

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2013

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2009-383-R
	:	Citation No. 8007661; 03/06/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 36-05466
ADMINISTRATION, (MSHA),	:	Mine: Emerald Mine No. 1
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-496
Petitioner	:	A.C. No. 36-05466-183943-02
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	Mine: Emerald Mine No. 1
Respondent	:	

DECISION AND ORDER

Appearances: Patrick W. Dennison, Esq., & Jason P. Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Pamela Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This proceeding is before me on a petition for civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against Emerald Coal Resources, LP (hereinafter "Respondent" or "Emerald") at the Emerald Mine No. 1 pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (hereinafter "the Mine Act" or "the Act"), the Secretary seeks penalties in the amount of \$12, 265 for two alleged violations of the Secretary's mandatory safety standards for underground mines. The Secretary originally charged Respondent with 10 alleged violations. Four were settled prior to the hearing, three were settled during the hearing, and one was

dismissed as the Respondent agreed to accept the violations as written leaving the remaining two alleged violations for decision in Docket No. PENN 2009-496. The three citations that were settled during the hearing were Nos. 8006756, 8006758, and 8006759.¹ The terms of the settlement were set forth in a written motion, which terms were approved by the court. The parties presented testimony and documentary evidence at the hearing conducted on November sixth, seventh, and 8th, 2012 in Pittsburgh, PA.

For the reasons set forth below I affirm Citation Nos. 8006753 and 8007661 and find a non-S&S violation of the latter. I also assess civil penalties of \$3,493.00 and \$5,000.00 respectively.

STIPULATIONS

The Secretary and Respondent agreed that the following stipulations should be included in the record:

1. Emerald is an “operator” as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the coal mine at which the Citations at issue in this proceeding were issued.
2. Operations of Emerald at the coal mine at which the Citations were issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designed Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
4. The individuals who signatures appear in Block 22 of the Citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Citations were issued.
5. True copies of the Citations at issue in this proceeding were served on Emerald as required by the Mine Act.
6. Emerald demonstrated good faith in the abatement of the Citations.
7. The penalties that have been proposed will not affect Emerald’s ability to continue in business.

THE REMAINING CITED VIOLATIONS

1. Citation No. 8007661

This 104(a) citation was issued on March 6, 2009 at 5:53 p.m. and was based upon the inspector’s observation of a violation of 30 C.F.R. §77.200. This safety standard states:

¹ A Decision Approving Partial Settlement for these eight settled citations was issued separately.

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

In his narrative, the inspector found:

Three structural support columns located on the sixth floor of the prep plant were not being maintained in good repair. The second column in the second row from the MCC room showed approximately 30 percent width loss on the creek side flange were (sic) a seventh floor beam connects to it. The fourth column in the same row was found to have 7 areas of width reduction ranging from approximately 30 to 50 percent. The fifth column in the same row was found to have approximately 30 to 50 percent reduction on all four sides and two holes ranging from ½ inch to 1 inch. 2 previous violations of this standard in the past 2 year.

(Government Exhibit 1).²

The inspector noted that the risk of injury or illness for this violation was “reasonably likely,” “fatal,” “S&S,” and would have affected 10 persons. He further noted that Respondent exhibited “moderate negligence.” The proposed penalty for this citation was \$8,209.00. The citation was extended on four occasions and was terminated on April 21, 2009 when the repairs were completed on the three cited columns.³ The inspector also issued a 107(a) imminent danger order which was vacated or terminated following an inspection by an MSHA civil engineer.

ISSUES

Did Respondent violate 30 C.F.R. §77.200 and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

THE SECRETARY’S EVIDENCE

1. Testimony of Tom McCort

Mr. McCort is an inspector trainee for MSHA having just returned to MSHA after approximately four years as a surface and mine inspector. His second stint with MSHA began approximately one month before this hearing. His private sector experience includes approximately three and a half years doing shaft and slope construction maintenance and underground maintenance and repair. Additionally, Mr. McCort worked for Local 549 of the Ironworkers out of Wheeling for approximately three to three and a half years doing construction

² Hereinafter Government Exhibits will be cited as “GX” followed by the number and Respondent’s Exhibits will be cited as “RX” followed by the number.

³ The inspector also noted that, “[t]his citation is a contributing factor to the issuance of the 107(a) Order No. 8007662.” This imminent danger Order is no longer in contest, but will be discussed as necessary in this decision.

and maintenance of steel structure, maintenance on building reinforcing bars and generally anything related to steel and iron. (Tr. 33-37).

Inspector McCort issued this citation because he found some structural columns on the sixth floor that had some severe thinning and holes in them and a general thinning of some of the structural members that he examined. (Tr. 40). The building examined was a prep plant which is a building that is used to clean coal. This prep plant was constructed of steel members, concrete floors, concrete floor beams, and sheeting for siding. He believed the plant had 13 levels. (Tr. 40). The primary focus of the examination was the sixth floor of the prep plant and McCort was accompanied by Floyd Campbell, a union representative, and Tim Drone who the inspector believes was the maintenance manager of the plant at the time. (Tr. 41). Mr. McCort went to the plant on March 6, 2009 in response to a 103(g) hazard complaint.⁴ (Tr. 42).

The examination of columns on the sixth floor eventually focused on three columns and those columns were iron and steel. They were located in the second row and were identified by McCort as the second, fourth, and fifth columns from the plant control room on the creek side of the plant. (GX 3). (Tr. 43-46). In examining the columns, McCort used a hammer to clean off the columns and also to sound the columns.⁵ In one particular instance the column was so thin that the hammer went through it. (Tr. 46). The examination of the three columns continued with the taking of measurements. With the exception of column five, anyplace that McCort saw noticeable thinning of the columns, he measured the thickest part of the column and the thinnest part of the column to determine how much structure was lost on the column. (Tr. 47).

On column 2 of row 2, McCort saw section loss on the flange at the top of the column as well as a lot of severe rust. Measurements were taken showing that the flange measured 3/8 of an inch at the bottom and 1/4 of an inch at the connection point. (Tr. 50-51). The quarter inch measurement was taken because it was visibly thinner and appeared to be the thinnest portion in that area. The 3/8 measurement was taken because it appeared to be the thickest part of the column. The amount of loss to the flange at the top of this column was approximately 30%. (Tr. 52).

In the fourth column, McCort observed multiple spots that indicated flange thinning and web thinning. He also sounded this column with a hammer and could hear this difference

⁴ A 103(g) hazard complaint enables miners to make complaints on safety or health hazards when there are reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists. This section of the Act creates a right to an immediate inspection by the Secretary. 30 U.S.C. §813(g)(1). In this case there were five complaints about conditions on the sixth floor. All five were investigated and four resulted in negative findings. One complaint resulted in a positive finding which noted that seven contractor employees were conducting repairs. (Tr. 109-111). The positive finding concerned three structural support columns located on the sixth floor of the prep plant which were determined to be not maintained in good repair. (Respondent Exhibit 11).

⁵ Sounding the columns is a way to tell if a column is solid or if it is thinning.

indicating thinning. Again, McCort took measurements of the thickest and thinnest parts of this column. The thickest part measured 5/8 of an inch and the thinnest part 1/8 of an inch thick, which meant that the measured flange loss was half an inch. McCort also testified from his notes that column five showed significant structural loss in five places and severe structural loss on the hillside above the hub column. (Tr. 53-57).

On the fifth column of row two, McCort observed conditions similar to column four, but there were holes in the base of this column and exceedingly severe web and flange thinning. He observed a 1 1/2 inch hole and a 1/2 inch hole in the web. The measurement of 1/4 inch to 3/8 of an inch would be compared with the 5/8 of an inch thickness which McCort found upon his observation and recollection from earlier measurement. (Tr. 58-60).

If a flange is thinner than it originally was then it is coming out of design specs and indicates weakness in that column. (Tr. 61). Because water all over the sixth floor would have caused the deterioration of the steel columns following his examination of March 6, 2009, McCort issued an imminent danger order.⁶

On the day of his inspection the third column of the row was under construction and being repaired. McCort noted that at the top of that repair that a hole in the webbing could be seen. That hole was 12-14 long and 2-3 inches wide. (Tr. 64).

Later that afternoon following completion of the examination of the sixth floor, McCort requested that an MSHA engineer evaluate the structure. Bob Newhouse, McCort's supervisor, requested the engineer, Jarrod Durig. Durig, appeared and sounded columns, took measurements, and did other things with which McCort was not familiar. Durig concluded that he did not believe there was an imminent danger but that the columns did need repair. (Tr. 69-70).

The hazards created by the condition of the prep plant, according to McCort, were that should the columns fail there would be falling material, falling miners, and multiple injuries, including fatalities. Also, in the event of column failure, the seventh floor could collapse on the sixth floor involving potential injuries to miners on the seventh floor. (Tr. 71). In explaining why column failure and partial plant collapse was reasonably likely, McCort opined that the specific columns cited were all in the same column line, on the same plane. (Tr. 74-75).

At the request of McCort, an MSHA engineer, Michael Marawski visited the plant in August, 2008, examined the plant and prepared a written report which was admitted as GX 26. Significant section loss was observed in the flanges on the upper column at the common splice connection in the column adjacent to cyclone A-5⁷ – Repairs to the column splice at Cyclone A-5 along with any other column splices on the sixth floor that were in a similar condition were recommended. (GX 26). McCort never saw the plans to repair the columns in the sixth floor,

⁶ The order was based on his opinion and a few miners who said they had noticed excessive plant shaking and vibration not noticed before. (Tr. 62-65).

⁷ This column is also referred to as the third column in the second row. (Tr. 85).

but the plans were explained to him by Tim Drone, maintenance manager of Emerald and McCort saw repair work being implemented. (Tr. 105-106).

2. Testimony of Jarrod Durig

Mr. Durig is a supervisory civil engineer with the Pittsburgh Safety and Health Technology center, or MSHA technical support group, and is the chief of the geotechnical branch overseeing the work of seven other engineers. Included in the types of duties he performs are structural assessments of preparation plants. Mr. Durig has worked for MSHA from 1995-2000 and from 2003 to the present. He has a bachelor's degree in civil engineering from West Virginia University and a master's degree in civil engineering from the University of Pittsburgh. He is licensed as a professional engineer in the Commonwealth of Pennsylvania. (Tr. 124-126).

Mr. Durig was called to the Emerald prep plant on March 6, 2009 to provide an assessment of conditions there and to make a recommendation regarding an imminent danger order. He was asked to look at three columns on the sixth floor and looked at a fourth column after inspecting the first three. They were designated columns 2B, 2C, and 2D. Durig later looked at 3D.⁸ (*see* GX 5).

In his examination of the columns, Durig performed a visual examination, used a chipping hammer for cleaning and sounding purposes, and used a tape measure to try to size the columns and also to measure the thickness of the flanges of the columns. After completing the evaluation he felt that the prep plant was not in imminent danger of collapse. (Tr. 135-136). Durig also felt that the prep plant was not in good repair based on the columns that he evaluated. (Tr. 136). Column 2D was in the process of repair. However, the area above the repair was in very poor shape due to substantial holes in the web along with thinning of the flanges in the same area. Durig would characterize column 2D as failed even with the repair work that was done. (Tr. 139-150).

Insofar as column 2B is concerned, Durig did not see any visible deformation but did recognize thinning of the flanges. He took measurements of that thinning to the bottom of the

⁸ The column Durig designated as 2B is McCort's No. 3, 2C is McCort's No. 4, and 2D is McCort's No. 5. (*See* Tr. 20 opening statement by counsel for the Secretary). However, this statement of explanation does not conform to the citation. The sixth floor of the prep plant was examined by a myriad of individuals who employed their own methods of identifying the columns which were the subjects of this citation. The inspector trainee for MSHA, Tom McCort, identified the columns as being in the second row from the raw coal side, and he numbered the columns as the second, third, fourth, and fifth columns from the creek side. (Tr. 45). The MSHA civil engineer, Jarrod During, identified the columns as 2B, 2C, and 2D. The columns cited in the citation are actually columns 2, 4, and 5 in McCort's version. Yet another numbering system is employed by Emerald and identified as row H that which is McCort's row 2, and listed the columns as 12H, 13H, and 14H. McCort's column 2 is Durig's 2B and Emerald's 12H; McCort's column 4 is Durig's 2C and Emerald's 13H; and McCort's column 5 is Durig's 2D and Emerald's 14H as represented by counsel for the Secretary. (Tr. 269-270). There is a slight variation provided by counsel for Respondent. (*see Amended Post-Hearing Brief* at p. 3).

column. The flange thickness at 6 inches above the floor was between 3/8 of an inch and half an inch thick. Measurements were also taken of the column itself so that by consulting a steel design manual he could determine that the size of the column at the time it was constructed or at the time it was put in place. (Tr. 153). By consulting the manual (GX 13) Durig determined that Column 2B had over a 50% loss in thickness for the flange. (Tr. 161). Durig took four measurements and all fell within this range, except where those locations that measured 3/8 of inch would have indicated over 60% flange loss at that location.

Column 2C was also examined that day and found to be not in good repair due to the thinning of the flange and the condition of the bottom of the column. Again, by consulting manual and his measurements, Durig determined that the percentage loss in thickness of the flanges along the bottom of column 2C would be approaching 40%. (Tr. 164-166)

RESPONDENT'S EVIDENCE

1. Testimony of Ralph Layfield

Mr. Layfield is an operational manager with Alpha Natural Resources and has been at Emerald for 14 years. Prior to Emerald, Layfield was employed for 22 years by Industrial Resources of Fairmont, West Virginia as a field manager and construction manager. His duties as a construction manager included the building of preparation cleaning plants, coal cleaning plants, rebuilding plants, and operations related with coal facilities. As such, he has approximately 35 years experience with preparation plants. (Tr. 222-223).

Mr. Layfield was part of the inspection party that eventually resulted in the issuance of citation No. 8007661. He does not remember seeing any holes in the structure or the beams that McCort was inspecting. He did not see any problems or issues with the structure. (Tr. 225-226).

2. Testimony of Douglas Montgomery

Mr. Montgomery is employed at Emerald as a processing engineer and has been employed there since April 2003. Before that he worked at Cumberland Coal, Peabody Coal Company, American Electric Power, Southern Ohio Coal Company, U.S. Steel, and American Bridge. Over the years his various capacities have included being a foreman, engineer, plant manager, construction estimator, design draftsman, and detail draftsman. Mr. Montgomery has a master's degree in metal process engineering from West Virginia University, a bachelor's degree in mining engineering from the University of Pittsburgh, and an associate's degree in mechanical engineering from Penn State. (Tr. 230-232).

By the time of the inspections which resulted in this citation, Emerald was in the process of repairing columns on the sixth floor.⁹ Lincoln Contracting, whose field man was Mike Yoder, was working with Emerald. (Tr. 235-236). Several exhibits were offered and accepted to show that repairs were underway: RX-6 – materials used; RX-7 – Time sheets; RX-8 – invoice from

⁹ Through this witness we learned that a third means of identifying rows and columns was employed. Row H is McCort's row 2.

Lincoln Contracting for work performed; RX-4 – Floor plan; RX-5 – time and materials invoice; summary of time sheets, and a change order; RX-9 – 2009 log book for completed repairs.

3. Testimony of John Leach

John Leach is a project manager, estimator, and engineer for Lone Pine Construction, a construction company that does mine work. He holds a professional engineering license from the Commonwealth of Pennsylvania. On numerous occasions, Emerald Mine has called Lone Pine to do several projects, including prep plant renovations. Lone Pine investigates, prepares an estimate, submits a bid, and is sometimes awarded the job and sometimes not. (Tr. 270-273). Mr. Leach believed that this prep plant was one of the better cleaning facilities that he has seen. (Tr. 273).

On the day the citation was issued, Lone Pine was performing work at Emerald Mine and Mr. Leach was asked to evaluate three columns on the sixth floor of the pre plant, and to prepare a report. He did not believe that the structure was in any imminent danger of collapse. (Tr. 274-279). Column 14H (2D) was under construction at the time Leach performed his examination. The repairs involved adding bent channel plates to form the inside of the flange as well as the web on both sides of the column and flange plates were added on the outside of the flange of the column. Mr. Leach believed that this was an exceptional way to repair that column and the load capacity of that column probably doubled or tripled by the way construction was performed. (Tr. 281-283).

On March 6, 2009, Leach observed a quarter-sized hole in the center of the web on column 12H (2b) and that hole could have been put there for a purpose. While it was possible that the hole was there because it was a loss of thickness of the web, it was not likely. (Tr. 297-298).

4. Testimony of William Schiffko

Mr. Schiffko works for Emerald Mine, Alpha Resources and began in May or June of 1978. He is currently the manager of compliance. This position involves educating employees about new laws and new regulations for compliance purposes and also education about safety and accident prevention. (Tr. 305).

Mr. Schiffko does not believe there was a violation of 30 C.F.R. §77.200 because hitting the columns with a small sledge hammer did not produce any problems and there was no danger of an imminent collapse. Money is budgeted for maintenance and examination by the professionals. (Tr. 319-320). Mr. Schiffko fundamentally disagreed with the degrees of gravity and negligence and thought there were considerable mitigating factors which should have affected MSHA's degree of negligence. (Tr. 324).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

- a. Due to the deteriorated columns on the sixth Floor, Emerald failed to maintain the prep plant in good repair and thus violated 30 C.F.R. §77.200
- b. In reaching this conclusion the inspector visually inspected the columns, did sounding tests with a hammer, and performed measurements with a tape measure to determine the extent of column, flange, and web thinning.
- c. Additional confirmation of thinning was provided by an MSHA engineer who contrasted the present condition of the columns with their original construction or installation.
- d. While there were repairs on the inspector's third column, such repairs had not been completed and the column was not in good repair.
- e. The percentage of thinning indicates a column's loss of ability to support its intended weight.
- f. The S&S designation was appropriate because the evidence established that the four core components of S&S had been met, particularly the reasonable likelihood of column collapse resulting in injuries of a reasonably serious nature, and Emerald did not adequately rebut the S&S allegation.
- g. The degree of negligence of Emerald was high with no mitigating circumstances.

2. Respondent's Contentions

- a. There was no violation of 30 C.F.R. §77.200 because there was no evidence of disrepair or that the condition presented a hazard. The conditions of the sixth floor of the plant were a result of normal wear of steel structures and posed no hazard.
- b. Emerald was in the process of retrofitting columns on the sixth floor with one column having been retrofitted with other columns having been identified as needing attention, and professional contractors and engineers had been hired to design and complete the work.
- c. The inspector's measurements of the three columns identified in the citation were unreliable.
- d. This case focuses on the conditions on the sixth floor. However, substantial

amount of weight had been removed on the seventh floor directly above the area in question and the removed weight was approximately 1,180 tons, less than what had originally existed. Also, smaller columns were used from above the sixth floor because of reduced load. Thus the Secretary fails on the hazard arguments presented.

- e. The S&S designation is inappropriate as the evidence does not establish a hazard, or even meet the test of a reasonable likelihood of an event in which an injury could occur, and reasonable likelihood of injury should be made assuming continued mining operations.
- f. There is no evidence that Emerald was in any way negligent or aware that the condition of the columns on the sixth floor posed a hazard and substantial mitigating circumstances existed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

30 C.F.R. §77.200 requires all mine facilities to be maintained in good repair to prevent accidents and injuries to employees. The evidence in its totality requires a conclusion that the columns on the sixth floor were not being maintained in good repair. Measurements, soundings, and consultation with manuals all confirmed the visual observations of both Tom McCort, the inspector, and Jarrod Durig, a professional engineer, that significant thinning had taken place and in such percentages to indicate that the prep plant was not in good repair.

Documentary evidence also leads to that conclusion. For example, Respondent's Exhibit 11, a 103(g) hazard complaint, states that there were positive findings for the cited areas in that three structural support items were not being maintained in good repair. Also, GX 15, a report prepared by Durig, who was called to evaluate the efficacy of an imminent danger order, noted that the columns in question displayed extensive corrosion, delaminations, and section loss and recommended that they be retrofitted or replaced. The Secretary has established by a preponderance of the evidence that Respondent violated safety standard 30 C.F.R. §77.200.

2. Gravity and S&S Discussion

With respect to gravity, as noted above, the inspector felt that the risk of injury or illness for this violation was "reasonably likely," "fatal," and would have affected 10 persons. However, I credit the evidence presented by Respondent that showed that the possibility of injury from this condition was unlikely. Three engineers stated that there was no threat of immediate collapse and, further, that weight had been removed from the seventh floor, limiting the possibility of collapse.¹⁰

¹⁰ Respondent also argued that it was in the process of retrofitting the conditions to prevent further deterioration.

More importantly, the burden of proving the likelihood of injury was on the Secretary. I do not believe that the incomplete and contradictory evidence regarding the likelihood of collapse provided by the Secretary was sufficient to show that the risk of injury was anything more than “Unlikely.” For example, Durig testified that he believed that collapse would occur if 2B, 2C, and 3D were allowed to deteriorate to the condition seen at the top of 2D. (Tr. 214). However, he did not testify that those three columns definitely, or even probably, would deteriorate in the same way as 2D. McCort testified that the cited conditions were reasonably likely to result in structural failure due to the fact that the specific columns cited were all in the same column line and the thinning and damage were all in the same plane of the column. (Tr. 74). However, he also believed the columns were in imminent danger of collapse, a conclusion that was not only refuted by Respondent’s witnesses but also by Durig, the MSHA civil engineer. (Tr. 117, 135-136). Therefore, I believe that the gravity was more accurately described as possible but “Unlikely.”

However, given the serious danger posed by the collapse of a building, I find that if the unlikely event were to occur, the injuries could be fatal.

In order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

With respect to the first factor, it has already been established that there was a violation of a mandatory safety standard. As noted above, Respondent failed to maintain the prep plant in good repair when it allowed three structural support columns to deteriorate.

While the evidence presented by the two witnesses for the Secretary (inspector trainee McCort and civil engineer Durig) established the violation of the safety standard, the S&S requirement that the violation contributed to a hazard has been judged by me and found wanting. Therefore, the Secretary has failed to establish the second factor of *Mathies*.

The evidence presented by the Secretary does not show a realistic hazard existed at the time of the citation. Further, the evidence shows that no hazard would be contributed to in this case because, even before this citation was issued, Respondent had begun repairs on the columns. Respondent’s ability to present evidence in defense of the charge of S&S is not a new and novel development in Commission jurisprudence. For example, in *Secretary v. Consolidation Coal Co.*, 5 FMSHRC 890, 899 (June 1986), the Commission held that, given the legislative history of the mine Act a presumption of S&S existed when excessive respirable dust exceeded the minimums established by 30 C.F.R. §70.100(a). However, the Commission further held that the presumption of S&S may be rebutted by the operator’s showing that miners were not exposed to the hazard of excessive dust through the use of personal protective equipment. In essence, the Commission held that even if there is a presumption of S&S, the details of the specific situation, including preventative measures taken, must be considered. In *Consolidation Coal*, the Commission found S&S was because the operator could not rebut the presumption. Here, however, exposure to a hazard was unlikely because Respondent had already taken

preventative measure; specifically it had begun repairs of the cited columns.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1135, 1130 (Aug. 1985) the Commission held that S&S must be resolved in terms of 1) the circumstances as they existed at the time the violation was cited and 2) as they might have existed had normal mining operations continued. Here, as has been shown, on the day Citation No. 8007661 was issued, repairs were underway on one column and planned for the others. Thus, it was not the citation that triggered the repairs and, at the time of the citations, Respondent was already eliminating the possibility of a future hazard. Therefore, the condition was unlikely to lead to any hazard.

Even the hazard suggested by the Secretary shows that it was unlikely at the time of the citation. For example, Inspector McCourt couched his language regarding column failure and its effect on the seventh floor in terms, “*could* collapse on the sixth floor,” and in response to a question of “what *might* happen” if any of the columns failed the answer was, “it *could* potentially be a domino effect.” (emphasis added) (Tr. 71). McCort did testify that it was reasonably likely that a portion of at least some of the columns would fail and a portion of the prep plan would collapse. (Tr. 74). It was clear that the dangers McCort discussed did not consider repairs already underway at the time of the citation. However, McCort was aware of these actions as he characterized the negligence as moderate (or the borderline of high) due to the implementation of a repair schedule and the fact that what he found was not plain to the eye. (Tr. 86-87). Further, in extending the original termination date, Investigator McCort noted that the “operator has a plan in place to repair all of the columns on the sixth floor and evidently has 7 contractor employees conducting the repairs.”

In a report submitted by civil engineer Durig dated April 30, 2009, and introduced and accepted as GX 15, Durig’s focus was to evaluate the imminent danger order which he vacated or terminated (he was not sure of the requirements of each). (Tr. 177). But his testimony is related to the S&S issue. In response to the court’s question of what could happen, Mr. Durig answered “...ultimately a structure failure,” and “there could be tripping, a fall hazard in the location.” (Tr. 208). Durig further testified that unless conditions were improved, unless a repair was done, it would collapse. And if columns 2B, 2C, and 3D had been allowed to deteriorate to the degree 2D had been allowed to deteriorate it was reasonably likely that over a period of time there would have been some kind of failure. (Tr. 215). However, the reality here is that the cited columns had not been allowed to deteriorate in such a way and were in the process of repair even before the citations were written. Durig stated that “the retrofit that was witnessed on column 2D appeared to be adequate in restoring a sufficient amount of steel to transfer the applied loads through the Column.” (GX 15)

As the Secretary has failed to establish that the condition contributed to a hazard given the repair work already in progress, I do not deem it necessary to consider the third or fourth *Mathies* factors. This citation was not S&S.

3. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. §

100.3(d). “A mine operator is required to 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.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, an operator exhibits reckless disregard where it displays “conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

In this case, Respondent knew or should have known that it violated C.F.R. §77.200. Respondent was under a continuing obligation to examine working areas of the prep plant and should have seen the deteriorating columns. It could not have been particularly difficult to see that the columns had deteriorated to the point that a hammer could drive through the metal. Furthermore, on September 25, 2008, MSHA engineer Murawski issued a report that found serious structural problems with the columns and Emerald did not adequately correct the conditions before the inspection at issue here. Respondent suggest that this report did not place it on notice of the conditions because the report dealt with splice connections, not flange thinning or holes in webbing. I do not find that argument to be particularly compelling. The report indicated to Respondent that care and attention was needed for the supports on the sixth floor.

The Secretary claimed in his brief that there were no mitigating circumstances in this instance. However, this position is in direct contradiction to the Inspector’s testimony. The Secretary acknowledged that McCort found Respondent guilty of “between” moderate and high negligence, but stated the evidence suggested it was high. However, with respect to negligence, I found the Inspector’s testimony to be credible, including his testimony regarding mitigating circumstances. Specifically, McCort testified that Respondent had implemented a repair schedule and that the conditions were not apparent to the naked eye. As a result of these mitigating circumstances, I cannot find high negligence. With that noted, I would not characterize these mitigating circumstances as “considerable.” Therefore, I find that Respondent exhibited Moderate Negligence.

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$8,209 for Citation No. 8007661. While the Secretary’s proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8007661:

- a. The operator’s history of previous violations – Respondent was twice cited under Section 77.200 in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator’s

business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA’s penalty assessment guidelines this gives Emerald Mine No. 1 15 “mine size points” out of a possible 15 and Respondent 10 “controller size points” out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator’s ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent’s ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation, given the repair work, is unlikely to cause injury, but if it did it could result in permanently disabling or even fatal injuries to ten persons.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith and this was so stipulated.

As I have decided to modify the gravity of this citation from “Reasonably Likely” and “S&S” to “Unlikely” and “Non-S&S,” I believe that it is necessary to also reduce the proposed penalty. Considering all of the factors listed above, Respondent is ordered to pay \$5,000.00 with respect to this citation.

CITATION NO. 8006753

This 104(a) citation was issued on March 9, 2009 at 9:15 p.m. and was based upon the inspector’s observation of a violation of 30 C.F.R. §75.1714-7(a). This safety standard states:

(a) Availability. A mine operator shall provide an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen, and carbon monoxide to each group of underground miners and to each person who works alone, such as pumpers, examiners, and outby miners.

In his narrative, the inspector found:

The mine operator failed to provide an MSHA-approved, handheld, multi-gas detector that could measure methane, oxygen, and carbon monoxide to each group of underground miners and to each miner who works alone. Four miners were observed working in C-1 (032-0 MMU) number 2 entry, 184’ inby the longwall face without a multi-gas detector. The longwall was operating at the time of my inspection.

(GX 19). The inspector noted that the risk of injury or illness for this violation was reasonably likely, the injury/illness could reasonably be expected to be fatal, the violation was significant and substantial, and it would affected four miners. Negligence was assessed as moderate. The proposed penalty for this citation was \$3,493.00.

This citation was terminated on March 9, 2009 at 9:30 a.m. as a representative of the miners was provided with a multi-gas detector for this group of contractors.

ISSUES

Did Respondent violate 30 C.F.R. §75.1714-7(a) and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

THE SECRETARY'S EVIDENCE

1. Testimony of Charles Reidmann

Reidmann is an underground coal mine inspector employed by MSHA for the past seven years. (Tr. 351). He had over 30 years of experience in coal mining before joining MSHA. (Tr. 351-354).

On the day citations were issued, Reidmann saw four miners working on the No. 2 Entry of the C-1 Longwall. Those miners were employed by High Tech, a contractor that conducted foreman work at Emerald Mine. (Tr. 359-360). Inspector Reidman spoke to the miners who were there to install pumpable supports. They were on the day shift, which began at 8 a.m. An MSHA-approved multi-gas detector was not provided. Inspector Reidmann was told that they usually have a person who traveled with them as an escort but no escort was provided that day. (Tr. 360). When questioned, the miners were located at the No. 2 Entry inby the long wall face. A canvas check was up and the miners were in there about a block, 180 to 184 feet. (Tr. 361).

The hazard that the cited standard was intended to prevent was to protect miners in case of fire or to warn miners in the event of methane or low oxygen. (Tr. 361). A multi-gas detector protects miners who are in the presence of low oxygen, carbon monoxide, or methane. When within a certain range, a light will appear and an audible alarm will sound. (Tr. 361). The miners would know to come out of the area. Oxygen, carbon monoxide, and methane are odorless. Exposure to low oxygen and carbon monoxide results in the danger of loss of consciousness. The risk provided by the presence of methane is an explosive mix. (Tr. 361-363).

The likelihood of a methane explosion in the mine could have been reasonably likely as Emerald No 1 mine is on a 5-day methane spot and liberates over a million cubic feet of methane in 24 hours. Emerald No. 1 is a gassy mine. Face to face ignitions have occurred before on the longwall. The miners would not have been safe in their location if there had been an explosion at the longwall face, where the methane ignition would have been. The methane ignition could also have been at the head gate. (Tr. 367-368).

Inspector Reidmann further testified in cross-examination that not everyone needs to wear a multi-gas detector. (Tr. 374). Anyone working alone would need a multi-gas detector, but the term “alone” is not defined. Reidmann was instructed in MSHA training that “alone” means “by yourself.”¹¹

Production was occurring on the longwall face and 5 or 6 miners were on the longwall face. There was also a headgate operator who works on the headgate side where the curtain is located. Inspector Reidmann did not check with anyone to see how many had a multi-gas detector. (Tr. 381).

Respondent introduced, through Reidmann, Respondent’s Exhibit 22, which were the field notes Reidmann produced stating that the on the day of the inspection and citation the methane reading was 0, with 20.8% oxygen and that these were good readings. (Tr. 383). However, on re-direct examination, Reidmann testified that the presence of methane at the face or longwall can change in minutes. (Tr. 385). If a person on the longwall had a multi-gas detector that had alarmed, it could not have been heard by the four contract miners. (Tr. 394).

RESPONDENT’S EVIDENCE

1. Testimony of Gary Bochna

Gary Bochna is employed by Emerald Coal Resources as a senior safety representative and has held that position for 32 years. (Tr. 400).

Bochna testified that he accompanied inspector Reidmann on an inspection the day Citation No. 8006753 was issued. The citation was served on Bochna. In the course of the inspection, Bochna observed four working contractors on the C1 section. More specifically, they were working inby the No. 2 Entry, about one block inby the longwall face. It takes a minute to walk one block. Production was occurring at that time and about 12 people were working on the longwall, and various people on that crew would have had a multi-gas detector. (Tr. 401-402). The four contractors came in with the crew and therefore the crew would have known that the contractors were there. (Tr. 402-403). Other miners were near the longwall face in the No. 2 Entry. A headgate operator was in the No. 3 Entry on the face, about 2 blocks away. It would take about two minutes to walk two blocks. Various miners, including the headgate operator, mechanics, and the foreman would have a “gas meter.” (Tr. 403-404).

Bochna went to the area where the contractors were to check for ventilations and insofar as the readings were concerned he “did not think we had anything.” (Tr. 405). It is Emerald’s practice to send a miner with a multi-gas detector along with the contractors depending on where they are working. If they are away from a group of people they would have someone with a detector with the group and would not need one. (Tr. 410-411). But if there was a person on the longwall section with a multi-gas detector, the alarm would not be heard by, in this case, the four contractors. (Tr. 421). This is also true of the MGD that the headgate person used. (Tr. 422).

¹¹ The four miners here were working together, none was by himself or in any way “alone.”

2. Testimony of William Schifko

Schifko testified for Respondent with respect to Citation No. 8007661 as well.

Schifko decided to contest this citation due to confusion with regulations promulgated by MSHA and the portion of the regulations that caused confusion was the definition of “alone.” Schifko asked for compliance assistance from several people including MSHA field inspectors and from the District Office. (Tr. 434). Someone from MSHA referred to a series of questions and answers prepared by MSHA and specifically question No. 35, which is part of Respondent’s Exhibit 27. Schifko testified that the question stated, “Are several miners who work individually but are normally located within a maximum of five minutes walking distance from all the miners in this group are each required to have a multi gas detector?” And the answer provided is, “No, if it is practical and logical for these miners to quickly assemble prior to evacuation, only one gas detector to (sic) required for this group.” (Tr. 437).

Schifko further testified that that in a policy issued to all contractors, that he expected them to provide their own safety equipment including detectors. In the past, Emerald had lent detectors out to people and not gotten them back, which is expensive. (Tr. 438-439). There are a lot of occasions where miners do not have their detectors or have forgotten them and Emerald has allowed them to borrow the equipment. Schifko makes them sign for the equipment. (Tr. 439). Loaner detectors were available. (Tr. 440).

The High Tech employees typically work at the long wall because that is the only place where pumpable cribs are built. Pre-shift organizational meetings are held where assignments are given and everyone is told where to go. The Emerald “responsible person” knows where everybody is going to go. (Tr. 440-441).

Insofar as a potential ignition on the longwall face is concerned, Schifko testified that they had never had any ignition in the C Block. Further, whether or not there was an ignition would not be influenced based on whether the contractors had detectors.

Schifko disagreed with the testimony attributed to inspector Reidmann that if you cannot see or hear somebody else, that someone was alone. Although he does not believe that Inspector Reidmann was given a lot of guidance from MSHA. (Tr. 445). There is no question in Schifko’s mind that someone with a multi-gas detector was within 900-1000 feet and therefore within five minute walking distance. (Tr. 447-448). Furthermore, it is Schifko’s testimony that the four contractors were in the same group as the people working on the longwall. (Tr. 450).

SECRETARY’S ADDITIONAL EVIDENCE

1. Testimony of Robert Newhouse

Following Respondent’s Final witness, the Secretary moved to re-open the record, which motion was granted and the Secretary then presented witness Robert Newhouse.

Newhouse is employed by MSHA as the supervisory coal mine inspector for the Ruff

Creek Field Office and has been as supervisor since 1985. He has been an inspector of underground coal mines since 1977. (Tr. 501). Newhouse was designated as the Secretary's Representative and sat at counsel table for all proceedings.

Newhouse testified that he read all of the questions and answers regarding multi-gas detectors in RX 27 and had been involved in the issuance and development of the standard. He was familiar with the standards, why they were enacted, and their purpose. In his opinion, the question about distance and a five minute walk is irrelevant. The key is air pressure. A group of miners or an individual miner walking in an area that can have bad air, is being inundated with smoke, needs to be protected with a detector. (Tr. 502-503).

Newhouse testified that due to the check curtain the intake air was split, creating different areas where the air pressure was different. In the longwall mining area, the rock fell back across the shields as mining occurred and normal roof falls occur. The rock displaces air in that area forcing the air to come out through the entries as it has to go somewhere. Thus, there is a buildup of pressure in the areas where there is no fall, creating a void, or a potential void. That void has methane, low oxygen, dust, and other "things" in it. The four contractors and the other people in the mine would not necessarily know. They would know if a roof fall occurred, but their air would not change. That is why they have a union person with a detector normally assigned to the contractors who are inexperienced. (Tr. 503-505).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

The four contract miners working underground were a group and Respondent was therefore obligated to provide a multi-gas detector to the group.

2. Respondent's Contentions

The four contractor miners working underground were not a group, but were instead part of a larger group that was equipped with a multi-gas detector. The fact that the contract miners were within a five minute walk from Respondent's miners satisfies MSHA's question and answer publication which clarifies the requirements of 30 C.F.R. §75.1714-7(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

Respondent was cited because the inspector found four contractors working together in the mine without a multi-gas detector. Furthermore, there were other miners within a five minute walk of the four contractors, though not working directly with them, who had multi-gas detectors. These facts are not in contest. The cited standard, 30 C.F.R. §75.1714-7(a) requires all individual miners or groups to have a working multi-gas detector. Therefore, the primary issue with respect to this violation is whether the four contractors were members of a discrete "group" that were not supplied with a multi-gas detector or were part of a larger "group" that

included miners who had the required multi-gas detector. To a large extent, this topic boils down to the definition of the word “group.”

Under well-settled Commission precedent, where the language is clear, the terms of that provision must be enforced as they are written, unless the regulator clearly intended the words to have a different meaning or unless such a meaning would leave to absurd results. *Sedgman*, 28 FMSHRC 322, 329 (June 2006); and *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *Id.*

Here, the term “group” is not given a statutory definition. The Merriam-Webster dictionary defines a group as, “two or more figures forming a complete unit in a composition” and “a number of individuals assembled together or having some unifying relationship.” *Merriam-Webster Dictionary* (11th Ed. 2003). In the context of the standard, there is no real question as to the meaning of the term. “Group” in the context of §75.1714-7(a) cannot mean anything other than two or more workers acting together as a unit, in a discrete area, with knowledge that they are members of a group. In this situation, the four contractors functioned as a discrete and separate unit. They acted together to perform foreman work. There is no other way to describe the four contractors as anything other than a “group.” At the same time, it would be absurd to consider other employees, even those employees working nearby, to be considered a part of their “group.” There is no evidence in the record that they interacted with Respondent’s direct employees on the Longwall or in any way coordinated their work. The plain meaning of the word “group” will not support such a contention.

Beyond the plain meaning of the word group, considering the four contractors as part of the longwall group would have a negative effect on the safety of miners. The Commission has interpreted that the plain meaning of a term along with the overall purpose of the Act. *Local union No. 5817, District 17, United Mine Workers of America v. Monument Mining Corp. and Island Creek Coal Company*, 9 FMSHRC 209, 211-212 (Feb. 1987); *see also* 30 U.S.C.A. § 801(a) (“the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner.”) I credit the testimony of Inspector Reidmann that the contractors would not have heard the multi-gas detector alarm on the longwall. Furthermore, I credit Newhouse’s testimony that the contractors and the miners on the longwall were breathing different air, meaning that even if the longwall miners’ multi-gas detector did not go off, the contractors could be experiencing dangerous atmosphere. An understanding that miners breathing different air and outside of the range of the alarm are part of the same “group” as the longwall miners would place a technical reading of the term “group” over the Act’s primary goal of miner safety.

As I have decided to apply the plain meaning of the term “group,” there is no need to consider the level of deference accorded to the Secretary in this instance. Furthermore, there is no need to discuss whether Respondent had “fair notice” of the interpretation because the meaning of the standard was clear.¹²

¹² Respondent presented several arguments to support its claim that the Secretary’s interpretation was not entitled to deference. Specifically, it claimed that the Secretary was inconsistent in his

interpretation, that its current interpretation is a post-hoc rationalization, and that the interpretation would be absurd. However, it is only when the meaning is ambiguous that the judge is to consider the reasonableness of the Secretary's interpretation. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal LTDA v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference ... is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); see also *Jim Walter Res.*, 28 FMSHRC 983, 987 (Dec. 2006); *Jim Walter Res.*, 19 FMSHRC 1761, 1765 (Nov. 1997); *Cannelton Indus.*, 26 FMSHRC 146, 151 (Mar. 2004). As I found that the meaning of the word "group" in the context of the standard was not ambiguous, there is not need to consider the deference accorded to the Secretary.

However, even if this definition of "group" simply were the Secretary's interpretation, I do not believe Respondent's arguments attacking the reasonableness of that definition are compelling. For example, Respondent's argument relies on the 2007 Emergency Mine Evacuation Final Rule Questions and Answers. That document included a question asking if individual miners working within a five minute walking distance were each required to carry a detector. The answer said, "No, if it is practical and logical for these miners to quickly assemble prior to evacuation, only one multi-gas detector is required for this group." Respondent argues that it this means the four miners were part of the longwall group. However, Respondent ignores the fact that individual miners are only considered part of a group if, "it is practical and logical for these miners to assemble quickly prior to evacuation." As already shown, the Secretary's witnesses credibly testified that the contractors would not have heard the alarm. Therefore, it would not have been practical for those contractors to quickly assemble in order to evacuate. Instead, miners on the longwall that heard the alarm would have had to immediately act as a rescue crew and go searching for the contractors rather than themselves safely assembling for evacuation. Further, as those miners were in different air, there was no practical way for the contractors to know if they were experiencing dangerous atmosphere and were in need of evacuation.

In a related argument, Respondent contends that the Secretary's interpretation of the term "group" has been inconsistent in light of the above "answer" and that its use of the interpretation urged at hearing was a post-hoc rationalization. However, as shown above, the Secretary's position at hearing, as well as the 2007 Question and Answer, are consistent with the language of the standard and with one another. If anything, it appears that the Respondent is the party engaging in post-hoc rationalization of its position. The evidence clearly showed that at all other times, Respondent provided an escort with a multi-gas detector to the contractors. (Tr. 360, 410-411). It was only when they were cited in this particular instance that it argued that these miners were part of a larger group.

Finally, Respondent argues that the Secretary's interpretation is absurd because it would be unclear whether a group is determined by "minimum distance" or "common task." It noted that miners working on separate tasks but "within arms reach" might not be considered a group and require a separate multi-gas detectors. I do not believe there is any uncertainty. The issue is

2. Gravity and S&S Discussion

With respect to the gravity of this citation, I credit the testimony of Inspector Reidmann. He presented evidence that if the four contractors encountered dangerous conditions; they would be unaware of the danger. As a result, those miners could have been trapped in an area with low oxygen and/or carbon monoxide and loss of consciousness or even been injured by a methane explosion. The possibility of low oxygen or carbon monoxide is a real danger in a coal mine. Furthermore, this was a gassy mine on a five-day spot with a history of face ignitions, making a face ignition possible. (Tr. 367-368). As a result, I agree with the Secretary's findings that this hazard was reasonably likely and possibly fatal.

As stated previously, in order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC at 3-4.

As shown above, there was an underlying violation of the mandatory safety standard.

With respect to the second factor, Respondent argues that the failure to provide the contractors with a multi-gas detector did not contribute to a safety hazard because the contractors were not engaged in an activity that risked ignition.¹³ (*Respondent's Post-Hearing Brief* at 48-49). It may be true that the contractors were not engaged in an activity that risked ignition but that does not change the fact that they were near the face where mining activity was taking place. In the event of an inundation of methane, those contractors would have no warning. Further, in order to be S&S, a violation need not be shown to cause a hazard, it need only contribute to a hazard. The fact that the miners did not have a multi-gas detector would contribute to the hazard of explosion in some way, regardless of the possible causes of ignition. Finally, methane ignition is not the only hazard possible. The miners could enter an area with carbon monoxide or low

not whether "minimum distance" or "common task" denotes a group; those are two equal aspects of the definition of "group." Miners at a distance from other miners are not part of the same "group" for the reasons discussed already, namely different air courses and inability to hear an alarm. At the same time, miners working on a different task, even if close by, are not part of a "group" because, as they are not part of a unit working together, they may leave the area without being noticed or accounted for at any time. In essence, miners working in a group share a known responsibility towards a particular task and also for one another. A miner outside of that shared task could easily be left outside of the group's sense of reasonability as well. That is why a worker conducting an unrelated task, even if close, might be considered outside of a "group." There is nothing absurd about that result.

¹³ Respondent also argues that there was no danger of ignition because there was no methane was present. (*Respondent's Post-Hearing Brief* at 48). However, as Respondent is apparently aware based on other arguments in the brief, as an emergency standard, an event is assumed when considered the S&S nature of the violation. *Cumberland Coal Resources, LP*, 33 FMSHRC 2537 (Oct. 2011).

oxygen and lose consciousness, regardless of the presence of explosive gases.

Respondent also argues that, in the event of an incident, the contractors would have been among the first warned of danger because of their location. This would only be true if the contractors happened to be in a location where they could be easily warned. There is no evidence to suggest that evacuating miners would definitely come in contact with the contractors. Even if they would, that protection would only help those contractors if they were in the same atmosphere as the miners with multi-gas detectors. If the contractors were in an area with methane, low oxygen, or carbon dioxide while the other miners were not, there would be no warning. Therefore, the failure to provide multi-gas detectors to the miners contributed to the hazard of exposure to explosion or to asphyxiation.

With respect to the third and fourth factors of *Mathies*, There is no question that an explosion or asphyxiation would cause an injury to the contractors. Furthermore, such an injury would be serious, perhaps even deadly. As a result, I hold that this violation was S&S.

3. Negligence

Respondent knew or should have known that the contractors should have been provided with a multi-gas detector. In fact, the Secretary presented evidence that Respondent had always sent the contractors with an escort in the past equipped with a multi-gas detector. (Tr. 360, 410-411). This shows that Respondent was aware that these miners were a “group” and that they were required to provide a multi-gas detector for them. I credit Reidmann’s testimony that Respondent’s actions were only moderately negligent because they had attempted to comply with the standard in the past. (Tr. 370-372).

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$3,493.00 for Citation No. 8006753. While the Secretary’s proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8006753:

- a. The operator’s history of previous violations – Respondent was cited four times under Section 75.1714-7(a) in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator’s business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA’s penalty assessment guidelines this gives Emerald Mine No. 1 15 “mine size points” out of a possible 15 and Respondent 10 “controller size points” out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator’s ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent’s ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation was reasonably likely to cause injury, or illness that could reasonably be expected to be fatal.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith.

I **AFFIRM** Citation No. 8006753 as issued as well as the Secretary’s proposed penalty assessment of \$3,493.00.

ORDER

Respondent, Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$8,493.00 within 30 days of the date of this decision.¹⁴

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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¹⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390