FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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January 10, 2014

THOMAS E. PEREZ, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-1126 A.C. No. 15-17497-219607
v.	:	
LEECO, INC., Respondent.	:	Mine: Mine No. 68

DECISION

Appearances:

Willow E. Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN - Appearing on behalf of the Petitioner;

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, and Kilpatrick, Lexington, KY - Appearing on behalf of the Respondent.

Before: L. Zane Gill

Procedural History

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d).

On February 23, 2010, Mine Safety and Health Administration ("MSHA") Inspector Silas Brock ("Brock") and MSHA Staff Assistant Clayton "Eddie" Sparks ("Sparks") were part of an inspection at the Leeco #68 Mine. During this inspection, Brock and Sparks issued Citation No. 8361343 ("the citation") and Order No. 8361345 ("the order"). Respondent Leeco, Inc. ("Leeco") contested the citation and order, and the parties were unable to resolve the matter by settlement. A hearing was held on May 8, 2012 in London, KY.

Stipulations

1 . During all times relevant to the matters at issue, Leeco was the operator of Mine #68, Mine ID Number 15-17497.

2. Leeco Mine #68 is a "mine" as that term is defined in Section 3(h) of the Federal Mine Safety and Health Act ("The Mine Act"), 30 U.S.C. § 802(h).

3. At all material times involved in this matter, the products of the subject mine entered commerce, or the operations thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

5. Brock, whose signature appears in Block Number 22 of the citation and the order, was citing in the official capacity and as an authorized representative of the Secretary of Labor.

6. True copies of the citation and the order were served on Leeco as required by the Mine Act.

7. The total proposed penalties assessed for the citation and the order will not affect Leeco' s ability to remain in business.

8. The alleged violations were abated in good faith.

9. The R-17 Assessed Violation History is an authentic copy and may be admitted as a business record of MSHA.[1]

Preliminary Rulings

Violation History Exhibits Are Admissible

There is a preliminary evidence issue to resolve. MSHA used Exhibits GX-15, 17 and 18 at the trial to show the history of Leeco violations. They were provisionally admitted. (Tr.173:5-12) The Secretary wants to rely on the exhibits to support a higher level of negligence, gravity, and penalty. Leeco wants the court to disregard them.

Commission proceedings operate under simplified evidence rules. Commission Rule 63(a) sets the parameters for admissible evidence in FMSHRC proceedings. 29 CFR § 2700.63(a). The rule states that "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." *Id.* Although the Federal Rules of Evidence do

[1] Counsel for the Secretary requested a 15-month Assessed Violation History for Leeco. Counsel for Leeco noted that exhibit R-17 appeared to contain violations issued outside of this range. Counsel for the Secretary and Counsel for Leeco agreed that the violations outside of the 15-month range should not be considered.

have value by analogy, the Commission is not required to apply them. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135-36 & n.6 (May 1984). Here, they provide useful guidance in resolving the issue raised by Leeco.

According to Fed. R. Evid. 401, "relevant evidence" is evidence having a tendency to make the existence of any fact at issue in the case more or less probable than it would be without the evidence. The rule 401 relevance test requires two things: the evidence must have some probative value, and the fact to which it relates must be of some consequence in the case. These contested exhibits bear on the issues of negligence, gravity, and penalty, which are of obvious consequence. In addition to other possible relevance, their content relates to the issue of whether Leeco was or should have been on heightened notice because of prior and similar enforcement actions, an element of both the S&S characterization and the unwarrantable failure allegation. The contested exhibits are relevant.

Fed. R. Evid. 402 makes all relevant evidence admissible unless it is excluded by another rule or law, e.g., hearsay under Fed. R. Evid. 801, or 803, as argued by Leeco. (Leeco Resp. Br. at 2) In addition, per Fed. R. Evid. 403, the court may exclude evidence of doubtful relevance if it would promote confusion or prejudice, or be a waste of time. Leeco argues that because the exhibits' sponsoring witness could not vouch for the business processes within which the prior violation data was collected and reported, the information in the contested exhibits is misleading because it lacks accuracy and is of doubtful provenance. Leeco also intimates that the court's consideration of the evidence in the contested exhibits might prejudice its case.

As stated above, the Commission Rules allow the court to consider hearsay evidence. Moreover, Fed. R. Evid. 803(8) excludes from the hearsay prohibition public records and reports. The compilation of data relating to the violation and enforcement history of Leeco is a public record, and the contested exhibits are reports of those records. The litigation context of anything falling within the jurisdiction of the Commission and its administrative law judges is quite narrow. We all know enough about the methods and purposes of the violation history data collected and reported by MSHA that in the absence of some foundational evidence of misuse or corruption of that data, there is no legally significant doubt about where it came from, what it pertains to, or whether it is accurate in its collection and reporting.[2] The only question about

[2] Leeco argues that the contested evidence is not a candidate for judicial notice under Fed. R. Evid. 201 because the information is neither generally known nor able to be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. (Leeco Resp. Br. at 2) However true this may be in the arena of general litigation, it is less true and less needed as a prophylactic in this specialized practice area. Fed. R. Evid. 201 speaks of the "territorial jurisdiction" of the court as being one of the two factors bearing on whether evidence may be admitted by judicial notice. The Commission's ALJs have nationwide territorial jurisdiction, but our subject matter jurisdiction is narrow and specialized. Hence, the rationale supporting judicial notice on the basis of facts uniquely germane to a limited geographic territory is equally applicable where it is the subject matter jurisdiction that is limited and specialized. It

violation history records maintained by MSHA is what weight and focus to give them, which are issues consigned to the discretion of the judge. *See Keystone Coal Mining Corp. v. Secretary of Labor,* 17 FMSHRC 1819, 1853-54 (Nov. 1995) (*citing Phil Crowley Steel Corp. v. Macomber, Inc*., 601 F.2d 342, 344 (8th Cir. 1979)).

From this I conclude that the contested exhibits are relevant and admissible. Leeco's concerns about the use of the evidence are circumscribed by the court's discretion as to how much weight, if any, to give it and to which issues to apply it. The court is aware of the alleged inaccuracies, problematic scope, and questionable value of the contested evidence. The court is capable of filtering it and giving it the appropriate weight.

The Citation and Order Are Not Duplicative

Inspector Brock issued the citation under 30 CFR § 75.370(a) (1) and the order under 30 CFR § 75.325(b). The former alleges that ventilation control devices, i.e., ventilation curtains, required by the ventilation control plan were not in place. The latter alleges that air flow was insufficient to clear the area of potentially harmful and dangerous airborne particles and methane. Leeco argues that when it took remedial action and rehung the airflow control curtains, the airflow in the area rose to volumes sufficient to evacuate any bad air. It contends that since a single abatement action remedied both alleged violating conditions, it was duplicative for the inspector to cite under two separate standards, which could potentially increase the fines and result in two violations involving S&S and unwarrantable failure. (Leeco Br. at 4-7)

Related citations are not duplicative if they impose separate and distinct duties on the operator. *Western Fuels-Utah, Inc.,* 19 FMSHRC 994, 1004 (June 1997) (citations omitted).The citation and order here arise from the same factual situation but allege violations of separate and distinct duties. While it may follow that a missing airflow control curtain will cause the volume of ventilation air in a given area to fall, and rehanging the missing curtain may restore airflow volume, the proper question is whether the standards regulating ventilation curtain placement and those specifying airflow minimums create separate duties. I conclude that they do in this case.

Low airflow volume does not arise *a priori* from missing control curtains. It can result from a range of causes. Conversely, a missing curtain does not always result in low airflow volume. The record bears this out. The citation was written because curtains required by the ventilation plan were either missing or mis-hung. (Exhibit GX-1) The order was issued because the ventilation plan required a minimum of 9,000 cfm of airflow at the last open crosscut on the No. 10 section and only 7,372 cfm were measured. (Exhibit GX-2) The order's subject is airflow volume only, not the means to attain that airflow. When the curtains were correctly positioned to

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would be erroneous to believe that the court cannot take judicial notice of adjudicative facts that, because of the limited subject matter jurisdiction of the forum, are as generally known or as easily determinable within that specialized setting as facts that are generally known or easily determinable as a result of their geographic territorial limitation.

abate the citation, the result was an increase in airflow to 15,960 cfm, which in turn abated the order. (Tr. 177:19-178:21) If the two events were truly duplicative, there would be no need for the ventilation plan to specify placement of curtains at all. It would suffice to simply require that adequate airflow volumes be maintained at all times.[3]

The fact that a single fix—rehanging the missing curtains—abated both violations could be a determinant fact in another case. However, the *Western Fuels* language cited by Leeco in its brief, that the determination of whether separate duties underlie the allegedly duplicative violations "should be made on a case by case basis, dependent on the particular facts at hand" (Leeco Br. at 6), is advisory and obvious, and does not compel the court to make its determination in this case based only on the fact that a single remedial action abated both violations. The essence of the *Western Fuels* precedent is the existence of separate duties, not the effect of a single remedial step.

These facts describe two distinct duties related to proper placement and function of ventilation curtains. In addition, two distinct hazards could arise from the missing curtains – the possible drop in airflow volume and the possibility that a belt fire could spread. As a result, the citation and the order relate to separate duties and are not duplicative.

The Violation Allegations

The citation alleges a violation of 30 CFR § 75.370(a) (1), which states, "The operator shall develop and follow a ventilation plan approved by the district manager." (Exhibit GX-1) It alleges that a continuous miner was operating in the No. 3 entry of the No. 10 section (010 MMU) without a line curtain having been installed in the No. 3 entry, and without check curtains having been installed between the No. 2 and No. 3 entries or the No. 3 and No. 4 entries. It also contends that the curtain installed at the back of the conveyor tailpiece ("lo-lo") was only halfway across the entry.

The order alleges a violation of 30 CFR § 75.325(b), which states, "the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section . . . shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan." The order alleges that only 7,372 cubic feet per minute ("cfm") were flowing through the last open crosscut. (Tr. 90:11-24; 97:20-98:2)

The citation and order were designated as highly likely to result in permanently disabling injury or illness to two persons. The inspector concluded, and the Secretary alleges that Leeco

[3] Curtain placement in the ventilation plan responds to a duty beyond mere airflow maintenance. One of the missing curtains—at the conveyor tailpiece or "lo-lo"—was intended to decrease the likelihood of a fire or smoke on the belt line running further up the line than the next stop curtain. (Tr. 72:7-74:21; Sec'y Br. at 15) This describes a duty and a hazard separate and distinct from the mere maintenance of airflow volumes.

committed the alleged violations with high negligence, that they arose from unwarrantable conduct, and constituted significant and substantial ("S&S") violations. (Exhibit GX-1; GX-2)

Leeco concedes that some of the ventilation control curtains were missing (Tr. 12:11-15).

Decision Summary

For the reasons discussed below, I conclude: that the violations alleged in both the citation and the order occurred; that they arose from moderate negligence; that they were unlikely to occur; if they did occur, they might be permanently disabling; that they would affect two persons; that they are not significant and substantial (S&S); that they do not constitute an unwarrantable failure to comply with the applicable mandatory standards; and that a combined civil penalty of $800.00 is appropriate.

Analysis

It is clear in the Mine Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and "more" when talking about "significant and substantial" and "unwarrantable failure." The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d), also must prove that the circumstances of the violation satisfy both the "significant and substantial" and "unwarrantable failure" standards. If the Secretary fails to prove both, there can be no enhanced enforcement. The Secretary has to prove four distinct elements[4] when the enhanced enforcement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

[4] The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

The Underlying Violations[5]

The inspection that generated the citation and order in this case took place on February 23, 2010. (Exhibit GX-1) Inspectors Brock and Sparks and others (Exhibit GX-3-1) participated in an "impact" or "ventilation blitz" inspection in which an inspector monitors the mine's phone and communications system to assure that miners underground are not warned of MSHA's presence. (Tr. 27:9-16; 124:12-17)

When the inspectors arrived at the 010 MMU ("No. 10 section") of the Leeco mine, they observed that four ventilation curtains required by the ventilation plan were either defective or missing: (1) a check curtain that was supposed to be hung rib-to-rib at the back of the lo-lo was loose and gapped away from the ribs so that a person could walk around it on either side. (Tr. 34:15-35:4; 72:7-73:2; 130:9-17); (2) the line curtain in the No. 3 entry was missing; it was later found tangled around the continuous miner head. (Tr. 255:12-256:4); (3) and (4) check curtains between the No. 2 and 3 and between the No. 3 and 4 entries were on the ground. (Tr. 254:2-255:9)

Victor Colon, Leeco's section foreman, testified that when he did his pre-shift walk-through to check all five of the section headings, all of the ventilation curtains required for mining in the No. 2 entry were in place (Tr. 249:45-252:14), no methane was detected (Tr. 245:14-23), and the airflow at the last open crosscut exceeded the minimum called for in the ventilation plan. (Tr. 246:10-12) He testified that after his walk-through, and unbeknownst to him, the continuous miner was moved from the No. 2 to the No. 3 entry. (Tr. 252:15-18) He stated that moving the continuous miner from one entry to another without the knowledge of the section foreman was not a common occurrence, but that the continuous miner operator was trained to understand and comply with the ventilation plan, implying that management was not aware of the missing or defective curtains in the No. 3 entry. (Tr. 252:15-253:8) Nonetheless, when the MSHA inspectors pointed out the missing curtains, Colon saw that the check curtains between the No. 2 and 3 and No. 3 and 4 entries were lying on the ground or only partially hung (Tr. 254:14-255:1; 255:2-9), and the line curtain that had been in the No. 3 entry was wrapped around the bit head of the continuous miner. (Tr. 255:12-21) This establishes the violation of 30 CFR § 75.370(a) (1) alleged in the citation.

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[5] The facts cited in this decision are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

With the missing ventilation curtains, the airflow measurements at the face in the No. 3 entry were below what was required by the ventilation plan. Readings taken before the citation was abated showed airflow of 7,372 cfm. (Tr. 81:11-82:21) The ventilation plan required 9,000 cfm. (Exhibit GX-2; Tr. 82:11-21; 89:17-90:10) The missing ventilation curtains were either replaced from a roll of curtain material on hand in the mine (Tr. 83:17-84:1) or simply rehung. (Tr. 298:3-299:10; Ex. R-5) After the curtains were replaced, measured airflow climbed immediately to 15, 960 cfm. (Tr. 87:6-88:4; 92:21-93:9; 166:3-8) and Inspector Brock immediately abated the order. (Exhibit GX-2) This establishes the violation of 30 CFR § 75.325(b) alleged in the order.

Negligence and Gravity – Citation No. 8361343 and Order No. 8361345

Concepts of negligence and gravity apply to all citations and orders under the Mine Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors. The concepts of "significant and substantial" and "unwarrantable failure" are applied, primarily to 104(d) orders[6], as part of the enhanced enforcement mechanism set forth in the Mine Act.

The following negligence and gravity discussion pertains to both the citation and the order. Inspector Brock had in mind the same three hazards addressed by Citation No. 8361343 when he wrote Order No. 8361345, i.e., insufficient airflow across the section faces, insufficient airflow at the location where the continuous miner was working, and insufficient airflow to evacuate any dust or methane present where the miners were located. (Tr. 91:10-24) Brock assumed that two miners would be affected by these airflow deficiencies. (Tr. 91:25-92:6) He alleged that the missing curtains were the result of high negligence and were highly likely to result in an injury or illness that would be permanently disabling. (Exhibit GX-1)

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *A. H. Smith Stone Company*, 5 FMSHRC 13, 15, (Jan.1983)

[6] The Mine Act also contemplates that "any citation given to the operator under this Act" may form the basis for enhanced enforcement if the elements of "significant and substantial" and "unwarrantable failure" can be proved. 30 U.S.C § 814(d) (1).

(*citing Southern Ohio Coal Co.*, 4 FMSHRC 1458,1463-64 (Aug. 1982) and *Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation)).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required […] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "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." *Id.* Reckless negligence is when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

I am convinced that mitigating circumstances existed that require the negligence assessment for both the citation and the order to be reduced from "high" to "moderate." Leeco management (Colon) did not have actual knowledge that the curtains were down. (Tr. 252:15-21; 301:1-3) However, both Colon and David Lewis, the continuous miner operator, testified that it was Lewis' responsibility to take steps to assure the proper placement and functioning of the ventilation curtain when he moved the continuous miner from entry No. 2 to entry No. 3. (Tr. 252:15-253:8; 267:20-22)[7] The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636. The fact that the curtains were down and the airflow was sub-standard establishes a breach of duty, whether committed by Colon or Lewis. (Tr. 265:15-21)[8]

Mitigating against a finding of high negligence, however, is the fact that the defective condition lasted only a short time (Tr. 249:21-24; 281:3-6)[9] and was immediately remedied when

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[7] Lewis was ultimately disciplined for his actions. (Tr. 299:17-25)

[8] Leeco agrees with this point in its post-hearing brief. (Leeco Br. at 13)

[9] The continuous miner had cut 26 ft of coal out of the left side of the No. 3 entry and still had yet to cut on the right side when Inspector Brock arrived. This corroborates that the miner had recently been moved. (Tr. 31:22-25)

discovered. (Stipulation 8)[10] The fact that there was no detectable methane at any time is also a mitigating circumstance, and will be discussed further below. The lack of methane militates against an assumption that in the course of continuing mining operations hazardous methane levels were bound to exist at some indeterminate point in time, a point argued by the Secretary (Sec'y Br. at 14) and inadequately justified on the basis of the evidence that the Leeco mine was considered "gassy." I conclude that Leeco's negligence in this case was no more than moderate.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sep. 1996). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n. 11 (Sep. 1987).

Inspector Brock focused much of his testimony on his belief that the dust cloud he observed when he arrived on the No. 10 section was at least as great a hazard as the low airflow volume and the missing ventilation curtains. The gravity analysis should weigh the facts in the record against the Inspector's belief that motivated the issuance of the citation and order. The likelihood of an injury or illness arising from the conditions observed by the Inspector will be addressed in detail in relation to the S&S analysis that follows. Here, I consider whether the facts support the Inspector's allegation that these conditions would give rise to an injury or illness that is permanently disabling for two or more miners. (Exhibit GX-1)

[10] I am aware that the Secretary has argued that the fact that these violations were generated several hours into the shift (Tr. 30:8-24; 83:17-84:14; 124:25-125:3; 145:19-146:1) and that the missing curtains were replaced by new curtain material (Tr. 81:11-18; 83:18-84:1; 84:25-85:6; 143:14-144:15) is evidence that the violating conditions existed long enough to amount to wilful disregard and "marked indifference to obvious violations." (Sec'y Br. at 30) I also consider the fact that none of the miners had taken steps to reposition the ventilation curtains before the Inspector noted the violations to be a fact to be weighed against the mitigating factors discussed here. The preponderance of the evidence, however, weighs in favor of Leeco's argument that the curtains were torn down or not put in place when the continuous miner was moved from one entry to the other, and that the move had just happened.

The inspector's assumption of a probability is too thin to support his assessment of gravity. First, Leeco's excuse for the missing curtains makes operational sense. There is nothing about tearing down existing curtains and/or failing to adequately reposition them when moving the continuous miner from one entry to another that is hard to believe. The time frame here is from 10 to about 30 minutes[11], a time frame long enough for the curtains to be torn down during the move and short enough that they were not yet repaired. Aside from the suggestive and vague evidence of arguably similar violations in the past (Exhibits GX-15, 16, and 17), there is nothing more to show either that Leeco knew of the missing curtains for any length of time prior to this inspection or that these missing curtains were somehow connected to a larger pattern of sub-standard operations. Brock testified that he felt the missing curtains were evidence that Leeco's management lacked care for the well being of the miners. (Tr. 37:14-38:3; 60:3-14) However, his opinion is based in part on the assumption that the curtains had been down for some time, a point which is convincingly contradicted by Colon's testimony that they were all in place only 20 - 30 minutes earlier, and by his assumption that it would shave ten minutes per cut off the time it took to mine the coal if the miners did not pay due attention to proper placement and maintenance of ventilation curtains. (Tr. 60:3-14) This does not prove lack of care nor does it in any way contradict Colon's testimony about how long the curtains had been down. [12]

Leeco should have known about the missing ventilation curtains. I note also that Leeco would have done better to have undertaken repairs within the short period of time the curtains were misplaced. However, as to gravity, I conclude that it is unlikely that there would be a confluence of missing ventilation curtains and the presence of sufficient methane to result in an explosion or exposure to harmful dust for long enough to affect the health of miners to be permanently disabling. As a result, the hazards described by Inspector Brock are unlikely to occur, but if they did occur, they could result in permanently disabling injuries to two or more miners.

The picture that emerges from these facts is much more in line with Leeco's post-hearing briefing than the Secretary's. This is not to deprecate the potential severity of a methane explosion or lung disease. These facts just do not support the inspector's assessment of the likelihood of an injury or illness. It is perhaps somewhat likely that in the course of continuing mining operations this MMU would encounter enough methane to pose a real danger of explosion if it were not properly evacuated, however the evidence fails to convince this fact finder that Leeco would continue to operate in violation of the ventilation plan or that this

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[11] The period during which the curtains were down was between 10 and 30 minutes. Colon testified that he had been away from the face area for about 30 minutes working on a man door in a permanent brattice when the Inspector Brock arrived. (Tr. 249:21-250:3) On cross examination Brock agreed with the proposition that the curtains could have been down for as few as 10 minutes. (Tr. 227:18-229:24)

[12] The length of time the curtains were down is also a factor relevant to assessing whether the violation constitutes an unwarrantable failure, discussed below.

episode was part of a pattern of bad mining practices. In order to sustain his argument, the Secretary would have to prove both that there was a significant likelihood of encountering sufficient methane to result in an explosion and that as a result of poor mining practices and continuing violations of the ventilation plan, the methane would not be evacuated so that an explosion would result.

Unwarrantable Failure

The Secretary argued for a finding of unwarrantable failure and S&S in part on the basis that the Leeco mine was gassy (Sec'y Br. at 25), even though there was no evidence of methane at the site of the citation. (Tr. 69:10-23; 109:1-4) Inspector Brock testified that he was unable to predict when there would be no methane present. (Tr. 69:21-23) However, based on the fact that the Leeco mine was known to liberate enough methane to be considered a gassy mine in general (Tr. 47:13-18), he felt it was reasonably likely that if Leeco continued to mine out of compliance with its ventilation plan, mining could eventually progress into an area where methane was present, thus increasing the likelihood of a methane ignition. (Tr. 69:24-70:6) I am unable to agree with Brock's assessment.

In *Emery Mining Corp*., 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The violations in this case were limited to a discrete and relatively small area of the Leeco mine, the No. 10 MMU. This was not a widespread condition. As mentioned above, the violation existed for a short time. The violation was obvious, but given the short time involved, its being obvious is not a significant additional factor. The degree of danger is discussed in

greater detail below. The operator abated the condition immediately. As is discussed further below in the context of the visible dust cloud observed by Inspector Brock, the operator is charged with knowledge of the condition, however the fact that it arose only minutes before being seen by the Inspector and brought to the operator's attention, and that prior dust sampling failed to show any problems ameliorate the severity of this factor. It is also notable that the operator took appropriate disciplinary action against the miners who where tasked by training and normal operating delegation of duties.

We are required to evaluate the evidence relating to negligence and gravity against the backdrop of continuing mining operations, not just the snapshot at the moment of citation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). However, consistent with the general concept of resolving fact disputes on the basis of preponderant evidence, when evaluating what continuing mining operations might entail, it is permissible to extrapolate from evidence of the pattern of mining operations preceding the violation. *Consolidation Coal*, 32 FMSHRC 2326, 2336-37, 2013 WL 4648491 *12 (Aug. 2013).[13]

In order to understand the inspector's rationale, it is necessary to extrapolate future operating conditions from present unabated conditions. However, in order to conclude that future conditions would be identical to the unabated conditions at the time of the violations, there would have to be evidence that the ventilation curtains were either chronically defective or that Leeco's operations in this section were so substandard as to be the norm and not the brief exception. Such evidence is not to be found in the record. Instead, the Secretary argues in essence that because the operating conditions from which these violations arose – which were shown convincingly to be a momentary aberration – occurred in a gassy mine, further proof of reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care (required to prove unwarrantable failure), or proof of a reasonable likelihood that the defective ventilation curtains would result in an injury of a reasonably serious nature (needed to justify an

[13] On the surface it might appear that *Consolidation Coal* stands for the proposition that continuing operations *presume* a lack of abatement of the conditions present at the time of citation and gives special weight to an assumption that eventually active mining will produce hazardous levels of methane, particularly in a mine that has been determined to be gassy and is subject to spot inspections. This comes very close to being a presumption that any violation of a ventilation plan is *ipso facto* an S&S violation. In finer detail, however, it is clear that the Commission in *Consolidation Coal* based its rather sweeping "continuing mining" assumption on an evaluation of facts pertinent to the time and location of the violation present in the record and not just on the categorical designation of the mine as gassy and the fact that it was on the spot inspection list. The record contained evidence of methane present at the site of the violation and prior methane ignitions, both significant factual points missing in this record. It is important to avoid basing legal conclusions on assumptions lacking factual support, which tend to become presumptions that undercut the requirement that all violations, and related S&S designations, be determined on the basis of preponderant evidence in the record. *Consolidation Coal,* 35 FMSHRC at 2336-37.

S&S finding), is not required. In other words, any violation of the ventilation plan in a gassy mine should be treated as *per se* unwarrantable and S&S. This is the hallmark of a presumption, which would shift the burden of proof from the Secretary to the operator.

The Leeco mine was known to be gassy. However, no methane was detected either during Colon's sweep of the working faces (Tr. 245:14-23), or by Brock during his inspection. (Tr. 109:1-4) Nonetheless, Brock explained that his assessment of negligence and gravity was linked to an *assumption of a probability* that miners would eventually encounter methane during continuing mining operations (Tr. 69:14-70:6) and that mining in a methane environment with missing ventilation curtains could eventually result in an explosion and resulting serious injuries. (Tr. 56:5-13)[14]

The Secretary constructs a chain of inference to support the argument that these violations should be characterized as unwarrantable failures and S&S. First, he argues that this mine is known to be gassy and was on a 15-day spot inspection list (Tr. 47:13-18), which results when methane sampling from *the mine as a whole* exceeds a pre-determined limit. (Tr. 49:11-50:1) Then he argues that it is reasonable to assume, contrary to Stipulation No. 8 and other evidence in the record (Tr. 177:12-178:21; 256:9-15; 281:3-9; 298:3-5), that operations would continue unabated as they were when the citations were written. Next, because the mine is gassy, it is reasonable to assume that at some point methane would show up in the course of normal mining operations.[15] Then he asks the court to assume, again contrary to the evidence in the record, that Leeco would not have corrected the problem with the ventilation curtains or would have allowed it to recur.[16] Ultimately, the Secretary asks the court to conclude that, at some indefinite point in the future, there would be inadequate airflow in an area where there is methane and where there is a source of the spark needed to cause an ignition. (Tr. 67:8-20; 145:2-18) It is evident that the chain of extrapolation becomes weaker and weaker, step by step, and is not supported by the record.

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[14] Inspector Brock also testified that his gravity/negligence assessment took into account the presence of a visible dust cloud (Tr. 37:2-5) which he extrapolated to represent a citable risk of lung disease, with continued exposure. (Tr. 52:24-53:17) I deal separately with this aspect of the citations below.

[15] This assumption is called into question by the fact that there is no evidence that the methane readings that led to the Leeco mine being on a "spot" list and its being considered a "gassy" mine were taken from the area in which these violations occurred (Tr. 109:1-4) and by the fact that this mine was very large (Tr. 27:22-28:1; 91:1-6).

[16] Brock testified that he concluded that the violating conditions had existed for "a few hours" because the curtains were missing fairly late in the shift cycle (Tr. 30:14-31:2; 84:25-85:3; 124:25-125:6; 144:7-11) and based on his general mining experience. (Tr. 145:19-146:1)

It may be proper to extrapolate from the conditions existing at the time and in the location of the violation, but it is not proper to extrapolate it in one direction only. Specific evidence pertinent to the place and time of the violation should inform any assumptions about future mining operations. This includes whether methane was present. In addition to being relevant in evaluating the degree of negligence, if methane was present among the violating conditions, it is reasonable to extrapolate that continuing mining operations, in the absence of abatement, would result in methane being present again. This can elevate the assessment of gravity. However, absence of methane, even in a gassy mine, should not be ignored as an element for assessing future risk of continuing mining operations. It is just as reasonable to posit that there will be no methane present if the conditions under which the citation was written are assumed to continue into the future as it would be to assume the continuance of any other condition present at the time and place of the violation. Such is the weakness of assumptions. If the mine is gassy, that is relevant to the issue of whether mine management knew about the overall risk levels in the mine, including the location of the citation, but it should not create a presumption that continuing mining operations will, with reasonable certainty, encounter combustible methane conditions. It is simply improper to make the jump from a mine merely being gassy to the presumption of the presence of combustible methane in the future, without any other evidence in the record. They are separate and distinct factors. There is too great a danger of creating a presumption of unwarrantable failure or S&S *per se* any time there is a violation of the ventilation plan to follow the inspector's logic.

The assessment of whether an event is reasonably likely to happen in the future must be based on preponderant evidence in the record. I cannot find that the mere fact that a mine is considered gassy in total is a sufficient basis to assume that an ignitable methane accumulation is reasonably likely to happen at some indistinct time in the future in an area that despite active coal extraction had zero methane at the time of this violation. Piling assumptions on other assumptions is not a valid means of justifying enhanced enforcement actions.

It should be noted that there is no evidence, other than a possible inference, that the absence of methane was the result of the operator's care or diligence – it appears to be a fortuitous circumstance. The violating condition was the low airflow and defectively deployed curtains. It is appropriate to attribute to Leeco knowledge of the low airflow and how to properly deploy ventilation curtains. It is also clear that Leeco was aware of the gassy mine issue that weighed on the inspector's mind. However, the fact that there was no measurable methane, whether it is attributable to anything Leeco did or not, does act to mitigate, particularly in recognition of the requirement that violations be evaluated in light of continuing operations.

It is apparent that Inspector Brock placed more emphasis on the airflow than the resulting methane level. It is fair to conclude from these facts that Brock was more interested in addressing the potential for an ignition in this gassy mine than the facts relevant to the low airflows that

underlie these violations.[17] Leeco was aware of the gassy nature of this mine, but that is not the appropriate focus of this analysis. The issue is not whether Leeco knew or should have known that this was a gassy mine; it is whether it knew of the low airflows. Brock, on the other hand, placed more emphasis on the form of the regulation (the airflow measurements) and less on the substance (the lack of measurable methane). So, in this regard, the fact that there was no methane must be taken into account when assessing the violation. In sum, there are two additional elements that mitigate negligence and weigh against a finding of unwarrantable failure: (1) Brock's emphasis on airflow rather than the result of the airflow; and (2) the lack of any measurable methane. The fact that there was no measurable methane is relevant and material. The absence of measurable methane is one of the ultimate objectives of requiring adequate airflow at the faces. Although Leeco cannot take direct credit for the fortuitous lack of measurable methane under these facts, it also cannot be penalized by Brock's emphasis on the potential of a methane ignition in a gassy mine.

As pointed out by counsel for Leeco in its post-hearing brief[18], unwarrantable failure can only result from "aggravated conduct, constituting more than ordinary negligence," citing *Virginia Crews Coal Co.,* 15 FMSHRC 2103,2107 (Oct. 1993). A finding that the operator "knew or should have known" of the violating condition is not enough, otherwise "unwarrantable failure [would be] indistinguishable from ordinary negligence." *Id.* at 2107. As a result, I conclude that the lack of detectable methane is a mitigating factor, which when considered in concert with the short period of time the violating conditions existed before being discovered and abated, weighs significantly against a finding of unwarrantable failure. A preponderance of the evidence supports my conclusion that Leeco's actions were closer to mere "inadvertence, thoughtlessness or inattention," *Emery Mining Corp.,* 9 FMSHRC 1997, 2001 (Dec. 1987), than aggravated conduct or a deliberate and conscious failure to act. These are the dominant factors that lead me to conclude that the violations alleged in Citation No. 8361343 and Order No. 8361345 do not arise from reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care and are not unwarrantable failures to comply with mandatory standards.

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained that:

> 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)

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[17] This is not an inappropriate issue for an MSHA inspector to take into account. However, placing emphasis on a "potential" condition when addressing actual events cannot bridge the gap between these facts and the quantity and quality of facts needed to prove unwarrantable failure.

[18] Leeco Br. at 14.

> 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.

Id. at 3-4. In *U.S. Steel*, the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."... We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

7 FMSHRC at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC.* 195 F.3d 42 (D.C. Cir. 1999).

The Secretary has proved a predicate violation of a mandatory safety standard for both the citation and the order, the first element needed to prove that they are significant and substantial. It is well established that plan provisions are enforceable as mandatory standards. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy W. Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Airflow measurements below the minimums required by the approved ventilation plan constitute a violation of a mandatory safety standard.

The Secretary also provided the following evidence tending to show that the missing curtains could contribute to the accumulation of coal dust and methane which might increase the likelihood of a mine explosion. This mine was on a 15-day "I-Spot" list due to methane levels. (Tr. 47:14-18) With the right mixture of methane and oxygen, a spark from a mining machine could cause a fireball explosion. (Tr. 48:3-18) A fireball explosion could, under the right conditions, pick up coal dust and become a more lethal explosion. (Tr. 48:19-49:10) Inspector Brock concluded that continued operation with missing ventilation curtains could lead to a methane explosion. (Tr. 50:24-51:9) He also concluded that of the 11 men working on the section at the time, at least two would be exposed to possible burn (or worse) injuries in the event of a methane explosion. (Tr. 54:24-56:4) Missing curtains can cause pockets of dead air to accumulate (Tr. 65:21-66:13), although the record is silent about there being dead air pockets on the date of this inspection. Pockets of dead air can allow methane to accumulate, thus increasing the likelihood of an explosion. (Tr. 66:14-23) Any piece of mining equipment could cause the

spark needed to ignite accumulated methane. (Tr. 66:24-67:20) Inspector Brock did not detect any methane at the face during his inspection, however this mine is known to be historically gassy. (Tr. 69:10-20) Despite the lack of methane, the missing ventilation curtains make it more likely that methane will accumulate to dangerous levels. (Tr. 69:21-70:6)

However, the second element of the *Mathies Coal* S&S test is not satisfied. There is no evidence in the record to make it any more than speculative that a hazard would arise from the low airflow attributable to the missing ventilation curtains. From the catalog of inspector's testimony above one might assume that methane would eventually be present or that some mine dust contains harmful particulates. One might even assume that at some indeterminate time in the future methane might accumulate to a combustible level and that a spark might happen from normal mining activities, or that extended exposure to high enough concentrations of dangerous dust particulates might cause lung disease. But, nothing in the record can even start that chain of assumptions. Without evidence of an actual methane accumulation or evidence of actual deleterious constituents in the dust cloud, there is no more hazard than that recognized by the mere existence of the health standard reflected in the ventilation plan, which without more makes out nothing more than a simple, basic violation. Were it otherwise, some standards would, on their own terms, call for enhanced penalties irrespective of the concept of S&S and its attendant requirement of "something more" than the bare violation. In other words, a bare violation of a ventilation plan provision does not in itself implicate any level of hazard beyond that underlying the existence of the ventilation plan itself. In order to prove a violation is S&S, there must be something more than general assumptions. There must be something concrete and discretely tied to the facts underlying the violation, *viz* "a discrete safety hazard [. . .] contributed to by [the conditions underlying] the violation.'

The *Mathies* analysis in this case also stalls at the third element, i.e., whether the low airflow caused by the deficient ventilation curtains presents a reasonable likelihood that methane would accumulate to ignition levels and/or harmful dust would persist in sufficient concentrations to cause lung disease. Stated otherwise, the deficient ventilation curtains in this case must play a role in causing a hazard that is reasonably likely to result in a serious injury. My conclusion is that, based on the facts of this case, the hazard – the defective curtains – is not reasonably likely to exist long enough or at a level of intensity to result in serious injury. Because the inferential chain, discussed below, is so tenuous, I cannot conclude that a hazard of that nature is reasonably likely to persist or recur.

Evidence Relating to Possible Lung Disease

The Secretary made much of the possibility that bad air caused by the missing ventilation curtains in this mine could cause black lung disease. (Tr. 51:10-57:20) This could be relevant to the second and third elements of the S&S test and possibly to the threshold gravity assessment. The Secretary attempted to show that there was a reasonable likelihood that the lack of required airflow related to these violations was reasonably likely to result in lung disease. To bolster this argument, the Secretary also referred the court to Leeco's violation history which purports to

show that Leeco had a significant number of similar violations in the two-year period prior to these violations. (Tr. 146:2-148:3) Despite the common knowledge that prolonged exposure to mining dust levels above a certain threshold (Tr. 107:16-22) is deleterious to miners' health, the Secretary's presentation on this point was simply unconvincing. This is an additional reason, along with the discussion of the gravity and negligence assessments above, why the Secretary has failed to satisfy the second and third elements of the *Mathies* test, i.e., that the violating conditions observed by the inspector constitute a hazard which has a reasonable likelihood of causing an injury.

The Secretary based his lung disease case on the inspector's observation that the air in the area of the violations was visibly dusty (Tr. 37:2-5; 141:20-142:6; 165:18-23), a point that is vigorously contested by Leeco. (Tr. 296:17-297:13) Beyond the inspector's observation, there is little if any evidence to show either that the atmosphere was contaminated by anything known to lead to lung disease or that the level of contamination was above the threshold levels above which scientific data confirms a *possibility* of causation. (Tr. 210:10-211:1)[19] In a word, the lung disease evidence was a dead end for the Secretary. I am not convinced that the atmosphere contained relevant contaminants at the requisite levels to cause lung disease, quite apart from the necessary and completely missing evidence that the bad air levels lasted long enough to constitute a reasonable likelihood of causing lung disease.

The Secretary also attempted to show that *any* exposure to quartz dust was a sufficiently significant health risk to support a finding of S&S and unwarrantable failure. But, there is no sampling data to show that the No. 10 section of the Leeco mine was exceeding airborne dust levels on the date of these violations. (Tr. 231:15-232:7) The actual dust samples from the No. 10 section show that the mine had been in compliance with dust sampling standards for at least six months prior to these violations. (Tr. 231:19-233:5) Exhibit GX-6 shows that for the two-year period covered by the exhibit, the No. 10 section was never over the dust sampling limit for quartz (Tr. 234:5-13). Mine operator dust sampling data, Exhibit GX-7, shows that the last time the dust sampling data was out of compliance was on August 5, 2009, some six months prior to the date of issuance of these violations (Tr. 235:20-236:8). Finally, there was no evidence that a single exposure to airborne dust causes lung disease. (Tr. 236:17-237:6)

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[19] Inspector Sparks stated in testimony that there was coal dust suspended in the dust cloud he observed, which he considered evidence of high negligence. (Tr. 142:20-143:7) Giving due credit to his experience in the mining industry and as an MSHA inspector, I grant that he may be able to determine whether a dust cloud in a mine contains coal dust based only on his visual assessment, however that is not of sufficient weight to support the Secretary's contention here that *this dust cloud* was likely to cause lung disease. (Tr. 141:20-142:10; 167:6-16; 199:19-200:11)

The testimony of MSHA's expert witness Randy Kline[20] was similarly unconvincing. His opinion about whether the dust conditions on the No. 10 section on February 23, 2010, were bad enough to pose a risk of lung disease is too tenuous to merit serious weight. Aside from the vague and tangential conclusion that the general area in which the Leeco mine is located is known as a "hot spot" for black lung and quartz-related lung disease (silicosis) (Tr. 188:1-6; 195:6-20), and that exposure to quartz dust is potentially worse than exposure to coal dust (Tr. 199:19-200:11), his testimony exposes the following: (1) Exhibit GX-6 (MSHA dust sampling) shows two instances when the dust samples exceeded acceptable limits, September 23, 2008, a year and five months prior to these violations, and April 21, 2009, ten months prior (Tr. 210:10-211:1); (2) Exhibit GX-7 (operator dust sampling) shows seven instances when the sampling was in excess of allowable limits (Tr. 213:2-12); and (3) As a result of a particularly high quartz dust reading on July 22, 2009, some seven months prior to these violations, the Leeco mine was put in a temporary higher-standard status (Tr. 218:6-220:7). Klein's expert opinion was that, based on the few historic instances of out-of-compliance dust samples, Leeco had no good reason not to have all the required ventilation curtains in place, a point which goes without saying in this strict liability setting. (Tr. 220:1-223:16) However, the expert's opinion is of no help to the court. Klein did not have data presented to him from which he or the court could determine what the dust conditions were on the day of these violations. The most he could say, based on his review of the historic dust sampling data, was that there were a few instances (noted above) when Leeco was out of compliance. Otherwise, his view was that the records he reviewed showed that Leeco's operations were "very good" vis-a-vis compliance with dust standards. (Tr. 213:2-12; Ex. GX-7) Klein opined that any time the prescribed ventilation control curtains were not in place, there was an increased risk of exposure to airborne dust. (Tr. 226:12-19) He also speculated that any time the ventilation control curtains were down, airborne dust concentrations would increase. (Tr. 227:18-228:6) In contrast, the evidence showed that lung disease is not caused by a single exposure to dust conditions. The exposure must be extended over a long time. (Tr. 57:13-20)

None of this is sufficient to establish the second, third, or fourth *Mathies* elements, i.e., that there was an identifiable hazard associated with the visible dust cloud; that there was a reasonable likelihood that the hazard contributed to would result in an injury; or that a reasonable likelihood existed that the injury would be of a reasonably serious nature. Mr. Klein's expert evidence does not establish that lung disease is a hazard likely to arise from these violations. The court will not speculate whether, if allowed to continue unabated, the absence of required ventilation curtains in the No. 10 section of the Leeco mine might lead to lung disease.

[20] Randy Klein was MSHA's District 7 Health Supervisor at the time of these violations. (Tr. 180:12-22). He was not present at the Leeco mine on February 23, 2010, when these violations were issued. (Tr. 191:7-9)

Penalty

The factors to be considered in assessing civil monetary penalties are set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). The court is required to consider six factors: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Commission case law requires that I explain substantial deviations from the Secretary's proposed penalties using these factors. *Mize Granite Quarries*, 34 FMSHRC 1760, 1763 (Aug. 2012) While "exhaustive findings" are unnecessary, I must discuss how 110(i) factors contributed to my penalty assessments. *Id.*, *citing Cantera Green*, 22 FMSHRC 616, 622 (May 2000) and *Martin County Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

I have treated separately Leeco's negligence and its demonstration of good faith in achieving rapid compliance after notification of the violation. The history of previous violations, appropriateness of penalty to the size of the operator's business, and effect of penalty on the operator's ability to continue in business are appropriately factored into the assessment of penalty points as shown in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty.

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables and considering the Secretary's justification, I conclude that a civil penalty of $800.00 is appropriate for both violations combined. Consistent with the criteria set forth in sections 105(b) and 110(i) of the Mine Act, I have made the penalty calculation in consideration of and based on an assessment of the size of the coal mine, the size of the controlling entity, the operator's history of previous violations, the degree of negligence, the degree of gravity, including likelihood, severity, and persons affected, and finally a deduction for prompt abatement. In reducing the penalty amount, I gave particular consideration to the gravity and negligence factors discussed above. The Secretary's failure to prove his proposed levels of gravity and negligence for the violations at issue justifies the reduced penalty.

Order

It is **ORDERED** that Citation No. 8361343 is **MODIFIED** from a 104(d) (1) citation to a 104(a) citation.

It is further **ORDERED** that Order No. 8361345 is **MODIFIED** from a 104(d) (1) order to a 104(a) citation.

It is further **ORDERED** that Leeco, Inc. pay a penalty of $800.00 within 30 days of this order. Upon receipt of payment, this case will be **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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