FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 22, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-872
Petitioner,	:	A.C. No. 15-18393-178634
v.	:	
	:	
ICG KNOTT COUNTY LLC,	:	
Respondent.	:	Mine: Clean Energy Mine

DECISION

Appearances: Brian C. Winfrey, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;

John M. Williams Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Paez

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. In dispute are one section 104(d)(1) citation and one section 104(d)(1) order issued to Respondent, ICG Knott County LLC ("ICG"). The Mine Safety and Health Administration ("MSHA") issued both this citation and order at ICG's Clean Energy Mine. To prevail, the Secretary must prove the cited violations "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable than its non-existence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

I. STATEMENT OF THE CASE

Both of these alleged violations involve ICG's ventilation plan at the Clean Energy Mine. Citation No. 8219731 charges ICG with a violation of 30 C.F.R. § 75.370(a)(1) for failing to comply with an approved ventilation plan. Order No. 8219732 charges ICG with a violation of 30 C.F.R. § 75.370(e) for failing to train miners on the unapproved provisions and changes to the existing ventilation plan. The Secretary designated each violation as significant and substantial

("S&S")[1] and as a result of ICG's unwarrantable failure to comply with a mandatory health or safety standard.[2] The Secretary proposes a penalty of $59,527.00 for Citation No. 8219731 and $12,563.00 for Order No. 8219732, for a total civil penalty of $72,090.00.

Chief Administrative Law Judge Robert J. Lesnick issued an Order of Assignment, which assigned Docket No. KENT 2009-872 to me, and attached a copy of my Prehearing Order. Given the unprecedented number of penalty petitions before the Commission and the high penalty involved in this case, I granted several extensions of time to comply with my Prehearing Order deadlines. After rescheduling the hearing due to a death in the family of a key witness for the Secretary, I held a hearing in Pikeville, Kentucky.[3] At the hearing, Respondent stated that ICG's Clean Energy Mine had previously stopped producing coal and the mine had since closed. (Tr. 126:20–25.)

The Secretary presented testimony from MSHA Inspector Carl Little. (Tr. 18:12–16.) ICG called four witnesses: Roger Cantrell, ICG's Safety Director; Clark Meade, Former ICG Mine Foreman and Superintendent; Ronald Gayheart, ICG section foreman; and Alger McIntyre, ICG section foreman. (Tr. 125:8–126:9, 157:6–7, 161:23–162:6, 208:10–23, 212:21–213:1, 228:8–10, 230:22–231:4.) The Secretary and ICG submitted post-hearing briefs, and ICG filed a reply brief.

II. ISSUES

The Secretary argues that the conditions were properly cited as violations and that the allegations underlying the citation and order are valid. (Sec'y Br. at 15.) ICG denies both violations, alleging ambiguity in the ventilation plan's map and arguing that Respondent did not

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

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[3] In this decision, the hearing transcript, the Secretary's exhibits, and ICG's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively.

revise its ventilation plan, and asks that I vacate the citation and order at issue.[4] (Resp't Br. at 22, 25.)

Accordingly, the following issues are before me: (1) whether the November 3 ventilation plan's map is ambiguous; (2) whether the Secretary's mandatory health or safety standard at 30 C.F.R. § 75.370(e) requiring training under the ventilation plan is ambiguous; (3) whether the cited conditions were violations of the Secretary's mandatory health or safety standards regarding ventilation plan provisions; (4) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including whether they are S&S; (5) whether the record supports the Secretary's assertions regarding ICG's negligence, including the unwarrantable failure determination, in committing the alleged violations; and (6) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation No. 8219731 is **AFFIRMED** as written, and Order No. 8219732 is **VACATED**.

III. BACKGROUND AND FINDINGS OF FACT

A. ICG's Operation at its Clean Energy Mine

At the time Inspector Little issued Citation No. 8219731 and Order No. 8219732 on January 23, 2009, ICG operated an underground coal mine known as the Clean Energy Mine. (Tr. 7:5–8.) ICG continued operations at the mine until it was "mined out" in late 2009. (Tr. 31:18–20, 126:20–25.) Maps of the Clean Energy Mine show it to be a room-and-pillar-type mine with long main entryways that serve as intake and neutral air lines, escapeways, and return

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[4] Respondent points to the "missing witness" rule and requests that I draw an adverse inference from the Secretary's failure to call MSHA Ventilation Specialist Jerry Bellamy, the Pikeville District Office specialist involved in approving ICG's ventilation plan. (Resp't Br. at 14–15; Tr. 30:24–31:13, 133:8–19.) The decision whether to make such an adverse inference is within the Judge's discretion as a factfinder. *See Bogosian v. Woloohogian Realty Corp.*, 323 F.3d 55, 67 (1st Cir. 2003) (observing that the "'missing witness' rule permits, rather than compels, the factfinder to draw an adverse inference from the absence of a witness [] particularly where the factfinder concludes that the party who requested the adverse inference failed to subpoena a witness otherwise available to testify.") (citations omitted); *Virginia Slate Co.*, 23 FMSHRC 482, 485 (May 2001). Here, although the Secretary included Bellamy as a potential witness in its initial Prehearing Report (Sec'y Request for Hearing and Prehearing Statement at 3), the Secretary's Amended Prehearing Report gave ICG notice that he no longer anticipated calling Bellamy to testify. (Sec'y Amended Prehearing Report at 4.) Under Commission Procedural Rule 60, Respondent could have procured Bellamy's testimony had ICG felt it was crucial to its case. *See* 30 C.F.R. § 2700.60 (allowing parties broad discretion to seek subpoenas). I therefore decline to draw an adverse inference against the Secretary for not calling Bellamy as a witness.

air passageways. (Ex. G–5.) Off these entryways a series of rooms, or panels, have been cut as a result of mining coal. (*Id.*) Prior to November 2008, ICG had mined the first right panel off of the main entryway, leaving behind a series of pillars.[5] (*Id.*)

Bleeder systems ventilate previously mined areas, or gobs,[6] in a way that pushes mining-related gasses and dust into a return air course and out to the surface. (Tr. 97:7–10, 136:6–9, 139:1–8.) A bleeder system usually includes rows of blocks—or pillars—which maintain the roof to support travelways, stoppings, and ventilation controls in the area around the outer edges of the gob. (Tr. 135:5–18.)

The Clean Energy Mine operated on three shifts: day, evening, and third shift. (Tr. 44:24–25, 221:15–21.) Ten miners each worked on the day shift and evening shift, while five miners worked on the third shift. (Tr. 77:2–17.) ICG produced coal on the day and evening shifts, but the third shift was for maintenance. (Tr. 109:16–24, 163:22–25.)

On November 3, 2008, two months prior to the issuance of Inspector Little's violations, MSHA inspectors cited ICG for failing to comply with its February 15, 2008, ventilation plan because ICG used a technique called retreat mining to remove "approximately 385 blocks [or pillars] of coal" without "an approved bleeder system." (Ex. G–9 at 1.) That same day, an MSHA inspector also cited ICG for failing "to properly instruct the management employees at this mine" in the provisions of ICG's February 15, 2008, ventilation plan. (Ex. G–8 at 1.) To abate these violations, ICG immediately submitted a revised ventilation plan on November 3, 2008, that included a bleeder system and instructed mine management and employees concerning those revisions. (Ex. G–8; Ex. G–9; Tr. 85:15–21.) MSHA immediately approved the revised ventilation plan for the Clean Energy Mine that same day. (Ex. G–9 at 3; Tr. 54:24–56:18; Ex. G–6.) This November 3 plan, especially its accompanying map, are a source of dispute between the parties in this proceeding.

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[5] For ease of description, I refer to this panel as the "first right panel" or "first right section" throughout this decision. The first right panel is nearly rectangular in shape. (Ex. G–5.) Viewed from above, the long base of the rectangular first right panel (in essence, the southern part of the panel) and the northern part of the rectangle run parallel to the main entryways. (*Id.*) At the time of violation, the approved ventilation plan did not include this section in active mining. The panel was to include a system of stopping lines, curtains, and bleeder blocks designed to force air around the short western side of the rectangle, and up and over the long topside of the rectangle, and out the short, eastern side of the rectangle. (*Id.*; Tr. 51:15–52:2.) This allows air ventilating through the panel to flow into a return air course and out of the mine rather than back into the active sections of the mine. (Ex. G–5.)

[6] A "gob" is common term for "goaf," which is "[t]hat part of a mine from which the coal has been worked away and the space more or less filled up with caved rock." American Geological Institute, *Dictionary of Mining*, *Mineral, and Related Terms* 239 (2d ed. 1997).

The November 3 plan incorporated a map that Safety Director Cantrell and Ventilation Specialist Bellamy drew up in abating ICG's November 3 citations.[7] (Ex. G–5; Tr. 55:7–14, 132:18–133:19.) According to the November 3 Plan approval letter, any "proposed changes . . . shall be submitted to and approved by the District Manager prior to implementation." (Ex. G–6 at 1.) ICG operated under this plan until January 23, 2009, when Little issued the two violations that are the subject of this proceeding. (Tr. 58:6–10.) ICG did not submit to MSHA any proposed ventilation plans after approval of the plan on November 3, 2008, and before the issuance of Citation No. 8219731 and Order No. 8219732 on January 23, 2009. (Tr. 58:8–11, 151:23–152:4.)

B. Inspector Little's December 2008 Conversation with Meade

Between October 1 and December 31, 2008, Inspector Little conducted the Clean Energy Mine's E01 inspection. (Tr. 24:22–25:5.) Little inspected Clean Energy at "random times through the week" and had visited the mine "several times" prior to January 23, 2009. (Tr. 25:3–20.) While at Clean Energy in mid-December 2008, Little spoke with Superintendent Meade about retreat mining in the first right panel. (Tr. 25:21–26:13.) Retreat mining is a process whereby an operator removes coal pillars that are being used to maintain the mine roof and bleeder system. (Tr. 73:18–20, 135:5–18.) Little claims he told Meade that "as far as [Little] knew, if [ICG] had a plan approved to retreat mine in that area, there was no reason [ICG] could not perform retreat mining in that area." (Tr. 26:13–16.) According to Little's testimony, he also told Meade during this mid-December conversation that ICG must submit a plan before mining the area. (Tr. 73:18–20, 81:10–25.) Meade denies Little told him that ICG needed to submit a new ventilation map to engage in retreat mining of the first right section. (Tr. 184:18–21.)

C. Inspector Little's January 2009 Inspection

Inspector Little again visited the Clean Energy Mine on January 22, 2009. (Tr. 27:21–28:1, 108:21–109:2.) During this visit, Little asked Superintendent Meade where ICG was currently mining. (Tr. 28:16–17.) Meade told Little that ICG was mining the first right panel. (Tr. 28:18–19, 31:16–20.) Little also asked Meade if ICG had "a plan approved to

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[7] Hereinafter, I refer to these as the "November 3 Plan" and "November 3 Plan Map," respectively. I note, however, that neither the Secretary nor Respondent introduced a copy of the November 3 Plan itself. Instead, the Secretary introduced only the November 3 Plan approval cover letter and the November 3 Plan Map. (Tr. 55:1–10, 56:6–9, 85:1–12, 148:16–19; Ex. G–6 at 1–2; Ex. G–5.) The cover letter references the approval of the supplemental maps but does not provide other written details about the approved ventilation plan. (Ex. G–6.) A copy of the November 3 Plan itself may have proved useful. Nevertheless, I must make findings based on the approval letter, November 3 Plan Map, witness testimony, and the inferences I am able to draw from that evidence.

perform retreat mining" and Meade answered that "as far as he knew [ICG] had a plan approved to retreat mine in that area."[8] (Tr. 28:12–29:2, 31:21–24.)

When Little arrived at MSHA's Whitesburg field office on January 23, 2009, he asked his supervisor, Vernus Sturgill, if he had seen any submitted plans allowing ICG to retreat mine in the first right panel. (Tr. 29:25–30:6.) Sturgill had not, and he directed Little to contact MSHA's ventilation department to determine whether it had approved anything to permit ICG to mine in that area.[9] (Tr. 30:12–19.) MSHA Ventilation Specialist Bellamy confirmed ICG had not submitted any new plans to allow retreat mining in the first right panel. (Tr. 30:21–31:6.) Little and Sturgill then traveled to ICG's Clean Energy Mine. (Tr. 31:9–13, 31:25–32:3.)

Little and Sturgill arrived at the mine at 8:50 a.m. (Ex. G–2 at 1; Tr. 32:12–14.) While still on the surface, Meade confirmed that ICG was retreat mining in the first right panel.[10] (Tr. 32:16–21, 33:3–20, 165:4–7, 165:20–22.) Inspectors Little and Sturgill orally issued Citation No. 8219731 to ICG at 8:55 a.m for a violation of 30 C.F.R. § 75.370(a)(1).[11] (Ex. G–3 at 1; Tr.

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[8] When asked about this January 22, 2009, encounter, Meade acknowledged he had seen Little during an inspection at the Clean Energy Mine "sometime before the violation" but was unable to determine specifically which day it was. (Tr. 185:1–6.) Given Little's specific and credible testimony in contrast to Meade's uncertainty regarding the date of the conversation and his failure to dispute its contents, I find the conversation occurred as Little described.

[9] To get a plan approved, an operator submits a map detailing the areas it intends to mine to the District office and the District's ventilation department. (Tr. 58:12–15.) "Vent[ilation] specialists" review the submitted plan and determine whether any changes—such as specified minimums of air at regulators or locations of stoppings—need to be made. (Tr. 58:16–19.) After a ventilation supervisor initially approves the plan, it is sent to the District Manager and Assistant District Manager for approval. (Tr. 58:20–24.) Once the District Manager signs off on the plan, it is approved and copies are provided to the operator, the field office, and the inspector assigned to the mine. (Tr. 58:25–59:5.)

[10] Both the Secretary and ICG entered into evidence maps depicting the first right panel on the day of the violation. (Ex. G–7; Ex. R–2.) Hereinafter, I refer to these maps as the "Retreat Mining Maps."

[11] Section 75.370(a)(1) provides:

> The operator shall develop and follow a plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only

33:3–20, 165:20–22.) Likewise, Little and Sturgill orally issued Order No. 8219732 to ICG at 9:10 a.m. for violating 30 C.F.R. § 75.370(e).[12] (Ex. G–4 at 1; Tr. 33:20–23, 34:7–10.) Although the violations were issued orally at the times indicated, Little did not make gravity determinations or write the condition or practice text for either alleged violation until after he had visited the first right panel. (Tr. 36:23–25, 93:20–95:5, 115:13–116:12.)

After Little and Sturgill orally issued both the citation and order, Meade directed ICG personnel to shut off the mine's belt and have the miners come to the surface. (Tr. 34:19–35:4, 165:20–24, 233:2–5.) The mining crew arrived at the surface within ten to fifteen minutes. (Tr. 35:7.) Little and Sturgill did not speak with any of the miners regarding the conditions on the first right panel (or section). (Tr. 102:22–103:20.) Little also checked the preshift examination books while still on the surface but did not record any air readings. (Ex. R–7; Tr. 101:15–17.) Little and Sturgill then traveled underground with ICG's Meade and McIntyre to the first right section through the mine's neutral air entries. (Tr. 44:9–45:10, 166:17–167:12, 233:14–16.) Once Little, Sturgill, Meade and McIntyre arrived at the first right p, they walked toward a permanent stopping line. (Tr. 45:21–24, 169:2–13, 233:21–25.) Little observed "the backup curtains that are actually required to be installed by [ICG's] ventilation plan to force air into the bleeder were torn down." (Tr. 45:25–46:4.) Moreover, the "curtains were not secured against the ribs, as required." (Tr. 46:5–6.)

As the inspection party traveled through the first right panel, Meade walked with Sturgill and Little walked with McIntyre. (Tr. 169:19–21.) During his inspection, Little did not identify any dust or methane problems. (Tr. 104:7–105:5.) The group entered the bleeder return entry through an open mandoor on the east side of the first right panel.[13] (Tr. 46:8, 169:19–170:1, 233:24–234:2.) Once through the east mandoor, Little and Sturgill traveled toward the panel's

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> that portion of the map which contains information required under § 75.371 [including the design of the bleeder system and the location of regulators, stoppings, and bleeder connectors, *see* 30 C.F.R. § 75.371(x), (bb)] will be subject to approval by the district manager.

30 C.F.R § 75.370(a)(1).

[12] Section 75.370(e) provides: "Before implementing an approved ventilation plan or revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions." 30 C.F.R. § 75.370(e).

[13] Throughout this decision, I refer to this mandoor as the "east mandoor," reflecting its position in the first right panel as viewed from overhead. *See supra* note 5. The shorter "east" side of the rectangular panel is the part of the bleeder system where air ventilating the panel flows back into the main return air course.

mouth and each took an air reading at "the outby [east] end of the bleeder entry, where it dumps back into the main return." (Tr. 46:9–21, 171:11–18.)

The inspection party then traveled the "entire [perimeter] of the panel" and "observed brattices, and the conditions around the [perimeter] of the panel" as they followed the bleeder line around from the east side of the panel to the northern part of the panel. (Ex. G–5; Ex. R–2; Tr. 47:9–13, 51:15–52:2, 171:24–25, 234:3–5.) While on the northern end of the panel, Little observed a "six-by-eight[-inch] hole in the corner of the brattice line" but "no other means" to "direct air from [the] first right panel directly into the return." (Tr. 47:15–19.) Little did not take an air reading at the hole in the brattice line, as the hole was "not sufficient to ventilate an active working section." (Tr. 47:22–25.) Little found no other suitably large opening in which to take air readings on the northern side of the panel.[14] (Tr. 52:13–52:17; 99:8–17, 121:5–18.)

While on the northern side of the first right panel, the inspection party also encountered two closed mandoors.[15] (Tr. 48:19–22, 50:7–51:14, 234:3–5.) ICG's witnesses testified that at least one of these mandoors was supposed to be "tied" open using wire to allow air to ventilate the section. (Tr. 50:7–51:14, 139:24–25, 172:16–173:16, 183:6–9.) At the conclusion of his inspection, Little wrote Citation No. 8219731 for a violation of 30 C.F.R. § 75.370(a)(1) as follows:

> The approved Ventilation, Methane and Dust Control Plan is not being complied [with] on the 002 MMU. The 002 section has mined 26 pillars of coal which were indicated on the plan approved 11-03-2008 to be left as bleeder blocks. This is the second violation of the same practice since 11-3-2008. The operator's approved Ventilation Plan has been cited 10 times since 10-2007. An inspection of the perimeter of the permanent stoppings constructed to divert intake air and to create a return air course to ventilate the gob area of the 1st right panel off the mains has no means for the gob air to be directly coursed into the return. No regulator of any kind is installed. The 002 section [had] no lapse in production between the first and second shifts. Production of coal was stopped immediately and miners withdrawn to the surface.

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[14] According to Little, an air reading for the six-by-eight-inch hole was not relevant to his inspection because "the approved ventilation plan was what was cited," and the size and location of the hole "would have no bearing on where [ICG was] presently mining." (Tr. 48:3–9.) On the other hand, Little believed that a regulator, which is simply a very large opening in a permanent stopping to allow air to travel through it, would have had a bearing on the approved ventilation plans. (Tr. 48:11–16.)

[15] For ease of description, I will refer to these doors as the "north mandoors."

(Ex. G–3 at 1.) Based on his examination, Little determined this violation was S&S. (*Id.*) According to Little, he marked the citation as S&S because—other than tying or propping open the closed north mandoors—there was no way to ventilate dust and methane accumulations from the first right section into the bleeder system. (Tr. 75:2–10, 76:3–6, 79:23–25, 80:5–15; 104:1–3.) He found it would affect the twenty miners on this section during the active mining shifts in this portion of the mine. (Ex. G–3 at 1; Tr. 76:24–77:9.) Little later amended the citation to characterize it as an unwarrantable failure.[16] (Ex. G–3 at 2; Tr. 80:16–81:11.)

Upon completing his inspection, Little also wrote Order No. 8219732 for ICG's alleged violation of section 75.370(e) for failing to train miners on a new ventilation plan. The condition or practice cited for the order reads:

> The operator has failed to submit and have a plan approved and train the miners on the provisions and ventilation changes necessary to ventilate the 1st right panel off the mains prior to beginning retreat mining on the panel. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–4 at 1.) Little also characterized the order as an S&S violation affecting twenty-five miners who worked during all shifts on that panel and resulting from ICG's unwarrantable failure. (*Id.* at 1; Tr. 77:10–17.) To abate the alleged violations, ICG submitted a new ventilation plan that was subsequently approved on January 28, 2009, and then trained its miners in this new plan's contents.[17] (Ex. G–3 at 3; Ex. G–4 at 2–3; Ex. G–10.)

At the hearing, ICG introduced both on-shift and pre-shift records from the morning of January 23 (Ex. R–6; Ex. R–7; Ex. R–8), as well as videotapes showing smoke tests ICG conducted in the first right panel three days after the issuance of the citation and order. (Ex. R–5.) Although Little reviewed preshift reports before going underground, his review of those reports had no impact on his issuance of the citation and order. (Tr. 101:18–102:17.)

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[16] On February 6, 2009, Sturgill again modified Citation No. 8219731 to reduce the level of negligence from "reckless disregard to high" because "after further investigation a determination of high negligence is better suited for this condition." (Ex. G–3 at 4.) Sturgill's modification provided no details regarding his "further investigation" and no explanation of why high negligence better suited this citation than reckless disregard.

[17] Hereinafter, I refer to these as the "January 28 Plan" and "January 28 Plan Map."

III. PRINCIPLES OF LAW

A. Section 75.370(a)(1)

Section 75.370(a)(1) requires operators to (1) develop and follow an approved ventilation plan; (2) that is designed to control methane and respirable dust and suitable to the mine's conditions and mining system; and (3) consists of the plan content prescribed in section 75.371 and a map as prescribed in section 75.372. 30 C.F.R. § 75.370(a)(1). Only portions of the map containing information required under section 75.371 are subject to the district manager's approval. *Id.* Section 75.371's plan content provisions include "a description of the bleeder system to be used, including its design," and "the location of ventilation devices such as regulators, stoppings, and bleeder connectors used to control movement through worked out areas." *Id.* § 371(x), (bb). An operator violates section 75.370(a)(1) when it does not conform its operations to items required in a ventilation plan map. *Solid Energy Mine Co.*, 19 FMSHRC 886, 888 (May 1997) (ALJ) (finding a violation where an operator failed to construct stoppings "required by the plan and shown on the ventilation plan map.").

B. Significant and Substantial

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

Besides specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981). Moreover, the Commission has indicated "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission indicated an evaluation of the reasonable likelihood

of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

C. Unwarrantable Failure

In *Emery Mining*, the Commission described "unwarrantable failure" as "aggravated conduct constituting more than ordinary negligence." 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

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

D. Plan Interpretation

Plan interpretation weaves together two threads of Commission precedent. First, the Commission has indicated that, "plan provisions are enforceable as mandatory standards." *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 254 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987)). Moreover, as with regulatory standards, unambiguous plan provisions must be enforced as written. *Id.* at 255 & n.11.

In a plan context, however, the Commission has specifically rejected deference to the Secretary's reasonable interpretation of an ambiguous plan. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 589 n.8 (Aug. 2006). Where a plan provision is ambiguous, the Commission reiterated, "the Secretary must 'dispel the ambiguity' by establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent

enforcement." *Id.* at 589 (citations omitted). As Administrative Law Judge David Barbour observed, regulations requiring adherence to a plan "recognize [that] due process entitles an operator to fair notice of the Secretary's interpretation of a plan's provision." *Mach Mining, LLC*, 29 FMSHRC 869, 882 (Oct. 2007) (ALJ).

These two lines of precedent, therefore, provide the framework for interpreting a provision in an adopted plan. First, I must determine whether the plan provision is unambiguous. If it is, those terms must be enforced as written. However, if the plan provision is ambiguous, the Secretary's reasonable interpretation is not entitled to the deference a reasonable regulatory interpretation would receive. Instead, I must determine whether the Secretary's credible evidence as to the history and purpose of the provision, as well as evidence of consistent enforcement, establish the intent of the parties and dispel the provision's ambiguity.

E. Regulatory Interpretation

Interpreting the Secretary's regulations that implement the Mine Act is a two-step process. First, unambiguous regulatory provisions "must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). The meaning of regulations are "ascertain[ed] . . . not in isolation, but rather in the context in which those regulations occur." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary's reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

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

A. Citation No. 8219731 - Ventilation Plan Violation

1. Additional Findings of Fact

a. Inspector Little and Superintendent Meade's December 2008 Conversation

Inspector Little and Superintendent Meade provided contradictory testimony regarding their mid-December conversation. Little claims he told Meade that ICG would need to submit revised plans before beginning retreat mining in the first right panel, but Meade denies he received such instructions. Little admitted that he made no notes regarding his mid-December conversation with Meade. (Ex. G–2; Tr. 108:5–9.) More importantly, Little made no mention of this conversation in the condition or practice section of his citation, even though it was one of the bases for his unwarrantable failure determination. (Ex. G–3; Ex. G–4; Tr. 108:10–20.) Although Little did mention other detailed facts underlying his citation and made notes during the course of

his inspection, this factor was not recorded. (Ex. G–2.) Given Meade's credible testimony to the contrary, Little's inability to produce any notes from the conversation, and Little's failure to include this assertion in his citation, I find that Little and Meade's mid-December conversation did not include a discussion about plan requirements.

b. Position of Mandoors During Inspector Little's January 23 Inspection

Superintendent Meade testified that he and Inspector Sturgill approached the east mandoor before Inspector Little and section foreman McIntyre, who were trailing behind him. (Tr. 169:19–21.) According to Meade, the mandoor had been propped open using a cinder block and head board to create a "T." (Tr. 170:3–15.) Meade testified that he went through the mandoor and held it open for Sturgill, but Sturgill waited for Little. (Tr. 169:21–170:1, 170:25–171:2.) At that point, Meade shut the door behind him and waited in the return for Sturgill, Little, and McIntyre. (Tr. 171:3–5.) Meade's testimony that the east mandoor was open when he and Sturgill approached it during the inspection seems self-serving, but the Secretary presented no contrary evidence suggesting the east mandoor was closed when the inspection party approached it. Little also agreed he was probably the last person through the door because he takes inspection notes as he goes. (Tr. 50:1–2.) As a result, Little "couldn't say that [the east mandoor] was open or closed when approached by the party." (Tr. 50:4–5.) Finally, because mandoors are meant to be closed when not in use (Tr. 49:8–10), it makes sense that Meade would close the door behind him. Accordingly, I find the east mandoor was propped open when Meade approached it during the January 23 inspection, and Meade closed it behind him while he waited for Sturgill, Little, and McIntyre.

Later, while on the north side of the panel, Little found both north mandoors to be closed, including the door that was supposed to be tied open. (Tr. 50:7–52:9, 80:8–10.) According to Little, Meade explained to him at the time that one of the north mandoors should have been tied open, but Little did not know when the mandoor had been closed or if anyone in ICG management was aware it had been closed. (Tr. 123:21–124:11.) Section foreman Gayheart testified that the doors in the northern side of the bleeder entry had been open during his evening shift on January 22, 2012. (Tr. 215:12–216:10, 218:16–219:14, 224:6–11.) However, Gayheart admitted he did not travel all the way to the north mandoor that had been tied open, and he had no knowledge of what occurred between 12:30 a.m., when his shift ended, and 8:30 a.m. on January 23. (Tr. 222:10–13, 224:18–19.) In addition, Meade stated that an unidentified miner purposely relieved himself in the bleeder entry's return air course, closing the tied-open mandoor behind him when he finished. (Tr. 173:14–174:17, 206:11–207:2.) Given the use of return air to ventilate air out of the mine, Meade's uncontroverted testimony regarding the unknown miner and the mandoor is convincing. Based on the evidence before me, I find that a miner closed the tied-open north mandoor at some point between 12:30 a.m. and 8:30 a.m. on January 23.

c. ICG's Use of Mandoors to Control Airflow

The approved November 3 Map also indicates that air was to flow in the direction of the northern and eastern parts of the panel and out to the bleeder system. (Ex. G–5.) Yet when ICG engaged in retreat mining of this panel, Little indicated that no regulator had been installed; instead, ICG tried to use mandoors. (Tr. 48:11–49:25.) At the hearing, ICG suggested that mandoors on the first right section functioned as regulators.[18] (Tr. 96:4–97:3, 99:3–7, 139:15–25, 152:25–153:9, 214:23–215:1.) Respondent's intention in propping and tying open the east mandoor and one of the north mandoors was, therefore, to ventilate air off of the working section. The facts before me, however, demonstrate that ICG was not permitted to use mandoors as regulators under its November 3 Plan and that the mandoors themselves, which are designed to maintain separation between air courses, did not operate as regulators.

First, ICG's mandoors serve a different purpose than regulators. Regulators are openings in a stopping used to control air flow for proper ventilation. (Tr. 48:15–17, 96:4–7, 120:12–16, 146:7–10, 242:25–243:16.) Conversely, mandoors allow miners access between areas with separate air flows but mandoors remain closed after miners pass through. (Tr. 49:8–19.) Inspector Little explicitly stated several times that the type of mandoors ICG used are not permissible regulators. (Tr. 49:8–19, 54:12–14, 95:15–96:3.) Little also drew a sharp and very important distinction between *sliding* doors that might be used as a regulator and the mandoors ICG used in this case: though sliding doors will not be inadvertently closed, the mandoors ICG used are to be kept closed. (Tr. 119:23–120:5.) That ICG needed to employ on-the-fly, makeshift adjustments to force open the mandoors demonstrates that ICG's mandoors were *not* equivalent to regulators. Regulators are fixed *openings*. Mandoors open for egress but remain closed otherwise. *See supra* note 18.

The miners' conduct at ICG also indicates that its mandoors did not *function* as regulators. Both Meade and an unidentified miner closed the very mandoors that ICG said were to be propped and tied open. *Cf. Consolidation Coal Co*., 11 FMSHRC 1105, 1109–1111 (June 1989) (ALJ) (discussing a ventilation plan where a door in a stopping was likely to remain open). Meade's own action of closing the east mandoor is particularly instructive. As a supervisory

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[18] In its post-hearing brief, ICG argues that mandoors qualify as regulators because they "meet [the] definition" of 30 C.F.R § 75.333(e)(1)(ii). (Resp't Br. at 15.) Section 75.333(e)(1)(ii) requires that regulators be "constructed of noncombustible materials" like "concrete, concrete block, brick, cinder block, tile, or steel." However, just as a dinner spoon does not become a surgical scalpel simply because it is made of the same material, a mandoor does not become a regulator simply because it is constructed of the material listed in section 75.333(e)(1)(iii). Each has a distinct purpose or use, and they are not interchangeable. Notably, a different paragraph of the same regulation indicates that "personnel doors [i.e., mandoors] shall be constructed of non-combustible material and shall be of sufficient strength to serve their intended purpose of maintaining separation between air courses . . . . When not in use, personnel doors shall be closed." 30 C.F.R. § 75.333(c)(3).

employee in the midst of an inspection—and knowing ICG had been issued a citation for not following its November 3 Plan— Meade would have had a strong incentive to leave the mandoor open to show a ventilated first right section if ICG were actually permitted to use mandoors as regulators. Despite that incentive, Meade either absentmindedly or purposely closed the mandoor. Given the context, his closure of the east mandoor suggests that the November 3 Plan did not permit mandoors to be propped or tied open as a proxy for a regulator. It also indicates that ICG's mandoors were to remain closed when not in use.

The unidentified miner's closure of the tied-up north mandoor also supports a finding that ICG's mandoors were routinely kept closed. ICG personnel had been trained in the November 3 Plan in order to abate earlier violations. Yet even section foreman McIntyre admitted he was not aware that the north mandoor was being used as a regulator. (Tr. 234:8–10, 243:9–12.) If ICG's section foreman did not know that the north mandoor would be tied open to try to ventilate the section, it is reasonable to expect other ICG miners would be similarly unaware. That a trained miner, therefore, would close a tied-open mandoor indicates the mandoor was supposed to be closed under the Secretary's regulations and November 3 Plan. Moreover, it further demonstrates that propped-open or tied-open mandoors would have been closed in the normal course of continued mining operations.

Finally, Safety Director Cantrell admitted that in abating Citation No. 8219731, MSHA refused to approve a plan map that allowed mandoors to operate as regulators. (Tr. 145:12–22, 147:23–148:13.) As a result, the January 28 Plan Map specifically includes a regulator rather than a mandoor. (Ex. G–10; Tr. 145:12–22, 147:23–148:13.) MSHA's refusal to accept a mandoor—a piece of equipment that is designed to be kept closed to maintain separate air courses—as a regulator supports a finding that the November 3 Plan prohibited ICG from tying or propping them open to ventilate pillar removal activities on the first right section.

Based on these facts and circumstances, I therefore find that the November 3 Plan did not permit ICG to use these mandoors to ventilate the section. I also find that miners trained in the November 3 Plan would have closed any open mandoors in the course of continued mining operations. Moreover, as Cantrell and McIntyre each admitted, a closed mandoor would not serve as a regulator. (Tr. 153:9–13, 243:17–244:7.) Accordingly, I find these mandoors did not function as regulators or ventilate the section because they were either closed at the time of the inspection, being improperly tied or propped open, or would have been closed by miners during future mining operations.

2. Respondent's Evidence

a. ICG's January 23, 2009, Morning Shift Records

At the end of the overnight maintenance shift, ICG maintenance shift section foreman Arthur Tackett completed a Preshift Mine Examiner's Report for the first right section (or panel). (Ex. R–7; Tr. 163:17–21, 238:18–239:2.) Preshift reports alert mine operators to hazardous

conditions and the amount of air on the examined section. (Tr. 238:21–25.) The January 23, 2009, preshift reports showed no hazardous conditions observed between 5:00 a.m. and 6:15 a.m. (Ex. R–7; Tr. 239:4–7.) A little more than an hour later, section foreman McIntyre completed an onshift report showing no hazardous conditions observed or reported, no methane in working places between 7:30 a.m. and 8:00 a.m., and no methane in the return air course at 7:20 a.m. (Ex. R–8; 239:22–240:17.) McIntyre also took air readings at the last open crosscut across the face and at the continuous mining machine when he first arrived on the section and just before beginning to mine. (Ex. R–6; Tr. 236:2–237:18.)

Perfunctorily, ICG's on-shift and pre-shift records from the morning of January 23 (Ex. R–6; Ex. R–7; Ex. R–8) might suggest that enough air was flowing through the section and that methane had not accumulated in the first right section. Yet despite Superintendent Meade and section foreman Gayheart's admissions that ICG had been mining the first right section for two to three days, Respondent did not present similar reports for any previous shifts during which it undertook active mining in the section.[19] (Tr. 193:16–19, 214:19–22.) Moreover, it is possible and likely that any previously present methane would have dissipated during the overnight maintenance shift that immediately preceded mining operations—either through a small opening in the brattice line or a then-open mandoor. Regardless, ICG's records provide little insight regarding the ventilation of the section in previous shifts when active mining occurred, or how well-ventilated the panel would have been in *future* shifts. Accordingly, I afford little weight to ICG's on-shift and pre-shift records from the morning of January 23 beyond suggesting that methane had not accumulated in the section during the two hours between the beginning of the morning shift and the issuance of the citation and order in this case.

b. ICG's Video of Smoke Tests

Three days after MSHA issued both the citation and order in this case, ICG performed and videotaped its own smoke tests in the first right panel. (Ex. R–5; Tr. 194:4–13.) Chemical smoke tests may be used to determine the direction and quantity of airflow. (Tr. 105:14–15.) To perform a smoke test, the tester breaks the end off of a test tube and aspirates its contents to create smoke. (Tr. 105:10–13, 186:3–6.) The direction the smoke travels in five-, ten-, or

[19] Gayheart did testify that on the day pillaring (or retreat mining) began, the air passing through one of the open mandoors was strong enough to shake his jacket, that ICG had "sufficient air" on the section, and there was no methane on the section. (Tr. 215:8–216:14.) During his exchange with Respondent's counsel, however, Gayheart admitted he was not sure of other details, including the block number location of the continuous miner where he allegedly took his air reading, how many days ICG had mined the first right panel, the method in which the mandoors were held open, and the location and direction of mining activities in the section. (Tr. 214:19–215:6, 215:8–17, 216:2–5, 218:1–18.) He also did not give any specifics regarding the amount of air he measured on his anemometer beyond saying it was "sufficient." (Tr. 216:6–14.) Based on his admitted difficulty in remembering such details, I give his testimony little weight as to the amount of air flow on the active mining section.

twenty-second intervals may be used to determine air direction and velocity. (Tr. 105:17–106:4, 186:3–6.) According to Inspector Little, chemical smoke tests are "very rarely used to measure an air reading" but might be used where air "has a very low velocity or the movement of an anemometer is not possible." (Tr. 106:5–8.) ICG claims it videotaped its smoke tests with both the east and north mandoors open and then with the mandoors closed in an effort to show that air flowed in the proper direction under both scenarios. (Ex. R–5; Tr. 189:1–8, 190:16–19; Resp't Br. at 17.) Moreover, ICG represented at the hearing that no changes had been made to the ventilation of the first right panel. (Tr. 192:9–13, 194:17–19.)

Notwithstanding the poor quality and confusing nature of the video footage, ICG's smoke tests are riddled with problems. ICG's process for making its smoke test videos raises serious evidentiary concerns. First, Superintendent Meade admitted that no MSHA representatives were present during the smoke tests, and MSHA had no way to verify conditions had not changed in the three days that elapsed between the inspection and the smoke tests. (Tr. 194:19–195:8.) Second, Meade admitted that ICG made the smoke test video and took pictures using cameras that may not have been permitted in the return airway under MSHA regulations, and that he did not know what kind of cameras were used. (Ex. R–3; Ex. R–4; Ex. R–9; Tr. 195:9–196:3.) Third, Meade admitted he did not know if ICG sought permission from MSHA's District Director to use the cameras in the return. (Tr. 196:4–11.) Granted, Meade stated that he had no knowledge of any changes to the ventilation system prior to the smoke test, that he specifically ordered miners not to go on the section, and that ICG was under a section 104(d) order preventing access to the area. (Tr. 192:9–13; 204:1–13.) Nevertheless, I note that miners who might inadvertently or openly violate permissible-equipment regulations might also inadvertently or openly violate a section 104(d) order, let alone Meade's order not to go on the section. Further, the absence of MSHA officials at the videotaping and inability of MSHA to verify the ventilation conditions calls into question the veracity of the smoke test videos in their entirety. Accordingly, the results of ICG's smoke tests are sufficiently questionable that I accord them no weight.

3. November 3 Map Interpretation

Inspector Little and ICG's Cantrell also testified to their varying interpretations of the November 3 Plan Map. (Tr. 110:17–113:20, 122:16–123:4, 132:20–136:20.) Little testified the "Xes" on the November Plan Map reflected coal blocks, or pillars, that could not be mined. Specifically, he pointed to the map's legend as indicating "Xes" that represent "Blocks To Be Left." (Tr. 67:1–7, 111:8–19, 112:6–16, 122:16–25.)

Conversely, Cantrell testified that he and MSHA Ventilation Specialist Bellamy drew up the map in order to abate the earlier violations cited on November 3. (Tr. 131:22–133:12.) According to Cantrell, some "Xes" were placed on the blocks in order to "maintain the bleeder line," while other "Xes" were placed on "blocks that were expected to be mined." (Tr. 133:2–7.) Cantrell further testified it was the company's understanding that the "Xes" were placed on the map to "maintain the bleeder line" and ICG was "not to take any blocks that would affect the

bleeder line." (Tr. 133:23–25.) In addition, Cantrell testified that not every block marked with an "X" was necessary for the bleeder system. (Tr. 134:25–135:18.) From Cantrell's perspective, ICG would be permitted to mine blocks marked with an "X" as long as mining them did not affect the bleeder line. Cantrell, who has thirty years of experience preparing ventilation maps, also stated that bleeder blocks are normally identified with a "B," but in this case started out being marked as "X" and continued throughout the map's development. (Tr. 136:10–20.) However, Superintendent Meade admitted: "The way we refer [to] Xes as far as [the] mine process [goes], these [are] blocks that we cannot get due to bad roof conditions, a bleeder line, et cetera. That's what we put our Xes down for." (Tr. 202:8–11.) He also indicated that if he saw an "X" on a map, he would not mine the block "[b]ecause . . . something's wrong with it." (Tr. 202:13–14.)

As I indicated above, the November 3 Plan Map contains several items listed in section 75.371—including the design of the bleeder system and the location of regulators, stoppings, and bleeder connectors. 30 C.F.R. § 75.371(x), (bb). These items are part of the ventilation plan subject to the District Manager's approval. *Id.* §§ 75.370(a)(1), 75.372. Thus, the first step in interpreting a November 3 Plan Map provision is to determine whether the provision is unambiguous.

Despite Cantrell's testimony to the contrary, the map's provisions are ostensibly clear. As Inspector Little correctly identified, the legend in the bottom right hand corner lists "X" as indicating "Blocks To Be Left." (Ex. G–5.) In addition, on the upper right hand side of the November 3 Plan Map is a small blue box. (*Id.*) Inside the box in blue type, the text reads: "Pillar Left To Maintain Bleeder Line," followed by a black "X." (*Id.*) I need not refer to the dictionary definition of each of these words to deduce the meaning of these provisions. The words used in both the legend and the small blue box support Little's interpretation that every block of coal marked with an "X" could not be removed. Read plainly, "Blocks to Be Left," implies that every box marked with an "X" must not be mined. Similarly, the "Left" in "Pillar Left To Maintain Bleeder Line" implies that a block marked with an "X" may not be removed.

Furthermore, Cantrell's alternate reading does not hold water given the context in which the parties developed the November 3 Plan Map. *Cf. Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) ("[W]e ascertain the meaning of regulations not in isolation, but rather in the context in which those regulations appear.") (citations omitted). First, and most critically, MSHA and ICG developed the map *after* MSHA inspectors cited ICG for failing to comply with a previous ventilation plan where ICG engaged in retreat mining of 385 blocks of coal "without an approved bleeder system." (Ex. G–9.) The November 3 Plan approval letter, in particular, highlights MSHA's reluctance to grant ICG the latitude to adjust its ventilation plans on the fly, specifically requiring ICG to submit "[*a*]*ny* proposed changes to the plan" for MSHA approval "*prior* to implementation." (Ex. G–6 (emphasis added).) Moreover, nothing in the record besides Cantrell's self-serving testimony indicates that MSHA intended to empower ICG to make judgment calls about which pillars could be safely removed without affecting the bleeder system. In fact, given MSHA's conspicuous concern with retreat mining and bleeder systems at

the Clean Energy Mine, the exact opposite appears to be true: MSHA intended to keep ICG on a short leash.

Second, ICG's interpretation is incongruous with the standard methods of marking ventilation maps. As both Cantrell and Meade indicated, an "X" normally indicates a coal pillar that cannot be removed. Conversely, a "B" is used to mark bleeder blocks. The parties drew up, and MSHA approved, the November 3 Plan Map immediately after MSHA inspectors cited ICG for failing to comply with its ventilation plan by engaging in retreat mining of 385 pillars. MSHA would have had strong reasons to make the November 3 Plan Map unambiguous so ICG would not mine pillars MSHA thought necessary for proper ventilation. Given this background, I simply do not find credible Cantrell's testimony that he and Bellamy ignored ventilation plan conventions and used an "X" to mark bleeder blocks so that an "X" could be seen as meaning two different things. Indeed, Cantrell seems to have adopted Humpty Dumpty's memorable boast to Alice in *Through the Looking Glass*: "When *I* use a word . . . it means just what I choose it to mean—neither more nor less." Lewis Carroll, *Through the Looking Glass* 123 (1897). As Alice astutely responded, I must observe: "The question is . . . whether you *can* make words mean so many different things." *Id.* Here, I am not convinced by Cantrell's variable meanings. Rather, the "X" in the November 3 Plan Map meant the pillar was not to be removed, as Cantrell and Meade readily admitted is the industry convention.

Third, ICG's suggested interpretation is inconsistent with the text of the November 3 Plan Map. "Blocks to Be Left" does not imply any wiggle room in interpretation: those blocks will be left no matter what. It makes no sense to read the November 3 Plan Map, as ICG suggests, to have an "X" in one case mean the pillar may not be removed and in another case mean ICG has the discretion to remove the pillar. The only reading that makes sense is the plain one whereby a block marked with an "X" may not be removed.

Finally, MSHA's authority for plan review and oversight is one of the bulwarks of miner safety. I find it implausible that MSHA would have permitted ICG—or that ICG would have believed it could—pick and choose which pillars were necessary to maintain an effective bleeder system when one of section 75.370's main purposes is to establish a framework for ventilation plan submission, approval, and implementation. *See* discussion *infra* Part IV.B. It is not the approved substantive provisions alone that protect miners; the plan review process itself allows MSHA to contribute important oversight of the ventilation plan.

Consequently, I see no need to read ambiguity into the November 3 Plan Map's provisions simply because Cantrell's self-serving testimony might suggest an alternative, though tortured, interpretation. Based on my review of the November 3 Plan Map and the context surrounding its adoption, I determine its provisions are unambiguous and prohibit mining any block marked with an "X." Accordingly, I do not need to determine whether the Secretary's evidence regarding the history and purpose of the provision and its consistent enforcement establish the intent of the parties.

4. Violation

Inspector Little issued Citation No. 8219731 for ICG's failure to comply with the November 3 Plan, including the November 3 Plan Map. ICG argues it did not violate section 75.370(a)(1) because the Secretary "failed to prove that ICG . . . min[ed] blocks necessary to maintain the bleeder system in the Mine" and "failed to prove there were no regulators in the 1st right panel." (Resp't Br. at 16.)

Despite Respondent's arguments, to establish a section 75.370(a)(1) violation the Secretary need not prove that ICG mined blocks necessary to maintain the bleeder system or that the first right panel had no regulators. As noted above, 30 C.F.R. § 75.370(a)(1) requires operators to develop and *follow* an approved ventilation plan designed to control methane and respirable dust that is suited to the mine's conditions and mining system. A failure to follow the terms of an approved plan, therefore, establishes a violation of section 75.370(a)(1).

The text of the November 3 Plan approval letter is clear: "*Any* proposed changes to the plan *shall be submitted* and *approved* by the District Manager *prior* to implementation." (Ex. G–6 (emphasis added.)) The section 75.370(a)(1) requirement to *follow* an approved ventilation plan, therefore, bound ICG to abide by the terms of the plan, including the November 3 Plan Map, or to submit any proposed plan changes to the District Manager for his or her approval.

Even a cursory comparison of the November 3 Plan Map and the Retreat Mining Maps makes clear that many pillars of coal marked with an "X" on the November 3 Plan Map had already been mined. (Ex. G–5; Ex. G–7; Ex. R–2.) This constituted a change. ICG's Cantrell and Meade admitted under oath that the maps showed differences, even though Cantrell refused to call them "changes." (Tr. 150:10–22, 151:4–21; 200:3–8.) Cantrell also admitted that he did not submit such "differences" to MSHA for approval until after receiving the January 23, 2009, citation. (Tr. 151:23–152:5.)

Given the November 3 Plan requirement that ICG submit any proposed *changes* to MSHA for approval, Cantrell's attempt to characterize these mined pillars as mere "differences" rather than "changes" is understandable, yet unconvincing. ICG's semantic alchemy notwithstanding, I do not parse those words nearly as fine as Cantrell. Where the design of the first right panel, as mined, differs from the design outlined in the November 3 Plan Map, a change has occurred. According to the November 3 Plan approval letter, ICG was required to submit these changes for the District Manager's approval prior to implementing the changes. Failure to do so, therefore, constitutes a failure to follow an approved plan.

Moreover, I have found that the November 3 Plan Map unambiguously prohibited the removal of blocks marked with an "X," which Respondent has indisputably done. The Secretary also presented uncontroverted evidence that backup curtains, which play a role in ventilation, had not been secured to coal ribs. In addition, Inspector Little's comparison of the November 3 Plan Map and the government's Retreat Mining Map identified the unauthorized construction and

relocation of stopping lines. (Tr. 71:20–73:8; Ex. G–5; Ex. G–7.) Meade also admitted that the November 3 Plan Map and ICG's Retreat Mining Map had differences in their stopping-line construction and brattices. (Ex. G–5; Ex. R–2; Tr. 199:25–200:1.) Little characterized these as "major changes" that required re-submission to MSHA. (Tr. 73:9–15.) Because these parts of the map are part of the approved plan, failure to follow its terms also constitutes a violation.

I have also found that the November 3 Plan did not permit ICG to use mandoors to ventilate the section. Yet that is precisely what Respondent tried to do when it propped open and tied open the east and north mandoors. In doing so, ICG cobbled together a new ventilation scheme for active mining to remove in the bleeder area and again failed to follow its approved November 3 Plan.

Based on the above, I therefore determine that ICG failed to follow its approved ventilation plan because (1) it did not comply with the November 3 Plan Map provisions but made changes such as relocating stopping lines and mining pillars marked with an "X", (2) it failed to submit the ventilation plan changes it made before implementing them, and (3) it impermissibly used mandoors as regulators changing the air course. Each of these, individually, would be enough to show a failure to follow an approved ventilation plan. Consequently, I conclude ICG violated 30 C.F.R. § 75.370(a)(1).

5. Gravity and S&S Determination

ICG's violation of section 75.370(a)(1) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* element requires that the violation contribute to a safety hazard.

In this case, Inspector Little's credible testimony highlighted the dangers that respirable dust and methane accumulations would present if this gob air became trapped on the first right panel. (Tr. 74:21–76:23.) Moreover, Little credibly testified to the potential for methane liberation at the Clean Energy Mine and identified the continuous miner, power centers, belt drives, and personnel carriers as potential sources of ignition. (Tr. 75:14–76:6.)

In response, ICG first argues that Inspector Little's failure to take air readings or discuss conditions with miners and his inability to testify to methane levels—as well as Respondent's smoke tests, readings and inspections, and section foreman McIntyre's testimony regarding conditions on the section—indicate the violation is not S&S. (Resp't Br. at 17–18.) However, ICG's arguments do not rebut Little's credible opinion that the ventilation system, as it existed at the time of the violation, did not adequately ventilate the first right panel. When Little inspected the section, both the east and north mandoors were closed. He saw no means for air to escape from the section besides the small hole in the brattice line.

Little's testimony is credible and convincing given his long history in the coal industry, professional certifications and training, and specific experience with bleeder systems and

ventilation plans. He worked in coal mines for 32 continuous years before joining MSHA as an inspector in 2005. (Tr. 22:17–23.) Little served as a general laborer, belt man, section foremen, mine foreman, assistant superintendent, and superintendent. (Tr. 20:8–22:22.) He held state foreman certifications beginning in the late 1970s and became a certified electrician in the late 1990s. (Tr. 20:23–21:9, 22:24–23:4.) As a mine foreman, assistant superintendent, and superintendent, Little established bleeder systems, installed ventilation controls, performed weekly exams of the bleeder system, and had input on the development of ventilation plans for retreat mining (Tr. 22:3–13), which specifically relate to the issues in this case. Accordingly, his opinion is based on the facts he observed and his experience entitles that opinion to significant weight. *Cf. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1279 (Dec. 1998) (relying on inspector's opinions to conclude the substantial evidence supported the Judge's S&S determination).

Next, ICG points to Little's admissions that he would not have considered the violation S&S if he had been able to take an air reading in the return air course showing sufficient air flow from the first right section, if a regulator had existed, or if the mandoors had been open. (Tr. 53:5–54:4, 110:1–10. 118:19–119:12, 122:2–12.) However, Little explained his rationale: the doors were closed when Little approached them. As Little stated: "[P]eople can go by a [man]door—and knowing mandoors are supposed to be kept closed when not in use, they can close those mandoors. Defeating your ventilation." (Tr. 120:3–6.) Indeed, the facts of this case illustrate Little's explanation. Even though I have found the east mandoor was open when Superintendent Meade initially approached it, it is uncontroverted that Meade himself closed it behind him. Still another miner closed the north mandoor after relieving himself in the return air course. In light of this otherwise appropriate instinct for miners to close mandoors, ICG's evidence noticeably does not explain how or why these mandoors would remain open in the future. Instead, ICG's mandoors would be closed—as they are designed to be, and as the miners would have been trained to ensure under the November 3 Plan (Ex. G–8)—in the course of future mining operations.

Looking at ICG's evidence, Respondent's closed-door smoke test demonstrates, at best, that air *might* have flowed toward the bleeder system at the time of the violation. Likewise, ICG's preshift and onshift reports at most suggest that methane was not present at the end of the maintenance shift (when no mining took place). Respondent's air readings from the January 23 morning shift are similarly inconclusive. I have found that the east mandoor was open at the time the inspection began, *see* discussion *supra* Part IV.A.1.b, so it is not surprising that McIntyre recorded air movement at the time. ICG, however, did not demonstrate that these air readings would be consistent with past or future mining operations with the mandoors closed, as they are intended to be. I have afforded each of these exhibits little weight individually, and ICG's proffered testimony regarding past conditions is not credible and inapposite. None of ICG's evidence, on its own, dispositively rebuts Little's determination regarding the gravity of this violation.

Even taken together, ICG's evidence is still insufficient to rebut the inspector's opinion that the conditions he found did not adequately ventilate the panel or demonstrate sufficient air would ventilate the panel as additional pillars were removed. Unlike Little's opinion, ICG's evidence tells little about *past* or *future* ventilation conditions during active mining on the first right section. Revealingly, ICG's McIntyre admitted he would not mine with the north mandoor closed because "there wouldn't be enough air at the [continuous] miner." (Tr. 248:25–249:14.) Further, when asked what would happen if the tied-up north mandoor were closed, he responded: "[The air] would stay in the area where they were mining." (Tr. 249:17–23.) Thus, with no fresh air to ventilate the section, the closed north mandoor would create a hazard. At the time of the violation, Little was in the first right section with both the east and north mandoors closed. Thus, McIntyre's testimony confirms Little's prediction that air would be trapped on the first right section when these mandoors are closed.

In determining that compliance with the terms of a ventilation plan does not necessarily shield an operator from liability for other bleeder-related violations, one Commissioner observed: "Ventilation regulations and ventilation plan provisions were designed to recognize that mine ventilation is a dynamic process." *Plateau Mining Corp.*, 28 FMSHRC 501, 511 (Aug. 2006) (separate opinion of Comm'r Young), *rev'd on other grounds*, 519 F.3d 1176, 1191–93 (10th Cir. 2008). That same dynamic nature informs the crux of the hazard in this case. Because the mandoors had been closed—trapping the air on the section—the violation therefore contributed to, or made more likely, the hazards Little identified. Thus, the first two elements of the *Mathies* test have been satisfied because the violation contributed to discrete hazards of methane explosion and accumulation of respirable dust under normal and continued mining conditions.

The Secretary has also established the third and fourth element of the *Mathies* test. Rather than proving insufficient ventilation as ICG suggests, the Secretary must prove the discrete safety hazard—here, a methane explosion and breathing respirable dust—are reasonably likely to contribute to an injury. *Cf. Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) ("The test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury . . ."). The Secretary, therefore, does not need to prove ICG's failure to follow its approved ventilation plan is reasonably likely to cause injury. Instead, he must prove the discrete safety hazards of respirable dust inhalation or a methane explosion are reasonably likely to contribute to reasonably serious injury.

Methane and respirable dust do not need to be present at the precise time a citation issued for these safety hazards to be reasonably likely to result in injury. *See United States Steel Mining Co.*, 7 FMSHRC 1125, 1129–31 (Aug. 1985) (approving Inspector's designation of a violation as S&S in part because "a rapid buildup of methane could reasonably be expected" when coal is being cut and an ignition source was present); *Consolidation Coal Co.*, 15 FMSHRC 1895, 1917 (Sept. 1993) (ALJ) ("I do not believe a physical indicia of the presence of coal dust is necessary to uphold an S&S finding. Pneumoconiosis is a cumulative disease. . . . It is not possible to state

that any one exposure is more 'likely' to bring on a disease than any other . . . ."). The S&S analysis is not an idle snapshot; rather, it contemplates continued operations at the mine. It is well-known that coal mining can produce dust and methane, and given ongoing mining operations, dust and methane would be produced on the first right panel. Respirable dust and methane explosions are among the most serious dangers underground coal miners face. *See Pine Ridge Coal Co.*, 34 FMSHRC 291, 303–305 (Jan. 2012) (ALJ) (discussing the dangers of respirable dust); *cf. Consol of Kentucky, Inc.*, 30 FMSHRC 1, 2 n.2 (Jan. 2008) (ALJ) (discussing the impact of the Sago and Darby methane explosions). Correspondingly, these dangers are reasonably likely to cause serious or fatal injuries if they occur. I determine that the third and fourth *Mathies* elements are established, and thus conclude that this violation was appropriately designated S&S.

6. Negligence and Unwarrantable Failure Determinations

The Secretary's regulations define negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Moreover, the regulations indicate high negligence is found where "the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* at Table X. That ICG knew or should have known of the violative condition or practice is unmistakable. MSHA and ICG developed the November 3 Plan and November 3 Map immediately after violations of a ventilation plan for retreat mining the first right section. (Ex. G–9.) The November 3 Plan approval letter specifically required ICG to submit *any* plan changes for approval. (Ex. G–6.) ICG had been cited for ventilation plan violations ten times in the 15 months immediately prior to the issuance of Citation No. 8219731. (Ex. G–1 at 15–18.) MSHA's specific and recurring steps to correct ICG's poor track record with ventilation compliance at the Clean Energy Mine—and the first right panel, in particular—demonstrate that ICG either knew or should have known of the violative condition or practice.

More critically, ICG altered—or ignored—its ventilation plan in several ways, but neither informed MSHA of these changes nor sought MSHA's prior approval to implement these changes. As I noted above, the November 3 Plan Map unambiguously precludes the removal of coal pillars marked with an "X," yet ICG indisputably removed some of those pillars. ICG plainly relocated brattice curtains and stopping lines, which ICG should have known changed their ventilation plan. ICG also impermissibly used mandoors to ventilate the section. Finally, ICG did not ensure that even its own faulty and unapproved plan was implemented correctly. Indeed, the improperly used mandoors did not remain open and line curtains were torn down. ICG's "gum and duct tape" approach to its use of mandoors and line curtains highlight precisely why the MSHA ventilation approval process exists. Although MSHA ultimately approved a plan incorporating some of ICG's general ventilation ideas, it only did so after guaranteeing proper ventilation controls such as installation of regulators. Thus, I conclude that ICG demonstrated a high degree of negligence.

ICG's behavior is also precisely the type of intentional misconduct that is a hallmark of unwarrantable failure. As I explained above, ICG altered or ignored the November 3 Plan requirements when it mined pillars marked with an "X," improperly and impermissibly propped and tied open mandoors, moved brattice and stopping lines, and allowed line curtains to be torn down. Compounding its error, Respondent ignored the express requirements of the November 3 Plan approval letter when it did not seek MSHA's approval for ICG's poorly implemented changes. Given the danger involved in mining without proper ventilation, ICG's poor implementation of its on-the-fly changes to the plan also demonstrates a serious lack of reasonable care under the facts and circumstances of this case.[20]

Furthermore, ICG's actions represent aggravated conduct constituting more than ordinary negligence. First, the pillar removal process lasted three days and, in removing 26 pillars, extended throughout the first right panel. Moreover, any operator should have recognized the degree of danger inherent in retreat mining this panel without sufficient ventilation. In fact, Cantrell himself admitted that ventilation would be defeated if the mandoors were closed. (Tr. 153:9–13.) Thus, the risk should have been obvious to Respondent's Safety Director. Despite ICG's intention that the propped-open and tied-open mandoors function as regulators, *see* discussion *supra* Part IV.A.1.c, I have found this use of mandoors impermissible under the November 3 Plan. Given his long experience in the mining industry and recognition that closed mandoors would defeat ICG's ventilation, Cantrell should have recognized how misguided it was to rely on this type of spur-of-the-moment, makeshift ventilation. Employing quick-and-dirty solutions with crossed fingers in order to mine more coal is no substitute for the standard of miner safety the Mine Act requires.

In addition, ICG's violation of the November 3 ventilation plan for removing coal pillars put Respondent on notice that greater efforts were necessary for compliance. Little's January 22 instruction to Meade similarly indicates ICG had knowledge that engaging in retreat mining of the panel without approval was a violation and that greater efforts were necessary for compliance.[21] ICG did promptly abate the violation in conformance with MSHA's instructions,

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[20] In its post-hearing brief, Respondent suggests the existence of mandoors (as regulators) and the volume and direction of air flow on the section mitigate ICG's negligence in this case. (Resp't Br. at 19.) ICG's argument is inapt. Citation No. 8219731 alleges a violation for failure to follow a ventilation plan. *See* discussion *supra* Part IV.A.4. ICG's proposed mitigating factors *might* have borne on the gravity of the violation, *see* discussion *supra* Part IV.A.5. But given my gravity findings, Respondent's arguments have little bearing on ICG's negligent failure to follow the November 3 Plan and Map.

[21] ICG claims the Secretary did not prove "that any agent of ICG was aware that the regulator was closed or any proof that there was not sufficient air on the section." (Resp't Br. at 20.) According to ICG, this means it cannot be liable for high negligence and unwarrantable failure. Again, Respondent unreasonably narrows what the Secretary must prove to show high negligence and unwarrantable failure. The Secretary has charged ICG with failing to follow its

but I have also concluded that ICG was highly negligent in its failure to follow its ventilation plan—particularly given its repeated history of ventilation plan violations. Though Inspector Sturgill modified Citation No. 8219731 from "reckless disregard" to "high negligence," a citation need not be marked as "reckless disregard" to sustain an unwarrantable failure. In fact, the Commission "has previously recognized that a finding of high negligence suggests an unwarrantable failure." *San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007) (citing *Eagle Energy, Inc.*, 23 FMSHRC 829, 839 (Aug. 2001)).

Based on all of the above, I therefore conclude that this violation constitutes an unwarrantable failure to adhere to a mandatory safety standard. Consequently, Citation No. 8219731 is **AFFIRMED** as written.

7. Civil Penalty

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

The Secretary has submitted a report of ICG's history of violations at the Clean Energy Mine that became final orders over a fifteen-month period preceding this violation. (Ex. G–1.) The report consists of 132 violations, 28 of which were assessed as S&S violations, and ten of which involve the same standard violated in Citation No. 8219731. (*Id.*) Nothing in the record suggests that the proposed penalty of $59,527.00 the Secretary seeks in these proceedings is inappropriate for the size of ICG's business, and the parties stipulated that the proposed penalties would not affect ICG's ability to remain in business. (Tr. 7:10–12.) Moreover, once MSHA issued this citation, nothing suggests that ICG failed to make a good faith effort to achieve rapid compliance with the safety standard. I have determined that ICG's violation was S&S and constituted an unwarrantable failure to adhere to a mandatory safety or health standard. ICG was highly negligent and this violation exposed 20 miners to a reasonable risk of serious injuries. In

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approved ventilation plan, not with having closed mandoors or improper air volume.

Furthermore, section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a mine." 30 U.S.C. § 802(e). At the time of the violation, Meade was a general mine foreman, which involved "manag[ing] the outby section" such that "if something needed to be done . . . I made sure it was done." (Tr. 163:3–16.) Accordingly, Meade was an ICG agent. His knowledge is imputable to the operator. *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 328–331 (Mar. 2009) (affirming Judge's determinations that supervisors were acting as agents for the mine operator and their conduct was imputable to the operator).

considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of $59,527.00.

B. Order No. 8219732 - Ventilation Plan Training

Section 75.370(e) provides: "Before implementing an approved ventilation plan or a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions." 30 C.F.R. § 75.370(e). Section 75.370(e), therefore, requires mine operators to instruct miners in a ventilation plan's provisions prior to implementing the approved plan or revision to a ventilation plan. In this case, however, ICG already had an approved plan (the November 3 Plan) and trained its miners in that approved plan's provisions. (Ex. G–8 at 2.) In its post-hearing brief, Respondent claims it did not "change" its ventilation plan and cannot be cited for failure to instruct its miners. (*See* Resp't Br. at 22–23.) I understand Respondent's reticence to admit to a change in its ventilation plan, but I have already determined that ICG did not comply with its November 3 Plan and, in fact, made changes it did not submit to MSHA. *See* discussion *supra* Part IV.A.4. In his post-hearing brief, the Secretary contends that these changes constitute an unapproved "plan" and that section 75.370(e) required ICG to train its miners in these unapproved changes prior to implementing them. (Sec'y Br. at 11.) Consequently, Order No. 8219732 turns on whether section 75.370(e) requires an operator to train its miners in unapproved plan changes—or revisions—prior to implementing those unapproved changes. [22]

Under the Commission's two-part regulatory analysis, I must first determine whether the text of section 75.370(e) is unambiguous. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012). Section 75.370(e) envisions two scenarios under which an operator must train its miners in plan provisions prior to implementation—"approved" ventilation plans and "revision[s]" to ventilation plans. 30 C.F.R. § 75.370(e). One potential reading of this regulation would apply the "approved" modifier conjunctively—in other words, both "ventilation plan[s]" and "revision[s] to . . . ventilation plan[s]" must be "approved" before an operator has a duty to train affected persons in the plan's provisions. *See id.* On the other hand, a disjunctive reading is possible if "approved" modifies only "ventilation plan[s]" but not "revision[s] to . . . ventilation plan[s]." *See id.* From this perspective, an operator has a duty to train affected persons in the plan's provisions prior to implementation where there is an "approved ventilation plan" or any "revision to a ventilation plan," whether approved or unapproved.

As a matter of regulatory interpretation, these two plausible readings of section 75.370(e) seem to suggest that the text of the regulation is ambiguous. *Cf. Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (finding that where a meaning of a term in a regulation is "open to

[22] Notably, the Secretary did not cite ICG for a failure to submit a plan under section 75.370(a)(2) or for implementing a proposed plan before approval under section 75.370(d). As the U.S. Court of Appeals for the Eighth Circuit recently indicated, vacating a violation is a proper result when MSHA errantly relied on a regulation. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 709–12 (8th Cir. 2013).

alternative interpretations . . . we conclude that it is in some respects ambiguous."). However, the Commission has also made clear that a regulation's meaning must be read "not in isolation, but rather in the context in which those regulations appear." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010). I must, therefore, examine the regulatory context within which the section 75.370(e) training requirement appears.

As a whole, section 75.370 creates a comprehensive process for ventilation plan proposal, approval, and implementation that involves MSHA, the mine operator, and the representatives of miners. Paragraphs (a) through (d) of section 75.370 outline the process for proposal, review, and approval of a ventilation plan and a revision to a ventilation plan. Conversely, paragraphs (e) and (f) detail a mine operator's duties in implementing an approved ventilation plan or revision to a ventilation plan. Finally, paragraph (g) of section 75.370 specifies MSHA's ongoing responsibilities for oversight of the ventilation plan.

Given this structure, the text of section 75.370(e) supports a clear, conjunctive application of the word "approved" to both a "ventilation plan" and a "revision to a ventilation plan." First, the overall text of section 75.370 contemplates two distinct types of ventilation plan revisions: approved revisions and unapproved revisions. *Compare id.* § 75.370(f) (requiring that certain disclosures be made to representatives of miners upon plan approval) *with id.* § 75.370(a)(ii)–(iii) (requiring identical duties for unapproved revisions). Thus, the text of the regulation uses the "proposed" modifier to discuss unapproved plans and revisions. *See id.* § 75.370(a)–(d). In contrast, the text of the regulation omits that modifier when discussing an approved plan or revision. *See id.* § 75.370(f)–(g)). Hence, the Secretary knew how to distinguish between approved and unapproved ventilation plans and revisions in the text of the regulation. Yet the Secretary's application of section 75.370(e) in this case surprisingly overlooks that important textual distinction. Nevertheless, the text of section 75.370(e) would have included the "proposed" modifier if paragraph (e) actually required training on unapproved revisions to a ventilation plan.

Further, the Secretary's interpretation in this case overlooks his own preamble for section 75.370, which support a conjunctive reading of paragraph (e).[23] First, according to the preamble,

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[23] Section 75.370(e) originally appeared in the Secretary's regulations as section 75.370(d) as part of a "comprehensive revision of the existing standards." Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 34,683, 34,683 (Aug. 6, 1992) (delaying effective date of final rule); *see also* Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899–900, 20,924 (May 15, 1992) (final rule). In 1996, MSHA revised "the existing plan submission and approval process to provide for an increased role for the representatives of miners in the mine ventilation plan process." Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,806 (Mar. 11, 1996) (final rule amending section 75.370). One of the changes was to "redesignate[] existing paragraphs (b)(1) through (f) as (c)(1) through (g)." *Id*. As a result, section 75.370(c) and (d) became section 75.370(d) and (f), respectively. The regulatory history of section 75.370(c) and (d), therefore,

paragraph (d) of section 75.370 "clarifies that ventilation plans or revisions may not be implemented until approved." Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899 (May 15, 1992) (final rule). Consequently, an operator would only train its miners on approved plans or approved revisions prior to their implementation. Second, when MSHA later developed paragraph (f)'s disclosure requirements for approved plans, some commentators suggested these requirements were duplicative of other parts of the regulation. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,808 (Mar. 11, 1996) (final rule amending section 75.370). MSHA ultimately "crafted the final rule in light of the [current paragraph (e)] which requires that operators instruct persons affected by the mine ventilation plan or its revision prior to its implementation." *Id.* Recognizing that "[c]hanges to the plan occur during the approval process[,]" MSHA expected "that the plan or revision would be available to the person conducting the required training, and, therefore, would be provided to the representative of miners." *Id.* Thus, MSHA based its paragraph (f) provisions on the premise that mine operators should be able to provide copies of approved plans and revisions to miner representatives, because an operator cannot properly train its miners prior to implementation without a copy of an approved ventilation plan or revision to a ventilation plan. Accordingly, the preamble for present day paragraphs (d) and (f) support a conjunctive reading of "approved," whereby training requirements under paragraph (e) of section 75.370 only apply to approved ventilation plans and approved revisions to a ventilation plan.

Moreover, the preamble for section 75.370(e) itself similarly supports a conjunctive interpretation. Paragraph (e) was a new provision in the 1992 standards, *see* Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,910 (May 15, 1992) (final rule), and was developed under a regulatory scheme that prohibited the implementation of an unapproved plan or unapproved revision. *See id.* at 20,899. Conspicuously, the preamble to paragraph (e) omits any reference to proposed plans in the new training provision, requiring "that *before* implementation of *a revision to an approved plan*, all persons in the mine who are affected by the revision must be instructed in its provisions." *Id.* (emphasis added). The preamble for paragraph (e) also notes, "[c]omplete understanding of the requirements of the *approved plan* is essential for it to be effective." *Id.* at 20,899–900 (emphasis added). Given the prohibition on implementing unapproved plans under paragraph (d), *see id.* at 20,899, the preamble to paragraph (e) of section 75.370 suggests training requirements apply only to *approved* plans and revisions.

Finally, the regulatory purpose of section 75.370 also supports a clear, conjunctive reading of "approved" in paragraph (e). Read as a whole, section 75.370 assigns duties to both operators and MSHA, as well as entitling miner representatives to certain disclosures, starting with the submission and review of proposed plans and revisions in paragraphs (a)–(d). Paragraphs (e) and (f) apply to approved plans. Thus, a disjunctive reading of paragraph (e) that would include "proposed revision" within "a revision to a ventilation plan" is incongruous with paragraph (d), which prohibits implementation of unapproved plans or revisions. *See* 30 C.F.R.

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frames my interpretation of present day section 75.370(d) and (e).

§ 75.370(d); Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899 (May 15, 1992) (final rule). In fact, the specific apportioning of duties, responsibilities, and entitlements suggests a carefully-crafted administrative framework for the submission and approval of ventilation plans. As the Secretary stated in the preamble:

> Mine ventilation plans are a long recognized means for addressing safety and health issues that are mine specific. Individually tailored plans, with a nucleus of commonly accepted practices, are an effective method for regulating such complex matters as mine ventilation . . . . Section 75.370 requires that each mine operator develop and follow a ventilation plan that is approved by MSHA and that is designed to control methane and respirable dust in the mine. Section 75.370 further requires that the plan be suitable to the conditions and mining system at the mine. In addition, § 75.370 provides the procedures for submittal, review and approval of the plan to assure that the plan for each mine will address the conditions in that mine.

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,806 (Mar. 11, 1996) (final rule amending section 75.370). The 1996 preamble also repeatedly describes section 75.370 as a "process." *Id.* at 9,806–08. Tellingly, the 1996 preamble makes no mention of an operator's duty to train miners on ventilation revisions that had merely been "proposed." Such silence is not surprising. Requiring operators to train on "proposed" revisions would frustrate the entire purpose of the regulation, which establishes the requirements and procedure for submitting a plan, having it approved, and then implementing its terms.

Therefore, based on the regulation's structure, text, history, and purpose, I determine that section 75.370(e) is unambiguous and does not require an operator to train its miners on ventilation plan provisions until after the District Manager has approved the plan or revision.[24] The Secretary has not argued that the regulation intended a different result, or that the unambiguous meaning would lead to absurd results. As noted above, the Secretary's own witness, his post-hearing brief, and his exhibits admit that ICG trained its miners in the November 3 Plan. Furthermore, I conclude that section 75.370(e) unambiguously does not require training on the unapproved changes ICG made to its November 3 Plan. Accordingly, Order No. 8219732 is **VACATED**.

[24] Because I have found the text of section 75.370(e) unambiguous, I do not need to determine whether the Secretary's interpretation is reasonable or due any deference.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8219731 be **AFFIRMED** as written and that Order No. 8219732 be **VACATED**. ICG is **ORDERED** to **PAY** a civil penalty of $59,527.00 within 40 days of the date of this decision.

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

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