testified that Inspector Johnson told Thomas that he could be fined for the violation and that "*it could be a fireable offense*," although unlikely given Thomas's good safety record. Tr. 62 (emphasis added). Additionally, based on a review of the mine's violation history, this was by far the most serious violation the company had dealt with up to that point. Finally, Demers testified that based on Thomas's comments during the investigation, he believed that Thomas was not taking his unsafe conduct seriously and did not think it was important.[13] Tr. 398; *see also* Tr. 176-77 (Thomas testifying that working without his PFD was "not a big deal.").

The Judge also stated that Thomas had a 16-year career at CalPortland with a clean safety record and without indication of previous violations of this kind. 43 FMSHRC at 548. However, this finding is contrary to record evidence demonstrating prior disciplinary problems. In particular, the record reflects that Thomas had been involved in a disciplinary incident in 2012, where he received a verbal warning, as well as a three-day suspension for violating company work rules after it was determined that he lied to government and CalPortland officials during an investigation involving his prior misconduct. Decl. of Laiho, Ex. L; CalPort. Mot. in Lim. at 2-3; Tr. 203-04. While evidence of this prior disciplinary incident was introduced into the record via pleadings prior to hearing, the Judge refused to allow any testimony about the matter on the grounds that it had occurred six years prior and was "not relevant and highly prejudicial." Tr. 203-04, 311-13, 397-98.

[13] According to CalPortland's Disciplinary Policy, Sec. 2.4: "Non-compliance and/or disregard of the Company safety programs, policies, and provisions set [forth] may result in disciplinary action based on the Company disciplinary policy." CalPort. Ex. CC at 18.

The Judge's exclusion of this evidence was an abuse of discretion. Commission Procedural Rule 63(a) states that "[r]elevant evidence … that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). A finding of pretext is even more unlikely where there is evidence of "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley*, 4 FMSHRC at 993.

A miner's behavior during a post-violation investigation is just as relevant as the behavior that led to the investigation, particularly in the context of analyzing whether the company had justifiable reasons for terminating his employment. In the prior incident, not only was Thomas disciplined for making false statements to government investigators and failing to cooperate with an investigation, which was also a violation of company policy, he was specifically warned that such behavior could lead to termination in the future.[14] Decl. of Laiho – CalPort. Ex. L at 1. Therefore, because Thomas's conduct surrounding the investigation was a significant factor in this case of alleged discrimination, it was improper for the Judge to exclude evidence of prior disciplinary problems and limit the universe of relevant conduct to safety related violations only.

Finally, the Judge found CalPortland's claim that Thomas voluntarily resigned to "be feeble." 43 FMSHRC at 546. We, again, do not agree. Thomas went a total of seven days refusing to communicate with his employer and failing to provide a compelling excuse for his absence. CalPortland introduced evidence that its HR department processed Thomas's exit from the company as a voluntary resignation – consistent with its "personnel rules [and] practices" forbidding employees from being absent for three or more consecutive workdays. *Bradley*, 4 FMSHRC at 993; CalPort. Exs. FF at 3, R, U. Thomas on the other hand did not introduce evidence that CalPortland's Attendance Policy was not enforced against other employees who refused to communicate or that the policy was not enforced in general. *See Ritenour v. Tennessee Dep't of Hum. Servs*., 497 Fed. App'x 521, 533 (6th Cir. 2012).

In summary, record evidence demonstrates that CalPortland responded to Thomas's failure to wear a PFD, which resulted in an unwarrantable failure citation, by suspending him pending an investigation. When Thomas refused to communicate, despite CalPortland's repeated attempts to reach him, the operator terminated him as a voluntary resignation under its

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[14] On the Corrective Action Form suspending Thomas for three days for failing to fully cooperate with an investigation and for lying in 2012, under "Supervisor Comments," it states:

> The company has the right to require the full cooperation from all employees during an investigation. Refusal to cooperate, false answers or misrepresentations is grounds for disciplinary action including terminations. Dishonesty is a serious violation of company work rules.

Decl. of Laiho, Ex. L at 105, 111. Thomas also testified that he was aware that CalPortland required employees to participate in company investigations and that he had been warned previously that lying would not be tolerated in the future. Tr. 203-04.

attendance policy. Thomas failed to present any evidence that this rationale for his termination was not legitimate. Therefore, the Complainant failed to meet his burden of establishing pretext.

III.

Conclusion

If Thomas had not made safety complaints to Demers, if he had not spoken with Inspector Johnson regarding his PFD violation, and if he had not filed a discrimination claim on February 13, the record demonstrates that Thomas still would have been suspended for his PFD misconduct and later processed out as a voluntary resignation for his refusal to communicate with his employer after January 31. CalPortland has also produced evidence articulating a legitimate, nondiscriminatory reason for the adverse actions, and Thomas is unable to show pretext.

We conclude that Thomas has failed to meet the burden of proof set forth in the 9th Circuit's remand decision. That is, he was unable to show that, but for his protected activity, he would not have been suspended or terminated. In fact, Thomas failed to prove that his discharge was in any way caused by any protected activity. Thus, the Judge's finding of discrimination is not supported by substantial evidence. For the reasons set forth above, we again reverse the Judge's finding of discrimination and dismiss this case.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 5, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0117 A.C. No. 01-03143-571391
v.	
VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	Mine: South Russellville Quarry

DECISION AND ORDER

Appearances: Alessandra T. Palazzolo, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner,

Jean C. Abreu, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner,

Misty Hillis, Vulcan Construction Materials, LLC, Birmingham, Alabama, for the Respondent,

Autumn Graves, Vulcan Construction Materials, LLC, Birmingham, Alabama, for the Respondent.

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor through her Mine Safety and Health Administration ("MSHA") against Vulcan Construction Materials, LLC ("Vulcan" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act'), 30 U.S.C. § 815(d). The Secretary alleges that Vulcan violated 30 C.F.R. § 56.11012 when it failed to properly guard a ladderway opening on an elevated walkway adjoining a conveyor at Vulcan's South Russellville Quarry in Russellville, Alabama.

The parties presented testimony and documentary evidence at a virtual hearing via ZOOM for Government on September 19, 2023. MSHA Inspector Timothy Schmidt testified on behalf of the Secretary. Vulcan's area manager, Coleman McNider, and Russellville's plant manager, Rob Molyneux testified on behalf of the Respondent which is acting pro se in this matter. The Secretary filed her post-hearing brief on December 1, 2023, and Vulcan filed its response on December 29, 2023.[1] For the reasons below, I affirm the single citation and uphold MSHA's proposed penalty.

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

The South Russellville Quarry involves typical quarry operations, including the drilling and blasting of rock that is then processed through a plant that crushes and sizes the material using multiple crushers, screeners, and belt conveyor systems. Among these systems is the C-17 conveyor, which includes, among other components, a radial stacker, a shoot entryway where rock pours from an adjacent conveyor, skirting, and guarding. Tr. 13, 15-16, 38-39.

Running alongside the C-17 conveyor system is an adjoining elevated metal walkway, a catwalk that is accessible at one end by a fixed ladder. Atop the ladder is the metal structure of the conveyor to the left, and on the right is the start of the railing that runs the length of the catwalk. At the other end of the catwalk is the conveyor's head pulley section, where the conveyor's drive belt motor is located. Tr. 15; Ex. S-2 & 3 (photographs).

On June 6, 2022, Inspector Schmidt conducted a regular inspection of the quarry. Before working at MSHA, Inspector Schmidt, over the course of seven years held multiple positions, including plant operator at a surface mining company. In January 2017, he started his current position as a MSHA inspector and successfully completed his training at the Mine Safety and Health Academy. As part of his mandatory refresher training, Inspector Schmidt returns to the academy every two years. Annually, he conducts approximately fifty to sixty regular inspections – 20 to 30% of which involve limestone quarries. Tr. 11-13.

During his prior inspection of the South Russellville plant, six months earlier, Inspector Schmidt did not cite Vulcan for any unguarded ladderways, including at C-17. Tr. 29-31. Later, however, a month before his June inspection, Inspector Schmidt issued citations for violations of section 56.11012 involving unguarded ladderway openings at two of Vulcan's other operations. Tr. 25, 27; Ex. S-5 & S-7. Section 56.11012 provides that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed." Vulcan did not contest those citations, or the penalties assessed for them. Tr. 57; Ex. S-6 & S-8.

During his June inspection at Russellville, Inspector Schmidt issued Citation No. 9700252, alleging a violation of section 56.11012 for the unguarded opening at the top of the ladderway to the C-17 catwalk that exposed a miner atop the walkway to a vertical drop of

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as follows: "Jt. Stip.," "Tr.," "Ex. S-#," and "Ex. R-#."

approximately 50 inches to the ground below. Tr. 14-15; Ex. S-1. The inspector designated the violation as unlikely to result in injury or illness, that any injury that did occur would result in lost workdays or restricted duty, and that it was due to low negligence on the part of Vulcan. Ex. S-1. That same day, Vulcan terminated the citation by adding a chain that could be strung between the railing and the conveyor structure to close the opening atop the ladderway. Tr. 24; Ex. S-4 (post-abatement photograph); Ex. S-13, at 4 (Admission No. 7).

The Secretary later petitioned the Commission for a civil penalty assessment, proposing the then-minimum penalty of $143. At issue here is whether Vulcan violated 30 C.F.R. § 56.11012, and if so, the penalty to be assessed**.**

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Fact of Violation

Citation No. 9700252 states:

> No chain or barrier is provided for an opening on the work platform on the walkway of the C-17 conveyor. The ladderway opening has no chain or gate exposing a drop off of approximately 50 inches. Miners may work in the area to change skirt boards, work on guards or conveyor parts. This condition exposes miners to a fall hazard should they misstep into the unguarded drop off while working. Should a miner fall through the opening injuries such as fractures, strains, and contusions would likely occur.

Ex. S-1. To prevail here, the Secretary must prove the cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citations omitted). The Secretary's burden of proof requires her to demonstrate that the "existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted).

There is no dispute regarding the lack of either guarding around the ladderway opening or an alternative warning signal at the top of the C-17 ladderway. Tr. 14, 21-23, 35; Ex. S-1, S-2, S-13, at 4 (Admission No. 8); Jt. Stip. No. 9. Rather, the Secretary and Vulcan disagree on whether the opening at the top of the ladderway was subject to section 56.11012 and thus protection as provided by the standard.

At hearing, in explaining why he issued the citation, Inspector Schmidt's primary focus was on the risk posed to a miner working on the catwalk close to the ladderway opening. The inspector, drawing upon his experience with conveyor maintenance, explained why he had concluded that a miner would work from the catwalk at a point close to the ladderway opening. Tr. 16-17.

The inspector began by pointing out that, immediately to the left of the opening above the ladderway, was a shoot entryway where rocks poured onto the C-17 conveyor from an adjacent

conveyor. Tr. 15; Ex. S-3 (supporting photograph). At that entryway, skirting was present to settle the rocks, preventing them from bouncing or spilling off the conveyor. The inspector also described in detail other various rubber and metal components of that section of the conveyor, and estimated that, due to wear and tear over time, there would be a relatively frequent need to maintain and repair the skirting and other parts. Tr. 15-18.

Inspector Schmidt also testified to additional potential maintenance issues with the conveyor that may require a miner to work from the catwalk, including at a point near the ladderway opening. The conveyor ran on various types of rollers, that the inspector also predicted would wear out over time, which could lead to misalignment of the belt and prompt the need for replacement of the rollers. He also discussed that at the other end of catwalk was the conveyor's drive pulley, or V-belt, which, attached to its motor like a large rubber band, had to pull the weight of the whole conveyor. In the inspector's opinion, such pressure and stretching of the drive pulley would eventually lead to the need to replace the belt. The inspector also explained that all the guarding at the head pulley's moving parts would wear down and need replacement due to vibration and wear. The inspector further testified that cleanup of spillage from the conveyor would occur from the catwalk, as well as sampling of material for quality control and other purposes. Tr. 18-20.

Lastly, the inspector stated that the length of the catwalk would be traveled each month by a miner to grease the head pulley, and on an annual basis to change the oil in in the gear box there. The inspector's ultimate estimate was that miners would need to travel upon at least part of the catwalk a minimum of two to three times per week, on average. Tr. 20-21.

According to Vulcan's two witnesses, the inspector vastly overstated miners' use of the catwalk for conveyance maintenance and repair assignments. Mr. McNider, Vulcan's area operations manager reviewed the work plan records for the C-17 conveyor for the preceding two years. Ex. R-4. He testified that these plans showed all the maintenance and repair work being done by miners either standing on the ground or using a manlift while wearing fall protection. The projects included maintenance and repair work on the tail pulley, head section, and the conveyor's return pan. McNider also said that skirt board or guarding maintenance or repair would be done by a miner in a manlift, and that the miner would be outfitted in fall protection. Tr. 39-41, 43.

The testimony of Mr. Molyneux, the Vulcan plant manager at Russellville, largely supported McNider's on how much of the repair and maintenance on the C-17 conveyor is usually accomplished. Tr. 59, 62. Molyneux further testified that quality control is also done from the ground after a sample is dumped by a loader bucket. Tr. 59-60.

For the most part, I credit the Vulcan witnesses over Inspector Schmidt on the issue of how frequently miners would perform conveyor maintenance or repair tasks from the catwalk, particularly near the ladderway. The Vulcan witnesses' testimony was based on records kept by Vulcan and their general knowledge of how work was done on the C-17 conveyor, while Schmidt's testimony was based solely on his general, previous experience from working on conveyors like the C-17.

I nevertheless conclude that the Secretary established that the ladderway opening was, in the terms of section 56.11012 an "[o]pening . . . below [] or near [a] travelway[] through which" the miner could fall if the opening was not protected. A "travelway" is specifically defined in the

regulations as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Here, there is more than sufficient evidence that miners would regularly access the catwalk by foot using the ladderway, and thus, upon return from whatever their task, be exposed to the unprotected drop off at the ladderway to the ground 50 or so inches below.

Prior to hearing, Vulcan answered interrogatories from the Secretary, providing information that "miners moved or walked on or otherwise used the C-17 Walkway between June 6, 2020, and June 6, 2022" in order "to access the head pulley for greasing and inspections," and that the walkway was accessed for such inspections "usually [one to two] times per month." Ex. S-12, at 4-5 (Answers to Interrogatory Nos. 2 and 5); Jt. Stip. No. 11. Similarly, Vulcan admitted that during that period "miners accessed the C-17 Walkway at least once per month to inspect the C-17 conveyor's motor head and pulley." Ex. S-13, at 5 (Admission No. 12); Jt. Stip. No. 10. Finally, the parties stipulated that miners use the C-17 walkway for conveyor inspection and head pulley greasing at least once per month. Jt. Stips. 13-15.

Use of the catwalk for conveyor inspection and head pulley maintenance was also addressed at hearing. Inspector Schmidt testified that the citation was predicated in part upon such miner use of the catwalk. Tr. 18, 20. More importantly, Vulcan's McNider stated that "[t]he catwalk is used to inspect the conveyor," and that "[t]he catwalk at Russellville is a travelway for inspection purposes of the conveyor system." Tr. 39, 44;[2] *see also* Resp't Post-Hearing Br. at 2 ("Vulcan does perform periodic inspection and greasing at the head pulley of our conveyors, as stated in the admissions. . . . . The location of greasing and inspection at the head pulley, which is 92 feet from the end of the catwalk."). McNider testified that miners would access the catwalk not only by using a manlift, but also by climbing the ladder to the catwalk. Tr. 38-39.

The foregoing establishes, under the section 56.2 definition of travelway as providing "a way regularly used and designated for person to go from one place to another," that the catwalk here is a travelway, and thus subject to the terms of section 56.11012. The catwalk was used by miners to go from the ladderway to points elsewhere on the catwalk, and then used by them to return to the exposed ladderway opening. The inspector may have viewed the primary danger posed to miners to be use of the catwalk as a working platform for maintenance and repair projects conducted near the ladderway opening. However, Vulcan had adequate notice that it was also being cited for violating section 56.11012 by exposing miners traveling back to the unguarded ladderway from other points on the catwalk, such as the tail pulley area, to the risk of falling to the ground. *Cf. Nolichuckey Sand*, 22 FMSHRC at 1060-61.

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[2] McNider's testimony was contradictory, as he also argued that the catwalk did *not* qualify as a travelway in this instance because traveling from "one place to another" in section 56.2 means to travel from a catwalk to an adjacent catwalk or from one conveyor to another. Tr. 39. However, there is nothing in the standard or its regulatory history that leads to the conclusion that the phrase "one place to another" in section 56.2 is so limited. Indeed, the Commission has held to the contrary. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000) (finding end of maintenance platform was a "place" under the plain meaning of that term as it is used in section 56.2 definition of travelway); *see also Nordic Ind.*, 36 FMSHRC 2687, 2688-89 (Oct. 2014 (ALJ) (platform used to gain access to mine equipment constituted travelway under section 56.1101).

Vulcan does not contest that the ladderway and catwalk was, in the terms of the section 56.2 definition of travelway, the "designated" way for miners conducting inspection and greasing of the head pulley on foot. With no other manual access point, such miners had no choice but to climb up to the catwalk and return to the ground via the ladderway. *See Watkins Engineers & Constructors*, 24 FMSHRC 669, 678 (July 2002).

In addition, that this occurred on at least a monthly basis establishes that the catwalk was "regularly used" as a travelway under the section 56.2 definition. Recently, Commission Judges have been looking more to the regularity of use of an alleged travelway rather than the frequency of its use. *See, e.g., Oil-Dri Prod. Co.*, 32 FMSHRC 1761, 1769-1770 (Nov. 2010) (ALJ) (finding regular use even where operator employees did not use testing platform when evidence was that contractor employees conducted emission testing from it every two years); *see also Nordic Ind.*, 36 FMSHRC at 2688-89 (unprotected landing accessed once a week for inspections purposes held to be a "regularly used" travelway and thus subject to section 56.11012).

Instead, at hearing the testimony of Vulcan's witnesses largely focused on discrediting the statement in the citation that the catwalk was subject to use as "a work platform" near the ladderway for the previously discussed C-17 repair and maintenance projects. Tr. 40-41. Given the greater relative credibility of its witnesses on this subject, Vulcan argues that the citation should therefore be dismissed in this instance. Resp't Post-Hearing Br. at 2.

Nothing in section 56.11012, or the definition of travelway provided by section 56.2, however, limits the application of section 56.11012 to just those times or places where the travelway is being used as a work platform. Section 56.11012 applies to any "[o]pening[] . . . . through which persons or materials may fall . . . ." While it is unlikely that a miner, having accessed the catwalk via the ladderway would, upon returning, fail to perceive the ladderway opening and fall to the ground below, it is at least possible. Moreover, the lack of likelihood of the occurrence of this hazard was reflected in the citation as written (Tr. 23), and, consequentially, in the minimal penalty assessed.

Vulcan alternatively argues that the cited unguarded ladderway does not require a gate or chain because of MSHA guidance clarifying the requirements of 30 C.F.R. §§ 56/57.15005. Resp't Post-Hearing Br. at 1; Ex. R-14 (PPL No. P14-IV-02 (Mar. 25, 2014)). In that Program Policy Letter, MSHA generally adopts OSHA's fall protection standard requiring guardrail systems, safety net systems, or personal fall arrest systems to protect employees that walk or work on a horizontal or vertical surface with an unprotected side or edge at least six feet above a lower level. Ex. R-14; *see* 29 C.F.R. § 1926.50(b)(1). Vulcan's position is that the PPL thus establishes that the 50-inch drop off from the top of the unguarded ladderway to the ground at issue here is not a violation. Tr. 49-50.

I agree with the Secretary that the PPL's guidance with respect to totally different standards – sections 56.15005 and 57.15005 – has no bearing on how section 56.11012 is to be applied. There is no indication whatsoever therein that MSHA intended for the PPL to apply to standards beyond the two it specified.[3] Vulcan is essentially arguing that its compliance with

[3] Even if the letter provided relevant and appropriate guidance, MSHA in the PPL recognizes that the OSHA fall protection standard may not always satisfy MSHA's standards. The PPL states that MSHA retains the discretion to independently "evaluate all work area

(continued…)

section 56.15005 permits it to ignore the plain terms of section 56.11012, a view that is contrary to how the Mine Act is enforced. *See Consol Pennsylvania Coal Co.*, 44 FMSHRC 691, 696 n.10 (Dec. 2022) (compliance with another applicable standard has no bearing on whether the Secretary established a violation of the cited standard).

Finally, Vulcan argues that because MSHA does not cite unguarded openings to stairways as violations of section 56.11012, it should not be permitted to enforce the standard with respect to unprotected ladderways. Resp't Br. at 2; Tr. 48, Ex. R-11 & 13. This is little more than an impermissible collateral attack on section 56.11012. In any event, as Inspector Schmidt explained in his rebuttal testimony, stairways and ladderways are fundamentally different, and are treated as such under the regulations. He stated that a ladder is inherently more dangerous than a stairway as a ladder has a vertical drop while a stairway has a more gradual incline. Tr. 64-66. The regulations recognize these differences in incline by requiring a stairway leading to an elevated walkway to only have hand railings. *See* 30 C.F.R. 56.11002 ("Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.").

Accordingly, I conclude that the cited area was a "travelway" under the Mine Act's definition, and that by failing to install a chain, barrier, or protective cover on the ladderway, Vulcan violated section 56.11012.

B. Fair Notice

Vulcan also argues that it should not be penalized because MSHA failed to provide it fair notice in this instance of what section 56.11012 required of it concerning the C-17 catwalk and ladderway. Resp't Br. at 2. However, as a matter of law, Vulcan was provided sufficient notice that its C-17 catwalk qualified as a travelway under section 56.2, and thus subject to the terms of section 56.11012, by the previously discussed plain meaning of section 56.2's definition of travelway. "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.

Vulcan maintains that notice was especially lacking because Inspector Schmidt had, as recently as the previous year, inspected the Russellville plant and had not cited the C-17 ladderway or any other similar ladderway at the plant for lacking required protection. Resp't Br. at 2; Tr. 61. Vulcan's contention is essentially a form of estoppel argument that has been consistently rejected by the Commission and the courts. The "Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Austin Powder*, 29 FMSHRC at 919-20 (citing *Nolichuckey Sand*, 22 FMSHRC at 1063-64); *see also Mainline Rock & Ballast,*

[3] (…continued)
hazards to ensure appropriate fall protection provisions are in place to protect miners from fall hazards." Ex. R-14. Under this discretionary reading, the "6 feet above a lower level" standard is not absolute.

Inc., v. Sec'y of Labor, 693 F.3d 1181, 1187 (10th Cir. 2012) ("MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. . . . 'Those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of government agents contrary to the law.'" 693 F.3d at 1187 (quoting *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984)); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 890 (July 2000) (ALJ) ("[o]perator is in no worse position than if MSHA had cited the condition five years ago. It simply would have had to correct the condition and pay the civil penalty at that time.").[4]

In sum, fair notice of the requirements of section 56.11012 was provided to Vulcan in this instance and the minimum requirements of due process have been satisfied.

C. Gravity

For Citation No. 9700252, Inspector Schmidt designated the citation as "unlikely" to cause an injury or illness, given that most of the travel, work, or maintenance done on the walkway would be completed away from the ladderway opening and the side skirt. Tr. 23. If an injury occurred, Inspector Schmidt concluded that it could result in one person suffering an injury reasonably expected to lead to lost workdays or restricted duties. Tr. 23. Because the citation is designated as "unlikely," it was not designated as a significant and substantial violation.

Inspector Schmidt, given his years of experience, offered credible testimony that one person would travel along or complete work and maintenance on the C-17 walkway at a time, subjecting only that one person from falling through the unguarded ladderway opening. In the unlikely event of a person falling, Inspector Schmidt anticipated that the possible injuries would include fractures, sprains, or bruises. According to his testimony, these relatively minor injuries are associated with a fall from four to five and a half feet and would likely result in restricted duty or missed work. Tr. 23.

Given the facts above and Vulcan's silence on this issue, I affirm the assessed likelihood, severity, and number of persons likely to be affected.

[4] At hearing, evidence was introduced that Inspector Schmidt, the month before he cited the C-17 conveyor at Russellville, had issued citations involving unguarded ladderway openings to Vulcan at two of its other mines. Ex. S-5, 7. Vulcan maintains that it did not contest those citations because it conceded in those instances that its miners would use areas near the openings to conduct work assignments. Resp't Br. at 1. I have no reason to doubt Vulcan on this, and thus that Vulcan may have reasonably considered the citations to have been issued for that reason. Indeed, Inspector Schmidt testified as much. Tr. 26-27. However, as discussed, the scope of section 56.11012 is not limited to "work platforms," but rather is broader, with the regulation applying to all "travelways." The earlier citations are thus of little relevance to my finding of violation here.

D. Negligence

Commission "judges may evaluate negligence from the starting point of a traditional negligence analysis" rather than based on the Secretary's definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *JWR Res. Inc.*, FMSHRC 1972, 1975 n. 4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation…occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission's negligence analysis asks whether an operator has met "the requisite standard of care – a standard of care that is high under the Mine Act." *Brody Mining, LLC*, 37 FMSHRC at 1702. To determine whether an operator met its duty of care, Commission Judges consider "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." *Id.* (citations omitted). A Judge, however, "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* at 1702-1703*; see* 30 C.F.R. § 100.3(d) (stating that operators 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."). Lastly, the Commission has recognized that an "operator's knowledge (actual or constructive) is a key component of a negligence determination." *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

Here, Vulcan does not challenge Inspector Schmidt's designation of low negligence. In his determination, Inspector Schmidt explained that low negligence was appropriate because there had been no indication that there was a recent change, such as the removal or addition of a chain or barrier, and the operator may not have noticed the condition. Tr. 23-24. His explanation is supported by Mr. Molyneux's testimony that none of the six conveyors at the quarry had chains or gates for at least six months before the June citation was issued. Tr. 63.

While it is plausible that a reasonably prudent person familiar with the mining industry under the same circumstances, would have guarded the ladderway opening with a chain, gate, or comparable barrier to protect miners from a vertical drop, I credit Inspector Schmidt's decision to give Vulcan the benefit of the doubt of not noticing the condition. Tr. 23-24. With that, I find that the operator possessed little to no actual or constructive knowledge of the violation.

Considering the totality of the circumstances, I conclude that a designation of low negligence is appropriate.

IV. PENALTY

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

> (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 the fifteen months preceding the issuance of Citation No. 9700252, MSHA issued two violations of section 56.11012 to Vulcan Construction Materials, LLC. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited March 4, 2024). While Mr. McNider asserts that the upholding of the citation would be devastating to the operator's continued operation of all its mines to the tune of millions of dollars, Vulcan failed to provide any supporting evidence to substantiate that claim or convince me that the penalty would impact its ability to stay in business. Tr. 52. With no such evidence, I presume that no such adverse effect would occur. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (confirming that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur") (citations omitted).

For Citation No. 9700252, the Secretary proposed a penalty of $143.00. I determined Vulcan's negligence to be low. *See* discussion *supra* Part III.D. Regarding the gravity of the violation, I also determined that it would affect one person, was unlikely to result in injury or illness, and was reasonably likely to result in a lost workdays/restricted duty-type injury. *See* discussion *supra* Part III.C. Moreover, Vulcan demonstrated good faith by promptly adding a chain to barricade the ladderway opening on the same day it received the citation. Tr. 24; Ex. S-4. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $143.00.

V. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9700252 is **AFFIRMED** and that Respondent pay a penalty of **$143.00** within 30 days of the date of this decision. Accordingly, this case is **DISMISSED**.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 8, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PRAIRIE STATE GENERATING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2022-0017 A.C. No. 11-03193-542773 Mine: Lively Grove Mine

DECISION AND ORDER

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Jason W. Hardin, Esq., and Artemis D. Vamianakis, Esq., FABIAN VANCOTT, Salt Lake City, Utah, for the Respondent

Before: Judge Young

I. SUMMARY

Citation No. 9199021, 30 C.F.R. § 75.517: Failure to insulate adequately and properly protect power cable. Cable on a 995-volt continuous miner was not insulated adequately and properly protected.

Facts		pp. 2-6 (Slip Op.)
Fact of Violation:	Affirmed	pp. 6-8
Negligence:	Low	pp. 8-9
S&S:	Yes	pp. 9-25
Penalty:	$1,800	pp. 25-26

This case arising under the Mine Safety and Health Act of 1977 ("Mine Act") involves a single citation that alleges Prairie State Generating Company LLC ("PSGC" or "Respondent") violated 30 C.F.R. § 75.517 for failing to insulate adequately and fully protect the power cable of a continuous mining machine. The Secretary cited the violation as significant and substantial ("S&S"), with moderate negligence and a reasonably likely risk of fatal injury to one miner from the hazard contributed to by the violation. For the reasons set forth below, I affirm the violation and the S&S finding, find that the violation was the result of low negligence, and assess a penalty of $1,800.

II. FACTS

PSGC operates the Lively Grove Mine and an associated coal-fired power plant located across the road from the mine portal in Southern Illinois. Tr. 19; Ex. JJ. PSGC is a nonprofit owned and operated by several municipal utilities. Tr. 243.

On July 16, 2021, Mine Safety and Health Administration ("MSHA") Inspector Stephen Tisdale was conducting a regular quarterly "EO1" inspection of the Lively Grove Mine. Tr. 28. He was accompanied by John Garrett, a representative of the operator with responsibility for safety and compliance issues. Tr. 30, 403-04, 406.

As part of the inspection, Inspector Tisdale examined the power cable attached to continuous mining machine No. CM-201. Tr. 37.[1] Inspector Tisdale examined the cable by "walking" it – using his bare hands to feel the cable for any damage – after de-energizing and locking out the machine. Tr. 37.

While examining the cable, Inspector Tisdale discovered an area of surface damage on the outer jacket of the cable. Tr. 38. He showed the area of damage to Garrett and used a small screwdriver to "clean" the damaged area.[2] Tr. 46-49.

Based on his evaluation of the surface damage, Inspector Tisdale decided to examine the interior of the cable. Tr. 50-51. This is commonly done by cutting open the jacket with a knife, exposing the interior of the cable. Tr. 42. When the jacket was cut open, the inspector found a small hole penetrating completely through the jacket. Tr. 38-39.

Inspector Tisdale issued a citation for failure to protect the CM-201 cable from damage, exposing miners to the risk of electric shock. Ex. P-1. The violation was assessed as S&S, with the potential exposure of one miner to a fatal injury. *Id.* PSGC abated the violation by removing the cable from service. *Id.*

[1] The cable at issue in this case was a Nexans AmerCable Tiger Brand 36-505 Type SHD-CGC 3/C, 2,000 Volts cable. Tr. 253; Ex. O.

[2] There was a minor dispute about whether the use of the screwdriver may have further damaged the cable and whether Garrett had asked Inspector Tisdale not to use the screwdriver to clean the damaged area on this occasion. *See* Tr. 99, 101, 413; Ex. G. A screwdriver represented as substantially identical to the one used during the inspection was used as a demonstrative exhibit. The entire length of the handle and blade was approximately 4" and the blade appeared to be less than 1/8" in diameter. Given the size of the screwdriver, the durability of the jacket, and the very minor damage to the outer jacket, I find that Inspector Tisdale could not have damaged the jacket by probing it and that the dispute about using the screwdriver is immaterial to these proceedings.

A. The Condition of the Cable

Both the actual damaged segment of the outer jacket and a sample cross-section of cable were produced as physical exhibits. *See* Ex. P-7 (photograph of cable). The cable components include two uninsulated ground wires, three insulated and shielded phase conductors, a pilot wire, and an inert plastic spacer. Tr. 93, 154, 262. The resulting cable is nearly solid, and witnesses testified that it is difficult to flex or bend by hand. Tr. 363-64, 553.

The entire cable is braided inside, so that components twist around one another. Tr. 93, 261-62; Ex. P-7. The cable is rated to carry 2,000 volts. Tr. 53. The continuous miner at issue, CM-201, draws 995 volts and is commonly referred to as a "995 miner." Tr. 53, 59.

The phase conductors are insulated with a durable insulated cover. Tr. 206-07. The insulation is 80 mills, or 0.08", thick. Tr. 209-10. The insulation is covered with braided copper shielding that is "tinned" to resist corrosion. Tr. 194-195. The tinned shielding is grounded. Tr. 194.

The inspector found a small hole, approximately 1/4 inch to 5/16 inch long, penetrating completely through the jacket. Tr. 38-39. The hole did not pierce through the jacket in the most perceivable area of damage to the exterior of the jacket but resulted from a less-obvious area of damage about an inch-and-a-half away. Ex. P-7. The hole penetrated the jacket above one of the ground wires, with the striations of the ground wire visible impressed in the cable jacket in the area of damage. *Id.*

Inspector Tisdale testified that damage to the outer jacket could expose a miner handling the cable in the damaged area to the risk of electric shock. Tr. 57-60. However, the shock hazard could only present if the insulation to at least one of the phase conductors was also breached. In that event, the current from the phase conductors could flow to the uninsulated copper ground wires, to the grounded shielding, or to the exterior of the cable. Tr. 68-69.

While the exterior of the cable was damaged, exposing the interior of the cable, the inner insulation around the phase conductors was not penetrated. Tr. 393-94. However, it was discovered that there was damage to the insulation consists of minor surface cracks that the operator's expert referred to as "weather cracking."[3] Tr. 98, 393-394; Ex. P-2.

The damage to the phase wire insulation is consistent with the deformation described by Inspector Tisdale. The weather cracking is only visible if the insulation is flexed. This suggests that severe crushing force was applied to that area of the cable, because the cable is molded as a unit, with components compressed tightly within the jacket. Tr. 93.

[3] Counsel for the Secretary rejected this characterization, noting that the interior of the cable obviously had not been exposed to weather. Tr. 393-94, 362. Cody Christian, Respondent's expert, replied that this is what the cracks looked like. Tr. 490. I credit his characterization of the appearance of the cracks, which are fine, web-like cracks not visible unless the insulation is flexed.

Only severe stress could cause enough movement to damage the phase insulator, which is made of a flexible material. Tr. 154-55. Furthermore, the mine's compliance manager, Todd Grounds, essentially acknowledged that Inspector Tisdale had noted during his examination that the cable was misshapen. Tr. 323.

In addition to the shielding and the insulation around the phase conductors, the cable was also guarded by a circuit that would shut off the current if stray electricity inside the cable exceeded six or seven amps. Tr. 174, 523. *See also* Ex. T (providing specifications for the ground fault relay).

B. Potential Hazard from Exposure to the Interior of an Energized Cable

Both Inspector Tisdale and MSHA Special Investigator Bubby Whitfield, MSHA's expert witness, testified that a fatal injury could result from exposure to as little as 100 milliamps of electricity. Tr. 59-60, 167-68. This testimony was essentially undisputed. Thus, a fatal injury could result from exposure to as little as than 1/70 the amperage required to shut down the power to the continuous miner.

According to Inspector Tisdale's testimony, there were also observable "gaps" in the braided copper shielding which serves as a grounding. Tr. 128. There is sufficient evidence to support a finding that the integrity of the shielding, like that of the phase conductor's insulation, had been compromised.[4]

In addition to the damage to this cable noted during the inspection, the mine's own inspection records show that the same cable was repaired after a "questionable spot" was discovered.[5] Tr. 283; Ex. U (Lively Grove maintenance report describing this "questionable

[4] The operator questioned the assessment of the damage and claims that Inspector Tisdale effectively changed his testimony by not including an assessment of the damaged shielding in his notes or the citation. Resp't Br. at 7. The operator further argued that the process of removing the outer jacket from the cable is inherently destructive – a witness described it as "violent" – and that witnesses testified that they would often find red fibers from the cover, and occasionally shielding material, embedded in the outer jacket. Tr. 128-29, 415, 418-19. *See also* P-7 (image of the cable showing fibers embedded in the outer jacket of the cable).

Inspector Tisdale, for his part, testified credibly about the deformation of the cable, and he described the effect that such pressure can have on the integrity of the cable. He said that the removal of the cover required finesse, not force. Tr. 589. The miners and the inspector had removed the outer jackets of cables numerous times, and I find that the witnesses all had an appropriate level of experience with the process. I find that the Secretary has established that the damage more likely than not occurred before the outer jacket was removed.

[5] The examination record of the repair shows that it was performed on the same day as the inspection. Ex. U. Neither party attached any significance to this fact, so I find that it is merely a coincidence.

spot" and subsequent repair work). The cable was repaired by cutting off the end of the cable past the "questionable" portion and reattaching the cut end to the machine. Tr. 372; Ex. U.

C. The CM-201 Continuous Miner

The cable in question here connects the power center to the CM-201 continuous miner and provides electric power to the machine. Tr. 36; Ex. P-1. Cables in this mine could be up to 1,000 feet long. Tr. 36.

While the continuous miner is cutting the coal seam, it carries a coiled length of cable called the "cut loop." Tr. 336-37. About 60 to 80 feet of cable is carried in the cut loop, which allows the continuous miner machine to move into the cut while minimizing the amount of loose trailing cable. Tr. 337. This part of the cable is routinely "roped up" or coiled. Tr. 337-38. The damage to the inner insulation was found in the "cut loop" of the cable. Resp't Br. at 22. *See* Tr. 77-78 (Inspector Tisdale describing the cut loop and noting "the damaged area was 40 feet out by the connection point where the cable connected to the miner").

The continuous mining machines weigh approximately 50 tons and move toward the coal face to engage a cutting head to remove coal from the seam. Tr. 381-82. During each "cut," the continuous miner typically moves forward and back at least eight times to make a 40-foot cut into the coal seam. Tr. 439-440. The forward and back movements of the continuous miner move the CM-201 cable trailing the miner. Tr. 328.

The continuous miner is capable of exerting force that could flex the cable, as well as assertions that other forces could also damage the cable. The cable is coiled, moved, and stretched during normal mining operations. Tr. 310. Witnesses handling the demonstrative segment of intact cable noted that it was difficult for even a strong person to flex the entire, integrated cable manually, and the process of cutting the cable jacket to expose the interior components was described by the operator's witnesses as "violent." Tr. 335, 415.

The cable is subject to up to 40 back-and-forth movements when cutting coal during a shift, which could put stress on the cable. Tr. 309-10. As the cable is moved, it is bent and coiled and that could cause the damage to get worse. Tr. 132, 310-11.

Cody Christian, the operator's expert witness, did testify about some future outcomes. He said that if the continuous miner ran over the cable, it would destroy it. Tr. 553-56. Other machines might also run over and damage the cable, and the continuous miner could exert force that would stress the cable, by pushing it up against the wall or flexing it in the "bend radius[]" of the cable. Tr. 556-57.

D. Electrical Non-Destructive Testing of the Cable

To ensure that a cable's electric components retain their integrity and that they conduct and contain electric current as intended, the operator uses an electric testing device to assess the cable. Various manufacturers produce the devices, but one common make is "Megger," and the

testing is colloquially referred to by miners as "Megging," or testing with a "Megger." Tr. 65. The cable here was tested using one of these devices.[6]

The testing devices are rated to handle various voltages. Ex. P-9. Proper practice requires the use of a device capable of testing the current that the cable being tested may carry. *Id.;* Tr. 349-50. A common testing device is "rated," or recommended for use, at up to 1,000 volts. The operator's electrician and its expert witness testified that they commonly carry a 1,000 voltmeter with them and use it during their work. *See* Tr. 350, 542.

While the cable at issue here is rated to carry 2,000 volts and the machine would draw 995 volts, the continuous miners operate on alternating current. Tr. 176. The Fluke testing device used here is rated based on direct current. Tr. 176. To ensure the proper rating for the device being used, a conversion factor of 1.414 is used to account for the fact that alternating current operates on a "sine wave" pattern that has peaks and valleys. Tr. 177-78. *See also* P-8. Thus, the peak current for the 995 volts carried by the cable would be approximately 1407 volts in total (995 x 1.414). *See* Tr. 180 (Special Inspector Whitfield testifying the cable would be carrying "[a]pproximately 1,400 volts AC [alternating current]").

The total current being tested must account for the fact that the current is divided among the three phase conductors. Each conductor would thus be expected to carry a peak of about 469 volts (1407/3). In the event of a phase/phase short circuit, where two phase conductors are exposed, the total voltage would be about 938 volts (469 x 2). However, the potential hazard here, with one phase conductor exposed to a potential for a phase/ground short, the total voltage implicated is limited to that carried by the single phase cable, i.e. 469 volts.[7]

III. DISPOSITION

A. Fact of Violation

Inspector Tisdale issued 104(a) Citation No. 9199021 on July 16, 2021, alleging a "significant and substantial" violation of 30 C.F.R §75.517 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal" and was caused by Respondent's "moderate negligence."[8] Ex. P-1. The "Condition or Practice" is described as follows:

> Company #201 Miner's trailing cable is not being adequately protected nor insulated. There is a hole through the outer jacket exposing the inner energized conductors. This hole measures approximately 1/4 of an inch in length and is

[6] The device used in this case was manufactured by Fluke. Tr. 351.

[7] No witness testified to a scenario that would implicate all three phase cables or a potential voltage greater than 1,000.

[8] The docket also originally contained Citation No. 9037896. Respondent withdrew its contest of Citation No. 9037896 prior to the hearing. Notice of Withdrawal of Contest of Citation 9037896 (Aug. 18, 2022).

approximately 40' feet from the cable clamp. This machine was in service and located on the Main north unit at the time of inspection.

Id.

Under 30 C.F.R. §75.517, "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." The Mine Act imposes strict liability for violations of mandatory safety standards. Thus, the operator may be found to have violated the Act despite the absence of any fault or negligence on its part. *Nally & Hamilton Enterprises*, 38 FMSHRC 1644, 1650 (July 2016) (citing *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009); *Spartan Mining Co.,* 30 FMSRHC 699, 706 (Aug. 2008); *Asarco, Inc.,* 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd,* 868 F.2d 1195 (10th Cir. 1989)).

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

I find that the operator violated 30 C.F.R. § 75.517. The Secretary's witnesses credibly testified about the visible damage to the cable. Tr. 38-39, 152. Inspector Tisdale noted an area of surface damage that penetrated through the insulating outer jacket of the cable and visible deformation of the cable. Tr. 38-39, 43.

The only way to assess the physical integrity of the interior components is to cut the cable open, which was done here. *See supra* Section II.A. (describing Inspector Tisdale cutting the cable). The inspection of the interior confirmed that the exterior jacket had been fully penetrated. *Id.*

Although the damage extending to the inside is very small – little more than a pinhole – the Secretary's witnesses testified that this could permit electric current to escape the interior of the cable under some circumstances. Tr. 98. The operator's witnesses did not refute this evidence.

I also credit the inspector's opinion that the cable was either flexed or compressed by the movement of the continuous miner, or it was run over by another piece of mobile equipment. The inspector testified that the shape of the cable was deformed by compression. Tr. 43. Instead of being approximately round, the cable was compressed into an oval profile. Tr. 43.

The inspector testified that compression of the cable stresses the internal components and can affect the integrity of the cable. The witness described the effect as being "like rolling an orange in your hands, and it pulls the skin loose from what's inside." Tr. 128. Inspector Tisdale also testified about operational conditions that could result in such damage to the cable. Tr. 132.

I find that the Secretary has demonstrated that PSGC failed to insulate adequately and protect the cable from damage. Both the outer and inner layers of insulation provide important

protection against electrical shock. The evidence establishes that there was both visible physical damage to the outer jacket and deformation of the cable. Most importantly, the damage to the outer jacket penetrated through the outer layer. Accordingly, PSGC violated the standard in section 75.517 as the CM-201 Cable was not insulated adequately and fully protected.

B. The Operator's Negligence was Low

While a finding of violation does not require proof that PSGC was negligent, the inspector assessed the operator's negligence as moderate. The Secretary has the burden of proving the operator's negligence.

I am not bound by the Secretary's definitions of negligence but assess the operator's culpability holistically, using a traditional negligence analysis. *Brody Mining, LLC,* 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y,* 809 F.3d 1259, 1264 (D.C. Cir. 2016). I find that the operator failed to use the requisite care a reasonable person would have employed under these circumstances.

While the operator appears to have been attentive, it did not notice damage that, while not obvious, would have been found by a careful hand-over-hand examination. I infer this because the inspector did discover the damage during his own examination of the cable using the hand-over-hand process.

This is not a case where the outer jacket was sliced open or split. The two visible areas of surface damage were slight. The small surface nicks could have been obscured by mud or dirt – the inspector in fact used a small screwdriver to clean the areas – making visual detection difficult. Furthermore, the area that appeared to be more damaged on the outside is not where the damage pierced the jacket and exposed the inside of the cable.

The operator's witness testified that he would inspect the cable the same way Inspector Tisdale had – by "walking" the cable hand-over-hand, without gloves, during the permissibility examination. Tr. 304-05. The Secretary has accepted that the most recent permissibility exam, on July 13 – four days before Inspector Tisdale discovered the damage – was performed this way and no damage was discovered. *See* Sec'y's Br. at 16 (stating "the damage to the cable occurred sometime between the July 13th inspection and Inspector Tisdale's discovery of the damage on July 17, 2011").

The damage was only evident to the inspector during a hand-over-hand examination, performed without gloves. Tr. 37-38. However, the normal pre-shift examination procedure provides only a visual examination of the entire length of cable. Tr. 303. The Secretary has not asserted that a visual pre-shift examination of the cable falls below the requisite duty of care. I also note that no citation was issued for such failure. Tr. 111.

Additionally, the cable had been either observed as damaged or examined and found to be damaged in another location on the same date as the inspection at issue. Ex. U. Thus, it is reasonable to infer that the operator was properly attentive to the condition of the cable.

The Secretary has not demonstrated that the visual examination is generally insufficient to meet the obligation to perform a proper pre-shift examination. I therefore find that the operator's negligence was low.

C. The Citation Was Properly Characterized as S&S.

A violation is properly designated as 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 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). 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 (July 1984); *Gatliff Coal Co.,* 14 FMSHRC 1982, 1986 (Dec. 1992)) ("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.").

Respondent incorrectly characterized the timing requirement for analyzing S&S. It accurately cites language from the 2021 *Consol* decision to argue that the analysis must be based on facts existing at the time of issuance. *See* Resp't Br. at 5, 14. It fails, however, to recognize what the Commission said immediately after, and it challenges the Commission's precedent regarding assumed continuation of normal mining operations.

Respondent states, in its description of standards,

> A determination of "significant and substantial" must be based on the facts existing [a] at the time of issuance and [b] assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.

Resp't Br. at 5 (quoting *Consol Pa. Coal Co.*, 43 FMSHRC at 148 (citing *U.S. Steel Mining Co.*, 6 FMSHRC at 1574; *Gatliff Coal Co.,* 14 FMSHRC at 1986)). It then goes on to dedicate a section to the assertion that "the cited conditions did not create an electrical shock hazard <u>at the time of issuance</u> of the Citation." *Id.* at 14 (emphasis in original).

While Respondent correctly quotes *Consol*, that language differs from that in *U.S. Steel*. *Consol* stated the determination must be "based on" the facts existing at the time, 43 FMSHRC at 148. *U.S. Steel*, however, stated that the determination must be "made at the time" the citation is issued, "*but* in the context of 'continued normal mining operations.'" 6 FMSHRC at 1574 (emphasis added). A determination "based on" the facts existing at the time of issuance is different from one "made at the time" of issuance. The former would preclude addressing continued normal mining operations.

Respondent seems to argue here that the Commission changed the *U.S. Steel* standard to require analysis of whether conditions existed at the time of citation to support an S&S finding, with assumed continued operation being a separate analysis—as demonstrated by its added lettering to the quotation. While I acknowledge the language used in *Consol*, such a change did not occur.

In *U.S. Steel*, the Commission immediately followed its statement of the standard with an explicit refutation of the argument that there was no likelihood of injury resulting from the cable *at the time* of inspection and citation. *See* 6 FMSHRC at 1574 ("We reject this narrow interpretation of the statutory language. . . . . Such a measurement cannot ignore the relevant dynamics of the mining environment or processes; indeed this cable was in normal use at the time it was observed by the inspector. Under these circumstances, it was not error for the judge to evaluate the cited violation in terms of 'continued normal mining operations.'").

The Commission's decision in *Consol*, while employing language that could arguably support Respondent's argument, actually reaffirms the relevant principle from *U.S. Steel*. The Commission rejected an argument grounded on the fact that miners did not go under the roof *on the day of* citation. *See* 43 FMSHRC at 148 ("It contends that the only hazard that the standard [reflectors] was designed to protect against is a miner walking under unsupported roof. Obviously, *the fact that no one had been identified as going under unsupported roof on this specific day does not negate the danger of falling roof or that a miner on a break would not be reasonably likely to cross the threshold*.") (emphasis added).

Neither case, therefore, supports the contention that the S&S analysis includes only discussion of whether the conditions at the time of citation would make the occurrence of the hazard or injury reasonably likely. Any evidence or arguments supporting such a contention are therefore irrelevant to the analysis and will not be considered.

1. Step 1 – A violation of a mandatory safety standard occurred.

The existence of a slit in the outer jacket of a trailing cable demonstrates a failure to adequately insulate and fully protect a power cable. I have found a violation of this mandatory safety standard. *See supra* Section III.A.. This satisfies the first step of the Commission's S&S analysis.

2. Step 2 – The violation was reasonably likely to result in miner contact with the damaged portion of the cable while energized, thereby exposing miners to an electrical current.

Under the second step in determining S&S, the violation must be reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed. The second step is a two-part 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, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2013). This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (Apr. 2016).

a. The record supports a finding that miners were reasonably likely to contact an energized, damaged cable.

The standard in section 75.517 is aimed at preventing a miner from encountering power cables that are inadequately insulated or not fully protected. Thus, in this case, the specific hazard is a miner contacting the damaged portion of the CM-201 trailing cable while the cable is energized.

The Secretary has established that the violation was reasonably likely to cause the occurrence of this specific hazard. Inspector Tisdale, Grounds, and Garrett all provided testimony that the trailing cable was handled by individual miners to move it. Tr. 76, 78, 338, 443-45. While most movement of the cable was conducted through the movement of the continuous miner, the testimony describes situations in which miners would move the trailing cable either with their hands or feet. Tr. 76.

Inspector Tisdale testified that when the continuous miner is moved from one side of the entry to the other, the trailing cable follows it and moves into the center of the crosscut. Tr. 76. Often, in these situations miners will use their hands or feet to reposition the trailing cable to one side of the entry, because ram cars must be allowed to entry to load coal. Tr. 76. Inspector Tisdale describes this as "a normal practice that is done very often." Tr. 77.

Garrett, who had previously worked as a continuous miner operator in the mine, similarly testified that there are times where the ram car operators would have to move the cable with their hands when the cable is energized. Tr. 444-45. At times, miners also must lift the cable to allow ram cars to pass under it. Tr. 445. He likewise admitted that there were probably times when he picked the cable up with his hands and moved it out of the way. Tr. 443-44.

The location of the splice on the cable was in an area that was specifically prone to being handled. Tr. 78. The damage to the insulation was found in the "cut loop" of the cable, a portion of the cable, usually at least 40 feet long, that allows the continuous miner to move back and forth from the faces. Tr. 77.

As the cut loop is moved by the continuous miner during its operation which may move it into the entry, this portion would be handled often. Tr. 78. While Grounds testified that the cut

loop is not handled more frequently than the remainder of the cable, Tr. 338, Inspector Whitfield testified that cut loop portion of the cable, which is where the damage was found, was often handled by miners in the course of their work.[9] Tr. 78. *But see* Tr. 428 (Garrett testifying it is "not a very frequent thing" for a continuous miner operator to handle the cut loop cable with their hands).

The evidence therefore shows that miners routinely would move the cable to allow ram cars to pass while the continuous miner was in operation and the power cable was energized. This handling of the cable in the cut loop could bring a miner's hand into contact with the damaged portion of the cable while it was energized. I therefore find the violation reasonably likely to cause the occurrence of the discrete safety hazard.

b. Respondent incorrectly relies on the Commission's 2022 *Consol* decision to argue that the extent of the damage was insufficient for exposure.

Respondent argues that the discrete safety hazard should be determined to be the "potential electrical shock from stray electrical current at a level sufficient to cause an injury and contact with the cited ¼" slit in the outer jacket of CM-201's shielded trailing cable." Resp't Br. at 10, *citing Consol Pa. Coal Co.*, 44 FMSHRC 37, 42 (Feb. 2022) ("*Consol Pa. Coal II*") (noting "[t]he hazard from a violation of section 75.517 is that it may cause an electrical shock to a miner resulting from contact with an inadequately insulated or not fully protected power cable"). In fixating on the "electrical shock", the Respondent conflates the discrete hazard in second step of the *Newtown Energy* Test with the injury inquiry in the third step.

Moreover, in *Consol Pa. Coal II*, the Commission stated that the "Step 2 issue [was] whether the violation was reasonably likely to expose a miner to an electrical current." *Consol Pa. Coal II*, 44 FMSHRC at 42. The Commission majority rejected the S&S finding because it found that it was not reasonably likely that a miner would contact the damaged portion of the cable, which was hung with hooks secured to the roof or rib. *Id.* at 43-44.

The Commission found no evidence that the cable could be easily knocked to the floor. *Id.* at 43. Therefore, it was not reasonably likely that a miner would grab the cable to hang it back up. *Id.* Additionally, the was no testimony as to whether or why a miner would be likely to reach overhead and grab the feeder cable or whether a miner would be exposed during feeder moves. *Id.* at 44.

Respondent's reliance on *Consol Pa. Coal II* is misplaced here because the CM-201 power cable was not secured and hanging by hooks. The evidence here shows that the cable was usually lying on the ground and that miners would handle the cable regularly while working with the continuous miner. Unlike *Consol Pa. Coal II*, handling the cable could regularly and directly expose miners to the damaged portion of an energized cable.

[9] Respondent also contends that miners did not contact the damaged portion of the cable because miners were trained always to wear gloves. Tr. 289; Ex. FF. While is it the policy of the mine for gloves to be worn at all times, the evidence indicates that gloves were not always worn. Tr. 62.

Respondent failed to rebut testimony that the cable was likely to be handled in the "cut loop," where the damage was located. Citation to *Consol Pa. Coal II* is therefore inapposite here, other than to assert that the Secretary must demonstrate exposure to the hazard. The record here clearly shows that the Secretary met her burden as to reasonable likelihood that a miner could contact the damaged portion of the cable while energized.

3. Step 3 – Contact with the damaged cable was reasonably likely to result in contact with a stray current escaping through the damaged area capable of injuring a miner.

I have already determined that miners were reasonably likely to contact the damaged portion of cable. *See supra* Section III.C.2.a. The remaining issue with respect to reasonable likelihood of injury is whether stray current was reasonably likely to escape from the trailing cable.

The crux of Respondent's argument against this likelihood is that the shielded cable is inherently safe, and that the severity and location of the damage was unlikely to allow the injury. Resp't Br. at 22-23 (arguing miners were unlikely to come into the damaged portion of the cable on the cut loop and that the cable's shielding "[m]ade the [o]ccurrence of an [e]lectrical [s]hock [h]azard [u]nlikely"). However, I find the Secretary proved the injury was reasonably likely to occur during continued, normal mining operations, and Respondent failed to demonstrate elimination of the risk.

a. The record shows that stray current sufficient to cause injury could escape from the damaged cable.

A cable with an electrical defect, such as a phase/ground short-circuit, creates a danger that electricity will not follow its planned, intended path in a complete, integrated circuit. When this occurs, other grounding mechanisms might divert some of the free electrons to ground, but electric current follows the path of least resistance to ground. Tr. 109-10.

Where the amperage is high, as here, the current will flow to ground in proportion to the paths made available to it. The copper ground wires have extremely low resistance. Tr. 109. But a human body may provide a path to ground. *See* Tr. 109 ("electric current will vary depending on the resistance of the body in which the electrons are flowing"); Tr. 202 (among other factors, "[t]he current flow of a human who came into contact with a fault in [a] cable would depend upon the resistance or dielectric strength of that person").

If the exterior insulation of the cable is damaged, electricity may escape containment and contact a miner handling the cable in the damaged area. Tr. 57. For this to happen, there must be a defect interrupting the normal power circuitry, such as a failure of the insulation surrounding the phase conductors.

Here, the penetration of the outer jacket is directly above one of the two large uninsulated ground wires inside the cable. These cables are intended to provide the best path to ground. But a

miner who contacts the cable where the damage could allow the electricity inside to escape and contact the miner. Tr. 57.

The potential for this is greater if the cable is wet, and water is generally found in the area where the CM-201 miner was operating. *See* Tr. 55 (noting water is used to suppress dust when the continuous miner is in operation); Tr. 87 (noting "wet and damp" conditions); Tr. 311 ("damp environment is a possibility"). If the miner was not wearing gloves, as witnesses noted sometimes occurred (despite the operator's requirement that they be worn at all times), and if the miner's boots were damaged or the miner otherwise was not fully insulated against a path to ground, electricity could flow from the cable into the miner Tr. 57.

The amount of current needed to cause a fatal injury (as little as 100 milliamps) is significantly lower than the current carried by the cable. MSHA's witnesses testified credibly that a miner could be exposed to a risk of electric shock. Tr. 60. MSHA need not establish that a fatal injury was reasonably likely; it only needs to prove that there was a reasonable likelihood of a reasonably serious injury, which could include burns or other significant injuries. *See Consol Pa. Coal Co.*, 44 FMSHRC 182, 194 (March 2022) (ALJ) (finding electrical shock or buns to be a reasonably serious injury).

The operator suggests that the cable's integrity was confirmed by the Fluke testing device. Resp't Br. at 15-16. This is a flawed premise.

As an initial matter, I disagree with the Secretary's suggestion that the Fluke testing device was inadequate to the task of inspecting the electrical integrity of the cable. As noted at Slip Op. at 6, the total current is divided between the phase conductors and the total current present in the event of a short-circuit would not exceed 1,000 volts.

Therefore, I find the Fluke testing device, rated at 1,000 volts, was appropriate for the task here. In addition to the operator's witnesses credibly testifying about the capability of the device in these circumstances, *see* Tr. 348-356 (Grounds testifying about testing the cable with the Fluke testing device), documentary evidence about the device and its testing parameters show that the Fluke meter would have detected a short or other electrical problem in the cable, had one existed at the time of the test. *See* Ex. P-9.

That, though, is the problem. Having already determined that the interior inspection confirmed no present hazard of electric shock, the test results are essentially irrelevant. No witness or other evidence established that the device had any predictive value, and the only relevant period for an S&S assessment in this case is the future. The Fluke test therefore has no bearing on my decision about the potential for a hazard to arise in the course of continued normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC at 148 (stating S&S assumes continued normal mining operations, which suggests the relevant period is the future not the present).

b. Respondent did not effectively demonstrate that the presence of shielded cable eliminates the risk of an electrical injury.

The path to a serious injury here is admittedly not straight or direct. Lapses and failures of equipment and judgment must occur. Respondent argues that the presence of shielding around each inner conductor is an "inherent, engineered safety feature . . . that made the occurrence of an electrical shock hazard unlikely." Resp't Br. 23. It cited MSHA's shielded cable requirement and discussion of the benefits in support, but this analysis (1) fails to fully appreciate the language of the proposed rule and (2) essentially attempts to make any cable violation involving such shielding non-S&S.

First, Respondent provides,

> Metallic cable shielding . . . provide[s] *an engineering safeguard* for the protection of miners, which is a passive or "built-in" defense against shock and electrocution through contact with cable voltages. The Agency recognizes the advantage of engineering protection in some instances in addition to procedural safeguards that can be defeated by carelessness, mistake, lack of training or tampering. Cables which are properly shielded and maintained would *not* expose miners to the consequences of such human factors.

Id. at 24 (quoting *Electrical Safety Standards for Underground Coal Mines*, 54 Fed. Reg. 50,062, 50,087 (Dec. 4, 1989)) (emphasis in original). The first emphasized portion is in support of Respondent's contention that the shielding is not a redundant safety measure. *See id.* at 25 (citing Tr. 193). Even accepting that contention as true, a demonstration of damage to the shielding is sufficient to present a hazard. This is supported by the second emphasized portion. Respondent chose to highlight the word "not" to argue that shielded cables would not expose miners to the consequences of human failures. It should have instead noted the word "maintained." The cables must be shielded *and maintained* to not expose miners to the hazard.

"Maintain," in this context, is defined, "To care for (property) for purposes of operational productivity or appearance; to engage in *general repair and upkeep*." *Maintain*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). Coal mine regulations are replete with requirements to "maintain" equipment. *See e.g.*, 30 C.F.R. §§ 75.503 (requirement to "maintain in permissible condition all electric face equipment" required by other regulations in this subpart).

The evidence provided here showing damage and the likelihood of further degradation, is sufficient to demonstrate that the cable has not been properly maintained. *See* Tr. 131-32, 163, 311, 447. Since it is not shielded *and maintained*, Respondent cannot point to this to effectively argue the cable would not expose miners to the hazard.

Respondent continues,

> Although perfect compliance with all of MSHA's mandatory standards and the absence of human error are desirable, due to many varying circumstances, it would

> be unrealistic to assume such circumstances at all times. Therefore, the elimination of as many factors contributing to electrical injuries as possible *through shielding requirement* would lessen the risks to miners.

Resp't Br. at 24 (quoting 54 Fed. Reg. at 50,087) (emphasis in original). Note that the language says "lessen," not "eliminate." Taken together with the quoted language above, the proposed rule seems to contemplate that a maintained shielded cable would *lessen* the risks. But even if this type of cable presents a lesser risk of electrical injury, Respondent has not demonstrated contact with an energized cable at the point of damage is not reasonably likely to result in injury.

Respondent further notes, "Primarily, the use of shielded trailing cables would increase safety for miners required to physically handle the cables by reducing the likelihood of exposure to bare or short-circuited energized power conductors." *Id.* (quoting 54 Fed. Reg. at 50,088). Yet, this simply provides for reduced likelihood.

Finally, Respondent states, "If shielding had been present around the trailing cable power conductors, the leakage current would have been conducted to ground by the shielding, *eliminating* the shock hazard to the victim." *Id.* (quoting 54 Fed. Reg. at 50,088) (emphasis in original). This statement was in response to discussion of a fatality where an unshielded trailing cable was "damaged to the point of exposing conductors, but continue[d] to function properly." 54 Fed. Reg. at 50,088. The victim there was reportedly exposed to leakage current through "damaged and wet cable insulation." *Id.*

This informs us that if a phase lead's insulation is damaged (and wet), current will leak to the individual shielding and run to ground. But this statement does not account for damage to the shielding. As noted in Respondent's first quotation, the cable must also be *maintained* properly.

Respondent's own witnesses acknowledged that it is possible the shielding will not provide the intended safety if it is damaged. Tr. 328. *See* Tr. 548 (assuming shielding was not damaged at time of the "nail test"[10]); Tr. 566 ("If the shield were damaged to the point where it

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[10] The "nail test" discussed is a test conducted by the Penn State Mine Electrical Research Laboratory as part of a series of investigations to examine the feasibility of shielding low-voltage trailing cables in underground coal mines. Ex. DD at Bates label -01070. These investigations were published 1979 in the U.S. Department of Interior, Bureau of Mines Information Circular titled "Mine Power Systems Research (In Four Parts) 1. Trailing Cables." *Id.* at Bates label -0167-68. The nail test involved driving a six-penny coated nail repeatedly into an energized SH-D shielded cable. *Id.* at Bates label -01074. The nail test was described performed as follows:

> An additional electrical test was devised to show the effects caused by a person using a metal object to penetrate an energized cable. To duplicate worst-case conditions, the ground-current-limiting resistor was eliminated from the circuit so that the current through the shield would be allowed to rise above 25 amperes.

(continued…)

was spread more than a quarter inch apart, and the insulation had cracked all the way through, it's possible at that time [such damage would increase the likelihood of being shocked]."); Tr. 571–72 ("In order for [the current] to get past [the shielding] and come out the outer rubber coating, that shielding would have to have a gap greater than this thickness [of the rubber outer jacket].").

The record demonstrates damage to the shielding. *See* Tr. 43, 128, 323. Therefore, given the damage, and the likely further degradation during continued normal operations, Respondent failed to demonstrate that the cable is inherently safe or even lessened the risk to miners.

Respondent goes on to assert the violation was not reasonably likely to cause a shock hazard even in a hypothetical worst-case scenario. Resp't Br. at 26. It states that such a finding requires a litany of assumptions. That theory is refuted by a review of the actual conditions upon which the supposed "assumptions" rest:

- That something causes further degradation of the inner phase lead insulation. Resp't Br. at 26. It is permissible to assume that further degradation will occur due to consistent dragging and bending in the harsh, underground environment during continued normal mining operations. *See* Tr. 131-32, 163, 311, 447. Even Respondent's witnesses acknowledged that "it's not going to heal itself," Tr. 518, and I give no credence to contentions that the damage was not likely to get worse. Tr. 363, 390, 394, 424, 447–48. *See contra* Tr. at 162–63, 190, 300, 447.
- That leaked current from damaged lead insulation contacts the shielding and flows to ground. Resp't Br. at 26. This is an assumption in Respondent's favor—that any stray current flows down the shielding rather than escaping the cable jacket to injure a miner. But this itself assumes no damage to the shielding, as discussed above.

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[10] (…continued)
A 218-volt ac source was used to power two series-connected 100-watt electrical lights. One wire of the circuit was routed through a sample of flat SH-D cable from the test site. The six-penny nail was connected to a grounded 1,000-ohm resistor to simulate a worker, also under worst-case conditions. After the cable was energized, a remotely operated apparatus drove the nail into the cable.

Ten trials were performed and in 9 out of 10, the current flowing through the shield was sufficient to trip a 20-ampere circuit breaker in approximately 5 cycles or 83 milliseconds. The test results were very repetitive for these nine trials; identical current levels were observed in each. Current flow through the worker was a harmless 2 milliamperes, while current flow through the shield was 1,800 milliamperes. During the nine trials, the shield sustained no noticeable damage. However, during one attempt, the breaker was not activated because the shield around the nail penetration area was destroyed.

Id. at Bates label -01075. *See also* Resp't Br. at 27 n.3 (describing the "nail test"); Tr. 206, 527-532 (discussing the "nail test").

- That ground fault protection fails to function. Resp't Br. at 27. This is a redundant safety measure and therefore precedentially irrelevant. *See Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Also, the Secretary demonstrated that much less than the amperage required to trip the breaker would be sufficient to kill a miner, and a more potent charge could do so in the split-second before the breaker tripped. *See* Tr. 168, 171.[11]
- That the trailing cable's voltage limiting resistor fails to limit the voltage of the circuit. Resp't Br. at 27. This assumption fails to persuade for the same reason as the similarly-redundant ground-fault protection.
- That the damage, including the heat and smoke created, would not be detected. Resp't Br. at 27. This assumed miner precaution and abatement, both of which are precedentially irrelevant. *See Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992); *see also Crimson Stone v. FMSHRC*, 198 Fed. Appx. 846, 851 (11th Cir. 2006) ("Any assumptions about how and when [the equipment] would have been repaired do not alter the [S&S] nature of the violation."); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013).
- That something causes the damage (slit) to grow bigger. Resp't Br. at 27. This is already addressed by the assumption of further degradation during continued normal mining operations because witnesses testified credibly that this would happen.
- That a miner contacts the damaged portion simultaneously with the existence of the fault. Resp't Br. at 27. I have already found that miners are reasonably likely to contact this portion of the cable during continued normal mining operations. *See* Section *supra* III.C.2.a.
- That a miner contacting the circuit is not wearing gloves, or those gloves are wet. Resp't Br. at 27. *See Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018) (holding mitigating safety measures and expected miner precaution irrelevant to an S&S analysis); *see also Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d at 1028–29. Also note that while witnesses disagreed about the amount of water in the area where the continuous miner operated, there was no question that there was *some* water in the area, so the cable, and thus the gloves of any miner handling it, would be reasonably likely to become wet at some point.[12]

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[11] Cody Christian testified that electrical flow would most likely contact the shielding, flow to the ground fault relay, and trip the breaker, and that such happens in milliseconds. *See* Tr. 521–22. This seems intended to enable Respondent to make the argument that injury is unlikely because a miner would have to contact the damaged portion of the cable at the exact moment of fault, and that the shielding would prevent the flow through the miner. *See* Resp't Br. 31–32. I already found that damaged shielding is not likely to provide such protection. *See* Slip Op. at 17. I have also found that it is reasonably likely that a miner could be holding or touching the damaged area in the course of normal operations. *See supra* Section III.C.2.a. That such a fault would happen quickly does not effectively challenge the reasonable likelihood of injury, because if the miner is holding the damaged area of the cable at that exact moment, a serious or fatal injury could occur.

[12] There is no need to make too much of this fact, given that the gloves would be a redundant safety measure depending on miner precaution – neither of which is legally cognizant

(continued…)

- That a miner contacting the circuit is not wearing electrically rated boots, or that those boots are damaged. Resp't Br. at 27. Boots, like gloves as explained above, are irrelevant to whether an injury is likely to occur in an S&S analysis, because they shift the analysis from the engineering controls required by the mandatory standard to miner precaution and redundant safety measures. *See Spartan Mining Co.*, 30 FMSHRC at 707 (noting Congress' concern for particular dangers posed by damage to trailing cables and dismissing argument that circuit breaker – which did not prevent fatal injury in *Spartan* – or other redundant safety measures as effective prevention against reasonably likely injury from damaged cable).

Respondent further asserted that, given the assumed worst-case scenario, a miner would still only be exposed to 5 milliamps—sufficient to create only muscle spasms. *See* Resp't Br. at 27 (citing Tr. 528–35).[13] Respondent pointed to an absence of evidence of past incidence of shock from handling shielded cables and cited a 1985 ALJ decision regarding alleged cable damage to argue that the S&S citation should be vacated. *Id.* at 28 (citing *Arch of Ill., Inc.*, 7 FMSHRC 56, 88 (Jan. 1985) (ALJ) ("[R]espondent's evidence and testimony establishes that the construction and shielding of the cables provided more than adequate protection against any damage from the rubber-tired equipment which ran over them."). This case is not helpful to Respondent here because it involves a different standard and distinguishable factual findings regarding cable damage.

In *Arch of Illinois, Inc.*, the two citations involved a failure to adequately protect trailing cables from damage by mobile equipment—30 C.F.R. § 77.604. 7 FMSHRC at 58–59, 61, 88. The judge's decision was based on the fact that any damage was unlikely from the rubber-tired vehicles shown to have run over, or likely to run over, the cable. *Id.* at 88.

The standard at issue here is section 75.517, which involves a failure to adequately insulate a trailing cable. The standard in *Arch of Illinois, Inc.* is therefore based on exposure to possible damage from vehicles, whereas the standard here is based on actual damage to the cable.

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[12] (…continued)
in this context, but the gloves provided by the operator do not have an electrical rating. *See* Tr. 314 (the operator's compliance manager noting the gloves provided to miners do not have a manufacturer-listed electrical rating); Ex. O. (specification sheet for PosiGrip Gloves Style 720DGU provided by the operator listing no electrical rating).

[13] I note that Respondent included this argument in Step 2—analysis of likelihood of occurrence of the hazard. As I have stated that the hazard is miner contact with an energized, damaged cable, discussion of the amount of available amperage to which a miner is likely to be exposed relates to the likelihood of injury caused by such contact. Here, Respondent asserts the likely amperage is only sufficient to cause muscle spasms, and that it is unlikely to cause injury—e.g., shock, burns, or electrocution.

Importantly, the record in *Arch of Illinois, Inc.* demonstrated "no signs of any internal or electrical damages." *Id.* at 86–87. The judge's finding that damage from the types of vehicles present was unlikely also noted that "the evidence establishes that no damages occurred." *Id.* at 88.

The facts here are demonstrably different. Here, there was damage to the cable, and the type of vehicle was acknowledged to be capable of damaging the cable, *see* Tr. 330–31 (demonstrating that a continuous miner had "trammed over its own cable" and caused damage in the past); *see also* Ex. PP (citation for an incident where another continuous miner cable at Lively Grove Mine was found "with tire tracks on it for approximately 20 feet and had been pushed into the ground" after being run over by another type of vehicle), unlike the rubber-tired vehicles in *Arch of Illinois, Inc.*

Additionally, Respondent's own expert, after citing the "nail test" to state that minimal amperage would flow through a miner, stated that he "certainly would not" grab a nail driven into a live cable "[u]nless [he] was feeling extremely daring," Tr, at 549-50. He later qualified that he "would not take a nail underground and advise someone to grab [it]." Tr. 551. This seems to at least acknowledge that the conditions underground might make the risk of current escaping from shielded cable different than in a controlled lab setting.

Even accepting the validity of the "nail test" —although conducted at a lower current and with undamaged shielding—the testimony on the record demonstrates that the risk of injury from escaping electrical current is still present, especially in underground mining conditions. The Secretary has shown likely injury from contact with electrical current, and this Court acknowledges the dangers of serious injury from contact with inadequately protected cables. *See F & F Mendisco Mining Co.*, 4 FMSHRC 897, 898 (May 1982) (ALJ) (involving the death of a miner from contact with a bad splice while climbing down into a sump). Respondent's proffered evidence is insufficient to counter the obvious grave danger of electrical injuries.

c. Respondent did not rebut evidence demonstrating that the severity and location of the damage made current leakage reasonably likely.

Respondent's witnesses testified that the severity was insufficient to permit current leakage, and that the location of the damage did not provide a pathway for such leakage. Respondent's expert, Christian, testified, "If the shield were damaged to the point where it was spread more than a quarter inch apart and the insulation had cracked all the way through, it's possible at that time [that the likelihood of shock would be increased]." Tr. 566.[14] He later specified that such an increase created by a quarter-inch damage would be present if the holes—those in the shielding and that in the outer jacket—were lined up. Tr. 581.

[14] He later specified, "In order for [electricity] to get past the shielding and come out the outer rubber coating, that shielding would have to have a gap greater than this thickness [of the rubber outer jacket]." *Id.* at 571–72.

Bryce Jones, Respondent's maintenance technician, testified that the cracked phase insulation was a half-inch away from the outer cable damage. Tr. 365. Garrett, Respondent's "dust tag,"[15] testified that the hole in the outer jacket was over the ground lead. Tr. 417.[16]

Respondent therefore attempted to demonstrate that the damage would have to be greater, and the location would have to be directly over a phase lead. These assertions directly contradict both the requirement to assume continued normal mining operation, the spirit of the Commission's *U.S. Steel* decision, and the nature of electrical current if the insulation fails to contain the current within the phase leads.

I cannot assume that the damage would have been found and remedied, and I have already found that further degradation of the existing damage—to the outer jacket, the shielding, and phase lead insulation—is reasonably likely during continued operations. Respondent's proffered testimony therefore does not adequately challenge a demonstration that the violation is reasonably likely to degrade and expose miners to contact with inadequately insulated cable.

Acknowledging the significant risks from electricity and damaged cables, the Commission in *U.S.* Steel affirmed a finding that "both the outer and inner layers of insulation provided important protection against electrical shock." 6 FMSHRC at 1575. Respondent here would have the Commission believe that the existence of individual lead shielding negates the likelihood of such a contemplated injury.

I find, however, that the analysis in *U.S. Steel* continues to be perfectly applicable. In that case, there was no visible damage to the live power wire insulation, and both parties agreed that "because the power wires remained individually insulated at the time of inspection there was no immediate danger of electrical shock even if a miner should inadvertently grab the cable." *Id.* at 1573. Yet, the Commission still found that the existence of outer jacket damage and likely degradation from mining operations was sufficient to justify the S&S finding. *Id.* at 1575.

Accepting the existence of a third layer of protection, the *U.S. Steel* logic still ends in a finding that the "outer and inner layers [both individual phase insulation and shielding]" provide the contemplated protection. *Id.* And if I assume continued degradation due to the "relevant dynamics of the mining environment or processes," *id.* at 1574, then demonstrated damage to the outer jacket, the shielding, and the phase insulation is sufficient to support an S&S finding.

[15] As "dust tag," Garrett was responsible for dealing with dust samples taken at the mine. Resp't Br. at 4 (citing Tr. 403-04).

[16] The actual jacket provided as an exhibit shows the impression made by the uninsulated cable where the hole pierced the jacket, so this fact is beyond dispute. *See* Ex. P-7.

d. Respondent's argument that the standard use of safety equipment precludes an S&S finding runs counter to Commission and Circuit Court precedent and is contrary to record evidence demonstrating less than full compliance and likely equipment degradation.

Respondent directly challenges Commission and Circuit Court precedent regarding assumed abatement and redundant safety measures. *See* Resp't Br. at 18, 18 n.1, 29–30. It first argues that it is "just conjecture, speculation, and worst-case hypotheticals," *id.* at 18, to assume that normal practices that are part of continued normal mining operations would not occur, and that a finding of violation would be error. *Id.* at 18 n.1.

Respondent points out that it provided evidence of preoperational checks, weekly permissibility checks, and examples of identified and corrected cable damage. *Id.* at 18 n.1. But this argument is foreclosed by law. Simply put, the Commission will not assume abatement of the violation in an S&S analysis, unless the abatement is underway when the violation is discovered. *Mach Mining, LLC,* 40 FMSHRC 1, 6 (Jan. 2018), *aff'd*, 748 Fed. Appx. 357, No. 2019 WL 275718 (D.C. Cir. 2019) (internal citations omitted).

There was no active abatement here. Respondent therefore may not rely on such evidence to argue that a reasonable likelihood of discovery would have made it unlikely that the defect would cause the hazard to materialize.

Next, it argues that normal practices—e.g., all miners always wearing gloves and boots while underground—should be considered part of continued normal mining operations. Resp't Br. at 29–30. As with an assumption of abatement, the Commission will not consider such circumstances (or practices) external to a violation to reduce the likelihood that harm will occur.

I accept that the shielding is not a redundant safety measure but an integrated part of the protection and insulation provided in accordance with the standard. But the use of personal protective equipment ("PPE") is external to, and thus not relevant in considering, the hazard created by the operator's non-compliance. *See Cumberland Coal Res., L.P. v. FMSHRC,* 717 F.3d at 1029 (D.C. Cir. 2013) (*citing Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997) ("By focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards."). Even if I were to accept the use of rated gloves and boots in an S&S analysis, Respondent's own witnesses failed to demonstrate a reasonable likelihood of perfect use and integrity of such protection.

Respondent went to great lengths to develop testimony that gloves and boots are always used underground, and that it makes them available to all miners. Tr. 103–04, 108, 292, 285–96, 369. First, Grounds, Respondent's compliance manager, acknowledged, "I can't say that it's 100 percent compliant, but it is information that is shared with our employees, and I do believe that the majority of employees, if not -- if not most or all do comply." Tr. 290. Therefore, the risk of contacting a damaged cable with unprotected hands or feet is not eliminated by protective equipment used by miners.

Next, the Secretary effectively rebutted the availability of fully protective boots and protective gloves at all times. Grounds acknowledged that he did not know the dielectric rating of the gloves provided in the free vending machine. Tr. 314. He further admitted there was no way to tell if miners' gloves would always be dry during continued operations. Tr. 313. While the mine has a boot policy that seems designed to ensure miners will have safe, protective footwear, the policy only allows for reimbursement of one pair per year. Tr. 315-16; Ex. GG. Cut or damaged boots could be compromised, though the mine does have rubber boots available. Tr. 314–17.

Both Jones and Whitfield conceded that damaged or wet gloves could happen at any time. Tr. 235, 395. Inspector Tisdale acknowledged the PPE policy, but he referenced an incident at the mine where a supervisor put a bare hand on a cable while talking to an MSHA inspector. Tr. 104.

Even considering redundant safety measures, Respondent thus did not demonstrate that the cited PPE was always worn, was always available, or that it continuously maintained the integrity necessary to provide the expected protection. Respondent's assertions in this vein do not reduce the likelihood of injury.

4. Step 4 – The injury from exposure to stray current from the damaged CM-201 cable was reasonably likely to be of a reasonably serious nature

The final step in determining whether the violation was significant and substantial is whether there is a reasonable likelihood that the injury in question is of a reasonably serious nature.

The injury from electrical shock is directly related to the amount of current to which a person is exposed. Inspector Tisdale and Special Investigator Whitfield testified that a fatal injury could result from exposure to as little as 100 milliamps of electricity. Tr. 59-60, 167-68. This testimony was essentially undisputed. *See* Tr. 534 (Respondent's expert Christian stating the same).

The CM-201 cable is a 995-volt cable with a current of up to 200 amps coursing through it when it is energized. Tr. 59-60. This is well above the lethal limit. However, the system is equipped with a fault relay that triggers at six amps or seven amps. Tr. 168. If the insulation on a phase conductor is breached, electricity would flow from the phase to the shielding and trip the main fault relay within milliseconds, cutting of the power. *See* Tr. 59, 523.

The evidence demonstrates that it is possible for a miner to be shocked with a lethal current of electricity, even if the circuit breaker functioned properly. Under one such scenario, the inner phase insulation would have to be completely breached by subsequent stress or damage, at the precise moment when a miner is handling the cable and in contact with the splice.

Under a second scenario, it is alternatively possible that the conductor's insulation might be degraded to permit a current less than six amps to escape the conductor. I infer from Christian's testimony that as the insulation would wear and become thinner, it could begin to

allow leakage of some current from the phase conductor. Gradual failure of the insulation, as stress and wear reduced its thickness, would progressively allow more current to leak from the insulation.

Even without a complete breach, wear to the thickness of the inner conductor's insulation could cause the leaking electricity to increase above the potentially fatal 100 milliamps, before reaching the six or seven amps necessary to trigger the circuit breaker. In that range, the breaker would not be triggered, but a miner holding the cable at the damaged area could be exposed to a serious, and perhaps fatal, electric current.

Six amps is more than 60 times the electric current sufficient to cause a fatality. Under these circumstances, it is therefore reasonably likely that injury from exposure to the current could range from serious to fatal.

Respondent argues that the electrical current that could escape the hole in the outer jacket is insufficient to cause serious injury. Based on the results of the "nail test", Christian analyzed and estimated the maximum amount of current a person would be exposed to under the conditions present in this matter. Tr. 520-39.

He testified that even assuming a worst-case scenario where a miner comes into contact with the cited 1/4 inch slit in the cable's outer jacket at the precise moment a fault occurs inside the cable, any stray current that might have leaked out would have been no more than approximately five milliamps. Tr. 533-534. This would be enough to cause a tingling sensation but not enough to cause an injury or a reasonably serious nature. Tr. 534.

As I have discussed above — *see supra* Section III.C.3.b. — the testimony on the record demonstrates that the risk of injury from escaping electrical current is still present, especially in underground mining conditions. Respondent's own expert, after citing the "nail test" as support for his belief that minimal amperage would flow through a miner, stated that he would not personally risk touching an energized cable under the test conditions, nor would he advise anyone to grab the cable. Tr. 549-51. This seems to at least acknowledge that the conditions underground might make the risk of current escaping from shielded cable different than in a controlled lab setting.

I find that the results of the "nail test" cannot be reliably applied to the facts of this case. The laboratory conditions of the test are not analogous to the conditions of a cable being dragged across the floor of an underground coal mine. Moreover, the "nail test" fails to consider any damage to the wire shielding, but assumes the shielding is fully intact. The shielding inside the CM-201 cable was damaged, and thus was subject to further degradation as the cable was used.

To establish S&S, the Secretary does not need to prove the reasonable likelihood of a fatal injury, but only reasonably serious injury, which could include burns or severe electric shock. *See Consol Pa. Coal Co.*, 44 FMSHRC at 194 (finding the third and fourth steps of the S&S analysis was met when a damaged cable was "reasonably likely to cause electrocution and injuries such as electrical shock, burns, or death"). Therefore, given the high amount of current in the CM-201 cable and that the circuit break only triggers at six amps, which is well above the

100 milliamps threshold for a fatal injury, I find that Secretary has established that exposure to stray current from a damaged cable was reasonably likely to be of a reasonably serious nature.

The Commission has upheld an S&S violation where only the outer cable has been shown to have been damaged. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1288 (Dec. 1988) (affirming ALJ's crediting inspector's testimony about injury and determination that outer damage to insulation was sufficient because of potential "invisible" damage to insulation around inner conductors and noting that "even a pinhole-sized breach can conduct enough current to electrocute a miner."). The Commission in *Harlan* further noted that "[t]he judge's conclusion is bolstered by the presence of water and the high frequency with which the cable was manually handled during normal mining operations." *Id.*

I therefore find that the violation here is significant and substantial, based on similar evidence. Respondents violated the mandatory safety standard of 30 C.F.R. § 75.517. The violation was reasonably likely to result in a miner coming into contact with the damaged portion of the cable while energized.

This contact with the damaged cable is reasonably likely to result in a stray current capable of injuring a miner escaping through the damaged area. The resulting injury is reasonably likely to be of sufficient amperage to cause a serious electric shock or electrocution. This conclusion of a risk of reasonably serious injury is increased by the fact that, like in *Harlan*, the cable in question is handled by miners in the presence of water and sometimes wet and damp conditions. Therefore, I affirm the Secretary's S&S finding.

D. Penalty

While this is an S&S violation, I have held that the operator's negligence is not as severe as the Secretary alleges. Furthermore, the damage to the cable was minimal. Aggravating its diminishment of the cable's insulation could require a serious subsequent injury or a prolonged period of repetitive stress.

While redundant safety measures and miner precaution may not negate an S&S finding, I do credit the operator's proactive safety measures here. The operator provides gloves to miners. These gloves are not dielectrically rated, but witnesses said they could provide some protection if not wet or damaged. Additionally, the operator pays for a pair of boots for each miner, once a year, and requires that safety equipment be worn.

Not crediting the operator for these measures ignores their contribution to health and safety at the mine. While the violation is serious enough to compel its correction before any possibility of harm could arise, a reasonable person would understand that these measures may greatly reduce the hazard by making it much less likely that a miner could provide a path to ground for uncontrolled electrical current.

The size of the operator and its violation history are essentially uncontested. Tr. 471-73; Ex. P-3. The operator has stipulated that the penalty proposed by the Secretary would not interfere with its ability to remain in business, and the Secretary's proposed penalty credited the

operator with rapid good-faith abatement of the citation. Tr. 471-73; Ex. C. Considering the gravity posed by the hazard and the and lesser negligence supported by the record, and all the factors set forth in Section 110(i) of the Act, I assess a penalty of $1,800.

IV. CONCLUSION

For the reasons set forth above, I find that the operator violated 30 C.F.R. §75.517 as a result of its low negligence and that the violation was S&S. The operator is **ORDERED** to pay $1,800.00 within 30 days of this decision.[17]

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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[17] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MORTON SALT INC., Respondent. & QUINN NORWOOD, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0135 A.C. No. 16-00970-549832 Docket No. CENT 2023-0109 A.C. No. 16-00970-571154 A Mine: Weeks Island Mine & Mill

DECISION AND ORDER

Appearances: Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202

Donna Vetrano Pryor, Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202

Before: Judge Simonton

I. INTRODUCTION

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Morton Salt Inc. ("Morton Salt" or "Respondent") and Quinn Norwood, pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] These cases involve one Section 104(a) Citation No. 9646138 with a proposed penalty of $2,573.00 against Morton Salt, one Section 104(d)(1) Citation No. 9646139 with a proposed penalty of $12,754.00 against Morton Salt and a proposed penalty of $4,600.00 against Quinn Norwood. On September 21, 2023, the Secretary filed a Notice of Vacatur with the Court vacating 104(a) citation 9646138.

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

The parties presented testimony and documentary evidence regarding the remaining citation 9646139 at issue at a hearing held on, November 6, 2023, in Lafayette, Louisiana. MSHA Inspector Chad Derouen and Special Investigator Mark Shearer testified for the Secretary. Landon Olivier, the mine's Safety Manager, and employees Quinn Norwood and Travis Mallette testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation No. 9646139 as issued.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Morton Salt is the operator of Weeks Island Mine, Mine ID 1600970.

2. Weeks Island Mine is an underground salt mine in Louisiana.

3. Morton Salt, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

4. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

5. The subject violations were properly served by a duly authorized representative of the Secretary upon an agent of Morton Salt on the date and place stated on the citations and may be admitted into evidence for the purposes of establishing their issuance.

6. The proposed penalty in CENT 2022-0135 will not affect Morton Salt's ability to continue in business.

7. Morton Salt demonstrated good faith in abating Citation No. 9649139.

8. On January 11, 2022, MSHA Inspector Chad Derouen reviewed video recordings from Morton Salt's cameras that included footage from underground and multiple surface areas.

9. Inspector Derouen created a timeline of events based on the video footage. He included the timeline on page 11 of his general field notes, DOL 0027.

10. Derouen's timeline accurately reflects what he observed in the video.

11. Mr. Derouen viewed this video in the presence of the following Morton Salt personnel: Landon Olivier, Ryan McBride, and Rob Freeman.

12. Morton Salt did not retain a copy of this video.

13. It is undisputed that a violation of 30 C.F.R. § 57.22601(a) occurred.

Tr. 6-7.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Morton Salt, Inc., operates the Weeks Island Mine, an underground salt mine located in Louisiana. Tr. 8; Jt. Stip. 1. Because Weeks Island is a gassy mine that is known to liberate methane, the operator is required to ensure that all miners are on the surface before initiating blasting. Tr. 8. Management utilizes a tag-in/tag-out board ("tag board") to keep track of every miner that is underground. Tr. 21; Ex. S-4. Each individual miner is assigned a tag, and the tag's position on the board indicates whether the miner is in the mine or out of the mine. Tr. 21, 111. For contractors and other visitors like MSHA inspectors, miners are assigned a general tag that is recorded in a sign in and out book. Tr. 22, 112. The left two-thirds of the board is reserved for Morton Salt employees; the left side stores the tags, and the middle shows which employees are underground. Tr. 29-30, 111-12. The right third of the board is reserved for contractors' tags. Tr. 30, 112. When the tag is black or colored, the miner is in the mine and when it is white, the miner is on the surface. Tr. 183.

To comply with safety standards, management must ensure that the mine is clear and there is no one who remains underground before initiating blasting. Morton Salt developed a Standard Operating Procedure ("SOP") that outlines how to properly clear the mine. Tr. 106-07; Ex. R-G. If the supervisor is preparing to blast and there is still a tag that is flipped over on the board, it is his responsibility to contact that person and ensure they are out of the mine before proceeding with blasting. Tr. 26; Ex. R-G. According to the SOP, both the foreman and the powderman are required to check the tag board before initiating a blast. Tr. 50-51, 69; Ex. R-G. While the SOP states that the powderman must also check the tag board, the powderman is not a supervisor. Tr. 167. Miners receive blasting training during their new hire training and then refresher training yearly. Tr. 104. This training involves reviewing the SOP with a production supervisor who also demonstrates the process. Tr. 139-40.

Weeks Island generally blasts every day at the same time to make it easier for miners to know when the blast is going to occur. Tr. 146-47. Typically, a supervisor informs miners when blasting is going to occur on that day. Tr. 163. This information is communicated verbally to the miners on that shift, including contractors. Tr. 105-06. Four months prior to the incident, the time of blasting had been moved to 3:00 p.m., which is the end of the day shift. Tr 165. An hour before blasting is supposed to occur, miners will generally start exiting the mine. Tr. 147. When tying up the rounds for blasting, the leadman will sweep the mine areas to ensure there is no one left in the mine underground. Tr. 148.

On January 10, 2022, MSHA received a hazard complaint that Morton Salt blasted at the Weeks Island Mine while four contractors from American Mine Services were still underground and unaccounted for. Tr. 8. This blast took place around 3:00 p.m. Tr. 18. Prior to blasting, temporary production foreman (or leadman) Quinn Norwood and the powderman, in accordance with the SOP, went underground to drive through the mine and to tie-in the explosive rounds. Tr. 54-55. Video footage showed the contractors walking up to a shaft landing underground at 3:04 p.m. Tr. 31-32; Ex. S-3-11. The miners arrived back at the surface at 3:14 p.m. Tr. 61; Ex. S-3-14.

Inspector Chad Derouen conducted the investigation after the blast occurred on January 10, 2022, arriving at the mine at approximately 5:00 p.m., two hours after the blast. Tr. 17-18. Many of the people who had been present for the blast had already left, but the inspector was able to interview Quinn Norwood, who was the temporary production foreman that day. Tr. 19. As production foreman, Norwood was responsible for overseeing the production crew on shift and for blasting and clearing the mine. Tr. 20. Inspector DeRouen returned to Weeks Island the next day, January 11, to interview those present at the time of the blast including the four contract miners Tr. 23, 53. The contract miners told the inspector that they did not know the blast went off while they were underground, that they did not feel the blast, and that they only found out about the blast when they were back on the surface. Tr. 53-54. No methane had been detected from the blast. Tr. 56.

As part of his investigation, Inspector Derouen reviewed video footage of the room with the tag board and took notes based on his observations. Tr. 23; Ex. S-3. The footage was not retained by Morton Salt and was not presented at hearing. Jt. Stip. 12. The inspector testified that Norwood cleared the mine but "[d]idn't even look at the right side of the tag board" where the contractors' tags are located. Tr. 25; Ex. S-3-11. Norwood entered the room, and noticed there was a Morton Salt employee tag in the middle of the tag board that had not been turned over, indicating the employee was still in the mine. Tr. 26-27. Norwood then left the room to find that employee, and returned to the room to flip the tag to reflect that they were not in the mine. Tr. 27-28. Based on the actions in the video, the inspector did not believe that Norwood looked at the right side of the tag board where there were four contractors' tags that were flipped over to show they were still in the mine in either of the two times he was in the room to view the tag board. Tr. 27-28. The inspector did not see the powderman on the video, who is also tasked with checking the tag board under Morton Salt's SOP. Tr. 68. He testified that he did not speak with the powderman during the course of his investigation and did not know with certainty whether the powderman checked the tag board. Tr. 50-51.

When questioned by the inspector about the procedure he took to clear the mine, Norwood stated that he did not see the contractor tags on the board when he declared that the mine was clear and that he did not look at the right side of the board. Tr. 33-34; Ex. S-3-7. Norwood reportedly told the inspector that he "got in a hurry" when the inspector was conducting his interview. Tr. 32-33; Ex. S-3-7. Another employee also told the inspector that Norwood seemed to be "in a big hurry" to clear the mine. Ex. S-3-10.

The inspector testified regarding the hazards of blasting while there are still people underground. As a gassy mine, Weeks Island has a history of liberating methane after blasting. Tr. 37. Methane liberations are unpredictable, happen at various times and can cause secondary ignitions leading to a secondary blast. Tr. 36-37. Further, blasting can create sound and shock waves that can carry a long distance underground and have a concussive effect in confined spaces. Tr. 38. In certain circumstances, blasting can lead to flyrock or pieces of salt that can become projectiles. Tr. 39. The special investigator corroborated these hazards testifying that it is hazardous to leave miners underground during blasting because it exposes them to dangers such as fall of material, roof collapses, or if methane is unexpectedly liberated, explosions. Tr. 80.

In response to this violation, Inspector Derouen issued a citation, determining that it was reasonably likely to cause fatal injuries to four miners. Tr. 35-36, 39. He marked the violation as an unwarrantable failure because agents of the mine have a responsibility to miners under their watch which did not appear to be taken into consideration when it was time to blast. Tr. 40. The violation was also determined to be significant and substantial, because although there was no methane liberation in this instance, there is always the potential in a gassy mine for one that can lead to secondary explosions. Tr. 36-38. The inspector determined that the events which transpired on January 10, 2022, posed a high degree of danger. Tr. 40. The inspector marked the violation as high negligence because he believed that Norwood, as the foreman, had the experience to complete the task properly and failed to do so. Tr. 71. The investigator testified that this appeared to be an isolated incident and the condition was immediately abated. Tr. 59.

Special Investigator Mark Shearer also testified for the Secretary as to the findings of his special investigation. He did not speak to Quinn Norwood or view the video footage that the inspector did because it was no longer available. Tr. 76-78. The investigator recommended a 110(c) penalty be imposed on Norwood, because it was his job as the foreman to make sure that the mine was clear. Tr. 78. He credited the fact that Norwood removed the single Morton Salt employee tag as evidence that Norwood was present but found that Norwood did not look over the entire board. Because the tags were easy to recognize against the board itself and Norwood knew that there were contractors working that shift, the special investigator determined that the violation was blatant and obvious. Tr. 79–82. Shearer testified that the only way Norwood could have corrected the violative condition would have been to make sure they were out of the underground mine. Tr. 80. And even though Shearer had no specific information that Norwood knew at the time of the blast the miners were underground, it was the fact that there was so much overwhelming reason for him to know they were still underground that certainly factored into his decision to recommend a 110(c) penalty. Tr. 80-81. In other words, there is no excusing the fact that Norwood should have known those miners were still underground. The evidence was right in front of him on the board. It was just blatant and obvious. Tr. 82. Further, Shearer noted the actual location of the contract miners did not factor into his analysis because Norwood had no knowledge of their location at the time of the blast. Tr. 83-84. Shearer also found evidence that Norwood rushed through the blasting process, and that the operator recently changed the time of the blast from the start of the night shift to the end of the day shift as motivation for speeding up the process. Tr. 91-92.

Landon Olivier, the site safety trainer at the mine, accompanied the inspector when he investigated the violation and testified for the Respondent at hearing. Tr. 113. He confirmed that both Quinn Norwood and the powderman were disciplined for the incident. Tr. 113-14; Ex. R-H. As part of his own investigation, he interviewed the miners who had been underground during the blast, all said that they neither felt nor heard the blast. Tr. 115. He confirmed that the miners had been at the 1500 level of the mine, while the site of the blast was on the 1600 level. Tr. 115-17; Ex R-C. These levels are approximately 2,600 feet apart. Tr. 120. To get back to the surface, the miners needed to travel to the 1400 level, which is even farther from the blast site at approximately one mile away. Tr. 119, 121. In Olivier's opinion, the miners were not in a great degree of danger because they had been so far away from where the blasting took place. Tr. 122. He testified that Morton Salt had never been put on notice that greater efforts were needed for compliance regarding the regulation that miners should not be underground while blasting. Tr.

122. Finally, although the mine had liberated methane after blasting in the past, there had never been an explosion as a result of methane liberation during Olivier's employment. Tr. 127. He did acknowledge, however, that methane liberation is impossible to predict. Tr. 131-32.

Quinn Norwood testified for the Respondent regarding his involvement in the blasting incident. At the time of the blast, he was employed in the Miner A position, meaning that he performed all jobs in production. Tr. 139. He confirmed that he had received both powderman and blasting training. Tr. 139-40; Ex. R-E. As part of his responsibilities, he would act as a leadman and temporary production supervisor when supervisors were out. Tr. 142-143. This was the role he was in on the day of the blast. In the past, he has served for four weeks out of the year in this temporary role. Tr. 142-43. Norwood had participated in hundreds of blasts prior to January 10, 2022. Tr. 172, 177.

At hearing, Norwood testified that he was aware that contract miners were working the day of the blast, but he did not know they were still underground, and he did not see them in their work area when he was conducting his sweep. Tr. 156-57, 167-68. When he first checked the board, he saw that there was still a Morton Salt employee tagged in, based on the tag's location in the middle of the board. Tr. 153-54. Norwood left to check that the employee was not in the mine and returned to the board to flip the employee's tag over, looking at the board for a second time. Tr. 154-55. Before returning to the board to flip the tag, Norwood testified that he spoke to the powderman who told him that the mine was clear. Tr. 145, 171. He only saw the four contractor tags on the right side after the blast. Tr. 155, 179. Norwood denied rushing through the blasting procedures. Tr. 162.

Travis Mallette is a current Morton Salt employee who testified for Respondent. At the time of the incident, he was one of the contract miners who was underground. Tr. 188-89. He stated that he and his team knew what time the blasting was scheduled to occur on January 10, 2022, yet they were still underground at 3:00 pm. Tr. 190. He explained that he and the other miners took a bit longer to clean up than they normally would before leaving the mine to return to the surface. Tr. 195. He learned that the blasting had occurred after they returned to the surface, and that he did not feel or hear the blast. Tr. 191, 194. They had not been working on the 1600 level during the blast. Tr. 193.

IV. DISPOSITION

A. Citation No. 9646139

On January 12, 2022, Derouen issued 104(d)(1) Citation No. 9646139, which alleged:

> All development, production, and bench rounds shall be initiated from the surface after all persons are out of the mine. The Production Foreman on duty on the day shift, initiated three explosive face rounds from the surface while four Miners were underground, unaccounted for. Their tags remained on the tag in/tag out board when the board was examined and deemed "mine clear" by the Production Foreman. The Production Foreman engaged in aggravated conduct constituting more than ordinary negligence in that he knew the requirements of the standard

and still conducted blasting with four Miners underground. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1-1; Tr. 35-36.

Derouen designated the citation as a significant and substantial violation of 30 C.F.R. § 57.22601 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect four miners, and was caused by Respondent's high negligence. Ex. S-1-1. He also designated the citation as an unwarrantable failure. Ex. S-1-1.

i. Fact of Violation

The parties do not dispute the material facts surrounding the violation. Jt. St. 13. 30 C.F.R. § 57.22601(a) states that "[a]ll 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 ventilating air has passed over the blast area and through at least one atmospheric monitoring sensor." Here, blasting occurred while there were still miners underground. Jt. Stip. 8. Accordingly, the fact of violation is affirmed.

ii. Gravity

Inspector Derouen designated the citation as significant and substantial and reasonably likely to cause an injury that could be reasonably expected to result in a fatal injury. Ex. S-1. He testified at hearing that he selected "reasonably likely" and "fatal" because miners exposed to the blast can incur fatal injuries from flyrock and other projectiles. Tr. 35-36, 38-39. Methane liberations are also unpredictable, and can cause secondary ignitions leading to secondary blasts, which can have a concussive effect through shock or sound waves potentially causing flyrock or pieces of salt that become projectiles and can affect the entire mine. Tr. 36-39. In the inspector's determination, this violation rose to the level of significant and substantial (S & S). Tr. 47.

In order to establish that a violation of a mandatory safety standard is S&S, the Secretary of Labor must prove: (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). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

Since a violation of a mandatory safety standard has occurred, my analysis turns to the second step which requires a finding that the violation is reasonably likely to cause the occurrence of a discrete safety hazard. Here, I credit the testimony and experience of the inspector and the special investigator regarding the unpredictability of methane liberations, secondary blasts and potential concussive effects which can result in flyrock, projectile salt fragments, fall of material and roof collapses all of which put the entire mine at risk. Fortunately, there was no methane liberation as a result of this blast, but there is always potential for

liberation and for a secondary blast which increases the area where a miner may encounter a hazard beyond just the primary blast area. The specific hazard in an underground gassy mine is the unpredictable occurrence of an explosion as well as the above noted after-effects of a blast. It is noteworthy that Norwood himself testified that they cannot blast while miners are underground due to the mine's gassy nature, demonstrating a recognition on behalf of the operator of the risks associated with this act. The second step is satisfied.

The third step examines whether, based on the particular facts of the violation, the occurrence of the hazard would be reasonably likely to result in an injury. The Respondent contends that the particular facts of this violation reveal that the miners were working half a mile away from the blast and that there were no methane liberations, leaving the Secretary unable to satisfy the third element. R. Br. 13. While this may be true, these facts were only discovered after the blast had occurred and the hazards had been terminated. At the time of the blast, the miners were unaccounted for and their whereabouts unknown. This is exacerbated by the fact that when Norwood conducted his sweep of the mine, he did not find the miners in their normal work area where they would reasonably be expected to be found. I find it reasonably likely that four unaccounted-for miners were exposed to the hazards of an explosion; the repercussive impact of which would cause flyrock or salt projectiles, fall of roof materials or even collapse of roof for a period of fourteen minutes is reasonably likely to result in potentially fatal injury. In doing so, I conclude that the four unaccounted for miners were in fact exposed to the effects of a potentially fatal explosion because their location was unknown during those fourteen minutes.

Finally, the fourth element requires that the Secretary must prove a reasonably likelihood that the resulting injury would be of a reasonably serious nature. An injury of a reasonably serious nature does not require a specific type of injury. *S & S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury that would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element). I determine that given the hazards noted above the injuries expected to result from being underground during a blast are reasonably likely to be of a reasonably serious nature.

I affirm that this violation is significant and substantial and is reasonably likely to cause fatal injuries to four miners.

iii. Negligence and Unwarrantable Failure

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). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

More serious consequences are imposed for violations constituting the unwarrantable failure of the operator to comply with mandatory health and safety standards. The term "unwarrantable failure" arises in section 104(d) of the Mine Act, describing serious misconduct that triggers the issuance of a citation under that section. 30 U.S.C. § 814(d). The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987). The conduct that qualifies as unwarrantable failure is often characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006) (citing *Emery*, 9 FMSHRC at 2001). The Commission has recognized the close relationship between a finding of high negligence and a finding of unwarrantable failure. *See Dominion Coal Corp.,* 35 FMSHRC 1652, 1663 (June 2013) (ALJ), *citing San Juan Coal Co.,* 29 FMSHRC 125, 139 (Mar. 2007).

While these descriptors are helpful guideposts, the inquiry of whether conduct is "aggravated" is ultimately a holistic analysis of both aggravating and mitigating circumstances. Such circumstances include (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

The inspector designated the violation as high negligence and as an unwarrantable failure to comply with the mandatory standard.

a. Extent of the Violative Condition

The first factor to consider is the extent of the violative condition. The extensiveness of a violation is determined by examining "the extent of the affected area as it existed at the time" and "the number of persons affected by the violation." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014).

There were four unaccounted for miners underground during the duration of the blast for approximately fourteen to fifteen minutes. The Respondent contends that Norwood's actions to track down a Morton Salt employee who was still tagged in should be considered as a mitigating factor. While I acknowledge that this reduced the number of miners who were exposed to the hazardous condition from five to four, it did not lessen the risks to the four miners who were still underground and unprotected. Thus, I do not consider this to be a mitigating factor.

b. Length of Time

The Commission has highlighted the duration of the violative condition as a "necessary element" of the unwarrantable failure analysis. *IO Coal Co*., 31 FMSHRC 1346, 1352 (Dec. 2009). A duration of seconds or minutes often mitigates the severity of the violation. *See, e.g., Dawes Rigging*, 36 FMSHRC at 3080. However, when a hazardous condition is "readily distinguishable from other types of danger due to [its] high degree of danger [and] its obvious

nature," the brief duration of the hazard will not militate against a finding of unwarrantable failure. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sep. 2016) (quoting *Midwest Material Co*., 19 FMSHRC 30, 36 (Jan. 1997)) (internal quotations omitted).

The length of time that this violation existed was fourteen to fifteen minutes. While this may be viewed as a relatively short period of time this has to be balanced against the potentially fatal exposure to a blast, secondary explosion, exposure to flyrock or salt projectiles or roof collapse all of which are reasonably likely to cause a fatality. For this reason, the length of time of exposure in this case cannot be a mitigating factor.

c. Degree of Danger

The Commission has found that a high degree of danger presented by a violation constitutes an aggravating factor in support of a finding of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1355-56.

Here, the degree of danger was high. The inspector and the special investigator both testified regarding the multitude of hazards that exist from blasting while miners are underground, including fatal injuries from rockfalls and being hit by projectiles. Because the four contract miners were unaccounted for, the degree of danger is an aggravating factor.

d. Obviousness of the Violation

The obviousness of a violation can be an aggravating factor in the unwarrantable failure analysis. The contractor tags on the tag board were clearly in plain sight. Both the tags and the board have high contrast, which made them easy to identify visually. Most importantly, Norwood looked at the board not once but two times before proceeding with blasting. I find that this violation was obvious and as such, an aggravating factor.

e. Operator's Knowledge of the Violative Condition

An operator's knowledge of a violation is an important factor in unwarrantable failure analysis and is a requirement for a finding of high negligence under 30 C.F.R. § 100.3. *Maryan Mining, LLC,* 37 FMSHRC 1715, 1723 (Aug. 2015) (ALJ). Where an agent of an operator has knowledge or should have known of a safety violation, such knowledge should be attributed to the operator. *Martin Marietta Aggregates,* 22 FMSHRC 633, 637 (May 2000). The knowledge or negligence of an agent may be imputed to the operator. *Id.*

I find that the operator had knowledge of the violation. Quinn Norwood was the interim production foreman and was responsible for ensuring that the mine was clear and that no miner remained underground before blasting. Norwood admitted at hearing that he was aware that there were contract miners working at Weeks Island underground that day. While I credit his testimony that he would not have intentionally proceeded with blasting had he seen the contractor tags on the tag board, this does not excuse his oversight. This is exacerbated by the fact that when he did his sweep, he did not find the contractors where he expected them. I find that an experienced miner such as Norwood would have reasonably concluded that he needed to determine the whereabouts of the miners before blasting occurred.

Additionally, there is evidence that suggests the powderman, who is also required to check the tag board according to the SOP, did not check the board. Despite Norwood's testimony that the powderman told him that he checked the board, and the mine was clear, the powderman did not appear on the video recording that was viewed by the inspector. The Respondent as the operator should have known through their assigned agent, Norwood and employee powderman, that there were miners tagged-in resulting in a serious lack of reasonable care.

f. Abatement Efforts

Another relevant factor is whether the operator took action to abate the violative condition before the issuance of the citation or order. When an operator has been put on notice of a problem, "the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997).

While I credit Respondent for their efforts to train miners on their SOPs prohibiting blasting while miners are underground, that training did not prove effective in this instance where Norwood not once, but two times failed to see the contract miner tags on the board. This is exacerbated by the fact that he was aware the miners were not where he expected them to be when he did his pre-blast sweep of the mine. In addition, the powderman failed to follow the training as well in not checking the board as the SOPs required.

g. Notice to the Operator that Greater Efforts were Necessary

Finally, when an operator has previously committed similar violations, those violations are relevant to an unwarrantable failure determination to the extent that they give the operator notice that greater efforts are necessary for compliance with a safety standard. *Brody Mining,* 37 FMSHRC at 1691.

This citation is the first time Morton Salt has violated this particular standard. There is no evidence that Morton Salt was placed on notice that greater efforts were necessary for compliance with the standard.

h. Conclusion

Based on these factors, particularly the obviousness of the condition and the degree of danger, I affirm the inspector's designations that the violation was an unwarrantable failure and high negligence. Having "good reason" to believe that underground miners would not be impacted by a blast is not a substitute for verifying that they are no longer underground and are on the surface like the standard requires. Norwood examined the tag board twice before going forward with blasting. Missing the four contractor tags once constitutes high negligence. Missing the four contractor tags a second time is an unwarrantable failure and clearly demonstrates a serious lack of reasonable care.

I uphold the inspector's determination that the violation was a result of the operator's high negligence and unwarrantable failure.

B. Individual Liability

The Secretary also seeks to impose personal liability against Quinn Norwood for acting as an agent to operator Morton Salt. Section 110(c) liability for an agent is defined as:

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

30 U.S.C. § 820(c). "Knowingly" requires a finding that the agent knew or had reason to know of the violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16.

To establish individual liability, there is a three-part test: (1) that the agent knew or had reason to know about the violative condition; (2) that the agent was in a position to remedy the condition; and (3) that the agent failed to act to correct the condition. *Peabody Midwest Mining, LLC*, 44 FMSHRC at 526-27, 259. The agent's conduct or failure to act must be "aggravated." *Id.* at 527. Aggravated conduct encompasses more than just ordinary negligence.

Quinn Norwood was acting as the production foreman on the day of the incident. He had received all the proper training in order to perform the production foreman duties properly. The SOP implemented by the operator clearly states that the production foreman is responsible for ensuring that no one is underground when preparing to blast. It is also not disputed that Norwood was in a position to remedy the condition, and in fact did so for one Morton Salt employee who was still tagged in. He failed, however, to notice the four contractor tags remaining on the board indicating that four miners were still underground and proceeded to initiate the blast. This satisfies all three elements to establish individual liability.

Concerning Norwood's conduct, I find that it was aggravated. As the production foreman, Norwood had reason to know about the violative condition. He checked the tag board twice before proceeding with blasting, and somehow did not see the dark-colored tags against the board either of those times. Norwood testified that he knew there were contractors working that day and that he was aware they were on the 1600 level. However, he also testified that when he swept the mine prior to blasting, he did not find the four contractors where he expected them to be. An experienced blaster who participated in hundreds of blasts should know and follow the procedures in the SOP to achieve compliance with the standard. Further, the inspector's investigation revealed that Norwood stated that he was in a rush and another anonymous miner noted that Norwood appeared to be in a hurry. While Norwood disputed this in his testimony, I credit the inspector's contemporaneous notes and Norwood's own admitted failure to see the contractor tags to support the finding that he was in a hurry.

Accordingly, I find that Norwood was personally liable as an agent of operator Morton Salt for the violation.

V. 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. 9646139, the Secretary proposed a regularly assessed penalty of $12,754.00. Morton Salt does not have a prior history of violating this standard. The parties stipulated that the penalty will not affect Morton Salt's ability to continue in business. Jt. Stip. 6 As discussed above, I find that this is an S&S violation that is reasonably likely to result in fatal injuries to four miners as a result of Morton Salt's high negligence and unwarrantable failure. Finally, I find that Morton Salt demonstrated good faith in abating the citation. In light of these considerations, I find that the proposed penalty of $12,754.00 is appropriate.

Quinn Norwood, as the agent named in this matter, has been assessed a proposed penalty of $4,600 for his actions with respect to Citation No. 9646139. The same penalty criteria apply to Norwood as an agent. Norwood does not have a prior history of violating this standard. Concerns regarding his ability to pay the penalty were not raised. The penalty reflects the gravity and the negligence of the violation, and I find that the proposed penalty of $4,600 is appropriate.

VI. ORDER

The Secretary vacated Citation No. 9646138 prior to the hearing. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g., RBK Constr. Inc.,* 15 FMSHRC 2099 (Oct. 1993). It is **ORDERED** that Citation No. 9646138 is **VACATED.**

Further, it is **ORDERED** that Citation No. 9646139 is **AFFIRMED** as issued. Morton Salt, Inc., is **ORDERED** to pay the Secretary the total sum of **$12,754.00** and Quinn Norwood is **ORDERED** to pay **$4,600.00** within 40 days of this order.[2]

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

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[2] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 15, 2024

MINERAL MANUFACTURING CORP., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	CONTEST PROCEEDINGS Docket No. SE 2023-0185 Citation No. 9701784; 04/11/2023 Docket No. SE 2023-0186 Citation No. 9701785; 04/11/2023 Mine: Eufaula Plant Mine ID: 01-03237
SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MINERAL MANUFACTURING CORP., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. SE 2023-0191 A.C. No. 01-03237-576247 Docket No. SE 2023-0203 A.C. No. 01-03237-578487 Mine: Eufaula Plant

DECISION ON JURISDICTION

Before the Court are the parties' cross-motions for summary decision on jurisdiction.[1] For the reasons which follow, the Court finds that MSHA has jurisdiction over Mineral Manufacturing Corporation's Eufaula Plant. The only genuine jurisdictional contention in this matter is whether the Eufaula Plant is engaged in milling. If milling is occurring, then it is *ultimately, solely, and finally* up to MSHA and OSHA, not the regulated entity, to make the determination between themselves which entity will have jurisdiction over the milling activity.

For the reasons which follow, the Court finds that the Eufaula Plant performs milling of kaolin clay, and that it is not a ceramics manufacturing plant, and as such, per the Secretary of Labor's determination, it is under the jurisdiction of the Mine Safety and Health Administration.

Setting the Table; the Agreed-Upon Facts

[1] The Court also considered the parties' replies: Petitioner's Opposition to Mineral Manufacturing Corporation's Partial Motion for Summary Decision on the Issue of Jurisdiction and Mineral Manufacturing Corporation's Reply to Petitioner's Motion.

THE SECRETARY OF LABOR'S STATEMENT OF RELEVANT UNDISPUTED FACTS:

1. Mineral Manufacturing Corporation (MMC) owns and operates the Eufaula Plant located at 50 Harbison Walker Road, Eufaula, Alabama.
2. MMC does not engage in mineral extraction at the property where the Eufaula Plant is located.
3. MMC purchases and processes alumina clay from multiple vendors/mines located in Georgia and Alabama, one of which, the Fleming Pit Facility, was recently acquired by MMC.
4. All of the employees at the Fleming Pit facility are MMC employees.
5. MMC engages in kaolin clay extraction at pit sites in the Barbour and Henry County areas where MMC owns mineral rights or has permits pending, but these pits are not located on the same property as the worksite at issue in this case.
6. The kaolin clay contains varying amounts of alumina.
7. The purchased clay is brought to the Eufaula plant by truck and dumped on the Eufaula plant property.
8. As needed for processing, clay is picked up by loader and run through a crusher.
9. After the initial blending with other clays to reach the desired alumina content, the clay is run through a crusher.
10. Crushed and blended clay is transferred by loader to an extrusion operation to further reduce particle size and produce a smoother material.
11. The material is fed into a pug sealer mixer where water is added to reach a 16 – 18% moisture content.
12. The material is fed into a second pug sealer mixer and then into an extruder which compresses the alumina clay into a noodle type shape.
13. The material is taken from the extruder by loader and conveyor belt and loaded into a rotary kiln.
14. The kiln heats the material temperatures between 2850 and 3100 degrees F.
15. The very high temperature in the kiln causes a chemical reaction with the alumina clay, producing the ceramic material Mullite.
16. Mullite is primarily produced synthetically through applying heat and other processes to alumina clay to produce the ceramic material.
17. The Mullite produced by MMC is mostly sold for use as refractory material for use in the manufacturing of finished products.
18. MMC sells its ceramic mullite product as "kiln run" and also crushes and sizes mullite after kiln treatment and before shipment, according to customer needs.
19. Mullite is shipped in bulk by dump truck or packaged in bulk bags for shipment to customers.
20. OSHA and MSHA have entered into an agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide for coordination between MSHA and OSHA in all areas of

mutual interest. The parties have stipulated to the authenticity of this document, and the agreement is attached as Exhibit C.

21. MMC operates a ceramics manufacturing plant in Pennsylvania which further processes ceramic mullite from its ceramics plant in Eufaula, Alabama (Eufaula Plant).

22. The Pennsylvania ceramics plant has always been under OSHA jurisdiction.

Petitioner, Acting Secretary of Labor's Motion for Summary Decision on Jurisdiction ("Sec's Motion") at 3-5, (emphasis added).

Respondent Mineral Manufacturing Corporation's "Partial Motion for Summary Decision on the Issue of Jurisdiction" ("Respondent's Motion") is identical to the Sec's Motion. Respondent's Motion at 2-4.[2]

The Summary Judgment Standard

As Respondent notes, "Commission Procedural Rule 67 provides that summary decision is appropriately granted when "the entire record … shows (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R.§ 2700.67 (b). Respondent's Motion at 4. The Court finds that both elements are present in this matter.

The Applicable Statutory Provision

The Mine Act, at 30 U.S. Code § 802 – Definitions, provides "For the purpose of this chapter, the term - … "coal or other mine" means:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. *In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary*[3] [of Labor or his delegate] *shall give*

[2] Both motions have, as the last item, Item No. 23., which states "Counsel for MMC sent a letter dated January 18, 2023 to MSHA's District Managers in Birmingham, Alabama and Barbourville, Kentucky regarding MSHA's jurisdiction over its Eufaula Plant. That letter is attached as Exhibit D in the Sec's Motion. The Court did not include item 23 in the list above because it considers it to be irrelevant to the jurisdictional issue before it.

[3] Per 30 U.S.C. § 802(a), "Secretary" means the Secretary of Labor or his delegate.

delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

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

The Parties' Arguments, with the Court's Analysis[4]

The Secretary of Labor's Contentions

As the Secretary points out, the Mine Act's definition of a "coal or other mine" is very broad, to wit, 30 U.S.C. § 802(h)(1), as truncated and highlighted by the Court for the relevant language, defines a "coal or other mine" as:

[4] The Court notes that this issue of jurisdiction is not merely an academic one. The Eufaula Plant, which bears MSHA Mine ID: 01-03237, in the previous 6 years, had 47 cited 104(a) violations. These violations were all paid at their initial proposed penalty amount. *See Mine Data Retrieval System*, Violations, Mine ID: 0103237,1/1/2018-03/10/2024, MSHA (Mar. 11, 2024), https://www.msha.gov/data-and-reports/mine-data-retrieval-system.

Substantively, in the matters presently before the Court are two dockets. Docket No. SE 2023-0191, involves an alleged violation of 30 C.F.R. §56.14105, which asserts that "[m]aintenance work is being conducted at this operation on the Pug Mills while the equipment is not powered off and blocked against hazardous motion. Miners have been required to use plastic stakes to remove material buildup inside the pug mills by placing them through the guards of the pug mills by hand and using them to push the material off the sides and down into the mills. The mills have drums with teeth that process clay and rotate at approximate 1700 RPMs during operation. This practice occurs in order to prevent material in the mills from building up on the sides to the point of pushing the guards upwards, which activates t Pug Mills' emergency stop devices and halts production. The practice has been part of normal mining operations for an extended period of time, exposing miners to possible injuries from cuts, lacerations, and blunt force trauma. Mine management engaged in aggravated conduct constituting more than ordinary negligence by directing miners to conduct the cleanup activity around moving without ensuring the pug mills are de-energized and locked out to prevent hazardous motion. This violation is an unwarrantable failure to comply with a mandatory standard." Petition at 15.

Substantively, Docket No. SE 2023-0203, involves an alleged violation of 30 C.F.R. §56.12004 and an alleged violation of 30 C.F.R. §56.14201(b), which assert, respectively, that "[t]he outer jacket on the grounding lead on the portable welder wires were exposed to mechanical damage[]. The welder was not in use at the time of inspection and the leads was rolled up. The welder is used as needed for maintenance or repair in the plant area. This condi[tion] on exposes person to electrical shock and or burn hazards," and "[t]he conveyors and other related electrical driven equipment could not be seen from the control room. There was an audi[b]le device located on the top of the control that was not functioning properly when checked. The plant operator, clean up or maintenance personnel all have access to these areas at any time. Persons are exposed to an entanglement hazard that could cause serious injuries." Petition at 15-16.

> (A) an area of land from which minerals are extracted . . . , (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, **or resulting from, the work of extracting such minerals . . . , or used in, or to be used in, <u>the milling of such minerals</u>**, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. **In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.**

30 U.S.C. § 802(h)(1) (pertinent language emphasized by this Court).

> The Secretary notes that:
>
> The Mine Act does not define the term "milling" but gives the Acting Secretary the authority to make "a determination of what constitutes mineral milling." 30 U.S.C. § 802(h)(1). The Interagency Agreement identifies "milling" as an area within MSHA's regulatory authority and defines milling to include the processes of "sizing" and "drying." *See* 44 Fed. Reg. at 22829. According to Appendix A of the Interagency Agreement, milling is the process of separating valuable minerals from worthless material or "treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 Fed. Reg. at 22829.

Sec. Motion at 9.

The Court holds that the Secretary is clearly correct on this score – the Mine Act gives *the Secretary* the authority to make "a determination of what constitutes mineral milling." 30 U.S.C. § 802(h)(1). The Act's use, in 30 U.S.C. § 802(h)(1), regarding "making a determination of what constitutes milling for purposes of [the Mine Act]" vests that determination in the Secretary of Labor alone. That language does not suggest the determination is shared, collaboratively or otherwise, with mine operators. That authority results in a determination, *by the Secretary*, of whether the activity in question constitutes milling.

> As the Secretary notes, Appendix A of the Interagency Agreement provides that:
>
> milling includes one or more of the following processes: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing," [that] "crushing" is defined as "the process used to reduce the size of mined materials into smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved," [that] … "sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes[,]" [that] … "pulverizing" [is defined] as "the process whereby mined products are reduced to fine particles, such as to dust or powder size [,]" [and that] "kiln treatment" is defined as "the

> process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat."

Sec. Motion at 9-10.

Using that Interagency Agreement as its guidepost, the Secretary contends that MMC engages in milling by crushing, pulverizing, sizing, and kiln treating kaolin clay. Jt. Stip. 8-10, 14-16. Those cited stipulations, the Court observes, admit that the clay is run through a crusher, then subjected to an extrusion operation to further reduce particle size and produce a smoother material, then subsequently loaded into a rotary kiln for the purpose of heating the material, which process causes a chemical reaction with the alumina clay, with the result of producing the ceramic material Mullite. *Id.*

Thus, the product, Mullite, is produced by the steps described above to produce the ceramic material. *Id*. at 15. These described, stipulated, processes clearly fit within the Interagency Agreement as they include crushing, reducing the size of the clay, and heating the material. *Id*. at 10.

As noted in *Donoho Clay*, 3 FMSHRC 2381 (Oct. 1981) (ALJ), on March 29, 1979, the agreement between OSHA and MESA was superseded by an "MSHA-OSHA Interagency Agreement," which recognized the Secretary's dual enforcement role and the continuity of enforcement principles of the earlier agreement.

Section A (3) of the Interagency Agreement explains its purpose and general principles as follows:

> This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions. However, where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals on mite sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.
>
> The legislative history of the Mine Act indicates a Congressional intent to resolve jurisdictional doubts in favor of coverage under the statute. The Report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.
>
> S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978). Section B(5) of the Interagency Agreement recognizes the Congress' intent that doubts be resolved in favor of coverage under the Mine Act.

Donoho at 2383-2384.

The Court agrees with the Secretary's summary that:

> MMC runs its blended clay through a crusher before transferring the clay by loader to an extrusion operation to further reduce particle size and produce a smoother material. Jt. Stip. 9-10. MMC's kiln treatment of clay to remove water and moisture satisfies the Interagency Agreement's definition of milling because the treatment is integral to and part of the numerous other milling processes that occur at the property, with the kiln treatment occurring midway through the milling cycle and bookended by various crushing processes. Jt. Stip. 8-10; 13-15; 18. Regarding sizing, MMC sizes the material into various sizes, using screens to obtain desired product dimensions. Jt. Stip. 18.
>
> Like the operation in *Donoho*, MMC is a clay plant that relies primarily on milling processes to create its final product, synthetic mullite. Jt. Stip. 8-10, 14-16; 18. The mullite is a "primary consumer derivative" produced by milling kaolin clay into marketable for use in numerous refractory applications and industries but is not a finished ceramic product. 44 Fed. Reg. at 22,829. Rather, MMC's mullite is raw material sold in loose, bagged form and used by MMC's customers to fashion ceramic products. Jt. Stip. 19.

Sec. Motion at 10.

The Issue of Commerce

As the Secretary remarks:

> For MSHA to exert jurisdiction over MMC, the evidence must show not only that MMC is a "coal or other mine" under the Mine Act but also that MMC's products enter commerce or its operations affect commerce. *Cactus Canyon*, 45 FMSHRC at 394. Under Section 3(b) of the Mine Act, 30 U.S.C. § 802(b), commerce is defined as:

> trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]
>
> MMC argues that its process for milling clay does not fall under the definition of milling for the purpose of MSHA jurisdiction because the clay already entered commerce. This Court[5] has determined that a mine can be subject to MSHA jurisdiction even if the product the mine mills "was purchased on the open market." *Cactus Canyon*, 45 FMSHRC at 395. The Acting Secretary argues that the same reasoning should apply to MMC.
>
> MMC has sold its mullite to refractory companies to be used in the manufacturing of finished products. Jt. Stip. 17. Given these facts, MMC's operations affect commerce, and its products enter commerce. *See Cactus Canyon*, 45 FMSHRC at 394-395.

Id. at 11.

The Court finds that MMC's operations the Eufaula Plant constitute commerce.

This Matter, that is Whether the Respondent's Eufaula Plant is Subject to MSHA's Jurisdiction, has Been Decided Before.

The Secretary notes that this Court determined MSHA has jurisdiction over MMC's Eufaula Plant in 2011. This will be discussed below.

The Court agrees with the Secretary's observations that Section 3(h)(1)(C) of the Mine Act grants the Acting Secretary discretion to determine what constitutes milling, which discretion is granted deference both by the Commission[6] and the Courts, stating:

> Here, there are no genuine issues of material fact regarding how MMC produces mullite that would support Respondent's position that MMC should be under OSHA jurisdiction. However, even in close cases, the Mine Act grants the authority

[5] The reference to "[t]his Court" applies to a decision by another administrative law judge with the Mine Review Commission, not the undersigned.

[6] Highlighting the Commission's deference to the Secretary's discretion in such matters, in *Calmat of Arizona*, 27 FMSHRC 617, (Sept. 2005), one former Commissioner, in a separate affirmance, opined that, were it not for the mine operator's admission of MSHA's jurisdiction, *he* would have held that "the area in question, by geographical location, was more logically aligned with the concrete batch plant and more appropriately within OSHA's jurisdiction." *Id.* at 627, former Commissioner Michael Duffy, separate, concurring opinion. The problem, of course, is that Congress left such determinations to MSHA and OSHA, not to a Commissioner's personal take.

> to define the term milling to the Acting Secretary, and not to the ALJ or the Commission. 30 U.S.C. § 802(h)(1); *see also Carolina Stalite Co*. at 1551 (stating that the language of 802(3)(h)(1) gives the Acting Secretary discretion, within reason, to determine what constitutes mineral milling and that determining what constitutes milling is "just the sort of determination the Secretary was empowered by Congress to make."
>
> Here, the Acting Secretary determined that the activity at MMC's Eufaula Plant constitutes mineral milling within the authority of MSHA. The Acting Secretary's determination must be given the deference it is entitled to under the law. *Carolina Stalite*, 734 F.2d at 1551-53; *see also, In re Kaiser Aluminum and Chemical Co*., 214 F.3d 586, 591 (5th Cir. 2000) ("*Kaiser Aluminum*") (finding the Secretary should be given *Chevron* deference when determining what processes constitute milling); *Sec'y of Lab., Mine Safety & Health Admin. v. Nat'l Cement Co. of Cali*., 494 F.3d 1066 (D.C. Cir. 2007) (finding that 'the Secretary's interpretation of the law must be given weight by both the Commission and the courts' (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5–6 (D.C. Cir. 2003) (quoting *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting *S. Rep. No. 95–181, at 49 (1977),* U.S. Code Cong. & Admin. News 1977, pp. 3401, 3448). Here, the Acting Secretary's decision that MMC is a mine under the Mine Act because it is engaged in milling should be entitled to substantial deference because that decision was reasonable.

Id. at 12-13.

Deja Vu All Over Again[7]

As mentioned above, in 2011, MMC contested MSHA's jurisdiction over the Eufaula Plant, and its motion for (ALJ Moran).

> The Secretary points out, in denying MMC's earlier motion:
>
> ALJ Moran stated, "the Secretary, per the Mine Act, need only show that milling occurs and that it has made the determination that MSHA should oversee that activity. Thus, the Contestant is not entitled to weigh in with its views over which entity, MSHA or OSHA, is the more appropriate overseer." *Id*. at *5, footnote 8. Moreover, the Court recognized the Mine Act's expansive jurisdictional provision stating, ". . . the case law has been well established that Congress' definition of a mine is quite broad and not limited to classic lay understandings of that term. Beyond that, Congress expressly included milling activities within the [Mine] Act's coverage." *Id*. at *6. As the Court held in 2011, the Act's broad definition of the

[7] The phrase "Deja Vu All Over Again" is attributed to the famous Yankees baseball catcher, Yogi Berra. *Deja Vu All Over Again,* WIKIPEDIA (Mar. 13, 2024), https://en.wikipedia.org/wiki/Deja_Vu_All_Over_Again#:~:text=%22D%C3%A9j%C3%A0%20vu%20all%20over%20again,Again%2FThe%20Best%20of%20T.

> term "coal or other mine" and the Acting Secretary's reasonable determination that MMC engages in milling are sufficient bases to demonstrate that MSHA's exercise of jurisdiction over MMC's Eufaula Plant is legally proper.

Sec. Motion at 11-12.

The Court reviewed its February 2011 decision denying Mineral Manufacturing's Motion for summary decision and finds that it encompasses the issues raised in the Respondent's present Motion, which pertained to the same Eufaula Plant. As this Court decided in its summary decision pertaining to this very mine, MMC's Eufaula Plant is within MSHA's jurisdiction as it engages in milling. *Mineral Mfg. Corp. v. Sec. of Labor, Mine Safety and Health Administration*, 2011 WL 13550393, (Feb. 2011).

In that 2011 decision, this Court also:

> [took] note that the interagency agreement allows for a resolution process when there is a question of jurisdiction between OSHA and MSHA. It states that "when any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy." MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22,827 (Apr. 17, 1979), amended by 48 Fed. Reg. 7, 521 (Feb. 22, 1983). As advised by the interagency agreement, the District Manager of MSHA's Metal/Non-Metal Southeastern District, Michael A. Davis, and the Regional Administrator of OSHA, Benjamin Ross, discussed on January 21, 2011 the issue of whether MSHA or OSHA held proper jurisdiction over the Eufaula Plant. The jurisdictional issue was resolved in favor of placing the Eufaula Plant within the jurisdiction of MSHA. (Decl. of Michael A. Davis 4.) Although their determination is not binding upon this Court, it provides persuasive guidance that the Eufaula Plant lands squarely within the jurisdiction of MSHA.

Mineral Mfg. Corp, 2011 WL 13550393, at n. 9.

The Contentions of the Respondent, Mineral Manufacturing Corporation[8]

The Respondent's argument section refers at the beginning to the definition of a mine. However, with that start, it avoids critical, adverse, language from that definition, dropping the following key words from Congress that:

[8] Non-issues do not warrant any extended discussion. Accordingly, the subject of commerce, as referenced above, is sufficiently addressed. That the Acting Secretary also has the *burden of proof*, to establish that jurisdiction exists, is not in dispute either. Respondent's Motion at 4, citing Section 4 of the Mine Act and *Secretary of Labor v. Bowman Constr. Co., Inc*, 36 FMSHRC 683, 688 (2014). The Secretary has met its burden of proof on these issues.

> **In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration** resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

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

Respondent then cites to *Secretary of Labor v. Cranesville Aggregate Cos*., 878 F.3d 25 (2d Cir. 2017) ("*Cranesville*") as an example of a court rejecting MSHA jurisdiction, favoring OSHA jurisdiction. Looking to the Interagency Agreement, at Paragraph B.6, the Respondent contends that "certain types of facilities are *categorically covered* by each agency." Respondent's Motion at 8. (emphasis added). The Court does not consider *Cranesville* to be instructive. As a start, the jurisdiction of the Second Circuit Court of Appeals does not include Alabama.

More significantly, and ironically, Cranesville was arguing *that MSHA* should have jurisdiction over the safety violations.

The case also provides a window into the mine's understandable interest in having OSHA, not MSHA, have jurisdiction of the Eufaula Plant, as the Occupational Safety and Health Review Commission. In fact, the OSHA Administrative Law Judge ("ALJ") vacated the citations, finding that jurisdiction belonged to MSHA. The Second Circuit determined that the ALJ failed to give deference to the Secretary's determination giving jurisdiction, *in this instance,* to OSHA for this mine's bag plant. That Court noted that interagency Memorandum of Understanding ("MOU") between OSHA and MSHA explains what constitutes a mine, and therefore subject to MSHA regulation, and that the MOU defines "milling" as the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives and that drying is included as milling. *Cranesville* at 29.

The Circuit recognized that though the MOU offers a list of mineral milling, it is a non-exhaustive list. *Id.* And, it must be said, that *non-exhaustive list* provides some very important information, explaining it includes:

> the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and **enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility**.
>
> *Id.* (emphasis added).

The focus for that decision involved one product: sand. Critically, however, and a significant distinguishing factor from this case, MMC's Eufaula Plant, *the experts in the Cranesville case, all agreed that the sand delivered to the Bag Plant was a finished product*. *Id*. at 31.

That is not the case here as the Eufaula Plant is not dealing with a finished product. Again, ironically, Cranesville's expert was asserting that the jurisdiction belonged to MSHA as "the drying process employed at the Bag Plant was similar to other drying operations which were found to make up part of the mining process and therefore was subject to MSHA authority." *Id*.

At the end of the day, OSHA's jurisdiction was upheld by the Second Circuit by its determination that "the overall work at the Bag Plant was unrelated to the milling process." *Id*. at 35. As that Court remarked, "because the Secretary has authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference." *Id*. at 36. Absent an unfounded, outlandish, determination by the Secretary, which clearly did *not* occur here, the substantial deference principle applies.

Although the Respondent insists that the Eufaula Plant is a "ceramic plant," the *label* that *it wishes to* applies is not determinative.[9] Instead, it is a functional analysis which is partnered with the Secretary's broad authority under 30 U.S.C. § 802(h)(1). This authority expressly confers *due consideration* to the convenience of administration in the Secretary's determination of what constitutes mineral milling in delegating to one Assistant Secretary all authority with respect to the health and safety of miners employed at one physical establishment.

The Court notes that in *Sec v. Drillex*, 16 FMSHRC 2391, (Dec. 1994), the Commission observed that the:

> term "milling" includes processes by which minerals are made ready for use. *See DMMRT at 706; Webster's Third New International Dictionary, Unabridged 1434 (1971).* The Interagency Agreement further defines "milling" as:
>
> the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.
>
> 44 Fed. Reg. at 22829. The Interagency Agreement includes "crushing," "the process used to reduce the size of mined materials into smaller, relatively coarse particles," among milling processes subject to MSHA's regulatory authority. *Id*. Drillex crushed stone into gabion and smaller particles and separated usable stone from undesired contaminants. Therefore, Drillex engaged in milling. *See Donovan v. Carolina Stalite Co*., 734 F.2d 1547, 1551-54 (D.C. Cir. 1984).

Drillex at 2395.

[9] In its Reply to Petitioner's Motion, the Respondent merely continues, at length, its assertion that its Eufaula Plant is a ceramic plant. As mentioned, the label Respondent would like to apply is not determinative. It is a functional test, not a naming test, and the joint stipulations are this mine's undoing.

Conclusion:

Mine Operators do not have a seat at the table when it comes to making a determination of what constitutes mineral milling for purposes of the Mine Act. Absent completely unfounded, irrational, reasons presented for such determinations, it is up to MSHA and OSHA to determine which entity exercises jurisdiction over their respective Acts.

It bears repeating that Congress has clearly spoken to this issue in Mine Act itself stating:

> (B) **In making a determination of what constitutes mineral milling** for purposes of this chapter, **the Secretary** shall give due consideration to the **convenience of administration** resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

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

In sum, it may be said, the Eufaula Plant is milling, still milling, after all these years, and therefore the Court agrees with the Secretary that the Respondent's claim that it does not engage in milling of the clay "is contrary to the Mine Act, authoritative guidance on the issue of jurisdiction, and Commission case law interpreting this issue." Sec. Motion at 13.

Considering the above, and in light of the Joint Stipulated Facts, the Court finds there is no genuine issue of material fact, and that, as applied here, designating the activity at Eufaula Plant as performing milling is reasonable and the Acting Secretary's interpretation here of the term "milling" is within the bounds of her discretion. Restated, it is not for a mine operator to redesignate the description of its operation, in this case calling it a "ceramic manufacturing plant" and, by employing that new nomenclature, carry the day, when the facts, here the stipulated facts, establish that the plant is engaged in milling.

Accordingly, the Court **GRANTS** the Acting Secretary's Motion for Summary Decision on Jurisdiction, and enters this **ORDER**, **AFFIRMING MSHA's jurisdiction over the Respondent, Mineral Manufacturing Corporation's Eufaula Plant.**

SO ORDERED.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

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

March 19, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HEIDELBERG MATERIALS SOUTHWEST AGGREGATES, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0165-M A.C. No. 41-00025-574949 MineBridgeport Plant

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING THE SECRETARY'S CROSS-MOTION FOR SUMMARY DECISION

This case is before me upon the Petition 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 ("Mine Act"), 30 U.S.C. § 815. The Secretary alleges in Citation No. 9644299 that Heidelberg Materials Southwest Aggregates, LLC ("Heidelberg" or "Respondent") violated 30 C.F.R. § 56.14105 by not blocking the hot water and steam inside an 18-inch flex pipe that burned four miners trying to unclog the slurry line. On June 14, 2023, Chief Judge Glynn F. Voisin assigned me this case and attached a copy of my prehearing order, which required the parties either to settle the matter or position it for hearing by August 23, 2023. The parties sought extensions of the deadlines, which I granted. The parties timely filed their prehearing reports, and pursuant to my November 30, 2023, notice and order, I set this case for a hearing to be held on April 9–10, 2024, in Dallas, Texas.

On December 8, 2023, Heidelberg filed Respondent's Motion for Partial Summary Decision. The motion argues that section 56.14105, 30 C.F.R. § 56.14105, does not apply to Citation No. 9644299, one of the two violations contained in this docket, and thus the citation should be vacated. In response, the Secretary on December 20, 2023, filed her Acting Secretary's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision, which requests that I determine the cited standard is appropriate for the circumstances described in Citation No. 9644299.[1] Heidelberg filed Respondent's Opposition to the Secretary's Cross-Motion for Summary Decision on January 2, 2024.[2]

[1] I consider the Secretary's cross-motion to be for partial summary decision to address the issue of whether the noted standard applies to the facts alleged. Respondent still contests the gravity and negligence determinations, thus requiring a hearing on those issues.

[2] In this decision I use the following abbreviations: Respondent's Motion for Partial Summary Decision ("Mot."); Acting Secretary's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision ("Sec'y Cross-Mot."); Respondent's Opposition to Secretary's Motion for Summary Decision ("Resp't Opp'n").

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id*. at 2988 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

In reviewing these cross-motions for summary decision, I must determine whether there is no issue as to any material fact before determining which moving party is entitled to summary decision as a matter of law. Counsel for the parties stated in a conference call with my law clerk their belief that the facts surrounding the alleged violation were undisputed. The parties have submitted stipulations and attached affidavits, which I discuss at length below.

I. STIPULATIONS AND FACTUAL STATEMENTS

A. Stipulations

The following stipulations are taken from the parties' filings as follows:

1. At all times relevant to these proceedings, Respondent was an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d). (Resp't Prehr'g Statement at 2; Sec'y Prehr'g Statement at 1.)
2. With respect to these proceedings, Respondent is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801, et seq. (Resp't Prehr'g Statement at 2; Sec'y Prehr'g Statement at 1.)
3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act. (Resp't Prehr'g Statement at 2; Sec'y Prehr'g Statement at 1.)
4. The individual whose signature or name appears in Block 22 of the Citation at issue in this proceeding is an authorized representative of the Secretary of Labor. The inspector was acting in an official capacity when he issued the Citation. (Resp't Prehr'g Statement at 2–3; Sec'y Prehr'g Statement at 1.)
5. The Citation at issue in this proceeding was properly served upon Respondent, as required by the Mine Act. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
6. The Citation in this proceeding may be admitted into evidence for the purpose of establishing its issuance but not necessarily for the truthfulness or relevancy of any statements asserted therein. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)

7. The proposed penalty will not affect Respondent's ability to remain in business. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
8. Respondent demonstrated good faith in abating the alleged violation. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)

B. Factual Statements

The relevant, uncontested, and material facts taken from Respondent's motion and the parties' filings are as follows:

1. On August 5, 2022, a slurry line at the Plant was clogged. (Mot., Ex. A at 1: Citation No. 9644299; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
2. The slurry line is between the 10SU001 Tank and the 70SU001 Tank. (Mot., Ex. B at ¶ 2: Affidavit of Robert Branch.)
3. A pump connected to the slurry line has a rotating impeller that creates suction to move the slurry down the line. (Mot., Ex. B at ¶ 3: Affidavit of Robert Branch.)
4. The impeller is the only mechanical moving part of the pump on the slurry line. (Mot., Ex. B at ¶ 4: Affidavit of Robert Branch.)
5. When the pump is off, the impeller does not move, and no material can pass through the pipe or past the pump. (Mot., Ex. B at ¶ 5: Affidavit of Robert Branch.)
6. The pump is near the suction flex hose, but the impeller sits deeper into the connecting pipe and away from anyone working to remove the suction flex hose. (Mot., Ex. B at ¶ 6: Affidavit of Robert Branch; Mot., Ex. C at 1: Photograph of Slurry Line with Suction Flex Hose Removed and Next to Pump Connector.)
7. Four miners—three Heidelberg employees and one contractor—attempted to clear the clog. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
8. In a first attempt, the miners ran the pump connected to the slurry line, but this attempt was not successful. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
9. In a second attempt, the miners proceeded to remove a suction flex hose to access the material and clean it out. (Mot., Ex. A at 1; Mot., Ex. C at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
10. The pump was off during this second attempt. (Mot., Ex. A at 1; Mot., Ex. B at ¶ 8: Affidavit of Robert Branch; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
11. When the miners removed the suction flex hose, a sudden release of hot water and steam injured the miners. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
12. On October 11, 2022, the Secretary issued Citation No. 9644299 alleging that Heidelberg violated the safety standard at 30 C.F.R. § 56.14105 "by not blocking the hot water or steam from the slurry line." (Mot., Ex. A at 1.)

C. Citation No. 9644299 Allegations

MSHA Inspector James D. Redwine, who issued Citation No. 9644299 on October 11, 2022, designated the alleged violation as highly likely to result in fatal injury to four miners.

(Mot. at Ex. A.) He made the following allegations in the "Condition or Practice" section of Citation No. 9644299:

> A serious accident occurred at this mine involving 3 miners and 1 contractor, while attempting to unplug a slurry line the miners had ran the slurry pump for several minutes trying flush out the slurry line out. With no success in unplugging the line, they decided to break the line loose by the 18-inch flex pipe after removing the 30 bolts that holds the line together. They then connected a come-a-long to pull the flex pipe out, in this process maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. This condition exposed miners to serious injuries by not blocking the hot water or steam from the slurry line.
> Standard 56.14105 was cited 1 time in two years at mine 4100025 (1 to the operator, 0 to a contractor.)

(Mot., Ex. 1.)

D. <u>Affidavit of Heidelberg's Robert Branch</u>

I, Robert Branch, based on my personal knowledge and belief, do hereby declare and state as follows:

1. My name is Robert Branch, and I am a leadman at the plant. I have been in the mining industry since 1986. I have worked with the type of slurry pump at the Bridgeport Plant for over two decades, and I am familiar with how the system operates.
2. There is a slurry line between the 10SU001 Tank to the 70SU001 Tank.
3. A pump connected to the slurry line has a rotating impeller that creates suction to move the slurry down the line.
4. The impeller is the only mechanical moving part on the slurry line.
5. When the pump is off, the impeller does not move, and no material can pass through the pipe or past the pump.
6. The pump is near the suction flex hose the crew removed on August 5, 2022, but the impeller sits deeper into the connecting pipe and away from anyone working to remove the suction flex hose.
7. On August 5, 2022, I was periodically with the four-man crew attempting to clear the clogged line.
8. I saw the four-man crew while they were in the processes of removing the suction flex hose. At that time, the pump was off.
9. I was not with the four-man crew when they removed the suction flex hose.

(Mot., Ex. B.)

E. Declaration of MSHA's James D. Redwine

I, James D. Redwine, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an employee of the Mine Safety and Health Administration ("MSHA"), United States Department of Labor, where I serve as a Mine Safety and Health Specialist. I am fully familiar with the facts and circumstances of the above-captioned case.
2. The information contained in this Declaration was obtained from my personal knowledge and from my inspection of the Bridgeport Plant on August 5, 2022.
3. I have been an inspector for 11 years.
4. Prior to working for MSHA, I worked at Texas Industries in Bridgeport, Texas for 28 years.
5. In total, I have 39 years of experience in the mining industry.
6. It is not uncommon for slurry lines, like the one in this incident, to become clogged and require maintenance or repair, including breaking the line loose to remove the clogged material.
7. I have performed this task at least 20 – 30 times during my career.
8. The pump is an essential and integral part of the slurry line. The slurry line cannot function without the pump.
9. The pipe, including the flex hose used in this instance, is also an essential and integral part of the slurry line. The pump serves no purpose without being connected to the pipeline.
10. When the pump was run repeatedly to clear the clogged material, the limited volume of water inside the part of the line had nowhere to go. As a result, the pump heated that water to boiling, and caused pressure and steam to build up in the pipe.
11. The pressure and steam was sealed inside the line, and it was all released suddenly when the come-along pulled the piece of flex hose off the line.

(Sec'y Cross-Mot., Ex. 1.)

II. ARGUMENTS AND ISSUES

In Respondent's motion for partial summary decision and in its opposition to the Secretary's cross-motion for partial summary decision, Heidelberg argues that there is no genuine issue as to any material fact and that it did not violate section 56.14105 as a matter of law. (Mot. at 7; Resp't Opp'n at 1.) Heidelberg argues that the language of the standard is unambiguous, and therefore the Secretary's interpretation should not be entitled to deference. (Mot. at 7; Resp't Opp'n at 1.) Heidelberg also argues that the Secretary, in her cross-motion, omitted analysis of whether her interpretation is reasonable and instead skipped to whether the notice provided by the regulations satisfies due process. (Resp't Opp'n at 5–7.)

The Secretary filed a combined Response to Heidelberg's Motion for Summary Decision and Cross-Motion for Summary Decision. The Secretary argues that (1) Heidelberg was performing maintenance and repair on the slurry line; (2) the cited standard does not require that the machinery or equipment be powered; (3) even if the standard required the machinery or

equipment to be powered, the standard applies because the pump is powered machinery, and it is connected and integral to the function of the slurry line; (4) the release of hot water and/or steam is hazardous motion; and (5) the term "blocking" means to prevent or obstruct movement or progress. (Sec'y Cross-Mot. at 8–15.)

The issues the parties have put before me are: (1) whether section 56.14105 applies to the facts presented by the parties in Citation No. 9644299; (2) whether the language of the standard, on its face, is ambiguous; and (3) whether either party is entitled to a ruling on the application of section 56.14105 as a matter of law.

For the reasons discussed below, I **DENY** both parties' requests for summary decision.

III. DISCUSSION AND ANALYSIS

Heidelberg attacks the Secretary's reading of the standard on multiple fronts. First, Heidelberg argues that the equipment or machinery cited in Citation No. 9644299 is not covered by section 56.14105 because this standard applies only to "powered" equipment or machinery. (Mot. at 7–13; Resp't Opp'n at 6–7.) In that vein, Heidelberg asks me to view the slurry line (i.e., the 18-inch pipe connecting two silos that use a pump to manage the flow of slurry) as an individual piece of equipment, which Heidelberg argues is not powered in any way. (Mot. at 14.) Second, Heidelberg argues that "hazardous motion," as that term is used in the standard, can only be concerned with the actual movement of the equipment or machinery – not with the movement of any substance or material within the equipment or machinery. (Mot. at 12; Resp't Opp'n at 7.) Lastly, Heidelberg takes issue with the terms "maintenance" and "repair" as they are used in the standard, arguing that its miners were not involved in such activities as envisioned under the standard. (Resp't Opp'n at 4; Mot. at 13–14.)

In response to Heidelberg's arguments on powered machinery or equipment, the Secretary argues that Heidelberg's motion "asks this court to dissect the specific pieces of equipment and the process in such a way that the standard does not apply[, and that s]uch a disjointed view undermines the purpose of the standard, which is to protect miners from the release of hazardous energy or motion during maintenance or repairs." (Sec'y Cross-Mot. at 15.) Thus, whether the pipe in Citation No. 9644299 is covered under this standard may hinge on whether the pipe is part of an integrated, powered pumping system.

However, after a review of the record before me, I determine that neither party is entitled to summary decision because the parties disagree on a material factual determination—that is, whether the slurry pipe is an integral part of an overall slurry line system containing the pump. That factual determination is material to determining whether Heidelberg's plain reading of section 56.14105 entitles it to summary decision. Likewise, that same factual determination affects the analysis of the interpretation of the other language contained in section 56.14105.

Here, the parties submit a competing affidavit and declaration in support of arguments which are at odds factually. Heidelberg argues the pipe is an individual piece of equipment that is not powered and points to the affidavit of Robert Branch to make its claim. (Mot., Ex. B.) On the other hand, the Secretary argues the pipe is part of an integrated slurry line system that includes

the pump, essentially negating Heidelberg's reading of the standard, and points to the declaration of MSHA Inspector James Redwine to make its claim. (Sec'y Cross-Mot., Ex. 1.)

The parties want me to cast the die for one side based on a declaration or affidavit that inherently conflicts on a material fact, which comes without the benefit of witness testimony that is subject to cross-examination. I decline their invitation when a fact material to the outcome is in dispute.

Furthermore, the parties argue over the terms "hazardous motion," as well as the definitions of "maintenance" and "repair." (Resp't Opp'n at 4; Mot. at 8, 12–14; Sec'y Cross-Mot. at 10–13.) Similarly, resolving the material fact of whether the pipe is part of a system may affect the analysis of these legal questions.

Consequently, despite the parties stating that no facts were in dispute, I determine that the parties do not agree on a material fact in this case, as they submitted competing affidavits on the factual determination of whether the pipe in question may be considered part of an integrated system of machinery or equipment. I am bound by Commission Rule 69 to grant summary decision only when "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact." 29 C.F.R § 2700.69. I conclude that there is an issue of material fact and thus neither party can prevail as a matter of law.

IV. ORDER

Respondent Heidelberg Materials Southwest Aggregates' Motion for Partial Summary Decision is hereby **DENIED**, and the Acting Secretary of Labor's Cross-Motion for Summary Decision is **DENIED**. The issues involving Citation No. 9644299, as well as the other citation contained in this docket, will be addressed in a decision issued after the scheduled hearing on April 9–10, 2024, in Dallas, Texas.

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

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