FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-701
Petitioner	:	A.C. No. 11-02752-253416-01
	:	
	:	Docket No. LAKE 2011-881
v.	:	A.C. No. 11-02752-259393-01
	:	
	:	Docket No. LAKE 2011-962
	:	A.C. No. 11-02752-262111-01
	:	
	:	Docket No. LAKE 2012-58
	:	A.C. No. 11-02752-268036-01
	:	
THE AMERICAN COAL COMPANY,	:	
Respondent	:	Mine: New Era Mine

DECISION AND ORDER

Appearances: Courtney Prsybylski, Esq., & Ryan L. Pardue Esq., U.S Department of Labor, Office of the Solicitor, Denver CO for the Secretary

Jason W. Hardin, Esq., & Mark Kittrell, Esq., Fabian and Clendenin, Salt Lake City, UT for Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These cases are before the undersigned ALJ on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, The American Coal Company ("Respondent" or "American Coal"), pursuant to Sections 104(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Evansville, Indiana from May 21, 2013 to May 22, 2013. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

Between October, 2010 and March, 2011 MSHA inspectors Phillip Stanley, Bernard Reynolds, Wendell Crick, Jared Preece, and Edward Law issued ten (10) citations to Respondent for alleged safety violations at American Coal's New Era Mine ("Mine") located in Saline County, Illinois. Prior to the commencement of the hearing the parties reached a partial settlement regarding Citation Nos. 8427681, 8432066, and 8500423 in Docket No. LAKE 2011-

881 and Citation Nos. 8431001 and 8431003 in Docket No. LAKE 2012-58.[1] The remaining below citations issued by Inspectors Stanley and Law went to full hearing.

ISSUES

The issues to be determined are whether Respondent violated §75.1403 and §75.202(a) as alleged in Citation Nos. 8432052 (LAKE 2011-962), 8428508 (LAKE 2011-701), 8432118 (LAKE 2012-58), 8432126 (LAKE 2012-58), and 8432129 (LAKE 2012-58) respectively; if so whether any of the violations were significant and substantial in nature ("S&S"); and what would be the appropriate final penalty for any violations.[2]

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties Joint Exhibit 1. Those stipulations include the following:

1. Respondent, at all times relevant to these proceedings, engaged in coal-mining activities and operations at the Mine in Saline County, Illinois.

2. Prior to September 24, 2010, Respondent was the owner and operator of the Galatia Mine, which encompassed multiple operations and mines (New Era, New Future and Galatia North). On September 24, 2010, the New Future Mine began operating under Mine ID No. 11-03232, and the New Era Mine continued operating under Mine ID No. 11-02752. Respondent remained the owner and operator of both mines.

3. Respondent's mining operations affect interstate commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. §803.

4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ et seq. (the "Mine Act").

5. Respondent is an "operator" as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Mine where the contested citations in these proceedings were issued.

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

7. The individuals whose signatures appear in Blocks 22 of the contested citations at issue in these proceedings are authorized representatives of the Unites States of America's

[1] *See also* Transcript, Volume I, hereinafter referred to as "Tr. I," at 5-6.

[2] As discussed infra, the ALJ finds that Respondent's challenges regarding the arbitrary and excessive nature of MSHA/the Secretary's original special assessments fail to raise cognizable claims in that the Commission alone is responsible for assessing final penalties.

Secretary of Labor, assigned to MSHA, and were acting in their official capacities when issuing the citations at issue in these proceedings.

8. The citations at issue in these proceedings were properly served upon Respondent as required by the Mine Act.

9. The citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

10. The operator demonstrated good faith in abating the violations.

Joint Exhibit 1 (*see also* Tr. I at 6).

SUMMARY OF THE TESTIMONY

1. Docket No. LAKE 2011-701

a. Citation No. 8428508

i. Phillip Stanley

At the Hearing Phillip Stanley ("Stanley") appeared and testified on behalf of the Secretary. (Tr. I, 10).

Stanley had been working for MSHA for the past 3 ½ years. (Tr. I, 11). Prior to such he had worked for a little over three years in the coal industry and 16-17 years in potash.[3] (Tr. I, 12).

Stanley had worked for Respondent at Galatia for 1 ½ years, operating a continuous miner machine, a roof bolter, cars, and anything else to do with underground production work. (Tr. I, 13).

Referring to Secretary's Exhibit 1 (S-1), Stanley indicated that the citation at issue involved a violation of a mandatory standard, §75.202(a). (Tr. I, 15). The violation occurred in the area of New Era Mine located near Entry One of the Northeast headgate. (S-1, Tr. I, 16). Stanley was conducting a quarterly EO1 inspection. (Tr. I, 18). Stanley informed an employee of Respondent, Mark Dennis, that he wished to inspect this area. (Tr. I, 18-19).

Upon his arrival, Stanley witnessed several roof bolts whose bearing plates were not in contact with the mine roof. (Tr. I, 21-22). Stanley had made a drawing in his notes depicting six

[3] Potash is primarily used as fertilizer. Unlike a coal mine, a potash mine is not gassy. But it is set up basically the same way with continuous miners, bolters, cars, feeders, belts, and the same room-and-pillar type mining that is in coal. (Tr. I, 12).

(6) roof bolts hanging from the mine roof where the bearing plates no longer contacted the roof. (Tr. I, 23-34; S-2, p. 3 of 7).

Stanley described fully grouted roof bolts as ones which have a glue inserted into the bore hole. The roof bolt goes in with the glue and the epoxy. The glue or the resin sets up and creates a solid beam as pressure is applied to the roof. (Tr. I, 24). The bearing plates are applied directly to the mine roof to support whatever draw rock or immediate roof strata is present. The glue binds all together and creates one solid beam. The bolts ensure that all stays intact. (Tr. I, 24).

The type of bolts used is a requirement of the mine's roof control plan. (Tr. I, 25). The roof was not solid where the bearing plates of the six bolts had pulled away. (Tr. I, 26). The damaged bolts gave no roof support. (Tr. I, 27). At least a portion of the draw-rock between the bearing plate and the limestone roof had turned loose and hit the mine floor, thereby leaving nothing between the bearing plates and the remaining draw rock. (Tr. I, 27). The (unsafe) condition had apparently existed for a "considerable period of time" in that there was rock dust on the mine roof in the cited area. (Tr. I, 27). Further, the draw-rock which had already fallen to the floor had a mixture of rock dust and float coal dust, as well as old and new foot traffic across the gob "or what they call gob or what I would call the draw rock that fell from the mine roof." (Tr. I, 27-28).

Although uncertain of how long the rock dust had existed in the area, Stanley noted that it had been there long enough to become gray instead of white. (Tr. I, 28). In his experience, rock dust in return air courses will go grey in a matter of two-to-three weeks. (Tr. I, 28-29). The rock dust had "certainly" been there for more than one shift. (Tr. I, 29). The foot traffic, because of dis-colorization from the surrounding area, appeared recent in origin. (Tr. I, 29-30). It had appeared that miners had actually walked on the gob that had fallen from the mine roof. (T. I, 30).

Given that the gob (either gray or black shale) was directly beneath the cited area and was the same make-up as the immediate roof, and given that the roof bolts were suspended as they were, it was apparent that the material had come from the roof. (Tr. I, 31).

The (unsafe) condition was immediately obvious because the roof bolts were suspended far enough below the immediate roof that "it looked like a piece of modern art." (Tr. I, 31). The amount of gob, which had fallen from the mine roof, was anywhere between six (6) to twelve (12) inches of immediate roof that was now laying on the mine floor beneath the cited condition and for the entire expanse of the cited area. (Tr. I, 31).

The hazard posed to those traveling beneath the damaged bolts was that of falling roof material – "fractured shale." (Tr. I, 32). Given the size and vastness of the area, Stanley's fear was that miners "would get a piece of rock on them that was bigger than they were and ride them to the ground and create some permanently disabling injury, if not a fatality." (Tr. I, 33).

Stanley was accompanied by Respondent's employee, Mark Dennis, during his inspection. Dennis reportedly commented, "I can't believe I've never seen this."[4]

Examiners would pass through the affected area at least once per shift. (Tr. I, 34). Permanently disabling crush injuries due to falling roof material would be likely to occur. (Tr. I, 34).

Stanley was familiar with a case that had taken place either at New Era Mine or at New Future Mine in which a miner went under unsupported roof and a rock fell, pinning him to the ground for six (6) hours. As a result of his injuries this miner was put on permanent disability. (Tr. I, 35).

Stanley's designation of the type of injury likely to occur with a roof fall was determined on a "case-by-case basis" but included the size and type of material existent. (Tr. I, 35). In Respondent's case, the rocks were big enough to ride someone to the ground and pin him. (Tr. I, 35-36).

Stanley determined that high negligence was involved in this cited violation because of the examiners' traffic directly adjacent to the cited area, both old and new tracks, and the examiner's duty, which was basically to record hazards and have such recognized before a miner sustains injury. (Tr. I, 36). Given that the condition was so obvious, Stanley found no mitigating circumstances for failure to report such. (Tr. I, 36).

Stanley had not written an unwarrantable failure because he had not seen a date, time, and initial report in plain sight of the hazard and because of his lack of experience. (Tr. I, 36-37). If he observed the same condition now, he would have issued a §104(d). (Tr. I, 36-37). In order to terminate the action, the mine operator decided to barricade the travel way. (Tr. I., 37).

Stanley served Respondent's safety person, Mike Smith, with a copy of the citation in the mine safety office on the surface. (Tr. I, 36-37). Smith had not accompanied Stanley during his inspection. Stanley met with Smith, Dennis, and a Mr. Webb regarding the citation. (Tr. 38-39).

Webb had contended that examiners did not travel through the area cited within Citation No. 8428508. However, out of Webb's presence, Smith admitted that examiners did in fact travel through the cited area. (Tr. I, 40; *see also* S-2, p. 7).

On cross-examination, Stanley stated that he had started with MSHA around December, 2008. (Tr. I, 41). Prior to his October 22, 2010 inspection he had not previously inspected the 4th East headgate area. (Tr. I, 43). The area in question was an outby, worked out area. (Tr. I,

[4] During cross-examination, Stanley agreed that Dennis' alleged statement was not in fact in reference to the Citation 8428508 unsafe roof condition at issue but was in reference to a different "slider cut" violative condition. (*see also* Sec. 2 , pp 2-3 (inspector's notes, pp. 6-8; Tr. I, 58-60)).

45). The area had been sealed off.[5] There was one seal in each of the old entries, the headgate and tail gate being separated by 1,000 feet. (Tr. I, 45). The seals had sampling pipes for checking ingassing and outgassing of methane and oxygen content. (Tr. I, 47). At the time the citation was issued, Respondent was required to examine the seals every on-shift. (Tr. I, 48). Although he did not use an anemometer, Stanley agreed that there was airflow in the affected areas. (Tr. I., 49). Stanley did not know when the last rock dusting in the affected area had taken place. (Tr. I, 51). He was also uncertain as to whether the affected area could be accessed with a pod duster. (Tr. I, 52).

There were props and cribs a little further inby the number One (1) Entry which would have provided access for a pod duster. (Tr. I, 53). Stanley agreed that the only people who would be in the area were examiners and potential rock dusters. He was, however, uncertain as to the rock duster's schedule. (Tr. I, 53). Although not a travel way, the area was, in Stanley's opinion, part of the examiner's route. (Tr. I, 54).

Referring to a diagram contained in his notes, Stanley testified that he had come to a man door and immediately observed a violation of Respondent's Roof Control Plan as cited in No. 8428507. (Tr. I, 57; S-2, p. 5 of inspector's notes).

Stanley confirmed that his notes reference to Dennis' comment – "I can't believe I never seen this" – was regarding a "slider cut" citation and not the No. 8428508 instant violation. (Tr. I, 59-60; S-2, p. 3).

Referring to his diagram of the cited area (S-2, p. 3), Stanley indicated that the area where the damaged bolts were located was approximately 14 feet wide. (Tr. I, 65). He traveled under the supported roof "bagged by screen wire. Adjacent to the cited area." (Tr. I, 66). Stanley was not concerned with a major rock fall. The well worn foot path across the gob was also immediately adjacent to the cited area. (Tr. I., 67). Stanley agreed that the six (6) roof bolts drawn in his diagram were not lined up side-by-side. (Tr. I, 69-70). He had failed to record depth/distance; but agreed that the six (6) bolts were spread out some distance lengthwise inby on Entry One. (Tr. I, 70).

Stanley agreed that fully grouted resin bolts were not like the typical older roof bolts that were dependent upon the bearing plates; the glue put into the mine roof with the fully grouted resin bolts moved through the cracks and laminations between the material of the roof and helped seal it together. (Tr. I, 71). However, Stanley disagreed with Respondent's counsel's suggestion that, even if the bearing plates are damaged and/or not in contact with the roof, the shaft and glue will still provide some support to the overall bear of the main roof. (Tr. I, 71).

In the strata of the mine roof the primary beam would have been limestone and directly beneath that would have been the shale, much of which had fallen out and was still present. (Tr. I, 72).

[5] Seals are basically large walls or blocks that seal old worked out areas. (Tr. I, 46).

Stanley could not recall whether Smith had brought him down in a golf cart. Dennis did not accompany him on the inspection of the seals and air course. (Tr. I, 74). Being referred to his notes at S-2, p. 6 (p. 17 of 22), Stanley did recollect that he had met Smith prior to returning to the surface. (Tr. I, 75).

Stanley denied being told by Dennis that Dennis was an air course examiner and did not usually inspect the seals themselves. (Tr. I, 76). He further conceded that he was uncertain as to what individual at subject mine had the responsibility for examining seals. (Tr. I, 76).

Stanley further agreed that R-42 contained the type of Respondent's examiner's reports which he would have reviewed in determining whether there had been an inadequate on-shift exam. (Tr. I, 77-80). Stanley also agreed that for an examiner to have actually observed the condition that he had seen and to have to report such, the examiner would need to have traveled the same route as Stanley. (Tr. I, 80). However, he did not know whether the on-shift and pre-shift examiners had used a different route from the one he had used during his inspection. (Tr. I, 81). He conceded, however, that after the affected area was barricaded off, examiners would have had to use a different route. (Tr. I, 81).

Stanley found high negligence for the following reasons: the condition was "blatantly obvious"; there was evidence of foot traffic; and the examiner had taken him on the route in question. (Tr. I, 82). Stanley conceded that he had not spoken with mine operator employees to ascertain the route of travel utilized by examiners. (Tr. I, 83). Stanley also conceded that Webb had denied that Respondent's examiners used the route traveled by Stanley. Further, Webb had asserted that Stanley could not determine the age of the foot prints. (Tr. 1, 88). Stanley had not required the sealing of the roof or rib in the affected area. (Tr. I, 90).

Stanley agreed his field notes did not describe any fractures or crack in the roof. (Tr. I, 93).

As to his recommendation for special assessment, Stanley had taken into account the examiner's route of travel, the obvious and extensive nature of the condition, and the fractured roof and ribs in the cited area. (Tr. I, 96). While he did not wish to issue a flagrant violation or unwarrantable failure violation, Stanley saw the special assessment as an "additional tool" that inspectors had to help companies be complaint and protect the health and safety of miners. (Tr. I, 96). Stanley did not know whether there was any publicly available guidance prior to October 22, 2010 that would alert operators when special assessments would be appropriate. (Tr. I, 97).

Referring to the special assessment forms at R-4 and R-5, Stanley could not explain, inter alia, how the actual special assessment amounts were arrived at. (Tr. I, 98-102).

On re-direct examination, Stanley testified that the footprints he observed were "immediately adjacent to the cited area on top of the gob that had fallen from the cited area. (Tr. I, 105). Stanley further explained that the foot prints were not under either the "supported or controlled area." They were between the controlled area and the uncontrolled area and the uncontrolled area immediately adjacent, meaning that the debris that had fallen from the roof was on the mine floor. (Tr. I, 106). Because falling roof material does not necessarily fall

straight down, people who walked where the footprints were observed could be struck in that route of travel. (Tr. I, 106). Because Dennis took him on the route by the affected area, it appeared obvious to Stanley that this was the route used by examiners. (Tr. I, 106-107). There were no barricades or flagging material to prevent people from walking directly under the unsupported roof. (Tr. I, 107).

Cribs[6] in the cited location suggested to Stanley that the mine operator had at one point felt the roof was unstable and decided that the best way to support it was with cribbing material. (Tr. I, 108).

In addition to the gob seen on the mine floor suggesting that additional roof might fall, Stanley also observed screen wire that had fallen as well which was indicative of curtain shale falling. (Tr. I, 108-109). Given further the fracturing of the indicated roof and rib sites, the potential for a miner being covered up was reasonable. (Tr. I, 109). Based upon his visual observations of the laminating effects between the immediate roof and upper roof -- a big portion of draw rock had already fallen to the ground – Stanley opined that the instant fully grouted bolts were unacceptable.

Stanley had informed Dennis that he wished to inspect the seals. Dennis, the examiner temporarily assigned to the safety department, led him to such. (Tr. I, 113).

It was not possible for Stanley to ascertain how long the unreported (unsupported) roof condition had existed but he could only assume that it had been for an extended amount of time and that the mine operator had rock dusting in the interim. (Tr. I, 114).

Stanley had traveled with other inspectors on EO1 inspections a number of times. (Tr. I, 116).

On re-cross examination, Stanley conceded that he had not discussed the location of footprints in his field notes as being located between the controlled and uncontrolled area. (Tr. I, 117). He did not observe any screen on the mine floor nor did he record in his notes any screen hanging from the roof. (Tr. I, 118). Although he had testified regarding the position of a massive roof fall at Entry One, Stanley had nonetheless walked through the area. (Tr. I, 119).

Stanley testified that the hazard he was concerned about at Entry No. 1 was a roof fall and that involved the "immediate roof." But as he encountered crib work inby that location and knowing the history of the mine and roof falls, it had occurred to him that more than an immediate roof fall could occur. (Tr. I, 121).

ii. Mark Dennis

At the hearing Mark Dennis appeared and testified on behalf of Respondent. Dennis had

[6] Cribs are standing supports to hold the roof; they are typically six by six timbers of varying lengths stacked one on top of another in a crisscross fashion from the mine floor to the mine roof. (Tr. I, 107).

worked for American Coal for a little over seven (7) years. (Tr. I, 123). He had been a daily examiner and a weekly examiner. (Tr. I, 123). Before America Coal, he had worked in mining as a belt mechanic, outby supervisor, and equipment operator. (Tr. I, 124).

At the time the instant citation(s) were issued, Dennis had been working as a weekly examiner, traveling worked-out areas, old air courses, and perimeters of long walls. (Tr. I, 125). He did not examine seals, a job performed by daily examiners. Dennis was also not a pre-shift examiner. (Tr. I, 125).

Dennis testified that he had not examined the seal(s) referred to in the left hand column of Respondent's pres-shift examination report, as he was in other areas, including the air course. (Tr. I, 126-127; *see also* R-43, p. 4, Line 44).

Referring to a map of New Era Mine contained at R-37, Dennis stated that it depicted the worked-out longwall panels on the east side. (Tr. I, 128). Dennis was familiar with these panels, including the fourth East Gate. (Tr. I, 129). Dennis testified that Stanley had required that he be taken to the area, later cited, just inside the north man door. (Tr. I, 129-130; R-37, p. 4).

Dennis testified that, during his regular weekly examination, he would normally start on the outby side of the south man door. (Tr. I, 133; R-37, p. 4). During Stanley's inspection, however, Dennis went through the north man door in order to "save a few footsteps, instead of going through the south door and then double walking." (Tr. I, 136). He had probably not been inside the north man door since the operator had mined out the area. (Tr. I, 136).

Dennis stated that it was his idea – not Inspector Stanley's – to take the (north) man door. He did not know what route the daily examiners utilized. (Tr. I, 136). When he went through the man door, he observed seeing some rib rash but nothing out of the ordinary. (Tr. I, 136). The rib rash had flaked off the wall and created a little mound against the rib. (Tr. I, 137). As he walked further inby, he saw more of the same rib rash. (Tr. I, 137).

Dennis disagreed with the inspector's findings in the citation that the area was frequently traveled. (Tr. I, 137). While there was evidence of foot travel, Dennis saw no indication that it was fresh travel. (Tr. I, 137). The rock dusting was grayish and dingy in appearance, not of a white color indicative of fresh travel. (Tr. I, 137, 138).

Dennis observed footprints down the middle of the walkway or entry. (Tr. I, 138). "There would be no reason to walk on top of the rib rash." (Tr. I, 138). Because of lack of water, the footprints could have been present for an indefinite period. (Tr. I, 139). Dennis only vaguely recalled loose roof bolts which would have, in any case, been over the rib rash. (Tr. I, 139). Dennis affirmed that he was unaware of the route the daily examiners took and had never traveled with the daily examiners. (Tr. I, 139).

Dennis had accompanied Stanley throughout his inspection, eventually ending at the third East Headgate, having examined four (4) seal panels. (Tr. I, 140-141). The entire route would have covered 45-50 crosscuts and would have been over 6,000 feet in length. (Tr. I, 141). Dennis was not familiar with anybody working or traveling in the crosscut of Entry One in the

cited area on October 22, 2010. (Tr. I, 141).

On questioning by the Court, Dennis explained the entry in question was approximately 18 feet wide with the center being located at 9 feet and the first roof bolt being located 3 feet from the rib. The footprints were a minimum of six feet from the roof bolts. (Tr. I, 141-142).

On cross examination, Dennis testified that his weekly examination reports would be located in a different examination book that where the daily exam reports were found. (Tr. I, 142-143). The daily on-shift examiner travel a different route than the one used by Dennis. (Tr. I, 144). Dennis agreed that it was not part of his typical route to go through the man door in question. (Tr. I, 144).

Dennis testified that there would be no reason for anyone to walk on rib rash when they could have "a good, smooth, flat, dry surface." (Tr. I, 145). He did not observe any fallen material in the walkway. (Tr. I, 145). "In general, the top looked fairly decent." (Tr. I, 147).

On re-direct examination, Dennis stated that a walkway was smaller than an entry and that, for the most part, people walked in the center of the walkway which would be, for the most part, roughly 12 to 18 inches wide. (Tr. I, 147-148).

iii. Michael Dean Smith

At hearing Michael D. Smith ("Smith") appeared and testified on behalf of Respondent. Smith was currently employed as a mining resource engineer with the SI University, Carbondale, Illinois. He had previously worked for approximately 8 years as a safety inspector for Dominion Coal and for 23 ½ years for Consolidated Coal Co., (Tr. I, 153). Smith had worked at numerous jobs in coal mining: roof bolter, miner, shuttle car, and diesel powered scoop operator, and beltman. (Tr. I, 154).

On the day the instant citation was issued, Smith went to the fourth East Headgate area. (Tr. I, 155). He met with inspector Stanley. Smith had some difficultly opening the man door. Stanley pointed out the loose bolts in question in an area which used to be an old belt entry. (Tr. I, 156-157). There were some old belts, an old piece of curtain, and some old sloughing off the ribs present. There were also "a few footprints" going through the area. (Tr. I, 157). Smith was asked if he agreed with the citation. He saw loose bolts "evident of the condition." (Tr. I, 157). Smith did not know where the footprints came from. (Tr. I, 157-158). At the same time, Smith did not presently know what route the seal examiners traveled. (Tr. I, 158). After being informed of the condition, Smith had the area flagged off. (Tr. I, 158).

After getting to the surface, Smith, Stanley, and Webb "conferenced this citation." (Tr. I, 158). After investigation, Smith learned that examiners did not travel through the man door to the left but passed through the right man door. (Tr. I, 159). Smith was unaware of such when he met with Stanley. (Tr. I, 159).

Smith disagreed that he had reportedly stated to Stanley that he had known examiners traveled through the area. (Tr. I, 160; *see also* R-22, p. 22). Smith agreed that the conditions observed by Stanley did exist and (the roof) "needs support." (Tr. I, 160). Smith assented that

he had advised Stanley that he did not know the actual path which examiners traveled to the fourth East Gate Seals.[7] (Tr. I, 161).

Smith specifically testified to the following:

> I don't know which way they traveled. I knew they made that sealed area in the fourth east headgate, but now there was three man doors there, one of them was flagged off straight ahead. So I knew they either had to go through the one on the right or the one on the left. I believed that they went to the one on the right, but I didn't know about it until later on when I got to talk to the examiner.

(Tr. I, 161).

Smith recalled that there were footprints through the left door in the crosscut Entry One but noted that footprints in a coal mine could be seen "all over the place." (Tr. I, 161). He did not know when they were (actually) made. (Tr. I, 161). The footprints went around the bolts – to the left side rib and down the edge up toward the seal. (Tr. I, 162).

On cross examination, Smith confirmed that he was no longer with American Coal and was not familiar with the area in question until after the citation was issued. (Tr. I, 162-163). Only after investigation did he learn that the examiners took a route different from Stanley. (Tr. I, 164). He had flagged off the cited area because he was not certain whether anybody was working or traveling in the area. (Tr. I, 166).

Smith indicated he had no personal knowledge of the route taken by examiners. (Tr. I, 168).

iv. Robert Deere

At hearing Robert Deere appeared and testified on behalf of Respondent. Deere had worked as an examiner for American Coal since 2004. (Tr. I, 169). He previously worked for Inland Steel and Consolidated for 28 ½ years. Among numerous positions, he was a miner operator, buggy operator, and examiner. He had approximately 17 years of examiner experience. (Tr. I, 170).

Deere was familiar with the fourth East Headgate area. (Tr. I, 171). He had examined it prior to the October 22, 2010 citation date. (Tr. I, 174; *see also* R-42, copy of pre-shift examiners report containing Deere's signature(s).) Deere indicated on a map of the area the route he usually travelled during his examinations. (Tr. I, 176-177; R-37, p. 4).

Deere testified that he did not use the route taken by Stanley to examine the seals. Access through the middle man door had been previously flagged off due to deterioration,

[7] In virtually every case that the undersigned has presided over there has been an allegation by an inspector that one or more of Respondent's employees gave an incriminating statement. Invariably this reported admission or declaration against interest has been denied at hearing.

including rib rashing in the area. Examiners did not use the left man door (which was used by Stanley to gain access) because this area was also not in good condition, had been gobbed, and there was no reason for anyone to walk in the area. Rather, Deere normally travelled through the right man door, this route going through a much better supported area. (Tr. I, 176-178).[8]

On cross examination Deere agreed that the south/left door used by Inspector Stanley had not been flagged or dangered off. Although the number 2 (center) entry door had been barricade, there was no barricade prior to October 22, 2010 from the south door. (Tr. I, 180).

Deere further testified that the subsequent barricading of the south door after citation issuance did not alter his normal route for examinations. (Tr. I, 181).

2. Docket No. LAKE 2012-58

a. Citation No. 8432118

i. Edward W. Law

At hearing Edward W. Law appeared and testified on behalf of the Secretary. Law had worked as a coal mine inspector for MSHA since September, 2005, being stationed at the Benton field office since 2008. (Tr. I, 190). As a coal mine inspector, he inspects all air courses, belts, equipment, surface areas, and records. (Tr. I, 190). Prior to working for MSHA, he worked for American Coal for 21 years and Consolidated Coal for approximately 2 years. (Tr. I, 191). His jobs with American Coal included labor equipment operator, supply man, and underground and surface repairman. (Tr. I, 191).

Law's Citation No. 8432118 involved a violation of a mandatory safety standard, §75.202(a), which also was a violation of one of the "rules to live by." (Tr. I, 192). Law found inadequately supported ribs at the first East Headgate seal entrance. (S-12, p. 1). Law observed a cracked rib, broken and leaning, with a gap behind the rib up to three inches from the coal pillar. (Tr. I, 193; *see also* S-13). Law testified that, when a rib had as much separation as he observed, especially when it was undercut, it would be like removing a leg from underneath a table. At any point it could roll out and fall on the ground. (Tr. I, 193-194).

Law opined that seal examiners would normally travel in the cited area, as well as individuals required to maintain the seals. (Tr. I, 195). Given that the area had been scooped out or undercut, law estimated that the condition had existed for a number of shifts. (Tr. I, 196, 200). The cracked rib was not being supported. Law could tell where it had been worked on. (Tr. I, 198). The area was black where the rib had been pulled down. There was an indentation where a piece of rib had been pulled out. (Tr. I, 198). The area was not flagged or dangered off in any way. (Tr. I, 198).

Prior to February 28, 2011 Law had safety talks at the mine regarding roof/rib control but not regarding the specific cited area. (Tr. I, 201-202).

[8] *See also* R-37, p. 4, for route reportedly taken by Deere marked in green pen.

Law found that an injury was reasonably likely to occur to a person either being directly or indirectly struck by a collapsing rib. (Tr. I, 203). The rib was 7 feet high and would probably fall in one solid piece into the travel way. (Tr. I, 204). The injuries sustained in a rib fall, including broken bones, could reasonably be expected to result in lost workdays. (Tr. I, 204). If an individual were walking directly next to the rib, there could be a fatal injury. (Tr. I, 204). However, experienced miners who are aware of rib collapse danger, usually walk in the middle of walkways so that the severity of the injury would be less. (Tr. I, 204).

Law found that one person, the examiner, coming in or coming out on the seal, would be affected. (Tr. I, 205). Usually a rib fall only affects one person. (Tr. I, 206).

Law had modified the cited area in question from "1st east headgate" to "1st east tail gate." (Tr. I, 206-207; see also S-12, pp. 1 and 2). When Law handed the citation to Michael Smith, Smith did not raise any mitigating circumstances. (Tr. I, 207).

Law had designated moderate negligence because some work had been performed in the area but the operator "probably should have done more" including flagging it or pulling the rib down or reporting it. (Tr. I, 207-208). Noting the unsafe condition to be "pretty obvious" Law had chosen to give the examiner the benefit of the doubt as Law had not written "absolutely it was obvious." (Tr. I, 208-208).

In order to terminate the citation the operator had pulled the rib down. (Tr. I, 208; *see also* S-12, p. 3). Law had recommended the citation for special assessment because the operator had a "lot of issues with ribs" and roofs and had been cited a "pretty high" number of times for 202(a) violations. (Tr. I, 209).

On cross examination Law testified that he may have written some of his notes contained at S-13 both below and above ground and may have also number some pages at different times. (Tr. I, 211-214).

Law's familiarity with the routes of examiners in the 5 right seal panels depicted in the map at R-37 was based upon his experience as an MSHA inspector and not as a former American Coal Employee. (Tr. I, 221). Law agreed that there were multiple entries that the first East Longwall Tailgate that (seal) examiners could have taken. (Tr. I, 228). No matter which way they would have chosen, they would have needed to go past the crosscut where the cited rib was recorded. (Tr. I, 227-228). Law did not recall whether he had observed any footprints in the rib area. (Tr. I, 231). Nor did he identify any individual near the loose rib during the date of citation. (Tr. I, 232).

Law testified that it was possible that part of the rib had fallen down and had not been pulled down by Respondent.[9] (Tr. I, 232-233). The fact that the area around the missing portion of the rib was black did not necessarily indicate that the causal event was recent in nature. (Tr. I, 233). Law agreed that his notes did not indicate any material on the floor in the rib area either

[9] As discussed infra, the ALJ found Law's testimony on this point somewhat contradictory.

way. (Tr. I, 233). Law agreed that the first East Tailgate sealed area was an outlying area of the mine, located a "good distance" from the active section. (Tr. I, 235, 236). Except for examination, Law was not personally aware of any work being scheduled in the first East Tailgate area. (Tr. I, 238). Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment. (Tr. I, 239). In general, Law also considered, in making a special assessment recommendation, whether there was a "rule to live by" violation. (Tr. I, 243).

Specifically as to the within citation, law also considered "the severity of the rib size." (Tr. I, 244). Law agreed that although the violative conduct as to the within citation was not highly negligent in nature, it did help justify a special assessment.[10] (Tr. I, 246).

ii. Michael Smith

As to Citation No. 8432118 (R-11) Smith testified that at the time the citation was issued he did not know the route examiners used to examine the seal areas. Subsequently, after speaking with the examiners, Smith learned that they went in at the fourth East Tailgate area, avoiding the first East Tailgate area cited by Inspector Law, by backtracking out. (Tr. I, 259-261). Miners also did not regularly travel the area where the unsupported rib was located. They also would travel up to the fourth East Tailgate and double back. (Tr. I, 261).

On cross examination Smith reiterated that miners did not go near the cited rib area (which was near an airlock) but went in at the fork and doubled back. (Tr. I, 262, 263).

Smith believed that §75.202(a) only applied to areas where persons "normally" worked or traveled. (Tr. I, 263). He agreed that the air-locked area (where the cited rib was located) had not been blocked off. (Tr. I, 264).

iii. Robert Deer

As to Citation No. 8432118 (R-11) Deere testified that he was familiar with the first East Tailgate area. (Tr. I, 267). Referring to the map of the first East Longwall Tailgate at R-37, p. 8, Deere further indicated that it depicted the area he usually examined, including seals. (Tr. I, 268).

Instead of trying to access the seals through the area where the discussed airlock was located (which was "fairly low"), Deere would drive down the fourth tail gate seals where he could drive off the road and park his golf cart with no danger of anyone hitting it.[11] (Tr. I, 269).

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[10] As discussed infra, the ALJ did not find the inspector's explanation as to why he recommended a special assessment as opposed to a regular assessment altogether enlightening. (*See also* R-45).

[11] *See also* Deere's detailed description of route taken at Tr. I, 268-270 and R-37, p. 8 in which Deere also asserts that no miner routinely traveled by the cited rib area.

On cross examination, Deere testified that it was "just as easy" to "walk down and walk right back out" instead of going in and out two different places. (Tr. I, 271). However, he conceded that the airlock area (used by law) had not been blocked off. (Tr. Tr. I, 271).

b. Citation No. 8432126

i. Edward W. Law

At hearing Law testified that he had issued Citation No. 8432126 because he had discovered four damaged roof bolts in the mine's main north travel way in the crosscuts between entries #5 and #6. (Tr. II, 281; S-14). The damaged bolts had created three different areas of unsupported roof. Once a bearing plate is no longer against the roof as instantly, there is no support as far as skin control.[12] (Tr. II, 282).

Law had ended up at the cross-cut during his inspection in order to allow an outby vehicle, which had right of way, to travel past him. (Tr. II, 283). "Just about everybody" traveled the main north travel way throughout the day: miner, management, and safety people. (Tr. II, 284). Law had drawn a diagram depicting the crosscut at issue. (Tr. II, 285; S-15, p. 4). Law opined that the damaged bolt condition had been existent for several shifts prior to his inspection because there were tracks through the area. (Tr. II, 286). After the four (4) bolts had been damaged there was no evidence of supplemental support being added or re-bolting. (Tr. II, 288). Given the visible tracks on the mine floor and the need for vehicles to pull into the crosscut to allow clearance, there was a hazard created of roof fall that could result in broken bones. (Tr. II, 289). Law had graded the gravity as lost workdays due to falling roof rock reasonably being expected to result in fractures causing lost workdays. (Tr. II, 289). Given the lack of skin control with only the bolt shaft remaining there was a reasonable likelihood of roof fall. (Tr. II, 289).

When Law pulled into the crosscut, the condition was noticeable to him. (Tr. II, 290). The area had not been flagged off. (Tr. II, 291). There would have been constant travel, up and down, past the crosscut. (Tr. II, 291). Law had designated one person as likely to be affected because in open top rides there would generally be only one person. (Tr. II, 292).

He had found moderate negligence because the affected area was off the travel way and there were multiple crosscuts. (Tr. II, 292-293). The crosscut could have "easily been missed." (Tr. II, 292-293). The citation was terminated by having the bolts replaced and the area re-bolted. (Tr. II, 294; S-13, p.2). Law had again recommended a special assessment because §75.202(a) involved one of the ten "rules to live by" and because of Respondent's past violation history. (Tr. II, 294).

Israel Burtis, Respondent's Safety Technician, had accompanied Law during his March 2, 2011 inspection. (Tr. II, 295).

[12] A bearing plate secures the immediate roof, skin of the roof; it also anchors the bolt tightly wherever the bolt is set with glue. (Tr. II, 282).

On cross examination, Law testified that the four compromised bolts at issue had been hit by some piece of mobile equipment: two had been sheered off and two had been damaged. (Tr. II, 290-297). The damaged roof bolts were bent to the point where they were no longer in contact with the roof. (Tr. II, 297). Law testified that at Respondent's mine anybody, including management, could have operated the machinery that had damaged the bolts. (Tr. II, 299-300). Law specifically referenced his observation of scoop tracks (but not other machine tracks) in his notes. (Tr. II, 301; R-14). He further did not observe any footprints. (Tr. II, 301).

Law agreed that, generally, mine examiners were not required to go into crosscuts. (Tr. II, 303). On March 2, 2011 Law did not observe any material hanging from the roof or fallen material on the floor. (Tr. II, 304). Law had not identified anyone at American Coal who had observed the cited condition prior to Law's citation issuance. (Tr. II, 304). Law did not know the actual amount of limestone present above the immediate roof in the cited area. (Tr. II, 308). A "good amount" of limestone offers the best support for a mine roof. (Tr. II, 308). If, however, the limestone had been thinned out, there could have been a catastrophic failure and fatal injury. (Tr. II, 308-309).

Stating that a "good amount" of limestone would be "even a foot," Law agreed that the goal was to anchor bolts in good limestone. (Tr. II, 309). Law did not record in his notes any evidence of roof cracking, spalling or chandeliering in the cited area. (Tr. II, 312-313).

Law agreed that the bolts at issue were fully grouted resin bolts. (Tr. II, 313). He further testified that if the head of a bolt had been sheered off or the bearing plate damage, because glue is brittle, the bolt might not hold the roof skin layer.[13] (Tr. II, 315-316).

Law agreed that there might be areas on each side of the crosscut where a golf cart could pull in and remain under supported roof. (Tr. II, 319). Except for golf carts, other vehicles did not have canopies, including the diesel ride, the scoop car and cab, the ram cars, and the mantrips. (Tr. II, 319-320).

Law testified that any citation involving a violation of one of the ten required "rules to live by" required filling out of a SAR (Special Assessment Review Form). (Tr. II, 320). Among the factors considered in making a special assessment determination was Respondent's prior violation history. (Tr. II, 320-322; *see also* R-45).

Law testified that he was unfamiliar with the special assessment narrative form at R-19 and did not know how the special assessment column number had been arrived at.[14] (Tr. II, 325-

[13] See Tr. II, 313-318, for full exchange between Respondent's counsel and Inspector Law regarding a full grouted resin bolt's ability to support roof area if the bolt head is sheered off or damaged. Despite counsel's best efforts, Inspector Law would not concede that such compromised bolts still afforded some support for roof skin.

[14] Despite Law's professed lack of knowledge regarding special assessment penalty determinations, Respondent's counsel argued that an inquiry into MSHA's decision-making

326).

ii. Israel Burtis

At the hearing Israel Burtis appeared and testified on behalf of Respondent. Burtis confirmed that Citation No. 8432126 (R-13) had been served on him by Inspector Law. (Tr. II, 331). Burtis and Law were riding in a golf cart when they arrived at the cited crosscut area. (Tr. II, 334).

Burtis testified that he did not observe any adverse roof condition; he saw no T3 channel[15] or screen wire which would have been indicative of roof failure. (Tr. II, 335). Burtis saw nobody else in the area of the crosscut. (Tr. II, 336). Hourly employees operating equipment would, however, be expected to go through the area. (Tr. II, 336).

On cross examination, Burtis testified that he traveled the main north travel way while conducting audits. (Tr. II, 337). He confirmed that outby traffic had the right-of-way, requiring inby traffic to pull into crosscuts in the affected area. (Tr. II, 337). During his audits, he did not always pull into every crosscut. (Tr. II, 337). Although he did not see a T3 Channels or screen mesh, Burtis did observe the sheered off and damaged roof bolts. (Tr. II, 338-339).

iii. Gary Vancil, Jr.

At hearing Gary Vancil, Jr. ("Vancil") testified on behalf of Respondent. Vancil worked as a senior geologist for American Coal. (Tr. II, 340). His responsibilities included coal quality, drilling, and most importantly, hazard mapping and roof control. (Tr. II, 340). He had attained bachelor's and master's degrees in Geology from Southern Illinois, (Tr. II, 340). He had worked in the limestone industry and had worked for 2 years with American Coal. (Tr. II, 341).

Vancil was familiar with the roof lithology at New Era Mine. (Tr. II, 341). Referring to the roof control plan for subject mine, strata information, Vancil testified that the No. 6 seam (the seam at issue) had a roof made up of sandstone, Anna shale, and Breaeton Limestone. (Tr. II, 342; R-30, p. 4). The shale had a 4-6 inch thickness and the limestone a 5 foot, 6-inch thickness. (Tr. II, 342; R-30, p. 4). Limestone would be strong, very competent it would not be laminated or porous. (Tr. II, 343). Once coal is removed, the limestone, if 42 inches or more in thickness, makes the best roof. (Tr. II, 343-344).

A limestone roof of such thickness would not be prone to chandeliering, scaling, or other skin control issues. (Tr. II, 344). Vancil has observed how the limestone roof behaved at the New Era Mine behind the longwall gob. On the 6th and 7th East panel, he could see behind the shields the roof with no support and the face approximately 1,000 to 1,200 feet wide and the limestone overhanging the shields for about 30 feet without breaking. (Tr. II, 345). Vancil was not aware of any instance – based upon his personal experience, review of records, and/or talking with individuals – in which there was a roof fall where the limestone was over 42 inches in

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process for special assessments was necessary. (*See also* Tr. II, 326-328).

[15] T3 channels indicate low limestone. (Tr. II, 338).

thickness. (Tr. II, 346-347). Records only recorded roof falls in area where the roof had gray shale or limestone missing. (Tr. II, 347).

As opposed to limestone, Anna shale could be either "competent or incompetent," "hit or miss." (Tr. II, 348).

Vancil testified that he had personal knowledge of the roof lithology in the cited area – spad 15376 between Entries Five and Six. (Tr. II, 348). Referring to R-9, p. 2, a mine map overlaid with his hazard map, Vancil indicated that roof bolters drew test holes to measure limestone thickness. (Tr. II, 349). Vancil subsequently ran a camera up the roof into the test hole(s) and recorded it, checking the roof lithology and trying to match it with the bolter's tag. (Tr. II, 349).

Vancil had personally inspected the cited area, including the immediate roof, and found that it was limestone in the crosscut. (Tr. II, 350-351). In looking at the rib, Vancil could see where there had been shale but it had been taken down during mining. (Tr. II, 351). However, he saw no evidence of shale in the roof of the crosscut. (Tr. II, 351). One of the test boreholes indicated over 6 feet of limestone in the crosscut. (Tr. II, 352). Vancil did not observe any evidence of cracking, jointing, sandstone channels, or kettle bottoms in the roof. (Tr. II, 353).

Reviewing inspector Law's drawing of the cited areas at R-14, p. 6, Vancil opined that it was unlikely, based upon his experience and person knowledge of the area, that there would have been skin control issues with the limestone roof in the area. (Tr. II, 353-354). Given the limestone roof, Vancil opined that it was "highly unlikely" that the four damaged roof bolts would have led to a larger roof fall. (Tr. II, 354).

On cross-examination, Vancil agreed that limestone could "quickly" vary at the mine, "from crosscut to crosscut," with varying degrees of lithology of the 6 seam. (Tr. II, 355).

Vancil was unsure as to whether he or a prior geologist had created the hazard map he testified regarding. (Tr. II, 355). He had inspected the area in question after the citation had been issued, approximately one week prior to the within May 22, 2013 hearing. (Tr. II, 356). Vancil agreed that if there was shale or sandstone in the immediate area, even through there was limestone present above, a bearing plate would serve as skin control. (Tr. II, 356). He further agreed that once a fully grouted resin bolt's glue of resin sets up, it becomes brittle, especially if not mixed correctly. (Tr. II, 357).

c. Citation No. 8432129

i. Edward W. Law

As to Citation No. 8432129 (S-16), Law testified that he issued such on March 3, 2011 based upon Respondent's violation of §75.202(a). (Tr. II, 360). Law had found the roof at crosscut 8, between entries #5 and #4, to be inadequately supported. An area along the inby rib had three (3) roof bolts that were too far from the coal pillar, exposing an area of 5.5 to 6 feet wide by 20 feet in length. Also there were roof bolts (2) too far from the coal pillar exposing an

area 5.5 to 6 feet wide by 15 feet in length. (Tr. II, 361; S-16).

Law believed that Respondent's roof control plan would have allowed only a four foot distance off the rib. (Tr. II, 362). The #8 crosscut would be another area in which vehicles would pull in to allow outby traffic. (Tr. II, 362). The area in question would be similar to the previously testified to areas (Citation No. 843216). The crosscut itself was originally bolted in compliance but the coal ribs or coal pillars had deteriorated to the point that a wide area was created between the last row of bolts and the solid existing coal pillar. (Tr. II, 364). Coal pillar deterioration could be caused by weight, weather, equipment, and/or moisture. (Tr. II, 364).

The coal pillar area had not been flagged off or dangered off. (Tr. II, 364). Once in the crosscut, the unsafe condition was "pretty easily" seen. (Tr. II, 364).

Based upon his experience, Law opined that areas, such as that cited, did not go from compliance to a 1 ½ to 2 foot distance in a short period. (Tr. II, 365). It would take several shifts, depending if equipment was rubbing, causing it to rash out, or fairly quickly where cable was hung around the corner. (Tr. II, 365). Under "normal terms," weight and weather, the condition would have taken "a while" to happen. (Tr. II, 365).

The hazard created was that of roof fall and/or rib roll out. The minimum 4 foot (bolting) distance was so that there would not be unsupported areas in which coal might fall out, individuals beings truck by roof, rock, and coal ribs being crushed out. (Tr. II, 367). Such injuries would result in lost work days. (Tr. II, 367; S-17, p. 5). Because the rides were open-sided, falling material could strike the operator or occupant of a vehicle, causing lost work days. (Tr. II, 368).

Law had designated the conduct as constituting moderate negligence because it might not have been observed unless one pulled into the area. (Tr. II, 368). Although he did not see anybody in the area, Law indicated that examiners and management would travel through the area and might pull into the crosscut. (Tr. II, 368-369). Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations, that existed for the other citations testified to. (Tr. II, 370).

On cross examination, Law agreed that there were "lots of crosscuts" in the main north area. (Tr. II, 371). He further agreed that the cited area was not an active section. (Tr. II, 372). As with other citations Law had not issued any exam-related citations. (Tr. II, 372).

Law stated that the areas had become noncompliant because of rashing out and getting wider when the bolts were originally installed. (Tr. II, 373). The areas were along both sides of the crosscut. (Tr. II, 373). Law did not note any mobile equipment tracks or foot prints being in the crosscut. (Tr. II, 373). Law agreed that the older an area is, the more the area will start to widen and the more rib rash can occur. (Tr. II, 375). Law did not identify any actual cracking or spalling in the roof. (Tr. II, 379). The fact that bolting was 6 feet from the rib caused the roof to be compromised. (Tr. II, 379).

Law agreed that his notes and citation did not mention anything about the roof other than the unsupported area. (Tr. II, 379). There was only mention that the 6 foot distance (from rib to

bolting) caused the roof to be compromised. (Tr. II, 380). Law's rationale for special assessment was essentially the same as previously testified to. (Tr. II, 381).

On re-direct examination Law indicated that he was travelling with mine manager, Marvin Webb, at the time of the citation. (Tr. II, 382).

ii. Gary Vancil, Jr.

As to Citation No. 8432129, Vancil testified that he was personally acquainted with the cited area. (Tr. II, 384). The immediate roof in the crosscut was limestone in the middle and shale on the outside edges; limestone was in the middle of the entry and above the shale. (Tr. II, 384). There was approximately 67 inches of limestone between Entries Four and Five. (Tr. II, 384). Based upon the bolter tag and review of the hazard map, Vancil opined the limestone in crosscut #8 was good. (Tr. II, 385-386; *see also* R-39, p. 3).

Given the rib rashing described in the citation, Vancil opined that the potential for a roof fall in the immediate roof in crosscut 8 was unlikely. (Tr. II, 386). The limestone was competent all throughout the area in question. (Tr. II, 386). Vancil did not observe shale in the area where the rib rash was present. In the area where he saw roof support – cable bolts and timber – he did not see any shale in the immediate roof. (Tr. II, 387-388). The limestone had rolled down and was on top of the coal. (Tr. II, 388-389). Based upon his experience, the unsupported 5.5 to 6 foot area that had rib rashing would not be at risk for a roof fall due to the absence of water and the amount of limestone present. (Tr. II, 390-391).

On cross examination, Vancil indicated that he had inspected the area one week prior to hearing. He did not know if the cable bolts had been installed in response to the citation. (Tr. II, 391).

3. Docket No. LAKE 2011-962

a. Citation No. 8432052

i. Edward W. Law

In reference to Citation No. 8432052 (S-9), Inspector Law testified that Respondent had violated a mandatory safety standard, §75.1403. The safeguard involved was written so that transportation type accidents could be avoided. (Tr. II, 395).

The original safeguard, Citation No. 3033358 was issued on January 13, 1988 when Law was still working at (Kerr-McKee) Galatia Mine. (Tr. II, 393; S-10). A miner operator was standing on the back side of a curtain when a ram car operator came through the curtain, striking the miner and causing leg injuries. (Tr. II, 394; S-10). The safeguard provided that all equipment be parked at least 25 feet away from curtains or that the curtain be marked to warn miners that equipment was parked behind the curtains. (Tr. II, 394; S-10).

Law had observed a transformer, in violation of the safeguard, located directly behind a

curtain between entries 3 and 4 with no marking on the opposite side warning miners of its presence. (Tr. II, 394-395). The transformer was up against the curtain in the area of the 9th headgate. (Tr. II, 395). The transformer was approximately 12 feet by 18 feet in size and was "very heavy." (Tr. II, 396). Law estimated that it had been at the cited located for several shifts. (Tr. II, 396). Miners in vehicles and doing set-up work would be in the area, including scoopers and ram car operators. (Tr. II, 397). Though he had not issued a previous citation for an improperly located/marked transformer, he had issued similar citations in the past for violating the safeguard. (Tr. II, 398).

The hazard created by the safety violation would be: some vehicle ramming in the transformer and the vehicle operator being injured; or some miner on foot behind the transformer being struck by the transformer after it was rammed. (Tr. II, 400). It was likely that somebody would be injured because a miner-pedestrian would have no protection from the collision. If another vehicle was cutting behind the transformer, the miner-pedestrian could be caught between 2 pieces of equipment. (Tr. II, 401). Although law had designated the gravity as lost workdays, he indicated the injury could be worse. (Tr. II, 401).

In the case of a mobile equipment operator, he would suffer impact injuries – though such injuries would likely be less serious than those suffered by a miner on foot. (Tr. II, 402). Law observed that equipment operators did not wear seat belts. (Tr. II, 402). Law found that one individual would likely be affected, although, given the right circumstances, two people could be injured. (Tr. II, 403).

Law had found only moderate negligence because it was difficult to ascertain who would have actually known the transformer's location. (Tr. II, 404). Light could be seen through the curtain; a shadow of an object might also be discerned. (Tr. II, 404). In order to have proper markings, hang flags or pogo sticks indicating, "stop, power center" should have been erected. (Tr. II, 405). Also, something should have been hung in the crosscut, alerting the operator before he got to the curtains. (Tr. II, 405). The citation had been terminated after the curtain was marked to warn miners. (Tr. II, 406). Law held a close-out conference after issuing the citation. (Tr. II, 406).

On cross examination, Law stated that the curtains at the time of the within citation were pull-though curtains, made of plastic or nylon base. (Tr. II, 408). At the time of the original safeguard incident the curtains were opaque. (Tr. II, 408). Miners cars and ram cars, as involved in the earlier incident, moved along frequently. (Tr. II, 409-410). Law agreed that individuals on a working crew would know during their shift the locations of the transformer. (Tr. II, 412). He further agreed that, as a general practice, miners would be dropped off in the area of the transformer. (Tr. II, 412). Law estimated that he had cited the instant safeguard less than 5 times in the past. (Tr. II, 416). Law indicated that the 55 past citations noted in the instant citation concerned a multitude of safeguards associated with §75.1403 and not just No. 3033358.[16] (Tr. II, 417; S-9).

[16] See also R-36 for various other safeguards cited in connection with §75.1403 and Respondent's cross-examination regarding such at Tr. II, 417-418.

Though not mentioned any specific activities in his field notes, Law asserted that he observed vehicles and individuals, in addition to bolters, in the cited area. (Tr. II, 419-420). Law remembered a string of lights above the transformer, although he did not know the specific number of light bulbs. (Tr. II, 432).

In recommending the within citation for a special assessment, Law considered the number of previous §75.1403 violations, that the violation involved on of the ten "rules to live by," and that it was S&S. (Tr. II, 433).

ii. Israel Burtis

At the hearing Burtis testified that he had accompanied Inspector Law when the within citation was issued. (Tr. II, 436; R-6). Burtis testified that the curtain involved was a clear run-through curtain. The power station (transformer) was on the back side and lit up. (Tr. II, 436). Burtis asserted that one could see through the curtain and what was behind the curtain. (Tr. II, 437). The power center was where everyone came for communications and maps. (Tr. II, 437). Everybody gathered at the power center at the start of the shift to get their game plan together for the day. (Tr. II, 437).

Burtis further testified that he could tell where the power center was because of the lights which illuminated the entry and shone through the curtain. (Tr. II, 437-438). In addition to the transformer, Burtis observed a roof bolter and possibly broken down battery scoop in the area. (Tr. II, 438).

iii. Edward W. Law

On rebuttal, Law stated that he recollected that the cited curtain was a line curtain that was opaque. While one could see light through it, one could not tell what type of equipment was behind it. One could only see shadows of things. (Tr. II, 439).

On cross examination, Law disagreed that clear curtains were commonly used behind a transformer at Galatia Mine. (Tr. II, 440).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Citation No. 8432052 (LAKE 2011-962)

a. <u>The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.1403 (Safeguard No. 3033358) Was Violated.</u>

On January 4, 2011, Inspector Edward Law issued the within citation which, under Section 8, Condition or Practice, reads as follows:

> The 12,470 VAC Unit transformer company #90, located on the 9th West Headgate, 008-MMU, between #3 and #4 at the survey station 19,546 North is parked against a curtain and the opposite side of the curtain is not marked with to

warn miners of the equipment parked on the other side.

Standard 75.1403 was cited 55 times in two years at mine 1102752 (55 to the operator, 0 to a contractor).

(S-9).

§75.1403, Other Safeguards, provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. §75.1403.

Safeguard No. 3033358, in pertinent part, requires that "all equipment be parked at least 25 feet away from curtains or that the curtain be marked to warn miners that equipment is parked behind the curtains." (S-10).

At hearing, Inspector Law testified he observed a transformer located directly against a curtain in the area of the northwest headgate with no markings on its opposite side to warn members of its presence. (Tr. II, 394-395). A very heavy piece of equipment, the transformer was approximate 12 feet wide and 18 feet long. (Tr. II, 394-395). The curtain in question was opaque. Light and shadows could be perceived behind it but not objects. (Tr. 404-405).

In issuing the instant citation, Law referenced the accident described in Citation No. 3033358 (safeguard) (S-10). An individual, while working on a continuous miner, located approximately six feet behind an (unmarked) curtain, was struck by a ram car coming through the curtain. (Tr. II, 394). The safeguard required that "all equipment" be parked at least 25 feet from curtains or that the curtains be marked to warn miners that equipment was parked behind a curtain. (S-10).

At hearing, Respondent offered no evidence contradicting Law's testimony regarding the location of the transformer viz a viz the curtain. Nor did Respondent present any evidence establishing that the curtain itself was marked. Further, Respondent offered no evidence that the area on the opposite side of the curtain was in any way flagged or posted.[17]

Given such the ALJ finds that the Secretary clearly carried his burden of proving by a preponderance of the evidence that Respondent had violated §75.1403 and associated safeguard.

[17] At hearing Law testified that hang flags or pogo sticks should have been erected warning the miners of the transformer's location. (Tr. II, 405). He further suggested something be hung out in the crosscut as advance warning because the transformer at issued was up against the curtain. (Tr. II, 405).

In reaching this finding the ALJ specifically rejects Respondent's argument that the within citation should be vacated because a properly narrow construction of the safeguard would require that "equipment" mean only *mobile* equipment. (*Respondent's Post-Hearing Brief*, p. 58). As the Secretary correctly argues, the inspector, who issued the safeguard notice, did not restrict in any way the *type of equipment* to be covered. (*Secretary's Post-Hearing Brief*, p. 14). The ALJ agrees with the Secretary's position that the language of the notice recognizes that it is "the presence of equipment behind a curtain, and not the means of transportation for that equipment that contributes to the hazard." (*Id*.). Likewise, the ALJ accepts the Secretary's argument and cited case law that "parked" does not change the meaning of the word "equipment" but rather refers to the temporary nature of the equipment in a particular location. (*Id*.).

The first element of *Mathies* – the underlying violation of a mandatory safety hazard – has been clearly established.

In *Wolf Run Mining*, 32 FMSHRC 1228, 1233 (2010) the Commission concluded that a violation of safeguard notice issued by a MSHA inspector constitutes a violation of Section 314(b)[18] of the Mine Act and is therefore a violation of a mandatory safety standard.

The clear purpose of the safeguard is to protect miners from possible injury because the presence of equipment behind an unmarked curtain might not be known or perceived. The unreasonably narrow construction suggested by Respondent would inexorably lead to all sorts of hairsplitting defenses[19] by miner operators that would defeat this purpose.

In its brief Respondent also argued that the within citation should be vacated because a strand of lights illuminated the transformer area and constituted a de facto marking of the curtain as to bring attention and notice of the transformer's location. (*Respondent's Post-Hearing Brief* at p. 60; *see* inter alia, Tr. II, 432, 436-437, 439).

This Court also holds that the clear wording of the safeguard requires that curtains be marked and not merely that an area be illuminated.

The problem with Respondent's light equals marking and notice rationale is that in the case *sub judice*, despite the presence of lighting, Inspector Law could not see what was actually behind the curtain at issue or the object's depth. (Tr. II, 439). The purpose of the safeguard is to alert miners of the actual presence of equipment at a close distance behind the curtain. Lighting

[18] "(b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

[19] The ALJ foresees similar case scenarios as existed here. Equipment might have missing or damaged wheels or rollers or skids; equipment might lack power or a power source; equipment might be tagged out; equipment might have defective parts rendering it inoperable. Mine operators, accepting Respondent's narrow construction, could arguable claim that such equipment was not technically *mobile* and, therefore, fell outside the scope of the safeguard.

which merely allows miners to possible discern shadow-shapes at some unknown depth behind a curtain does not sufficiently satisfy the safeguard's purpose.

Likewise, Respondent's argument and evidence that the location of the transformer was well-known to those working on the section is equally unpersuasive as to the essential issue of violation.[20] (*see*, inter alia, *Respondent's Post-Hearing Brief* at p. 59).

Respondent seems to suggest that he should be found not to have violated §75.1403 because most miners were aware of the within transformer's location.[21] However, the purpose of the safeguard is to reasonably alert *all* individuals, include those unfamiliar with the affected mine area, that a piece of equipment is located behind a curtain.

The ALJ therefore finds that Citation No. 8432052 was properly issued by Inspector law for a violation of §75.1403 (Safeguard No. 3033358) and should not be vacated.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.,* 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

As discussed supra, the first element of *Mathies* has been proved by the Secretary.

As to the second prong of *Mathies* – a discrete safety hazard, that is a measure of danger to safety, contributed to by the violation – the record again establishes satisfaction of such.

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[20] The ALJ, however, accepts that the factors of lighting and known location may be considered in determining the level of negligence and in assessing gravity.

[21] Taken to its logical conclusion, such a defense would allow operators to justify their failure to post warnings because of alleged "common knowledge" regarding the existence of safety hazards – a slipper slope for miners' safety.

At hearing Inspector Law testified in detail regarding the discrete safety hazards contributed to by the safety standard/safeguard violation. An individual walking behind the transformer might be struck by the transformer being moved by a vehicle ramming into it through the unmarked curtain. (Tr. II, 400). A vehicle operator ramming into the transformer might also sustain injuries, including lacerations. (Id.). There was further potential of both injuries happening at the same time involving a miner on foot on the other side of the curtain and/or someone in a vehicle on the opposite side. (Id.).

Law also testified that if an individual was "cutting behind" the transformer and a big piece of equipment came through and the miner did not know it was coming, he could be caught between the two pieces of equipment.[22] (Tr. II, 401).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also supported by the record and applicable case law.

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation , i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

At hearing Inspector Law described the hazard posed to a mobile equipment operator of colliding with a hidden transformer as being reasonably likely to result in an injury to the operator "banging around inside" (a cab) and "being jostled."[23] (Tr. II, 401, 402). The hazard posed to miner on foot being struck by equipment whose operator was unaware of his presence behind an unmarked curtain would also reasonably be likely to result in an injury. (*see also Secretary's Post-Hearing Brief* at p. 16 re *Mathies* third element that the Court adopts without recitation herein).

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[22] Though he assessed the gravity as lost workdays or restricted duty, Law noted the injury in such a scenario could be much worse. (Tr. II, 402). The potential for catastrophic injury or death due to pinning between machines or machines and standing objects is beyond dispute. The ALJ notes a recent July 18, 2013 MSHA fatal-gram regarding the tragic death of an Illinois miner. While taking lunch behind a line curtain, he was truck by a battery powered coal hauler and fatally pinned between the coal hauler and coal rib.

[23] At hearing Law further noted that equipment operators in mines generally do not wear seat belts.

Under *Mathies* the fourth and final element that the Secretary must establish is that there is a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574.

With respect to the fourth *Mathies* element, as outline supra, Law testified that injuries resulting from the cited violation would be lost workdays or restricted duty. (Tr. II, 401-402; S-9). Law further observed that a person pinned between mobile equipment and being knocked under the rub rail would sustain even worse injuries. (Tr. II, 402). A mobile equipment operator traveling through the curtain and colliding with the transformer would likely sustain injuries including lacerations. (Tr. II, 400).

Given *Musser's* holding that the Secretary need not prove the *violation itself* will cause injury, Commission law that the *absence of an injury producing event* does not preclude a determination of S&S,[24] and Inspector Law's judgment that the within violation was "S&S," the undersigned finds the Secretary has also carried its burden of proving S&S.[25]

c. Respondent's Conduct Was Reasonably Designated As Being "Moderate" In Nature.

In the citation at issue, Inspector Low found that the operator's conduct was moderately negligent in character.

30 C.F.R. §100.3(d) provides the following:

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

In 30 C.F.R. §103(d), Table X, the category of moderate negligence is described thusly: "The operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances."

At hearing, Law testified that he had designated only a moderate level of negligence

[24] *See Elkhorn Coal Co*., 27 FMSHRC 899, 906 (Dec. 2005).

[25] The Commission has held that the judgment of an MSHA inspector is an "important element" in determining whether a violation is S&S.

because "it was difficult to tell who would have known if (the condition) was there." (Tr. II, 404). "There was no supervisor directly in the area and no mine manager in the area that I could say was aware of it." (Tr. II, 404). However, Law opined that, "someone should have seen it on one of their passing through exams…" (Tr. II, 404).

A reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would be constrained to agree with Law's assessment that someone should have seen the unsafe condition posed by a transformer being juxtaposed to an unmarked curtain. The miner operator's conduct did fall below the high standard of care imposed by the mine not to protect miners against the risks of harm associated with machinery that is hidden or obstructed from view by a curtain.

The ALJ finds no reason to modify any of the negligence or gravity findings reached by Inspector Law as to this citation and adopts all of the Secretary's Post-Hearing Brief rationales in support of such.

d. Penalty

The ALJ shall discuss the issue of penalty imposition in greater depth with succeeding citations. The Court has broad discretion to assess penalties *de novo*. *See Spartan Mining Co.*, 2008 WL 4287784 at 22 (2008).

As noted supra, while not accepting Respondent's arguments that illumination of the area and/or miner's general awareness of the transformer's location dictated vacating the citation, the ALJ does view those factors as constitute mitigating circumstances. The ALJ gave only partial credence to the testimony of Respondent's witness regarding the visibility of the power center through the curtain, but does not accept that the illumination of the curtain gave possible partial warning regarding the hazard. Likewise, the ALJ accepts that most miners in the area were aware of the transformer's location despite the lack of curtain marking.[26] In the circumstances the ALJ finds it reasonable to reduce the proposed $4,800.00 penalty to $3,800.00. The citation is otherwise affirmed as issued.

2. Citation No. 8428508 (LAKE 2011-701)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On October 22, 2010, Inspector Phillip Stanley issued Citation No. 8428508 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

> The roof or rib where persons normally work or travel was not supported to protect persons from the hazards associated with the fall of the roof and rib. An area of unsupported roof exists at survey station 314.09 north in entry #1 of the 4th

[26] *See Secretary's Post Hearing Brief* questioning Burtis' testimony at p. 12, FN 12.

East Headgate. From the inby corner going across entry #1 to the solid bock, 6 roof bolts are hanging from the roof, from 6 inches up to more than 2 feet, and are not supporting the roof. The distance from the corner to the first effective roof bolt is 14 ft. The width of the unsupported roof as you go inby is 6 ft. This area is frequently travelled and an insufficient examination is also being cited. (Citation No. 8428509)

Standard 75.202(a) was cited 109 times in two years at mine 11-02752 (109 to the operator, 0 to a contractor).

(S-1).

Standard 75.202(a) provides as follows:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

In finding that the above standard was in fact violated the ALJ has been guided by controlling jurisprudence which holds that mine operators are strictly liable for violations of health and safety standards regardless of the chance of injury. S*ee e.g. Asarco v. Comm'n*, 868 F.2d 1195, 1197 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." Id. at 1197. If conditions existed that violated the regulations, citations are proper. *Allied Prods., Inc. v. Comm'n*, 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The Secretary is *not* required to prove that violation creates a safety hazard or that a violation is significant and substantial. *Asarco*, 30 FMSHRC 254, 256 (2008). A non-significant and substantial violation should be found and a penalty assessed even if the chance of injury is not very great. *Id*.

At hearing Inspector Stanley[27] testified that he had observed six (6) roof bolts in the northeast headgate area that were not supporting the immediate mine roof. (Tr. I, 16-17, 22, 24). The bracing plates were not in contact with the roof and shale pieces had fallen away from between the roof and the plates. (Tr. I, 21, 26). Stanley concluded that the bolts – one of which appeared to be bent -- were no longer serving any purpose in controlling the immediate roof. (Tr. I, 25-27).

Stanley further opined that the unsafe condition had existed for a "considerable period of time" given the gray color of the rock dust in the area. (Tr. I, 27). The draw rock, which had drawn to the floor, had a mixture of rock dust and float coal dust, as well as old and new foot traffic across the gob. (Tr. I, 27-28). Based upon his mining experience, Stanley opined that the area had been rock dusted two to three weeks prior. (Tr. I, 28-29). The rock dust had "certainly"

[27] Stanley had less experience as an inspector and less experience in coal mining than Law. (see also summary of testimony supra regarding such). As discussed infra the ALJ accorded somewhat less weight to certain of Stanley's determinations because of such.

been there for more than one shift. (Tr. I, 29). The foot traffic due to discoloration appeared more recent in origin. (Tr. I, 29-30).

Stanley testified that this area was examined regularly – at least once per shift. (Tr. I, 32).

As a result of his observations Stanley issued the within citation for violations of §75.202(a).

In its Post-Hearing Brief, Respondent properly states that it is the Secretary's burden, under the Mine Act, to prove each alleged violation by a preponderance of the evidence. (*See Respondent's Post-Hearing Brief* at p. 13); *see also* Commission and Circuit case law holding such as *Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1988). However, this burden is not an onerous "beyond a reasonable doubt burden" but a standard that only requires the Secretary to prove something is "more likely than not." *Keystone Mining Corp.*, 17 FMSHRC at 1838.

In its brief, Respondent essentially argues that there was insufficient evidence presented to establish that the condition existed in "areas where persons work or travel." (*See Respondent' Post-Hearing Brief* at p. 14 and 30 C.F.R. §75.202(a)). The ALJ grants that the cited area was in an outby section of Respondent's mine near seals and distant from active work areas.[28] However, the statutory language of §75.202(a) does not demand that the Secretary prove the affected area is "frequently" traveled or "actively" worked – only that it be shown that persons work or travel in the area.

In the final analysis, the undersigned gave credence to Stanley's observations and opinions that foot prints had recently been made by an individual or individuals – whether examiners, rock dusters, or pumpers – in the area where the damaged bolts and unsupported roof was located. (*see also* summary of testimony supra for Stanley's more detailed testimony as wells as *Secretary's Post Hearing Brief* arguments which the undersigned found persuasive regarding such at pp. 17-22).

The ALJ has also considered the reported admission of Respondent's safety officer, Michael Smith, that examiners did, in fact, travel through the cited area. This admission, which Stanley also documented in his field notes, was corroborative of Stanley's testimony and opinion regarding signs of recent foot travel in the cited area.[29] (See also Tr. I, 40; S-2, p. 7).

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[28] As discussed infra the ALJ did find such factors to constitute mitigating circumstances as to inter alia the level of negligence designated.

[29] Although Smith denied making such a statement, (Tr. I, 160) the ALJ, as trier of fact, has a duty to resolve conflicts in testimony without finding that a witness committed perjury. The ALJ found Stanley to be an honest historian and declines to accept Smith's suggestion that Stanley had made up the admission and fabricated notes "to bolster" his citation. (*see also* Tr. I, 160). Later, in his testimony Smith states, "I don't recall making that statement." (Tr. I, 167). However, he did not produce his own notes which he had taken of the conversation. (Tr. I, 168).

b. Considering The Record *In Toto* and Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protected persons from hazard related to roof falls. A discrete safety hazard – falling roof material – was contributed to by the violation. (*See* inter alia Tr. I, 32 where Stanley testified regarding "fractured shale.")

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury.[30] Stanley credibly described the unsafe roof condition with 6 to 12 inches of rock having already fallen in the area of foot travel. (Tr. I, 26, 31-32).

The ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ recognizes that a roof fall can spread into adjacent areas (*see also Secretary's Post Hearing Brief* at p. 22 and Tr. I, 105). However, the ALJ finds that the injury which could reasonably be expected to result from the within standard would be more reasonably designated as lost workdays or restricted duty. The ALJ finds that rather than being pinned by falling roof material a miner would most likely be struck by falling shale.

d. Negligence

The ALJ further finds that Respondent's conduct in this matter was at a moderate level of negligence rather than at a high level as designated by Inspector Stanley. Although, as discussed supra, the inactive character of the cited area does not preclude a finding of violation, the ALJ does accept, in part, Respondent's arguments that this factor lessened the degree of negligence on the part of the mine operator. (*see also Respondent's Post-Hearing Brief* at pp. 22-24). As discussed infra, the ALJ also agrees in part with Respondent's argument that the adjacent nature of the cited conditions constituted somewhat less of a hazard. (*Respondent's Post-Hearing Brief* at p. 21).

The ALJ observes that the factual issues of who had actually been present in the cited

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When confronted with conflicting testimony and mindful of a preponderance of the evidence standard, the ALJ finds that it is "more likely than not" that Stanley's recollection of events, supported by contemporaneous notes, was more credible than Smith's bald recollections.

[30] The ALJ again recognizes the Secretary, under *Musser*, above cited, need not prove a reasonably likelihood that the violation itself will cause injury.

area and who know or should have known of the cited conditions were hotly contested both at hearing and in the parties' briefs. The ALJ ultimately finds that the Secretary carried his burden of proof that some person or persons did enter the cited area and was exposed to the hazard of roof fall and should have at least *constructively* known of the violative condition. However, the ALJ recognizes that Respondent raised legitimate questions regarding these issues which compel the ALJ to find a lesser degree of negligence than found by Inspector Stanley.

e. Penalty

Before addressing the actual penalty to be imposed as to this particular citation, which was specially assessed, the undersigned will address the contentions of the parties regarding special assessments in general

i. Contentions of the Secretary

Mine operators are subject to civil penalties for violations under the Mine Act. The purpose of the penalties is to provide a strong incentive for compliance. The penalty amount should be sufficient to encourage the operator to comply with safety regulations rather than to pay penalties and continue in noncompliance. (*see Secretary's Post-Hearing Brief* at p. 8 and cited statutory and case law legislative history).

The Court has broad discretion to assess penalties *de novo*. In assessing civil monetary penalties the Commission shall consider the factors set forth at §110(i) of the Mine Act, 30 U.S.C. §820(i). In addition the violation's negligence level and possible S&S character should be taken into account. (*Secretary's Post-Hearing Brief* at pp. 8-9).

Respondent should have been aware of the possibility of special assessments. Continued violations of standards were repeatedly cited; the violations were the focus of increased educational and enforcement efforts which would lead to greater enforcement scrutiny. Given the time span during which the citations/dockets were issued, Respondent needed to implement a program that would lessen the frequency of violations. (*Secretary's Post-Hearing Brief* at 34-p. 35).

The purpose of the penalties is to compel compliance with health and safety laws and regulations to deter operators from violating such mandates. ALJs should consider the deterrent effect of penalties in addition to 110(i)'s six statutory factors. (*Secretary's Post-Hearing Brief* at p. 35).

Special Assessment Review ("SAR") forms are irrelevant in the context of de novo proceedings and, accordingly, the SAR form is not relevant for *any* purpose. (Secretary's Post-Hearing Brief at p. 36) (emphasis added).

ii. Contentions of Respondent

Special assessments proposed by the Secretary prevent the Commission and its ALJs from assessing civil penalties without the appearance arbitrariness. (*Respondent's Post-Hearing*

Brief, at pp. 1-6).

The Secretary's change to the special assessment program in 2007 rendered the regulation vague, ambiguous, and undeserving of deference. (*Respondent's Post-Hearing Brief*, at pp. 6-10).

The Secretary failed to meet his burden of proving, "particularly serious and egregious violations" or "other aggravating circumstances" justifying enhanced penalties. (*Respondent's Post-Hearing Brief*, pp. 10-19).

In its brief Respondent cites the recent decision of ALJ Zielinski in *American Coal Co.*, LAKE 2011-183 *et al*, *slip op.*, at 51 (June 13, 2013) (ALJ Zielinski); (*see also Respondent's Post-Hearing Brief* at p. 12). However, although ALJ Zielinski recognized American Coal's concerns about the practical implications of the Secretary's determinations to specially assess violations were well founded,[31] he ultimately concluded that whether the Secretary proposed a regularly or specially assessed penalty was not relevant to the Commission's determination of a penalty amount. (*American Coal Co.*, at p. 51).

This Court is of the same opinion.[32]

Regardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used – this Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The ALJ has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. Inter alia, the undersigned notes: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria

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[31] The undersigned also notes that ALJ Zielinski also found Respondent's arbitrariness and due process arguments were unavailing in light of the Supreme Court holding *in Fox Television Station, Inc.*, 132 S.Ct. 2307, 317 (2012)

[32] At hearing this Court allowed the admission of the Secretary's "SAR" form over the objection of the Secretary. Pending briefing by the parties this Court reserved his ruling as to the evidentiary purpose that the form could used for. After considering the arguments of both parties and mindful of the split opinions as to the discoverability of the forms, this Court concludes that the forms are admissible for the limited evidentiary purpose of corroborating the inspector(s) testimony that they had, in fact, recommended special assessments which were subsequently approved by MSHA superiors. While such evidence is perhaps technically relevant, this ALJ has not accorded the forms any probative weight in determining the penalty amounts in this case.

must be considered, but not necessarily assigned equal weight; and the Commission's holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties[33] is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties. (*see also Secretary's Post-Hearing Brief* at pp. 10-11 and cited case law).

iii. Penalty Assessed

A recent decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary' proposed penalties. (*see also* 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal*, also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id*. at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)).

The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein. As discussed supra, Respondent's conduct was not, in this Court's opinion, highly negligent but only moderately negligent. Further, the gravity designation as to the injury to be expected is more properly described as lost workdays or restricted duty.[34]

Affirming the citation as issued with a modification of negligence from moderate and gravity of expected injury from permanently disabling to lost workdays or restricted duty, the ALJ finds the Secretary's proposed penalty should reduced from $40,308.00 to $20,000.00.

3. Citation No. 8432118 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On February 28, 2011, Inspector Edward W. Law issued Citation No. 8342118 to

[33] In *Sec. v. Black Beauty* (Docket Nos. LAKE 2008-327 et al (August 2012), the Commission, citing its seminal decision in *Sellersburg Stone*, 5 FMSRHC at 295, considered whether an ALJ is permitted to take into account the deterrent purpose of the penalty provisions of the Mine Act when reviewing a settlement proposed. The Commission held that a Judge's decision in accessing a penalty is bound by proper consideration of the statutory criteria *and* the deterrent purpose underlying the Act's penalty assessment scheme.

[34] The ALJ , as discussed infra, also finds that the adjacent nature of the cited conditions presented less of a hazard to miners. (*See Respondent's Post-Hearing Brief* at p. 41).

Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

> The outby ribs at the 1st East Headgate seal entrance are not being adequately supported or controlled where miners normally work or travel to protect miners from the hazards related to falls of the roof and ribs. The hazardous rib is cracked, broke up and leaning with a gap behind the rib of 1 to 3 inches from rib to coal pillar. The rib is undercut at the base approximately 6 to 8 inches. The rib is approximately 5 to 8 feet long, 7 feet high and 3 to 10 inches thick. The area was flagged out by management after a citation was issued to prevent travel in the area.
>
> Standard 75.202(a) was cited 97 times in two years at mine 1102752 (97 to the operator, 0 to a contractor).

(S-13).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Inspector Law testified that he had observed inadequately supported ribs in the 1st East tailgate.[35] Specifically, he observed a cracked rib, broken, leaning, with a gap behind it up to three inches from the coal pillar. (Tr. I, 193, S-13). The rib was approximately seven feet high and tapered to the base where it was undercut.[36] (Tr. I, 192-193). Law concluded that the cracked, undercut rib was no longer supporting the coal pillar – "It's like taking…a leg up from underneath the table." (Tr. I, 194).

Given the area that was undercut, Law estimated that the condition had existed for a number of shifts. (Tr. I, 196, 200). Further, he testified that he could see where the area had been worked on, where parts of the rib had been pulled down. (Tr. I, 198). The area was not flagged or dangered off in any way. (Tr. I, 198).

As a result of his observations Law issued the within citation for violations of §75.202(a).

In its brief, Respondent argues that the instant citation is not valid because there was insufficient evidence presented to establish that the condition existed in "areas where persons work or travel." (*See Respondent' Post-Hearing Brief* at p. 30 and 30 C.F.R. §75.202(a)).

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[35] Initially, Law had cited the 1st East headgate, but he later modified the citation to more accurately reflect his observations. (Tr. I, 206-207; see also S-12, pp. 1 and 2).

[36] Law explained that the bottom in this area was fireclay, which can deteriorate underneath of a rib and cause a coal pillar to become unsupported. (Tr. I, 193). This is what he referred to as becoming "undercut." (Tr. I, 193).

To support this argument, Respondent pointed to the evidence that miners did not enter this area. It noted that the fact that this was an outby area of the mine was not contested. (Tr. I, 235) (*see also Respondent's Post-Hearing Brief* at 30).

Specifically, Respondent argued that examiners did not enter this area. It referred to Deere's testimony wherein he stated he conducted his examinations without traveling past the cited rib. (Tr. I, 267-270) (*see also Respondent's Post-Hearing Brief* at 33). According to Respondent, Deere's observation was bolstered by Inspector Law's testimony that there were several exits and entrances in the instant section of the mine, meaning that an examiner might travel through the area without passing the cited rib. (*Respondent's Post-Hearing Brief* at 30-33).

Respondent argued that other miners did not work in the area either. For example, Law did not observe any dusters or other miners in the area at the time of the inspection. (Tr. I, 237) (*see also Respondent's Post-Hearing Brief* at 33). Law also conceded that the pulled down rib might have fallen on its own, meaning that it was possible that miners were not "working on" the rib in the cited area. (Tr. I, 232-234) (*see also Respondent's Post-Hearing Brief* at 34).

In light of these arguments and the evidence which supports them, Respondent urges that the instant citation be vacated.

As with Citation No. 8428508, the ALJ recognizes that the cited area was an outby section, near the seals, and distant from active work areas.

However, as noted supra, §75.202(a) only requires that it be shown that persons work or travel in the area. This issue hinges on whether examiners (including seal examiners) or rock dusters performed their duties near the cited rib. The undersigned credits the opinion of Law that that seal examiners would normally travel in the cited area, as would individuals who were required to maintain the seals. (Tr. I, 195). Law further opined that that it is common for examiners to "loop through" entries when examining seals. (Tr. I, 143, 164, 179) (*see also Secretary's Post-Hearing Brief* at 26). This would mean that examiners would travel through the cited area.

Respondent's proffered evidence that examiners did not travel in this area was based largely on Deere's testimony that he did not travel in this location. However, this is the testimony of only one examiner out of a total of five. (Tr. I, 269-271) (*See also Secretary's Post-Hearing Brief* at 26). There is no evidence to suggest that other miners avoided this area during examinations. Further, the cited area was not dangered off or otherwise marked. (Tr. I, 199). Even if Deere knew to avoid this area and could avail himself of reasonable alternative routes, there is no reason to believe that other miners knew they were to avoid the cited rib area.

In light of Law's testimony that examinations were conducted in this area and the lack of compelling evidence showing that examiners knew to avoid the cited rib, it is reasonably likely that an examiner would travel or work near the cited area. Therefore, the ALJ finds that the Secretary has shown, by a preponderance of the evidence, that miners traveled or worked in the area cited for an unsafe rib. As a result, the violation is established.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, one rib was undercut and failed to provide support. A discrete safety hazard – falling roof material – was contributed to by the violation. (*See* inter alia Tr. I, 203 wherein Law testified regarding falling material).

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause broken bones and that a collapse of the rib could cause a crushing injury. (Tr. I, 204-205).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in broken bones or other injuries that would cause lost workdays or restricted duty. (See Tr. I, 205). While Law also testified that the rib itself could collapse and cause a crushing injury, the ALJ finds that this would be less likely.

d. Negligence

The ALJ further finds that Respondent exhibited low negligence rather than the moderate negligence designated by Inspector Law. As with the discussion of Citation No. 8428508, supra, the inactive character of the cited area does not preclude a finding of violation but can lessen the degree of negligence. As discussed supra, the ALJ also agrees in part with Respondent's argument that the adjacent nature of the cited conditions constituted somewhat less of a hazard. (*Respondent's Post-Hearing Brief* at p. 36-37). Further, the Secretary conceded that Respondent may have missed the condition. (*See Secretary's Post-Hearing Brief* at 27). Also, Inspector Law conceded that it was possible that no one had worked on the rib; it had collapsed on its own rather than been pulled down by an inspector. (Tr. I, 232-234) (*see also Respondent's Post-Hearing Brief* at 34). This means that Respondent may not have been aware of the cited condition.

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ finds that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate negligence but only low negligence.

Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should reduced from $9,100.00 to $7,200.00.

4. Citation No. 8432126 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On March 2, 2011, Inspector Law issued Citation No. 8342126 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

> The roof at cross cut #127, survey station #15736, between entries #5 and #6 of the Main North is not being adequately supported or controlled where miners normally work or travel to protect miners from the hazards related to falls of the roof and rib. There is 4 damaged roof bolts in this cross cut creating 3 inadequately supported areas. In one area there is 1 sheared off roof bolt exposing an area approximately (8 by 8 feet), the second area has 1 damaged roof bolt, approximately (8 by 8 feet) and the third area has 2 shared off roof bolts side by side approximately (8 by 12 feet). The area was flagged off by management to prevent travel after the citation was issued.
>
> Standard 75.202(a) was cited 98 times in two years at mine 1102752 (98 to the operator, 0 to a contractor).

(S-14).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Law testified that he issued the instant citation because he had discovered four damaged roof bolts in the mine's main north travel way in the crosscuts between entries #5 and #6. (Tr. II, 281; S-14). Law opined that the damaged bolts had created three different areas of unsupported roof. (Tr. II, 281). He further testified that several bearing plates had been sheered off, eliminating the skin control. (Tr. II, 282, 285-286, 290). No supplemental support or skin control was added. (Tr. II, 288-289). This created a roof fall hazard. (Tr. II, 290).

According to Law "just about everybody," travelled through the main north travel way daily. (Tr. II, 284). He further opined that the damaged bolt condition had been existent for several shifts prior to his inspection because there were tracks through the area. (Tr. II, 286).

As a result of his observations Law issued the within citation for violations of §75.202(a).

In response to Law's testimony, Respondent presented evidence to show that, despite the damaged roof bolts, the roof was adequately supported. Specifically, it argued that while non-compliance with a roof control plan is to be considered when determining if a roof is adequate supported, such non-compliance is not dispositive of whether a violation of §75.202(a) has occurred. (*See Respondent's Post-Hearing Brief* at 42 *citing Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987) (citations omitted)). In short, Respondent argues that the cited condition might not meet the requirements of the roof control plan, but nonetheless did not render to roof unsupported.

To support this argument, Respondent pointed to evidence that roof conditions in the cited area were adequate. (*See Respondent's Post-Hearing Brief* at 42-45). Specifically, Respondent argued that the limestone roof was solid, that no adverse roof conditions were noticed or possible, and that the fully grouted resin bolts provided adequate support even when damaged. (Id.).

The ALJ specifically rejects Respondent's arguments regarding the solidity of the roof and the assertion that such would invalidate the instant citation.

In making this determination, the ALJ credits Inspector Law's testimony that the cited condition presented a roof fall hazard. (Tr. II, 290). Law opined that the cited area lacked support even though he conceded that he could not determine the lithology of the roof or see any adverse conditions.[37] (Tr. II, 289, 290, 304, 311). With respect to adverse roof conditions, nothing in the record suggests that a lack of such at the time of a citation necessarily implies that a roof is adequately supported.

While Respondent's witness Vancil testified that the roof was solid limestone, he did not inspect the roof until two years after the citation. (Tr. II, 356). Vancil also conceded that there

[37] Respondent also argued that Inspector Law conceded that the fully grouted resin bolts would provide support for the roof even if damaged. As noted by the ALJ in the discussion of Law's testimony supra, the inspector was unwilling to admit that point. As a result, the undersigned will not consider Law's testimony as support for Respondent's position. The undersigned further credits Law's testimony for the proposition that damaged bolts do not provide skin control.

had been shale in the area at one time. (Tr. II, 351). It is more likely than not that the dangerous material observed by Law had fallen in the interim.

The preponderance of the evidence shows that, at the time of the citation, the roof was inadequately supported. Therefore, a violation of §75.202(a) existed.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

A discrete safety hazard – falling roof material – was contributed to by the violation. (Tr. II, 290). As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, three separate areas were not properly supported. There was exposure to that hazard as Law also opined that several workers in the mine traveled in unprotected equipment in the area and would enter the crosscut to yield the right of way. (Tr. II, 284, 289, 319-320). As noted supra, the alleged solidity of the limestone roof and lack of adverse roof conditions does not eliminate this hazard.

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause broken bones and that a collapse of the rib could cause a crushing injury. (Tr. I, 290).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature such that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in broken bones or other injuries that would cause lost workdays or restricted duty to one miner. (Tr. II, 290, 307) (*see also Secretary's Post-Hearing Brief* at 30).

Respondent argued that such injuries were unlikely for several reasons. First, miners would only occasionally enter the area and when doing so generally use equipment with protection for the operator. (*Respondent's Post-Hearing Brief* at 46-47). Those in vehicles without protection for the operator could pull into areas that were adequately supported. (*Id*. at 47). Respondent also noted that examiners would not be exposed because they were not supposed to examine this area, but instead were suppose to merely "glance" into the crosscut. (*Id*.). Finally, it noted that Law did not observe any employees in the cited area. (*Id*.).

The ALJ rejects these arguments. The preponderance of the evidence supports a finding that this area was a crosscut off of a main travel way and that miners would enter the cited location when yielding the right-of-way in mobile equipment. (Tr. II, 284, 289). This condition would be reasonably likely to create exposure to the hazard.

In addition, while some of the equipment provided protection for operators, several pieces of equipment, including diesel rides, scoops, and ram cars were uncovered. (*See Respondent's Post-Hearing Brief* at 30, Tr. II, 319-320). This would mean miners in these pieces of equipment would be exposed.

Finally, Respondent's argument that operators could have avoided the unsupported area is untenable in light of the other evidence it presented. Specifically, Respondent argued with respect to negligence that no one knew or should have known about the cited condition. (*see Respondent's Post-Hearing Brief* at 48). If miners could not be expected to observe the cited condition then there is no reason to believe they would be in a position to consciously avoid the unsupported area. As a result, these miners would be exposed to the hazardous condition and would be reasonably likely to suffer an injury.

d. Negligence

The ALJ further finds that Respondent's exhibited low negligence rather than the moderate negligence designated by Inspector Law.

As noted supra, Respondent argued that it was not aware of the cited condition. (*see Respondent's Post-Hearing Brief* at 48). The preponderance of the evidence supports this assertion. Specifically, the evidence presented confirms that examiners were not required to examine this area. (Tr. II, 303). Inspector Law conceded that the cited condition would be easy to miss.[38] (Tr. II, 293).

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ recognizes that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate

[38] However, given the admitted duty to "glance" into the crosscut, Respondent should have known of the cited condition.

negligence but only low negligence.

Affirming the citation as issued with a modification of the negligence from moderate to low the ALJ finds the Secretary's proposed penalty should reduced from $7,700.00 to $6,100.00.

5. Citation No. 8432129 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On March 3, 2011, Inspector Law issued Citation No. 8342129 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

> The roof at cross cut #8, between entries #5 and #4 of the Main North is not being adequately supported or controlled where miners normally work or travel to protected miners from the hazards related to falls of the roof and rib. An area along the inby rib has 3 roof bolts that are to far from the coal pillar exposing an area 5 ½ to 6 feet wide by 20 feet in length along the outby rib has 3 roof bolts that are to far from the coal pillar exposing an area 5 ½ feet to 6 feet wide by 15 feet in length. This is an area that is used to pull out of the way. The area ws flagged off by management to prevent travel after the citation was issued.
>
> Standard 75.202(a) was cited 99 times in two years at mine 1102752 (98 to the operator, 0 to a contractor).

(S-16).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Law testified that he issued the instant citation because roof bolts in the #8 cross cut between the #4 and #5 entries were inadequately supported. (Tr. II, 361). Specifically, The roof bolts on the outby and inby rib were too far from the coal pillar creating two areas of unsupported roof measuring 5 ½ to 6 feet by 20 feet and 5 ½ to 6 feet by 15 feet respectively. (Tr. II, 361, 369). Law opined that these ribs had been properly bolted at one time but had deteriorated. (Tr. II, 363-364).

As with Citation No. 8432126, this condition was cited along the main north travel way. (Tr. II, 361). As noted supra, Law testified with respect to that citation that "just about everybody," travelled on that travel way. (Tr. II, 284).

With respect to the instant citation, Law testified that the condition had existed for several shifts. (Tr. II, 365, 374).

Law opined that without the required support, rib rash creates an arcing effect at the top,

and the increased pressure can result in roof or rib falls. (Tr. II, 367-368).

As a result of his observations Law issued the within citation for violations of §75.202(a).

As it did with Citation No. 8432126 supra, Respondent argued that despite the spacing of the roof bolts, the roof was adequately supported. Again, it argued that the cited condition might not meet the requirements of the roof control plan, but nonetheless did not render the roof unsupported. (*See Respondent's Post-Hearing Brief* at 53)

Respondent presented several arguments to show that the roof conditions in the area were adequate. It argued, inter alia, that the limestone roof was solid, that no adverse roof conditions were noticed or possible, and that the fully grouted resin bolts provided adequate support even when damaged. (*See Respondent's Post-Hearing Brief* at 53-54)

The ALJ rejects Respondent's arguments regarding the solidity of the roof and the assertion that such would invalidate the instant citation.

In making this determination, the ALJ credits Inspector Law's testimony that the cited condition presented a roof fall hazard. (Tr. II, 367-368). Law opined that the cited area lacked support even though he conceded that he could not see any adverse conditions.[39] (Tr. II, 361, 380). As noted supra, nothing in the record suggests that a lack of adverse roof conditions at the time of a citation necessarily implies that a roof is adequately supported. The undersigned finds Law's testimony regarding the pressures placed on the top by the widely spaced bolts to be compelling even in light of the fact that he did not testify to adverse roof conditions.[40] (Tr. II, 367-368, 380) *See also Secretary's Post-Hearing Brief* at 33). The inspector was clearly aware of the circumstances raised by Respondent and still testified that the roof was not supported and some risk of exposure to roof hazards was present.

The preponderance of the evidence shows that, at the time of the citation, the roof was inadequately supported. Therefore, a violation of §75.202(a) existed.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

[39] Respondent's arguments regarding resin bolts are rejected for the same reason as discussed *supra* with respect to Citation No. 8342126.

[40] It is possible that adverse roof conditions were, in fact present. However, Law did not enter the unsupported area in order to avoid exposure to roof falls and therefore, was unable to testify to such. (Tr. II, 373-374).

A discrete safety hazard – falling roof material – was contributed to by the violation. (Tr. II, 367-368). As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, two large areas in the cited location were not properly supported. There was exposure to that hazard as Law also opined that several workers in the mine traveled in unprotected equipment in the area and would enter the crosscut to yield the right of way. (Tr. II, 284, 289, 319-320). As noted supra, the alleged solidity of the limestone roof and lack of adverse roof conditions does not eliminate this hazard.

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause lost workday or restricted duty injuries. (Tr. I, 365, 368).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in lost workday/restricted duty injuries to the operator of a piece of equipment. (Tr. II, 268)

Respondent argued that such injuries were unlikely for several reasons. First, the area was infrequently traveled as evidence by the fact that there was no evidence of travel in the area. (Tr. II, 369, 375) (*see also Respondent's Post-Hearing Brief* at 55). Further, Respondent argues that the limestone was competent and would not collapse and therefore would not cause an injury. (Respondent's Post-Hearing Brief at 55).

The ALJ rejects these arguments. As discussed with respect to Citation No. 8432126 supra, this area was a crosscut off of a main travel way and that miners would enter the cited location when yielding the right-of-way. (Tr. II, 284, 289). This condition would be reasonably likely to create exposure to the hazard.

Further, as noted by the ALJ supra, the supposed solidity of the limestone top does not eliminate the hazard posed by the cited condition. The preponderance of the evidence supports a finding that, even in light of the composition of the roof, an injury was reasonably likely.

d. Negligence

The ALJ further finds that Respondent's exhibited low negligence rather than the moderate negligence designated by Inspector Law.

The preponderance of the evidence supports a finding that Respondent was not required to examine this area. (Tr. II, 303). Law's testimony supports a finding that the condition could only be seen when in the crosscut and that it might not have been observed. (Tr. II, 364, 368).

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ recognizes that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this court's opinion, the result of moderate negligence but only low negligence.

Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should reduced from $7,700.00 to $6,100.00.

ORDER

It is hereby **ORDERED** that Citation Nos. 8432052 (LAKE 2011-962), 8428508 (LAKE 2011-701), 8432118 (LAKE 2012-58), 8432126 (LAKE 2012-58), and 8432129 (LAKE 2012-58) are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of $43,200.00 within 30 days of the date of this decision.[41]

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

Distribution: (Certified Mail)

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