FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TRI COUNTY COAL, LLC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2011-0309 A.C. No. 11-02632-241358 Docket No. LAKE 2011-0377 A.C. No. 11-02632-243991 Docket No. LAKE 2011-0937 A.C. No. 11-02632-260765 Docket No. LAKE 2011-1051 A.C. No. 11-02632-263794 Mine: Crown III Mine

DECISION AND ORDER

Appearances: Emily L. B. Hays, Esq., Department of Labor, Office of the Solicitor, Denver, CO, for Petitioner;

Wesley T. Campbell, Manager of Safety and Training, Farmersville, IL, for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act") involves seven section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Tri County Coal, LLC ("Tri County" or "Respondent") at its Crown III Mine. The parties presented testimony on April 2, 2013, in St. Louis, MO.

During the hearing parties came to an agreement on one citation.[1] Additionally, the day before the hearing, Respondent withdrew its contest on Citation No. 8433712 for Docket LAKE 2011-0937. (Tr. 8:2-5) Citations No. 8429578, 8429598, 8429536, 8419112, 8419546, 8419577, 8419579 were litigated.

[1] I have approved the Secretary's Motion in a Partial Settlement Decision dated December 23, 2014 for Citation No. 8419329, Docket No. LAKE 2011-0309, which was placed on stay in 2013, and Citation No. 8419572, Docket Lake 2011-1051, which was settled at the hearing.

Decision Summary

Citation No. 8429578 – Tri County violated § 75.630(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in permanently disabling illness; and, the violation did not justify being designated as significant and substantial ("S&S"). I assess a penalty of $300.00.

Citation No. 8429598 – Tri County violated § 75.630(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in permanently disabling illness; and, the violation did not justify being designated as S&S. I assess a penalty of $300.00.

Citation No. 8429536 – Tri County violated § 75.75.1505(b) of the Mine Act; its negligence was high; it was reasonably likely that an injury would occur and result in a fatality; and, the violation was properly designated as S&S. I assess a penalty of $3,144.00.

Citation No. 8419112 – Tri County violated § 75.220(a)(1) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in a fatality; and, the violation was properly designated as S&S. I assess a penalty of $1,944.00.

Citation No. 8419546 – Tri County violated § 75.403 of the Mine Act; its negligence was moderate; and, it was reasonably likely that an injury would occur and result in a fatality. I assess a penalty of $634.00.

Citation No. 8419577 – Tri County violated § 75.604(b) of the Mine Act; its negligence was moderate; and, it was reasonably likely that an injury would occur and result in a fatality. I assess a penalty of $425.00.

Citation No. 8419579 – Tri County violated § 75.604(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in a fatality; and, it was properly designated as S&S. I assess a penalty of $2,106.00.

Stipulations:

The parties submitted the following stipulations at the hearing: (Tr. 452:10 – 453:1)

1. These dockets involve an underground coal mine known as Crown III Mine, which is owned by Springfield Coal Company and operated by Tri County Coal, LLC;

2. The mine, located in Macoupin County, Illinois, MSHA ID 11-02632, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, the Mine Act, 30 U.S.C. § 801 through 965;

3. The administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act. 30 U.S.C. § 815;

4. Respondent is an operator as defined in 3(d) of the Mine Act, 30 U.S.C. § 803(d);

5. Respondent is engaged in mining operations in the United States and its mining operations affect interstate commerce;

6. Dennis Baum, Henry Trutter, Matthew Lemons, and Marsha Price are authorized representatives of the United States Secretary of Labor and were acting in an official capacity when the citations were issued;

7. Respondent demonstrated good faith in abating the violations at issue in these dockets;

8. The proposed penalties will not affect respondent's ability to remain in business;

9. The certified copies of the MSHA assessed violations history reflect the history of the mine for 15 months prior to the date of issuance of the citations at issue and may be admitted into evidence without objection by Tri County;

10. The Secretary modifies citation 8429536 in docket LAKE-2011-377 from unlikely to reasonably likely and from non-significant and substantial to significant and substantial.

Basic Legal Principals

Significant and Substantial

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.") Some of the citations in dispute and discussed below have been designated by the Secretary as S&S. A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *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 health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> 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.

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he 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." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Further, the Commission has found 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)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

There is additional case law regarding evacuation standards for S&S designations. The Commission found that "[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs. When the citation for a violation of an evacuation standard is issued, presumably no emergency exists at that moment." *Cumberland Coal Res.*, 33 FMSHRC at 2367. The Court also laid out the application of the second and third elements of the *Mathies* test to evacuation standards as follows:

> Regarding the second *Mathies* element, the judge found that the hazard contributed to by the violations was "miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape." We conclude that this statement is an accurate description of the relevant hazard contributed to by the violations [...] [I]n addressing the third *Mathies* element, the next question before the judge was whether there was a reasonable likelihood that this identified hazard would result in injury.

*Id.*at 2364-65. (internal citations omitted)

Negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to 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 present 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 or 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.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... 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.

5 FMSHRC 13, 15 (Jan. 1983)(citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

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." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)(ALJ Fauver). 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 Commission has

recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. at 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

> When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Citation No. 8429578 (LAKE 2011-0937) and Citation No. 8429598 (LAKE 2011-0937)

On May 2, 2011, at 11:30am MSHA Inspector Marsha Price[2] ("Price") issued Citation No. 8429578 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 72.630(b) pursuant to Section 104(a)[3] of the Mine Act. The relevant section of the regulation states that "[d]ust collectors shall be maintained in permissible and operating condition." 30 C.F.R. § 72.630(b). Section 72.630(b) regulates a mandatory safety standard. The Citation alleges:

> The dust collection system on the Fletcher Double Boom Bolter company number 30, serial number 91010/2005348, operating on the number 1 Unit (MMU 010-0) is not being maintained in permissible and operating condition. The following conditions were found: (1) The left drill pod has a bolt missing on the bottom of the pod. (2) Fine dust has accumulated on the clean side of the filter media of the left side collection box. (3) The dust collection approval tag is not on the machine.

Ex. S-5.

On June 8, 2011, at 5:10pm Inspector Price issued Citation No. 8429598 to Tri County

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[2] At the time of the trial, Marsha Price had been working at MSHA since 2005 as a health specialist, mine inspector, and had been a CLR since October, 2011. (Tr. 11:23 – 12:17) As a health specialist, Price reviewed ventilation plans, dust parameters, and ran respirable dust sampling at different mines. (Tr. 12:18-22) Price is a member of the "dust busters," a team of health specialists that perform health analysis of respirable dust in mines. (Tr. 13:1-9) Price is a regular certified mine inspector as well. (Tr. 13:10-12) Prince has CMI training, health specialty training, training from the National Dust Lab in Pittsburgh, CLR training, special investigation training, and the annual refresher trainings. (Tr. 13:21 – 14:12) Price also worked for American Coal and Kerr-McGee for over 15 years before joining MSHA. (Tr. 14:21)

[3] All citations are 104(a) citations, and therefore, no analysis is necessary to determine if unwarrantable failures existed.

Coal's Crown III Mine also alleging a violation of 30 C.F.R. § 72.630(b) pursuant to Section 104(a) of the Mine Act. The Citation alleges:

> The dust collection system on the Fletcher double boom bolter, company number 58, being used on MMU 013-0 active miner unit, is not being maintained in permissible and operating condition in that the following conditions were found: (1) The suction hose connector is leaking on the right side of the drill arm. (2) Three bolts are missing on the bottom of the left side drill pod. (3) The suction hose under the left side drill pod has a hole in it. (4) Fine dust has accumulated on the clean side of the filter media in the right side dust collection box.

Ex. S-9.

Violations

Respondent does not dispute that the conditions Inspector Price observed were violations. (Tr.73:17-19) Inspector Price determined that the dust collection systems for both citations were not being maintained in permissible or operating condition, in violation of the standard. "Permissible, as applied to a dust collector, means that it conforms to the requirements of this part, and that a certificate of approval to that effect has been issued." 30 C.F.R. § 33.2(a).

> Manufacturers of dust collection systems for use on roof bolters in mines must submit them for testing by MSHA, which entails measuring the net concentration of airborne dust at each drill operator's position while a series of test holes are drilled. *See, gen.* [*sic.*] 30 C.F.R. Part 33. Additionally, dust concentrations may not exceed 10 million particles (5 microns or less in diameter) per cubic foot of air. 30 C.F.R. § 33.33(b). Systems that pass the test are issued a certificate of approval, which must be reproduced as an approval plate. The plate must be stamped or affixed to the unit, which identifies it as permissible. *Id.* § 33.11. Without an approval plate, no unit has the status of "permissible." *Id.* § 33.11(d). Use of the approval plate is not authorized except on units that conform strictly with the drawings and specifications upon which the certificate of approval was based. *Id.* § 33.11(e).

Tri County Coal, LLC, 34 FMSHRC 3255, 3274 (Dec. 2012) (ALJ Zielinski).

Citation No. 8429578 deals with the left side dust collection system. It alleges an injury was reasonably likely to occur, the injury could reasonably be expected to result in permanently disabling injury, the violation was S&S, two people could be affected, and the negligence level was moderate. (Ex. S-5) Citation No. 8429578 identifies three issues on a Fletcher roof bolter: (1) the left drill pod was missing a bolt underneath the pod; (2) there was dust behind the clean

side of the filter media; and (3) the Respondent did not have a dust approval tag or plate on the machine. (Tr. 16:19-22)

Inspector Price testified that to check if bolts on the Fletcher roof bolter are secure, she one checked the vacuum pressure with a gauge and listened to hear if there were any leaks. (Tr. 25:3-20) Price testified that when she performed the vacuum test, she was alerted that there was a bolt missing by what she heard. *Id.* She asked the operator raise the drill so she could see if a bolt was missing. She visually confirmed that a bolt was missing on the left drill pod. (*Id.*; Tr. 23:16-17; Ex. S-5) Price testified that a missing bolt can cause the cap to loosen, which causes a leak in the vacuum system, and if left unfixed, causes the other bolts to loosen, resulting in a drop in vacuum below the 12 inches-of-mercury minimum. (Tr. 25:22-25)

Price also determined that an MSHA-issued approval tag or plate was missing. (Tr. 27:14-19) The MSHA tag assigns the machine an identification number and designates the approved suction level in inches-of-mercury. *Id.* Price concluded that the dust collection unit was not being maintained in a permissible and operating condition because of the missing bolt and the missing MSHA plate. (Tr. 26:8-22; Tr. 28:19-20)

Price asked the operator to remove the dust filter for inspection. (Tr. 21:10-14) She could see and feel dust behind the clean side of the filter on the left side dust box. *Id.* If functioning properly, the filter media prevents respirable dust from entering into the exhaust system and the mine atmosphere. (Tr. 19:11-19) Price considers dust on the clean side of the filter evidence that the dust collector is not in proper operating condition and thus not permissible. (Tr. 23:8-13)

Citation No. 8429598 deals with the right side dust collection system. It alleges that an injury was reasonably likely to occur, the injury could reasonably be expected to result in permanently disabling injury, the violation was significant and substantial, two people could be affected, and the negligence standard level was moderate. (Ex. S-9) Citation No. 8429598 identifies four violating conditions: (1) the suction hose connector on the right side of the drill arm was leaking; (2) three bolts were missing on the bottom of the left side drill pod; (3) the suction hose under the left side drill pod had a hole in it; and, (4) fine dust had accumulated on the clean side of the filter media in the right side dust collection box. *Id.*

First, Price observed and found that the right side drill arm's suction hose was leaking. (Tr. 47:13-25) The suction hose connects on the bottom side of the drill pod and runs to a collection box. *Id.* Price testified that she observed a hole and air leakage on the drill-arm connector. (Tr. 48:20-22) Price testified that she used a vacuum gauge on the drill pod and heard a leak. (Tr. 49:10-11) The leaking suction hose connector causes a bypass in the suction system. (Tr. 49:12-14) Price concluded that the suction hose was not being maintained in a permissible condition per the MSHA approval plate and it was not in operating condition because it was not functioning correctly. (Tr. 50:9-17; Tr. 50:4-8)

Second, Price discovered a hole in the suction hose on the left side of the drill pod. (Tr. 51:4-6) She testified that she used the same method as before and could hear sound coming from the hole in the hose. (Tr. 52:6-8) She measured the vacuum level; on the left side it was

12 inches, and on the right it measured 18 inches. (Tr. 52:9-16) Price testified that because of the hole in the hose, the vacuum level on the left side was near the low end of the allowable vacuum range – 12 inches. (Tr. 53:3-7) Price concluded that the hole in the left side hose was not permissible. (Tr. 53:19-24)

Third, three bolts were missing on the left side drill pod. (Tr. 53:10-13; Tr.54:4-10) Price testified that, as above, she saw that three bolts were missing (Tr. 54:15-18) and concluded that the dust collector was not in permissible or operating condition because of the missing bolts. (Tr. 54:19-24)

Fourth, dust had accumulated on the clean side of the filter media in the right-side dust collection box. (Tr. 55:2-7) At Price's request, the operator opened the dust collection boxes and removed the filter for her to inspect. (Tr. 55:4-7) She concluded that the dust collection box was not being maintained in permissible condition and was not in operating condition because of the dust behind the filter. (Tr. 56:1-8)

Tri County argues that, under the Secretary's regulations, dust collection systems must be evaluated as a whole, and that without evidence of dust sampling showing non-compliance with applicable performance standards, the citation must be vacated. "It is well-settled, however, that section 72.630, upon which the citation was based, is a workplace standard designed to protect, not only drill operators, but other miners in the immediate area, and that enforcement of the standard does not require dust sampling." *Tri County Coal, LLC*, 34 FMSHRC at 3274-75; *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ Barbour); *aff'd Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997), cited in *Genwal Resources, Inc.*, 27 FMSHRC 580, 588 (Aug. 2005) (ALJ Manning); *White Buck Coal Co.*, 30 FMSHRC 535, 541-42 (June 2008) (ALJ Hodgdon).

Although it can be argued that a vacuum level of 12 inches of mercury did not render the system inoperable, MSHA would not have issued a certificate of approval for a system with a hole in the suction hose, a leak in the hose connector, or a component with missing bolts. Additionally, the presence of visible dust on the clean side of the filters is credible evidence that the dust collection systems were not maintained in a permissible or operating condition. If the systems were working properly, there should not have been any dust on the clean side of the filters. If visible dust can bypass the filters, invisible respirable dust can also bypass them and be exhausted into the mine atmosphere. I find that the left-side dust collection system for Citation No. 8429578 and the right-side dust collection system for Citation No. 8429598 were not maintained in permissible condition. Tri County violated Section 72.630(b) of the Mine Act for Citation Nos. 8429578 and 8429598.

Negligence

Inspector Price assessed both violations at the level of moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Price designated Citation No. 8429578 as moderate negligence because the mine requires a pre-shift examination of the roof bolters in its ventilation plan. (Tr. 44:18 – 45:5; Tr. 70:10-18) The

section foremen and/or the roof bolters should have known of the condition because the section foreman approves the pre-shift examination. *Id.* Similarly, Price designated Citation No. 8429598 as moderate negligence, because the operator should have known of the condition due to the pre-shift examination requirement. (Tr. 57:1-4) Based on the above, I agree and find Respondent's negligence to be moderate for both Citation Nos. 8429578 and 8429598.

Gravity

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. These Citations were marked as reasonably likely to result in permanently disabling illness or injury, namely black lung or lung disease, from miners breathing contaminated atmosphere. (Tr. 29:1-11; Tr. 44:4-12; Tr. 56:11-13) Price testified that when she designates something as reasonably likely, she looks to the condition at the time of the inspection and factors in what could be anticipated if the condition were allowed to continue. (Tr. 56:14-19)

Price testified that breathing even a small amount of respirable dust can cause an eventual deterioration of lung capacity and overall health, and further, the more exposure one has, the more potential there is for black lung to develop over time. (Tr. 30:16-19; Tr. 32:12-17) Price also testified that she is aware of studies showing that even a small amount of exposure to respirable dust over time can lead to lung disease. (Tr.104:22 – 105:3)[4] Price also testified that she marked the citations as permanently disabling because exposure to respirable dust can restrict lung capacity and breathing and can be fatal, if the illness is serious enough. (Tr. 31:3-12; 44:4-12)[5] I agree that it is reasonably likely that breathing respirable dust could result in serious injury, i.e. permanently disabling lung disease. Therefore, I find that it is reasonably likely that the illness would be serious in nature.

Significant and Substantial

There was a violation of a mandatory safety standard for both citations. The improperly maintained dust collection systems contributed to a discrete safety hazard, i.e., respirable dust expelled into the mine's atmosphere subjected miners to the risk of developing lung disease. Any such illness would be serious. What is left to be determined is whether it was reasonably likely that the hazard identified here would contribute to an illness.

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[4] Price testified that the studies she was referring to are publically available from NIOSH and MSHA. (Tr. 105:4-9)

[5] In the Secretary's Brief, he emphasized the fact that the mine had repeated violations of Section 72.630(b), which he claimed is evidence of multiple or repeated exposure to respirable dust. The fact that a citation was issued in and of itself is not proof that there is actual exposure to respirable dust, nor is it proof that an S&S designation should be upheld for the Citations at issue in this case.

"There is no doubt that a violation of the respirable dust standards, sections 70.100[6] or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be 'significant and substantial.'" *White Buck Coal Co.*, 30 FMSHRC at 541-42; *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). However, the dust collector violations in this case do not arise from respirable dust standards. They involve a workplace practice standard which does not require a showing of dust sampling results above a minimum concentration (as the respirable dust standards do) and the related presumption of disease causation built into the sampling criteria. Every element of an S&S allegation must be proved by a preponderance of evidence unless there is an applicable presumption that can substitute for actual provable facts. The Secretary asks the court to graft the same presumption of causation from the respirable dust standards onto the workplace standards involved in these citations, and therein lies the rub.

Commission judges have been divided about how to apply Section 72.630(b). Some appear to have interpreted the legislative history to support an S&S designation based on a presumption of disease causation. *See, e.g., White Buck Coal Co.*, 30 FMSHRC 535, 541-42; *Genwal Resources, Inc.*, 27 FMSHRC 580, 588-89.[7] Specifically, the legislative introduction to Section 72.630(b) notes that during drilling, "there is the potential for extremely high exposures in short periods of time to both miners doing the [...] drilling and to other miners in the immediate areas." Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (February 18, 1994). Further, "[t]he development of silicosis and pneumoconiosis

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[6] Respirable dust standards: "(a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed, as measured with an approved sampling device and expressed in terms of an equivalent concentration, at or below: (1) 2.0 milligrams of respirable dust per cubic meter of air (mg/m^3). (2) 1.5 mg/m^3 as of August 1, 2016. (b) Each operator shall continuously maintain the average concentration of respirable dust within 200 feet outby the working faces of each section in the intake airways as measured with an approved sampling device and expressed in terms of an equivalent concentration at or below: (1) 1.0 mg/m^3. (2) 0.5 mg/m^3 as of August 1, 2016." 30 C.F.R. § 70.100.

[7] In both *White Buck and Genwal* there is considerable evidence of visible dust in the mine atmosphere, significant duration of the dust in the atmosphere, and miners being immediately exposed to the dust escaping the filtration system. These conditions can legitimately be presumed to persist as part of continuing normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. As such the reference to the language about the dangers of dust in the mine environment in the legislative history is *dicta*. On their facts, these cases align themselves with *Tri-County Coal* and *Banner Blue Coal*, which reject the notion that disease causation can be presumed merely from the legislative history. All four decisions can be harmonized with the idea that disease causation must be proved by preponderant evidence when the violation is for a workplace practice standard rather than a respirable dust standard. Violation of the latter follows from proof of extant atmospheric dust determined by dust sampling. As such, the causation element needed for an S&S determination is subsumed in an empirical maximum allowable dust measurement, which is another way of saying that disease causation is presumed for the respirable dust standards, but not for general workplace standards.

among underground coal miners has been well documented, particularly among roof bolters and transportation workers"[8] *Id.* at 8322, and that "§ 72.630 is a work practice standard that does not require sampling." *Id.*

Others have resisted applying a presumption of disease causation derived from the legislative language. Within this camp, the Secretary still bears the burden of proving disease causation despite the concern for lung disease mentioned in the legislative history. Thus, the finding that a violation deserves an S&S designation must be based on preponderant facts rather than a presumption of causation. *See, e.g., Tri County Coal,* 34 FMSHRC at 3274-75; *Banner Blue Coal Co.,* 34 FMSHRC 1321, 1342 (June 2012)(ALJ Koutras). My decision follows this line of cases. I cannot find a rationale from the cited legislative language to dispense with the requirement that disease causation must be proved directly by preponderant evidence.

Without a presumption that the mere presence of respirable dust in the mine atmosphere (the hazard) causes lung disease, irrespective of its concentration, its constituent makeup, its duration, and without the benefits of actual dust sampling data, I must limit my review to the evidence in the record to determine whether the S&S requirement -- that the hazard contributes to a serious disease or injury -- is satisfied.

As always, the Secretary carries the burden to prove, based on a preponderance of evidence, that there was respirable dust in the mine atmosphere, that the amount of dust in the atmosphere, its makeup, duration, and presence near the miners, if any, created a reasonable likelihood that a serious illness would result.

The Secretary suggests two reasons for the S&S designation: (1) a suction disruption due to the holes and missing bolts will cause respirable dust to enter the mine atmosphere, which causes serious illness; and (2) it can be inferred that dust on the clean side of the filter means that respirable dust is entering the mine atmosphere, which causes serious illness. Indeed, Price testified that the only time MSHA issues an S&S citation for a violation of this standard is when dust is on the clean side of the filter or the vacuum level is less than 12 inches of mercury. (Tr. 57:22-58:7) She testified that both or either of these scenarios apply in this case. (Tr. 58:18-21) The evidence is clear that there was a hole in the right side suction hose, a leak in the hose connectors, missing bolts, and dust on the clean side of the filters.

The filter element is designed to prevent respirable dust from entering the miner's atmosphere after passing through the dust control system. (Tr. 19:11-19) Price testified that dust on the clean side of the filter shows that dust has entered the mine atmosphere (Tr. 55:20-25), and that it takes a significant amount of dust to become visible on the filter. (Tr. 89:10-13) Further, Price testified that the visible dust on the clean side of the filter represents large dust particles that have escaped the filter unit. She inferred from this that invisible and respirable dust particles also bypassed the filter and went into the mine atmosphere. (Tr. 90:1-5) Price testified that dust behind the filter contributes to lung disease. (Tr. 76:5-6)

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[8] At the hearing I stated that: "I'm more interested in having this causation tied to this citation, not just general. I can take judicial notice that exposure - some exposure to respirable dust can cause black lung, that's not really a question." (Tr. 105:16-17)

Price testified that she could not take air samples on the days she wrote these citations because on both of the days, the mine was operating below the minimum production threshold necessary to make dust samples relevant under MSHA's respirable dust sampling regimen. (Tr. 66:3-7)[9] Additionally and importantly, she did not observe airborne dust coming out of the exhaust system at any time. (Tr. 88:22-23)

According to Price, when the bolter is being moved, one operator is in back of the machine handling the cables, behind the exhaust system. (Tr. 33:23 – 34:5)[10] Anyone downwind of the roof bolter could be exposed to respirable dust, including the roof bolter operators. (Tr. 33:15-20) The exhaust systems of the roof bolters in question are powered when the roof bolter is being moved. (Tr. 36:7-9) When the machine moves from place to place, the vacuum system is not operating but the exhaust system is. (Tr. 86:8-15) On the day of the inspection, the roof bolter operators were not wearing respirators. (Tr. 40:15-17)

The fact remains that despite Price's testimony regarding a bypass in the vacuum system, both roof bolters were measured for suction and were within the 12 inches-of-mercury requirement. (Tr. 68:14-17) Although the suction might not have been functioning optimally due to bypasses in the system, it was still within the parameters set by MSHA. While the roof bolter noted in Citation No. 8429578 did not have an MSHA approval tag outlining the appropriate inches-of-mercury parameters, Price testified that as a general rule, the allowable range of vacuum is 12 to 22 inches. (Tr. 53:1-2)

In summary, the weight of evidence does not support a conclusion that these violations were S&S. The only evidence tending to show that respirable dust could have entered the mine atmosphere is the presence of dust behind the filter elements. The evidence showing permissibility problems and lack of operational condition must be balanced against the fact that the vacuum levels for both systems were within MSHA guidelines. Although it could be inferred from this that some respirable dust might have entered the mine atmosphere, there is nothing to show duration, concentration, makeup, or anything else relevant to establish that the violating conditions were reasonably likely to contribute to the development of lung disease. I conclude that the Secretary has failed to carry his burden to prove that the violations warrant an S&S designation.

Price designated both citations as potentially affecting two people. However, in light of my findings above and of the testimony that only one roof bolter would be downstream from the exhaust at the time the roof bolter was being moved, it is necessary to modify both citations from two persons affected to one person affected.

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[9] Prince testified that she was at Crow III to work on EO1s and to run respirable dust sampling for the quarter. (Tr. 16:1-3)

[10] Prince testified that it takes anywhere from five to thirty minutes to move a roof bolter and it is moved approximately two to six times a shift. (Tr. 36:10-14)

Penalty

For Citations No. 8429578 and 8429598, the Secretary suggests a penalty of $1,026.00 each. Tri County's mine produces 1,310,941 tons annually. Tri County was moderately negligent. Tri County's business will not be significantly affected by the penalty sought by the Secretary. The violations are not S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $300.00 for each violation – a total of $600.00.

Citation No. 8429536 (LAKE 2011-0377)

On December 7, 2010, at 8:35am MSHA Inspector Price issued Citation No. 8429536 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.1505(b) pursuant to Section 104(a) of the Mine Act. The regulation states that "[a]ll maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made. " 30 C.F.R. § 75.1505(b). Section 75.1505(b) is a mandatory safety standard. The Citation alleges:

> All maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made. The Refuge Chamber located at crosscut 10 between entry 7 and entry 8, the Refuge Chamber located at crosscut 10 and the lifelines in the primary and secondary escapeways are not noted on the active Number One Unit, the Third West, MMU 011-0.

Ex. S-2.

Violation

The Citation alleges that an injury is unlikely; an injury could reasonably be expected to be fatal; the violation was not S&S; one person could be affected; and high negligence. *Id.* However, the parties stipulated to modify Citation No. 8429536 from unlikely to reasonably likely and from non-S&S to S&S.[11] (Tr. 9:23 – 10:1; Tr. 144:16 – 145:24) Respondent presented no evidence at trial to contradict Price's testimony, and did not dispute the fact of the violation in its brief. (Resp. Br. at 13)

Price testified that the regulation generally requires that all mine maps be kept up to date, and any changes in the mine must be added to the maps. (Tr. 112:22 – 113:3) Price testified that the correct locations of two refuge chambers were not shown on three different

[11] The Secretary made a formal motion at the hearing to amend the pleading to mark the Citation as reasonably likely and S&S (Tr.144:17-19), however, since the Respondent stipulated and agreed to the change, a formal ruling on the record was not necessary. (Tr. 145:8-23)

mine maps. (Tr. 114:7-20; Tr. 113:19-21)[12] Price also testified that the lifelines for the alternate and primary escapeways were not marked on the three escapeway maps. (Tr. 113:7-13; Tr. 116:6-20) The three incorrect maps were located at the two refuge chambers and at the end of the primary escapeway, or the first point at which a miner would access a lifeline to exit the mine in case of an emergency. (Tr. 116:15-20)

I find that Tri County failed to show the correct locations of the refuge chambers and escapeway lifelines on the three maps mentioned above. This violated Section 75.1505(b) of the Mine Act.

Negligence

Inspector Price assessed both violations as arising from high negligence. As stated above, high negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Price testified that the mine conducts a pre-shift examination of the alternative escapeway and the refuge chambers for each shift. Therefore, an examiner had been at the chamber several times and never noticed that the map was inaccurate. (Tr. 125:8-16) Additionally, miners are required to perform periodic escapeway drills. Generally, there is one person in charge of maps during such drills. (Tr. 126:11-20; Tr. 130:14-16) The inaccurate maps existed long enough for miners to make 14 crosscuts, which Price testified could be anywhere from several days to weeks. (Tr. 125:17-22) Additionally, the examination records on the outside of the refuge chambers did not reflect that the maps were inaccurate. (Tr. 141:21-22)

Price designated the citation as high negligence because mine management knew or should have known about the defective maps, and there were no mitigating circumstances. (Tr. 124:23 – 125:5) I agree and conclude that Respondent's negligence for Citation No. 8429536 was high.

Gravity

The citation's gravity was classified as unlikely to cause injury or illness, but Price testified that in hindsight she should have raised the gravity designation to reasonably likely and S&S. (Tr. 122:10-25) Price stated that she should have evaluated the condition in the context of an emergency, stating that it would be reasonably likely in an emergency that this condition would result in a fatal injury if a miner couldn't find a refuge chamber or if he followed the wrong escapeway out of the mine. (Tr. 122:10-16)

Price designated this citation as fatal because in an emergency situation the confusion caused by inaccurate map information could cause a miner to panic, thus increasing the likelihood he would die from lack of oxygen or not be able to find his way out of the mine. (Tr. 123:123:4-7) One of the inaccurate maps was located at the first point a miner would access if he were trying to escape. Panic and confusion could cause a miner to travel in the wrong

[12] The refuge chambers were actually located at crosscut 10 between entry seven and eight, and at crosscut 10 between entry six and seven. (Tr. 114:7-20; Tr. 113:19-21)

direction, and the resulting delay could cost the miner valuable breathing time on his self-rescuer. (Tr. 118:2 – 119:13) An inaccurate map increases the likelihood of panic, particularly if a miner is running out of oxygen and cannot find a refuge chamber or escapeway lifeline. (Tr. 121:7-13; Tr. 118:13-23)

Price added that when a miner enters a refuge chamber, he takes the mine map in with him so he can give the rescue team at the surface his location. (Tr. 121:4-6; Tr. 123:17 – 124:4) If the miner gives rescuers the wrong location because the map is not accurate, he might not be rescued. (Tr. 123:17 – 124:4)

Price designated the citation as affecting one person, but she testified she should have marked it for the whole crew, perhaps 10 to14 persons. (Tr. 124:7-20) I find it reasonably likely that in an emergency a crew would be affected, but the Secretary did not prove by a preponderance of evidence how many persons would be in the crew. Therefore, I asses the number of persons affected as three – the continuous miner operator, his helper, and the foreman.

Based on these facts and inferences, I conclude that the injury possible from the scenario of miners not being able to escape the mine quickly because of inaccurate maps could be serious and potentially fatal.

Significant and Substantial

I have determined that there was a violation of a mandatory safety standard and there was a reasonable likelihood that a reasonably serious injury would ensue. The three inaccurate maps gave incorrect locations for two refuge chambers, the lifeline for the alternate escapeway, and the lifeline for the primary escapeway. This contributed to a discrete safety hazard which had the potential of resulting in injuries to miners who might not be able to quickly escape the mine. I must yet determine whether there was a reasonable likelihood that the hazard was reasonably likely to result in an injury. *Mathies*, 6 FMSHRC at 3-4.

A miner must know where to go in an emergency. (Tr. 118:2-4) Updated and current escapeway maps are crucial in an emergency. (Tr. 128:20-22) Price testified that the impact of not showing refuge chambers on the mine map depends on the timing of events. (Tr. 119:7-13) Self-rescuers only have a certain amount of oxygen which must last until a refuge chamber is found. *Id.* If a miner runs out of oxygen, he might not make it out of the mine. (Tr. 118:13-23) If a miner actually makes it to a refuge chamber, he is trained to take the map into the chamber with him so he can communicate his location. (Tr. 120:24 – 121:3) However, as explained above, if a miner gives rescuers the wrong location, the chances increase that rescuers will not reach him in time.

Lifelines are a backup escape measure. A miner could follow a lifeline out of the mine without a map, however the potential for confusion increases in the dark and panic without an accurate map. (Tr. 117:16-20) Indeed, a miner might follow a lifeline to the place on an out-of-date map where a refuge is supposed to be only to realize it is not there. The inverse is also possible. A miner might follow a lifeline and be close to a refuge not shown on the map but not

know it. (Tr. 119:14-19)

Respondent argued that the hazard was not reasonably likely to result in an injury because its miners participated in previous escapeway drills. (Tr. 130:1-131:24) However, previous training is not a substitute for accurate maps. Training cannot guarantee that in a real-time emergency situation where miners are more likely to be panicked and relying on escapeway maps to guide them safely out of the mine or to refuge chambers that their drill experience will lead them to safety. Furthermore, "[e]scapeway maps are the primary source of information needed by miners as they are evacuating the mine. Locations of refuge alternatives are critical to decisions made during evacuation efforts and must be kept current on the escapeway map." Refuge Alternatives for Underground Coal Mines, 73 Fed. Reg. 80656, 80681 (Dec. 31, 2008).

Respondent also argued that the presence of lifelines should mitigate the likelihood of injury. This argument is unavailing, however, because the Mine Act requires both lifelines and accurate maps. 30 C.F.R §§ 75.1505(b); 75.380(d)(7). Additionally, there is well established Commission and D.C. Circuit case law holding that the presence of redundant safety systems is irrelevant to the designation of a violation as S&S. *Cumberland Coal Res., LP, v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Something that is required to be on hand is not properly considered a mitigating factor in this context.

In an emergency, the out-of-date maps would show an incorrect location for the lifelines in the primary and secondary escapeways and the two refuge chambers. Importantly, it is incorrect to assume a lifeline would always be present during an emergency. The emergency itself could obliterate it, increasing a miner's need for and reliance on the mine map to exit the mine or find a refuge chamber. Even assuming a miner did find a refuge chamber; incorrect information on the map located at the refuge chamber itself would still be reasonably likely to result in an injury because the miner might not be able to give an accurate location to a rescue team. In this case, both refuge chambers had inaccurate maps. In an emergency two separate rescue crews could have been misled by the inaccurate maps.

I conclude there was a reasonable likelihood that the inaccurate maps would result in injury, i.e. the inability of a miner or miners to escape quickly, or at all, in an emergency. Thus, the Secretary proved by a preponderance of the evidence that an S&S designation was warranted for Citation No. 8429536.

Penalty

The Secretary proposed a penalty of $2,107.00 for this violation. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was high. Its business will not be significantly affected by the penalty sought by the Secretary. The violation is S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $3,144.00.

Citation No. 8419112 (LAKE 2011-0309)

On October 30, 2010, at 1:50am MSHA Inspector Dennis Baum[13] ("Baum") issued Citation No. 8419112 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.220(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered. " 30 C.F.R. § 75.220(a)(1). Section 75.220(a)(1) regulates a mandatory safety standard. The citation alleges:

> A violation of the operator's approved roof control plan is present in the unit 1, 3W/2S panel. Two areas have been mined in excess of the 18' wide maximum that is allowed by the plan. Location 1 is in the number 3 entry from the inby rib line of the intersection at survey station 490 inby toward the face. This wide place measured approximately 18'6" to 20" wide for a distance of approximately 27'. Location 2 is in the last open crosscut between entries 2 and 3 at survey station 420. This place was mined 19'1" to 20' wide for a distance of approximately 37'. Standard 75.220(a)(1) was cited 41 times in two years at mine 1102632 (41 to the operator, 0 to a contractor).

Ex. S-14.

Violation

The Citation alleges that the violating condition is reasonably likely to result in an injury, the injury could reasonably be expected to be fatal, the violation was significant and substantial, two persons could be affected, and the negligence level was moderate. *Id.*

Inspector Baum was at the mine as part of an EO1 inspection. (Tr. 151:2-6) He testified that he found a violation of the roof control plan, viz. two locations had been mined in excess of the maximum width allowed by the plan. (Tr. 152:16-23) Respondent does not dispute the fact that the area was mined in excess of the approved roof control plan. (Resp. Br. at 17)

The maximum entry width at the Crown II mine is 18 feet per the roof control plan. (Tr.

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[13] At the time of the hearing, Dennis Baum had worked for MSHA since 2007. (Tr. 147:14-15) From March, 2012 until June, 2012, Baum was a Certified Mine Inspector for MSHA (Tr. 147:11-15), and he was a roof control specialist since June, 2012. (Tr. 147:3-10) Inspector Baum completed the mine academy training and had refresher training. (Tr. 148:7-14) He worked in mines for over 25 years and for part of that he worked at Crown III. (Tr. 149:21-24) He was also a UMWA safety committee chairman for about 15 years. *Id.* When he worked at Crown III it was operated by Freeman United Coal Mining Company (Tr. 150:3-6)

153:20-23; Tr. 154:17-18; Ex. S-16, pg. 2) Page 11 of the roof control plan provides that if miners inadvertently mine the entries too wide, or if the ribs weather and slough off, the mine must take additional measures to install supplemental support. (Tr.154:19 – 155:6; Ex. S-16, pg. 11) According to the roof control plan, in those instances: "a bolt, no less than 2 foot long, will be installed between the rows of bolts and the rib to compensate for the wider entry." (Ex. S-16, pg. 2) Respondent had not installed supplemental support at the two cited locations as required by the roof control plan. (Tr. 155:7-16)

The first location was in entry number three at the last open crosscut toward the face; it extended approximately 27 feet and was approximately 20 feet wide. (Tr. 153:2-12) Baum measured the roof with a tape measure. (Tr. 153:12-13) There was no additional support installed at this location. (Tr. 155:7-10)

The second location was in crosscut entries two and three, where examiners and the foreman take air readings. (Tr. 156:3-9) The width at this location ranged from 19 feet 1 inch to 20 feet for approximately 37 feet, which is almost the entire length of the coal pillar. (Tr. 156:13-15) Baum measured the width with a tape measure. (Tr. 156:16-17)

Baum testified that Respondent abated the violation by installing 19 fully grouted bolts between the two locations and putting a bolt at least two feet long between the existing rows of bolts in the wide area. (Tr. 164:17-22) He also testified that the violating conditions were not the result of sloughage; they had been mined too wide. (Tr. 165:24-25) The roof control plan specified a maximum width of 18 feet. However, in two locations, the width was more – as much as 20 feet. There was also no additional support, as required under the roof control plan.

I find that the width of the entries at the two locations just discussed exceeded the maximum set by the roof control plan. I conclude that the Respondent violated Section 75.220(a)(1) of the Act.

Negligence

Inspector Baum assessed the violation at moderate negligence. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Respondent did not object to Baum's negligence designation. (Tr. 171:25 – 172:3)

Baum chose moderate negligence because the pre-shift mine examiner and the foreman knew or should have known about the roof condition from being in the area while taking air readings. (Tr. 162:8-16) Additionally, Baum testified that the mine has a policy that the roof must be measured after it is cut and bolted. *Id.* Inspector Baum testified that he could have issued the citation as high negligence. (Tr. 162:22-24) Baum further testified that in the entry itself, the excess cut width was obvious enough that somebody should have seen it, especially since there were people in that area regularly. (Tr. 162:17-19)

I conclude that Respondent was moderately negligent for Citation No. 8419112.

Gravity

Inspector Baum testified that the violating conditions must have existed for a shift or more based on when the areas would have been mined. (Tr. 164:2-5) The first location extended approximately 27 feet with a width of approximately 20 feet. The second location was approximately 37 feet long – almost the entire length of the coal pillar – and was approximately 19 feet 1 inch to 20 feet wide. The danger to miners was proportionately greater because the excess cutting occurred in two locations.

It is clear that a miner could be injured by a roof fall. (Tr. 158:2-4) It is obvious that if a roof slab fell on a miner, the injury could be fatal. Baum testified that such a roof slab could be more than 18 feet wide and 6 feet thick. (Tr. 159:18-24) I conclude that if a roof fall were to occur under these circumstances, it could result in a fatality. Two persons could be affected – the continuous miner operator and his helper. (Tr. 160:10-16)

This failure to comply with the roof control plan posed a discrete safety hazard. Miners were subjected to the danger of falling rock from an unstable and inadequately supported roof. "[P]ractices that compromise the integrity of the mine roof or are permitted to exist in an area of compromised integrity are *per* se of a 'reasonably serious nature.'" *Excel Mining, LLC,* 34 FMSHRC 99, 116 (ALJ Gill). I conclude that there was a reasonable likelihood of serious injury to two persons.

Significant and Substantial

Roof control plans are tailored for the specific conditions in each mine. MSHA set the maximum cut width for this mine at 18 feet. (Tr. 158:13-17) Inspector Baum designated this citation as S&S because, consistent with *Mathies*, there was a violation of a mandatory safety standard giving rise to a reasonable likelihood of serious injury and involving at least moderate negligence. (Tr. 160:19 – 161:2) Baum designated the citation as reasonably likely to cause an injury because of poor roof conditions and the mine's history of roof falls. (Tr. 157:10-23)

In the last open crosscut, the roof had "potted out," (part of the roof had fallen out) prior to being bolted, indicating to Baum that the roof was susceptible of falling. *Id.* Baum testified that he observed a visible slip running toward the face, parallel with the entry. (Tr. 159:5-8) A slip is an anomaly in the roof caused by a change in rock strata, which according to Baum, increases the chance of a roof fall. (Tr. 159:9-13) Additionally, the fact that there were roof falls despite changes made to the roof control plan to deal with them, indicates that the quality of the mine roof in general was poor. (Tr. 176:17-22)

Miners were regularly exposed to the poor roof conditions. In the first location, the over cut was found at the last open crosscut inby the face, which meant that people were regularly going to and coming from the face throughout the shift. (Tr. 155:20 – 156:1) Baum also testified that the second location was used for haulage and ventilation, and mine examiners and foreman did their examinations regularly throughout the shift at that location. (Tr. 156:22 – 157:5)

Respondent argued that there had been no fatalities from previous roof falls at the mine. (Tr. 169:18-24) But, it conceded in its brief that if the roof were to fail as Inspector Baum opined, and if miners were under it, "a fatal injury would likely result." (Resp. Br. at 18) Respondent also argued that it was not reasonably likely that an injury would occur because there was no evidence in the record that roof failure was imminent. *Id.* However, this is not the correct standard to apply. The Court evaluates the citation in the context of continued mining operations. Miners would be exposed to the hazards of a roof fall in the two cited unsupported roof areas if a roof fall occurred.

Respondent also argued that the unit was idle. (Resp. Br. at 18; Tr. 173:5-6) The unit may have been idle at the time of the citation, but there were still people working in that section, namely, the section foreman and a couple of miners who were bolting and cleaning the face. (Tr. 175:10-21) Additionally, the condition had lasted for more than one shift, and in the context of continued mining operations, would have continued to exist unabated. Finally, exposure to the hazard was particularly high at the first location because of the greater width of the cut and the fact that miners worked there on a regular basis.

The Secretary has proved by preponderance of evidence that the excess cut width contributed to the hazard of a roof fall which was reasonably likely to result in serious injury. Therefore, I find that the S&S designation was warranted for Citation No. 8419112.

Penalty

The Secretary proposed a penalty of $1,944.00 for this violation. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The violation is S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $1,944.00.

Citation No. 8419546 (LAKE 2011-0937)

On May 23, 2011, at 9:45am, MSHA Inspector Baum issued Citation No. 8419546 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.403 pursuant to Section 104(a) of the Mine Act. The regulation states that "[w]here rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane." 30 C.F.R. § 75.403. Section 75.403 regulates a mandatory safety standard. The citation alleges:

> No dry rock dust has been applied over previously wet dusted surfaces of the roof, ribs and floor in the 9 Right/2 West Sub-Mains, 002/013 MMU. This condition is present in the following locations. 1. Entry number 1 from survey station 680 to survey

station 890. 2. Entry number 2 from survey station 590 to survey station 890. 3. Entry number 3 from survey station 680 to survey station 890. 4. Entry number 4 from survey station 680 to survey station 890. 5. Entry number 5 from survey station 750 to survey station 890. 6. Entry number 6 from survey station 680 to survey station 960. 7. Entries number 7-10 from survey station 820 to survey station 960. These areas also include the adjoining crosscuts.

Ex. S-18.

Violation

The Citation alleges that injury is unlikely; the injury could reasonably be expected to be fatal; the violation was not S&S; four persons could be affected; and, the negligence level was moderate. *Id.* Inspector Baum testified that under Section 75.403, rock dust must be applied to roof, ribs, and the floor of the coal mine and be maintained at least at 80 percent incombustible content. (Tr. 183:3-10) Rock dust is used to neutralize the danger of an explosion. (Tr. 196:7-9) Baum testified that the areas in question were in the working section, and there were a number of locations where he observed that no dry dust had been applied to the ribs and roof. (Tr. 183:11-15)

The areas in question were dry. (Tr. 189:22-24) Baum used his fingers to test areas to determine if they were wet and needed dusting. (Tr. 190:10-13) Dry rock dust had not been applied in seven places across the whole section from entries 1 through 20, ranging from 200 to 300 feet in length, including the adjoining crosscuts between entries. (Tr. 190:18-25) In total, approximately 1,900 linear feet were not properly dry or wet dusted. (Sec'y Br. at 29)

Baum testified that the area in question had been wet dusted. (Tr. 183:18-19) Respondent may wet dust initially, but when the wet dust dries, it must go back and apply dry dust. (Tr. 184:16-23) The Program Policy Manual dated February, 2003 states: "After the wet rock dust dries, additional dry rock dust shall be applied to all surfaces to meet applicable standards." (Tr. 188:4-11; Ex. S-36) Inspector Baum testified that even the wet dusting in the violating areas was rather poor. (Tr. 184:25) He testified that the wet dust covered about 50 percent of the area and looked speckled (Tr. 185:8-08; 194:1-3). He could determine visually that there was not 80 percent coverage. (Tr. 204:19-21) Baum also testified that at the time he issued the citation, the Respondent's representative voiced no objection. (Tr. 205:5-7)

Respondent argued that they were not in violation of Section 75.403 because they had wet dusted and because the area was not dry but was in fact damp. Inspector Baum did testify that the roof and rib were damp, but he testified that they were not wet. (Tr. 201:1-3) The dampness of the rock dusting relates to likelihood of an accident or injury occurring (Tr. 222:16-17), not whether the Respondent violated Section 75.403. And as Inspector Baum noted, there is moisture everywhere underground in a coal mine. (Tr. 221:19-22)

Respondent's "damp" argument is unconvincing because irrespective of whether the area was damp and not dry, the Respondent's dust application was insufficient to meet the standard.

I find that Respondent did not adequately dry dust the areas in question. I also find that in the areas that were wet dusted, the surfaces had dried sufficiently to require dry dusting. The combined coverage was insufficient to satisfy the standard. Therefore, for the reasons stated above, I conclude that Respondent violated Section 75.403.

Negligence

Inspector Baum determined that the violation resulted from moderate negligence. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Baum testified that he chose moderate negligence because the working section is examined before and during each shift by a foreman. (Tr. 198:14-25) Additionally, Baum had conversations with management before the Citation was issued regarding the requirement that dry dust be applied after wet dusting. (Tr. 186:12-20)

Baum testified that the areas were dry dusted after the citation was issued. (Tr. 200:4) Baum cited this as the reason he listed moderate negligence; management was aware of this requirement and had made some effort to comply. (Tr. 191:1-5)

I find moderate negligence for Citation No. 8419546.

Gravity

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. Baum designated the Citation as unlikely because ignition conditions were not present at the time. (Tr. 198:9-10; Ex. S-18)

Baum testified that the areas in question were not dry dusted for more than one shift based on the location relative to the face. (Tr. 192:22 – 193:8) He also testified an ignition is more likely to occur at the face because that is where the methane is liberated during the mining cycle. (Tr. 193:9-13) Here, however, he did not detect methane at the face nor did the mine have a history of face ignitions. Baum marked the Citation as unlikely to result in an injury. (Tr. 195:6-18)

Baum testified that if there were an injury, it would involve at least lost work days or restricted duty. However, he designated the gravity as fatal because if an ignition occurred at the face it would likely result in severe burns. (Tr. 196:10-25; 197:12-21) Baum determined that four people would be affected, namely the four ram car operators that were in the area. (Tr. 197:2-4)

I find that the injury was serious in nature, was unlikely to occur, but if it did occur could reasonably be expected to be fatal.

Penalty

The Secretary proposed a penalty of $634.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation was not designated as S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $634.00.

Citation No. 8419577 (LAKE 2011-1051) and Citation No. 8419579 (LAKE 2011-1051)

On July 6, 2011, at 11:10 am, MSHA Inspector Baum issued Citation No. 8419577 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.604(b) pursuant to Section 104(a) of the Mine Act. The regulation states "[w]hen permanent splices in trailing cables are made, they shall be: [...] (b) Effectively insulated and sealed so as to exclude moisture [...]" 30 C.F.R. § 75.604(b). Citation No. 8419577 alleges:

> The number 2, 3 conductor trailing cable supplying 480 VAC power to the number 57 roof bolter, contains two defective permanent type splices that are no longer effectively insulated and sealed so as to exclude moisture. The outer jacket of both of these splices is split open around the splice nearly to the inner insulated conductors.

Ex. S-24.

On July 7, 2011, at 10:05 am, Inspector Baum issued Citation No. 8419579 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.604(b) pursuant to Section 104(a) of the Mine Act. Citation No. 8419579 alleges:

> The number 2, 3 conductor trailing cable, supplying 480 VAC power to the number 58 roof bolter, contains one defective permanent type splice that is no longer effectively insulated and sealed so as to exclude moisture. The outer jacket material is split open exposing the insulated inner conductors. This bolter is in service in the 9 North/2 West Sub-Mains, 002/013 MMU.

Ex. S-27.

Violations

Respondent does not contest the violations, but disputes the "fatal" designation for both citations and the S&S designation for Citation No. 8419579. (Resp. Br. at 22) Baum described the process he used to inspect the cables: He started at the power center, required the mine to turn off the power, and performed a hand-over-hand evaluation of the entire cable, except for areas he could not reach because they were hung too high. (Tr. 238:10-19) To inspect the

splices, Baum flexed the cable to see if it was sealed. (Tr. 239:3-6) For the hanging cables, Baum observed the splices with his naked eye. (Tr. 239:21-23) A hand-to-hand examination was not needed for the splices that were cited because they were visible. (Tr. 240:12-16)

Citation No. 8419577 alleges that an injury was unlikely; the injury could reasonably be expected to be fatal; the violation was not S&S; one person could be affected; and, negligence was cited as moderate. (Ex. S-24) Inspector Baum found two defective permanent splices on roof bolter cable No. 57. (Tr. 226:10-13) He testified that the outer jacket material was split and the only thing that was left underneath was some tape. (Tr. 226:15-19)

The tough rubber outer jacket on these cables is there to protect the inner conductors and to keep moisture out. (Tr. 226:22-25) The opening Baum found would have allowed dirt, debris, and moisture to reach the inner conductors. (Tr. 227:3-6) Baum stated that if moisture gets in and a person makes contact, he could be electrocuted. (Tr. 227:8-18)

Citation No. 8419579 alleges that injury is reasonably likely; the injury could reasonably be expected to be fatal; the violation was S&S; one person could be affected; and, negligence was listed as moderate. (Ex. S-27) On roof bolter No. 58, Baum found one splice. The inner insulated conductors were exposed. (Tr. 231:11-18) Baum testified that the cable was not adequately insulated and sealed to exclude moisture. (Tr. 245:19-20)

I conclude that Respondent violated Section 75.604(b) for Citation Nos. 8419577 and 8419579.

Negligence

Inspector Baum assessed moderate negligence for both violations. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d).

For Citation No. 8419577, Baum chose moderate negligence because this condition should have been found during a weekly electrical examination. (Tr. 229:13-21) Baum testified that the operator had told MSHA on numerous occasions that they had a policy requiring miners to walk their machine cables to look for violating conditions. *Id.* Baum stated that this condition would have been obvious to anybody checking the cable. *Id.*

Baum designated Citation No. 8419579 as arising from moderate negligence because if miners had checked their cables as the operator indicated was their practice, someone should have seen the violation and fixed the problem. (Tr. 234:13-20) Additionally, this condition should have been found during the weekly bolter examination. (Tr. 234:1-20) Baum testified that the condition was obvious. (Tr. 234:6-7)

I conclude that Respondent was moderately negligent for both Citation Nos. 8419577 and 9419579.

Gravity

Citation No. 8419577 was designated as unlikely because the tear did not extend all the way through to the inner conductors, the cable was hanging up on the rib and somewhat out of the way, and the tear was in an area that would not generally be handled by anybody during the shift. (Tr. 227:19-228:3) Baum testified that if someone were to come into contact with defective cable splice, the 480-volt load could cause a fatal electrical shock. (Tr. 228:4-9) The condition existed for at least a shift. (Tr. 229:22-24) Baum designated the citation as affecting one person because generally only one person handles the cable at a time. (Tr. 229:7-12)

In contrast, Citation No. 8419579 was designated as reasonably likely. (Ex. S-27) The splice was in an area near the bolter where it would have been handled throughout the shift on a regular basis. (Tr. 232:7-9) Additionally, the cable would be energized when in use. (Tr. 231:22-24) When the roof bolter is moved, miners have to hang the cable, take the cable down, reel it up, deploy it along the ribs, and keep it out of the way. (Tr. 232:14-19) Baum testified that a fatal electric shock could happen. (Tr. 233:10-12) He determined that one person would affected because only one person handles the cable at a time. (Tr. 233:15-19) Baum testified that the condition lasted at least one shift. (Tr. 234:23-25)

Respondent argued that the citations should be limited to "lost workdays" because a NIOSH study shows that only 3.3% of all reportable coal mine electrical injuries were fatal, whereas 90% of the injuries resulted in lost workdays or restricted duty. (Resp. Br. at 21) Respondent also stated that according to the MSHA website, there were only three electrical fatalities between 2001 and 2007. *Id.* Respondent used a risk management analysis to determine that the likelihood of injury would not be fatal. *Id.* at 22. This is not the proper analysis when the court makes a determination of gravity.

The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *Harlan Cumberland Coal Co.*, 12 FMSHRC at 140. Additionally, the Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Citing statistics of fatalities at other mines over a period of time does not adequately account for the presumption of continued mining operations at the mine in question and under the circumstances at the mine when the citation was issued. Thus, I find Respondent's argument to be less convincing than the Secretary's.

I find that for Citation No. 8419577 an injury was unlikely and for Citation No. 8419579 was reasonably likely to occur, but for both citations, the injury would be reasonably serious in nature, i.e., electrocution.

Significant and Substantial

Citation No. 8419579 described a violation of a mandatory safety standard. There was a reasonable likelihood that the injury in question will be reasonably serious. The defective cable

splice created an electrocution hazard. The S&S allegation requires that I determine whether there was a reasonable likelihood that the hazard would result in an injury.[14]

Baum testified that the splice was in an area near the bolter where it would have been handled throughout the shift on a regular basis. He also testified that the cable was on the ground, and it would only take a pinhole in the insulation on the conductor for the electricity to get out if the conditions were right. (Tr. 233:1-6) Additionally, in this case the tear extended through to the inner conductors, creating a greater chance of shock. (Tr. 233:20-234:6) In addition, because the splice had opened all the way to the inner conductor, the cable was more likely to sustain additional damage during continued mining operations. (Tr. 232:2-9) Respondent's witness Randy Aymer ("Aymer")[15] testified that, as the cable is being moved along the mine floor, rocks and debris could get inside the outer jacket and cause further damage to the inner conductor. (Tr. 252:22 – 253:16)

Respondent argued that Citation No. 8419579 should not be designated as S&S because the bolter was not in use at the time of inspection, no work was scheduled for the machine for the remainder of the vacation period, and the roof bolter cable would have been checked as part of the required electrical permissibility prior to the roof bolter being placed back into service. (Resp. Br. at 22) Baum testified that even though the mine was idle for a vacation break, maintenance and repair crews were still working in the mine. (Tr. 241:18-20) Baum also testified that if the damaged cable was not found, it would have existed when mining resumed after the vacation. (Tr. 242:4-10) Respondent presented no evidence, other than conclusory statements in its brief, that no work was scheduled for the roof bolter during the vacation period and that the machine had been tagged out, which would require a permissibility inspection if returned into service. As such, Respondent's argument is unconvincing.

Aymer testified that if a fault occurs in the system, a ground check device would prevent electrocution, unless the inner insulation was damaged. (Tr. 250:9-23) For Citation No. 8419579, the inner insulation was damaged. (Tr. 250:9-23). Aymer confirmed that 480 volts could kill a person. (Tr. 257:1-2) On rebuttal, Inspector Baum testified that a defect in the cable covering does not always trip the ground fault protector as Aymer suggested. Baum has witnessed machines running with cuts in the cable. (Tr. 259:2-7) He testified that minor damage to the inner conductors does not necessarily cause the power to turn off. (Tr. 259:9-10)

I conclude that it was reasonably likely that the defective cable splice could contribute to an injury because of its location and the fact that the tear went all the way to the inner conductors. The Secretary proved by a preponderance of the evidence that the S&S designation was warranted for Citation No. 8419579.

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[14] Citation No. 8419577 was not designated as S&S, and therefore, no analysis is necessary.

[15] At the time of the hearing, Randy Aymer was the chief underground maintenance person for Tri County Coal. (Tr. 247:25 – 248:1) He has worked in the mine since 1973 and been chief electrician for a majority of the time. (Tr. 248:4-10)

Penalty

For Citation No. 8419577, the Secretary proposed a penalty of $425.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation was not designated as S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $425.00.

For Citation No. 8419579, the Secretary proposed a penalty of $2,106.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation is S&S. According to the stipulations agreed to by the parties, Tri County demonstrated good faith in abatement of the violative condition. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of $2,106.00.

WHEREFORE, it is **ORDERED** that Tri County pay a penalty of **$8,853.00** within thirty (30) days of the filing of this decision.

L. Zane Gill
Administrative Law Judge

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