

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

JAN 30 2017

HUNTER SAND & GRAVEL, LLC,
Contestant,

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

HUNTER SAND & GRAVEL, LLC,
Respondent.

CONTEST PROCEEDINGS:

Docket No. KENT 2014-391-RM
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM
Citation No. 8728541; 2/25/2014

Mine: Dredge IV
Mine ID: 15-17687

CIVIL PENALTY PROCEEDINGS:

Docket No. KENT 2014-566-M
A.C. No. 15-17687-350333

Docket No. KENT 2015-75-M
A.C. No. 15-17687-362767

Mine: Dredge IV

DECISION AND ORDER

Appearances: Willow Fort, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for Petitioner

Robert Nienhuis, Esq.; Elana Charles, Esq., Goldstein and Price, L.C., St.
Louis, Missouri for Respondent

Before: Judge Barbour

At the heart of this case is an all but certain fatal accident that befell Dustin Burnham, an employee of Hunter Sand and Gravel, LLC (“Hunter”), who in the early morning hours of December 10, 2013, disappeared while working on a company dredge on the Ohio River. Burnham is presumed to have fallen into the river and drowned, but no one saw him fall. His body has not been found, nor have any of his personal effects. He was twenty eight years old. He is survived by a wife and two young children.

Burnham’s disappearance was promptly reported by the company to the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”), which immediately sent investigators to the scene.¹ The investigators delved into the circumstances surrounding Burnham’s disappearance and found Hunter in violation of several of the Secretary’s standards for metal and nonmetal mines. As a result, one of the investigators cited the company for five alleged violations in one citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), one citation issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and three orders issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). In the section 104(a) citation the investigator found that the alleged violation was a significant and substantial contribution to a mine safety hazard (an “S&S violation”) and that the alleged violation was due to the company’s moderate negligence. In the 104(d)(1) citation and the 104(d)(1) orders, the investigator found that the alleged violations were S&S and were caused by Hunter’s unwarrantable failure to comply with the cited standards. The investigator further found that the company’s negligence was high. The company, which filed timely contests of the citations and orders, challenged the alleged violations and the investigator’s findings. Subsequently, the Secretary proposed civil penalties, and when Hunter declined to pay the penalties, the Secretary filed petitions requesting that the Commission assess the penalties as proposed. The company answered the petitions by maintaining it did not violate the standards, or, if it did, that the investigator’s findings were erroneous and the proposed penalties were excessive.

After the citations and orders were contested and the penalty petitions were filed, the Commission’s Chief Judge assigned the cases to the court, which consolidated them and directed counsels to confer to determine if they could resolve their differences. When it became apparent they could not, a trial was held in Paducah, Kentucky.

I. STIPULATIONS

At the commencement of the trial, and at the request of the court, counsel for the Secretary read the parties’ stipulations into the record. Counsel for the Secretary and Hunter agreed that:

1. Hunter . . . is an operator as defined in section 3(d) of the Act, 30 U.S.C. § 803(d);
2. Dredge IV[, the dredge on which Burnham last worked,] is a mine as that term is defined in section 3(h) of the Act, 30 U.S.C. § 803(h);
3. Dredge IV [is] used to extract sand from the Ohio River;

¹ The investigators also were duly authorized mine inspectors.

4. The principal office address for the Dredge IV mine is 1177 Clarksbury Road, Ledbetter, Kentucky 42058;
5. MSHA Inspector Sonia Conway was acting in her usual capacity as an authorized representative of the Secretary when the [subject] citations and orders . . . were issued;
6. Barge MEM 611[, the barge on which Burnham was last seen,] arrived at Dredge IV on December 9, 2013[,] at 11:40 p.m.;
7. Nobody witnessed Dustin Burnham go into the water;
8. Mr. Burnham's body was never recovered;
9. The Secretary will vacate Order No. 8728539²;
10. Government Exhibit 19, the MSHA Proposed Assessment Form accurately sets forth the mine hours worked , 25,667, at Dredge IV . . . for 2012, . . . the total number of assessed violations for the 15 months preceding . . . [February 2014], the month the citations and orders were issued, [a]nd the total number of inspection days for the 15 months preceding . . . [February 2014];
11. Government Exhibit 5, the MSHA [Investigation] Report, is a true and accurate copy of the report compiled and completed by MSHA on the basis of information provided to MSHA by Hunter employee, Robert Stone, on the dates and times set forth therein and may be admitted into evidence as such;
12. Government Exhibit 6, the MSHA Mine Injury and Illness Report 7000-1[,] . . . is a true and accurate copy of the form completed by Hunter employee, Robert Stone, and may be admitted into evidence as such;
13. Government Exhibit 7, which consists of one page of the vessel log from the MV Patsy M[, the tug adjacent to Dredge IV on the night Burnham disappeared], dated December 5 and December 9, 2013. is a true and accurate copy of the log maintained on the Patsy M. by Roger Fairfield and [by another Hunter employee] on the dates and times set forth therein and may be admitted into evidence as such;
14. Government Exhibit 20, drawings and schematics relating to the Dredge IV, contains depictions of the Dredge IV which are not to scale. Accordingly, it may be admitted into evidence only as a general configuration of Dredge IV and the arrangement of [the] various equipment on Dredge IV that it depicts.

Tr. 16-18.

² Order No. 8728539 (Docket No. KENT 2014-566) alleged Hunter violated 30 C.F.R. § 15005 by failing to provide required safety belts and lines for miners working on Dredge IV. The decision to vacate the order means that two citations and two orders remain at issue.

II. THE TESTIMONY

Edward Jewell

Edward (“Ed”) Jewell has worked as an MSHA inspector for 16 or 17 years. At the time of Burnham’s disappearance Jewell was working in the agency’s Franklin, Tennessee field office in its metal/nonmetal division. Tr. 33, 89. Jewell inspects underground metal/nonmetal mines, surface mines and some facilities such as dredges that are not traditionally thought of as mines. Tr. 34. Although Jewell testified that he usually inspects only one dredge a year (Tr. 90), he has extensive prior experience and on-the-job training in inspecting dredges and barges. Tr. 36-37. Most of the dredges with which Jewell is familiar extract sand and gravel, just like Dredge IV. *Id.* Jewell began his testimony by explaining how such dredges take sand from the floor of a river. The dredges:

have suction devices – heads along the riverbeds. . . .and basically [the devices] suck [the sand] from the bottom. And [the sand] gets pumped up through the two pumps on the dredge and it gets segregated with screens and chutes and [is transferred by chutes] into barges. And from there, [the barges are] towed to a plant . . . where . . . [the sand is] classified or segregated more.

Tr. 38; *see also* Tr. 39.

The dredge operator is in charge of the dredging process and operates the suction devices, the screens and the chutes from a designated operator’s station. Tr. 39-40. Miners (“dredge hands”) are assigned different tasks on dredges. Some do maintenance and repair work. Some do cleanup work and other needed tasks. When a tugboat (“tug”) brings a barge alongside a dredge for loading a miner has to secure the barge to the dredge. Once the barge is loaded it is released from the dredge and towed to a plant facility or to another storage area where the sand is offloaded. Tr. 40. After a full barge leaves the dredge, another empty barge is towed to the dredge to be loaded.

Barges must be loaded evenly. There are hash marks (“draft marks”) along the sides of a barge that indicate if the barge is floating horizontally in the water. The marks also show how much water the barge is displacing (the barge’s “draft”). Miners on a dredge are sometimes asked to take a “draft reading,” which means they must transfer to the barge, look at the numbers on the side of the barge and report the numbers to the dredge operator who can then determine whether the barge is level and the extent of its draft. Tr. 40-41.

Turning to the events of December 9-10, 2103, Jewell testified that on December 10 at around 4:30 a.m. his supervisor called and told Jewell there was a report someone had “[gone] into the water” at Hunter’s Ohio River operation. Tr. 58. The supervisor asked Jewell to contact Robert Stone, Hunter’s manager of sales and compliance, go to the facility, and open MSHA’s investigation of the apparent accident. *Id.*

Jewell arrived at the facility around 7:00 a.m. on December 10. Tr. 60. It was, he stated, “very cold.” Tr. 59. It had snowed during the night. *Id.* In addition to the snow, Jewell remembered that the Ohio River was “pretty wild[,] . . . swift[,] . . . up . . . [and] high.” *Id.* At the shoreline Jewell met Stone and another Hunter official. Jewell asked some general questions regarding what had happened and the state of the rescue and/or recovery operation. Hunter’s officials then arranged for Jewell to be transported to the dredge.³ Tr. 60.

Before traveling to the dredge, Jewell spoke with a coworker of Dustin Burnham, the missing miner. The coworker told Jewell that during the early morning of December 10 he and Burnham “had come into the sample room [on the dredge] to warm up a bit. And that [Burnham] was going to go and check the draft marks on the barge.” Tr. 74. Jewell thought that taking a draft reading was one of Burnham’s regularly assigned duties.⁴ After a short time in the sample room, Burnham told the co-worker he, Burnham, was leaving to take the reading. It was the last communication anyone had with Burnham. Tr. 78-79. Burnham disappeared sometime between 2:30 a.m. and 2:45 a.m. on December 10. Tr. 60.

Roger Fairfield, the pilot of the tug boat that brought the barge to the dredge, was also among those to whom Jewell spoke. Fairfield told Jewell that after the barge was secured next to the dredge, he positioned the tug behind the dredge and the barge. From the wheel house the pilot could see most of the decks of the dredge and the barge. Jewell stated that Fairfield told him he looked down from the wheel house and saw Burnham cross from the dredge to the barge and take a few steps along the walkway toward the stern of the barge. Tr. 79. As Burnham began to move toward the stern of the barge another vessel came upriver toward the tug. Fairfield turned to see how close the vessel was to the tug. When he looked back at the barge, he did not

³ Stone’s office is located at the company’s complex in Ledbetter, Kentucky. Tr. 103-104. Jewell knew Stone from his inspections of another dredge owned and operated by Hunter. He also knew him from Stone’s work with the Holmes Safety Association, one of the nation’s oldest mine safety organizations. Tr. 100. Jewell described Stone as intent on making sure the company’s dredges are operated in a safe manner. Tr. 100-101. Jewell agreed that prior to December 10 his experience with the company had been free of “significant” safety issues and that he found the company to be “very cooperative.” Tr. 101.

⁴ As Jewell understood it, to take a draft reading Burnham had to cross from the port side of the dredge onto the immediately adjacent starboard side of the barge, travel the barge walkway to the stern, and walk across the back of the stern in order to then read the numbers on the port side of the barge. Tr. 75; *see* Gov’t Exh 20 at 1. Asked why Burnham had to cross to the barge to take the draft reading, and why Burnham did not remain on the dredge and read the draft mark numbers on the starboard side, Jewell replied that the only numbers visible to Burnham were on the port side of the barge. Tr. 77. On a diagram of the barge Jewell marked the spot at which Burnham would have stood to take the reading. Gov’t Exh. 20 at 1 (*see* red “x” under words “Stern Travel Way”). Jewell stated that when Burnham reached the port side of the barge (also referred to as “the outboard side”) he would have had to position himself above the draft marks on the port side, lean out over the river and use his cap lamp to illuminate the hash draft so he could read the numbers. Tr. 77.

see Burnham.⁵ According to Jewell, less than a minute later the pilot saw “a light in the water and that’s when [Fairfield] hollered on the [tug’s] radio[,] [‘]man overboard[’].”⁶ Tr. 86.

Turning again to the details of the investigation, Jewell stated that although it felt like it was below zero when he reached the dredge, the temperature could have been in the 20s Fahrenheit. Tr. 97. In addition to inspecting the dredge, Jewell looked at the adjacent MEM 611 barge. Tr. 64-65. Although he never set foot on the barge, from his vantage point on the dredge Jewell noted a buildup of “snow and frozen snow” on the deck of the barge. When asked why he did not transfer to the barge, Jewell stated, “I didn’t want to slip and fall in the river myself.” Tr. 61. He added, “I had a lot of clothes on. There’s not railings . . . all the way around it. It’s a narrow path with a buildup of snow, frozen material. So I didn’t see that I needed to [get on the barge].” Tr. 61-62. Jewell made his observations of the barge around 7:30 a.m. Tr. 62. He took numerous photographs of the dredge and the barge. Most of the photographs were taken between 7:30 a.m. and 9:00 a.m. on the morning of December 10. Tr. 62.

Jewell noted draft marks at the bow and stern of the barge on both sides. The draft marks were in four columns, one column at each end of the barge. The marks were numbered one through nine. The numbered lines indicated the draft of the barge and whether the barge was riding level in the water.⁷

Jewell also testified that there was ice on the dredge, primarily in the screening area. Tr. 95-96. As for the barge, uneven snow covered its walkways. Gov’t Exh. 2 at 7; Gov’t Exh. 20; Tr. 68. The snow also covered ropes and other items that lay on the barge’s deck and walkways. Some of the items protruded up through the snow. Gov’t Exh. 2 at 5; Gov’t Exh. 2 at 4, 5 and 21; Tr. 67-68, 72. Jewell thought that there was probably ice under the snow, but he was not sure because he never walked on the barge. Tr. 97-98. As a result, Jewell had no firsthand experience as to what it was like to walk on the barge. *Id.* But Jewell believed that others, besides Burnham, had walked on the barge because there were several sets of footprints in the snow. Tr. 99.

In addition to his observations about weather, the river and the conditions on the dredge and barge, Jewell testified about the government’s training requirements for miners. He described annual refresher training as general training and task training as training that is “more specific to the job.” Tr. 42. In Jewell’s view, if weather conditions change new task training is

⁵ On the diagram of the barge Jewell marked with pink “Xs” the spots where he understood Mr. Burnham was last seen by the pilot. Tr. 80; Gov’t Exh. 20 at 1.

⁶ When working at night Hunter’s employees wore a portable light secured around their heads with an elastic strip over their caps. Tr. 86.

⁷ In fact, the barge was not level. Later in the trial Stone estimated that the barge was about 16 degrees out of level at the time of Burnham’s disappearance. Tr. 409. In addition, because the barge was loaded from back to front, Stone agreed that the barge experienced “considerable sloping . . . from front to back.” Tr. 410.

required. Tr. 102. Asked why, Jewell stated, "Because mining conditions have changed and procedures have to change." *Id.*

In Jewell's opinion an operator is responsible for ensuring that its safety policies and guidelines are readily available to miners and are enforced. Tr. 43. Jewell stated that when he was a supervisor, he ensured compliance by "put[ting] boots on the ground." Tr. 43. He said, "I had to go out and physically look and see if people were performing their task." Tr. 44. If miners were not abiding by safety rules or were engaging in unsafe procedures, Jewell spoke with the miners and "tried to get them to change their habits." *Id.* Jewell agreed that "in terms of regular safety practices, [his] typical progression would be first to counsel [an employee for unsafe practices and then to] remind the employee of the safety rule and the safety requirement[.]" Tr. 93. While the most usual course was to talk with the employee and remind him or her of the disregarded safety requirement, suspension and ultimately termination could follow if the employee proved to be a serial offender. Tr. 93-94

Jewell was not MSHA's lead investigator, Sonia Conway was. Jewell testified that between the time he arrived at the facility and the time Conway arrived, conditions on the dredge and barge changed. Tr. 82. Before Conway reached the facility company officials informed Jewell that they wanted to use the dredge and barge as staging areas for the continuing rescue and recovery effort. Jewell replied that first the company "needed to do some cleanup and thaw out and secure the scene so that no one else would possibly be in danger of . . . slick conditions." Tr. 82-83. When the temperature had risen above freezing Jewell allowed the company to eliminate the ice on the dredge and the snow on the barge by washing them off because, as Jewell put it, the decks of the dredge and barge were "pretty treacherous . . . [and] slick . . . [a]nd [he] did not want another accident [to] occur." *Id.*

Jewell testified that as part of the investigation he looked into the matter of whether or not Burnham was wearing a life jacket when he disappeared. Jewell stated that he asked one of Burnham's coworkers if Burnham had a life jacket on before he entered the dredge's sample room. The employee stated that Burnham did. Jewell then asked if the life jacket was assigned to Burnham. Tr. 84. The employee stated that he was not sure. *Id.* Jewell saw a life jacket sitting on a chair in the sample room. The jacket was next to Burnham's lunch box. Jewell photographed the chair, lunch box and life jacket. Gov't Exh. 2 at 12. Jewell stated that he could not determine if the life jacket in the photograph was the jacket Burnham was wearing upon going into the sample room. Tr. 85. Jewell also did not know if employees who worked on the dredge were required to leave their life jackets on when they took breaks in the sample room. *Id.*

Jewell testified that Conway arrived at the facility around 11:00 a.m. Tr. 86. Jewell met with Conway and briefed her. He told her about the interviews he conducted and that "Burnham had not been recovered, that he was missing [, and] . . . that [Jewell] had . . . [allowed the dredge and barge to be] clean[ed] up for rescue efforts." Tr. 87. Jewell also introduced Conway to Stone and to another management official. Tr. 87-88.

Sonia Conway

Sonia Conway, MSHA's primary investigator, testified that her goal was "to get an overview of what happened and . . . to narrow it down to . . . what caused or contributed to the accident" so the agency could educate the public and prevent future accidents. Tr. 108 – 109. Prior to the incident involving Burnham, Conway had investigated four fatal accidents at different metal/nonmetal facilities. Tr. 101. Before being employed by MSHA, Conway worked for 12 years as the safety director for a construction company, a company that also operated quarries. She investigated accidents for the company and she provided training, including new task training, to the company's miners. Tr. 111-13. Conway also conducted workplace examinations. Tr. 113.

Conway testified that on the morning of December 10, 2014, she received a call at her office in Lexington, Kentucky. The person calling was an MSHA official who asked Conway to go immediately to Hunter's Ohio River facility because, "someone had fallen into the water." Tr. 117. Conway never had been to the facility. *Id.*

She arrived around 11:00 a.m. on December 10 and found that the company was still searching for Burnham. Tr. 132. She described the air temperature as "cold" and the water temperature as 41 degrees Fahrenheit. Tr. 133. It was not snowing, but it had snowed during the night. *Id.* Conway first met Jewell and reviewed the information he had collected. She also looked at his photographs. Jewell introduced her to Stone with whom she met. She then interviewed some of Hunter's miners. She asked them what was going on when Burnham disappeared. Tr. 137. She learned that he was last seen between 2:30 a.m. and 2:45 a.m. She also learned it was cold that night and the river was rising and moving swiftly. Tr. 134.

The snow and/or ice that had been on the barge was no longer present when Conway arrived, but Conway remembered seeing sand in the barge's hold. Tr. 135-36. The sand was piled at the outboard side corner near the stern. Tr. 136, 138; Gov't Exh. 20a. She described the barge as "leaning away from the dredge at a pretty good angle." Tr. 136. The lean was caused by the sand being unevenly distributed.⁸ *Id.*

According to Conway, Eddie Henson, a deck hand on the dredge on the night of December 9-10, told her that there was snow on the barge's walkways that night. Tr. 144-45, 406. Conway also stated that tug pilot, Roger Fairfield, told her that company employees occasionally traveled along snow covered barge walkways (Tr. 147-48) and that they sometimes did so when they were assigned to take draft readings. Conway understood that after transferring to the MEM 611 barge, an employee who was asked to take a draft reading walked along the inboard walkway to the stern and then crossed the stern toward the outboard walkway. After

⁸ The court interprets this to mean that anyone using the walkway on the side of the barge closest to the dredge would tend to slide into the barge not away from it toward the water. However, at the stern anyone using the walkway would be traveling from the higher to the lower side of the barge, which would tend to cause someone who slipped or tripped to fall or slide toward the water on the outboard side of the barge. Tr. 136-38; Gov't Exh. 20a.

reaching the outboard walkway above the draft marks, the employee grabbed the coaming [⁹] on the side of the barge, leaned out and down over the water and, if it was dark, shined the light from his or her cap lamp on the draft marks and, using a portable radio the employee carried, called the numbers to the dredge operator.¹⁰ Tr. 162-64. Conway also was told that work assignments involving other tasks on the barge were common. The assignments involved collecting samples of the dredged material and tying up the barge. 173-74. In fact, she maintained that it was not unusual for miners to travel a barge's walkways up to 30 times during the barge loading process. According to Conway, Burnham was not the only employee to use the walkways of the barge during the night he disappeared. She learned that prior to Burnham crossing to the barge, at least one other employee crossed from the dredge and walked on the walkways. Tr. 171.

With regard to working on a dredge or barge when they were snow covered, Conway recalled that Robert Douglas, the dredge foreman, told her the barge he loaded prior to loading barge MEM 611 also was snow covered (Tr. 149), and he stated that he was "used to" snow on barges and he did not think snow and/or ice on the barges was a hazard.¹¹ Tr. 149-50. In any event, Conway understood Douglas to be saying that "it was not uncommon to get . . . the barges . . . with snow and/or ice on them." Tr. 150. And Conway concluded that when snow covered barges had to be used by Hunter, the company's attitude was "business as normal." Tr. 151. Conway believed Hunter's employees "didn't appear to recognize the hazard of snow and/or ice on the walkways." *Id.* When asked about her conclusion as to what had happened to Burnham, Conway answered that, "It appears . . . [Burnham] . . . slipped and fell into the water." Tr. 152.

Conway explained that after the investigation, a final report on the events was completed by MSHA. Tr. 153; Gov't Exh. 8. The report listed among the causes of the assumed accident the failure of Hunter's management to provide a safe working environment for its employees. Conway summarized the report's causal findings as, "Specifically, the operator failed to identify

⁹ A "coaming" is defined as a "raised rim or border around an opening, as in a ship's deck, designed to keep out water." *The American Heritage Dictionary of the English Language Fourth Edition*, Houghton Mifflin Harcourt (2009) at 353. See Gov't Exh. 8 at 2.

¹⁰ Conway indicated the location of the draft numbers on a diagram of Barge MEM 611 (Tr. 159; Gov't Exh. 20a (draft numbers circled in green)), and she marked with a green "X" where she believed an employee stood to take a draft reading. Tr. 160; Gov't Exh. 8a. Conway thought draft readings also could be taken from a boat obviating the need for an employee to travel along a barge's walkway (Tr. 174), but Fairfield disagreed. Tr. 481. Everyone agreed, however, that the most "common practice" was for employees to travel along the barge's walkways to take the readings.

¹¹ Stone may have had a different opinion. When asked about a photograph of the barge walkways taken the morning of Burnham's disappearance, but before the snow was removed, he seemed to agree that the walkways on the MEM 611 barge were hazardous. Tr. 412. He stated, "Well, the rigging and a cable certainly is there and I see clumps of frozen material. I would still prefer walking in the snow than I would on straight ice. But are there hazards out there, yes, absolutely." *Id.*

the hazard of snow and ice accumulation on the decking [of the barge]. Additionally, they [*sic.*] failed to enforce the life jacket policy.” Tr. 156; *see* Gov’t Exh. 8 at 9-10

On February 25, 2014, and as the result of the investigation including her interviews with both rank and file employees and management personnel, Conway issued the subject citations and orders to the company. Tr. 165; 227-28, 267; Gov’t Exhs. 9, 15, 12. Asked if the enforcement actions were based on the assumption that Burnham slipped on the barge and fell into the water due to snow on the barge, Conway responded, “Not necessarily just the snow, no.” Tr. 264. However, she stated she believed the snow and/or ice on the walkway of the barge was “a contributing factor.” Tr. 170. Conway came to this conclusion from talking with Hunter’s employees and from looking at photographs taken by Jewell. *Id.*

Conway found Hunter in violation of the standard requiring regularly used walkways to be sanded, salted or cleared of snow and ice as soon as practicable. She stated that even if only snow was present on the walkways (as opposed to snow and ice), she would have issued a citation for the same alleged violation and with the same findings (Tr. 268) because Hunter did not sand or salt the walkways of the barge prior to Burnham’s disappearance. *Id.* Nor did Hunter clear the snow from the walkways. Tr. 177. Conway stated; “[P]rior to putting someone in harm’s way, [Hunter] should have cleaned, salted or sanded or found a different way to get the draft readings so there wouldn’t be potential exposures to hazards.” *Id.* Or, Hunter should have restricted access to the walkways.¹² Tr. 178. Hunter’s failure to sand, salt or clear the walkways on the barge subjected those traveling them to the hazards of slipping, tripping or falling.¹³ Tr. 179. In Conway’s opinion, Hunter’s employees “could easily slip and fall.” Tr. 180. But Conway’s primary concern was that Burnham was sent to do a task under conditions that caused his disappearance and presumed death. She stated, “With the conditions that existed, the fact that [Burnham] was last seen on the barge, and . . . the way the barge was tilted, we came to the conclusion that he slipped off of [the barge] due to the ice . . . and/or snow.” Tr. 181-82.

Conway emphasized that it was not just Burnham who was endangered. Through her interviews with others she determined some employees lacked proper training and that some were subject to the same hazards as Burnham. Tr. 266. As she put it, they faced “the same . . . slip, trip and/or fall hazard into the water.” Tr. 182.

Conway thought that given the conditions it was reasonably likely an employee would fall into the water. “The fact that [the employees were] working at nighttime, the fact that [the

¹² She added that the fact Burnham may not have been wearing a lifejacket and that he lacked specific task training were also contributing factors to his disappearance and presumed death (Tr. 178), and while other causes for Burnham’s disappearance were considered, there was no evidence they were a factor. (For example, Burnham had no history of possible contributory medical conditions, and there was no hint that Burnham was in financial difficulty or experienced social problems. Tr. 272.)

¹³ Conway stated, “You had snow and/or ice on the walkways covering part of the way where miners were expected to walk. [T]hey couldn’t see what may be underneath it. But also [there was] the hazard of slipping.” Tr. 179.

barge's walkway was] a regularly used travelway and [that the walkway] was in that [snow covered] condition [and] that the miners would be expected to travel it" contributed to the likelihood Tr. 183. Further, when an employee fell into the water Conway expected the employee would suffer a "very, very serious injury and more than likely a fatality based on the river and cold temperatures."¹⁴ Tr. 184.

Conway was asked by the Secretary's counsel why she found Hunter's negligence to be "high," and she answered that in speaking with Hunter's employees:

[T]hey didn't believe snow and ice accumulation[s] were hazardous. They had not been instructed to remove or sand or salt snow and/or ice prior to traveling [on the barge] and there were no restriction[s]. Nobody had restricted access to that area. And to my knowledge there was no policy on prior to walking on a barge that had snow and/or ice, that they were supposed to . . . clean it or sand it or salt it.

Tr. 186.

In sum, Conway believed no effort was made by Hunter to clear the barge's walkways of snow and/or ice. Tr. 186-87. She stated that it was "common" for Hunter's employees to walk on snow and/or ice, and none of the employees to whom Conway talked told her they were instructed to remove snow and/or ice from a barge. Tr. 187-88. In Conway's opinion Douglas, the foreman of the crew of which Burnham was a part, was particularly culpable. A reasonably prudent person would have "recognized the hazard and addressed it." Tr. 244. In addition, she felt that Douglas's supervisors had "reason to know." *Id.*

Further, she believed that the alleged violation was due to the company's unwarrantable failure because, "[I]t was obvious. It was extensive. It ha[d] existed not only on . . . [the subject] barge . . . [but] on the barge prior to, [and in addition a] person in the supervisory position [*i.e.*, Douglas] . . . saw it."¹⁵ Tr. 245.

Conway also issued a citation to Hunter for its failure to task train employees on "what was going to make [the employees] slip or fall." Tr. 188. She believed that Hunter "failed to provide safe work procedures that addressed snow and ice accumulation on deck surfaces and the additional risk it poses." Tr. 188-89; *see* Gov't Exh. 15. She stated,

¹⁴ She believed that in addition to Burnham, two or three other miners might have been affected. They typically took draft readings. Tr. 185. However, Conway agreed she only knew for sure of one other miner who had been on the MEM 611 barge before Burnham. *Id.*

¹⁵ Conway acknowledged that the regulation she cited required the snow and/or ice to be neutralized (sanded, salted or cleared) "as soon as practicable." To Conway this meant "when you see it, you address it and don't allow people to walk on it if it's hazardous." Tr. 248-49. In her view, if it was going to take time to get needed sand or salt to apply to the walkways, Hunter should have restricted access to the area to eliminate the hazard the condition posed to employees. *Id.*

I issued the [c]itation because when . . . Burnham and possibly other miners went through the task training, the conditions changed after they went through the training And I was given no [indication] that . . . [the employees], as a part of their training, received additional training to recognize those conditions . . . and the . . . hazard associated with . . . [the conditions] while performing their task.

Tr. 152.

Conway maintained if an employee is assigned a new task or a task that creates new hazards and he or she has not been trained in how to avoid the hazards, then, new task training is required.¹⁶ Tr. 257. She testified that whether or not new task training is required “depend[s] on if there are hazards Did the weather create a different hazard than what they had been trained and exposed to?” Tr. 257. If so, employees needed new training. *Id.*

Conway agreed that Burnham initially was given adequate new miner and task training. Tr. 191. However, she maintained that when the conditions changed and Burnham’s job required him to take draft readings in the presence of accumulated snow and/or ice, “[T]he task training should have been revised in order to train him on how to deal with the snow and/or ice on [the barge] walkways.” *Id.*, see also Tr. 195. Conway noted that 30 C.F.R. § 47.7(b) states, “If a change occurs in a miner’s assigned task that affects the . . . safety risks encountered by the miner . . . [the operator] must provide the miner with [task] training . . . that addresses the change.”

In Conway’s view task training is not the same as annual refresher training or new miner training. Unlike annual refresher training and new miner training which cover numerous topics, task training requires the operator to ensure its employee is trained “in the specific task that [the employee] is expected to conduct.” Tr. 192. The training must be such that the employee “will demonstrate proficiency in [the] particular task.” Tr. 193. In Conway’s opinion, new task training applies to “[a]ny task [an employee is] asked to perform that [the employee] has not done in the past for the operator.” Tr. 194. Conway emphasized again and again that even if the employee has previously performed the task, “if conditions change” or if the operator sees the employee doing the task in an unsafe manner, task training must be given again. *Id.* Conway believed Hunter’s employees were not taking draft readings in a safe manner when snow and/or ice was present on barge walkways. In her view, Hunter either knew or should have known this and should have trained the employees on the dredge in hazard recognition associated with job performance. Tr. 195, 196. In short, Hunter should have retrained all of the dredge employees, including Burnham, because the dredge employees “did not seem to recognize the hazard of walking on the snow and ice while on the barge.” Tr. 195.

Conway testified that the failure to task train the employees to recognize the hazards associated with winter weather conditions created the danger that the employees would slip and

¹⁶ She also stated that if the conditions of a regular task change, an operator is required to provide its employee with new task training that takes account of the changed conditions, and if an employee has done a task before but cannot demonstrate proficiency in the task, an operator is required to provide new task training. Tr. 269.

fall from the barge while performing their draft reading tasks. Tr. 197. From her interviews with miners, Conway concluded the company simply “did not recognize the hazard.” Tr. 245. Hunter’s employees with whom she spoke had a “lack of knowledge on how to deal with the snow and/or ice on the walkways.” Tr. 199. The employees should have been instructed in how to take a draft reading in the presence of snow and/or ice in a way that did not subject them to a slip and fall hazard. Or, if there was not a hazard free way to perform the task in the presence of the snow and/or ice, the employees should have been trained how to ameliorate the hazard before they began the process of taking the reading.¹⁷ *Id.* As she put it, “[e]ither don’t expose yourself [to the hazards] or address the hazards that are there prior to performing . . . the task[.]” *Id.* In Conway’s view, the fact that Burnham was not trained in how to properly take a draft reading in the presence of snow and/or ice directly contributed to or caused the accident that befell him. Tr. 198. She noted that the same hazards apply to taking samples of dredged material since taking samples, like taking draft readings, requires an employee to use the barge’s walkways. Tr. 200-01.

Conway found that the company was highly negligent. She stated, “They didn’t instruct the [employees] to clear sand, [or] salt the snow and ice prior to traveling those areas.” Tr. 201. Conway maintained that when she showed management officials pictures of snow and/or ice on the barge walkways, “[S]ome of the management said yes, it was a hazard. Others said no, it was not.” *Id.* She described the company’s position as “conflicted.” *Id.* However, Conway was certain that Hunter’s employees were not told to clean snow and/or ice from barges. Tr. 203. She also was certain that Hunter made no effort to new task train miners in safe ways to work in the presence of snow and/or ice. *Id.* Management officials should have been aware of the requirement to provide task training, “if there’s a change in conditions.” *Id.* She added, “And [based on] the fact that they operated in winter months, and some of these [employees] were hired . . . [in] warmer months, when the conditions changed, I would think that . . . [Hunter’s officials] would revisit the task training.” *Id.*

As a result of her investigation Conway also issued a citation to Hunter for its failure to include the MEM 611 barge in its workplace examinations. Tr. 208. Although a workplace examination was conducted on the shift during which Burnham disappeared and on all other working shifts as well, barges were not included in the examinations. Tr. 208-09. Conway stated that the purpose of a workplace examination is “to identify hazards that potentially contribute or cause an injury and to address those hazards promptly.” Tr. 209. She added that if the hazards cannot be addressed in a timely fashion, [the operator should] restrict access . . . to prevent potential exposure to the hazards.” *Id.* The operator is required “to do something to eliminate the hazard promptly.” Tr. 209-10. In Conway’s view, the condition of the walkways on the MEM 611 barge presented a hazard that should have been, but was not recognized, reported and corrected. Tr. 210. According to Conway, Hunter’s management “did not appear to understand that the barge walkways in that condition [*i.e.*, covered with snow and/or ice] created a hazard.” *Id.* The hazard was one of slipping, tripping and falling, a hazard that Conway believed was reasonably likely to occur and a hazard that she believed was reasonably likely to result in a

¹⁷ For example, Stone admitted that under some circumstances a draft reading could be taken from a tug boat and that if taken this way, the need for a miner to travel on the barge to take a reading was obviated. Tr. 388-89. However, he noted that a tug always was not available. At times it did not stay at the dredge after it delivered a barge. Tr. 389.

serious injury or a fatality.¹⁸ In fact, Conway concluded the hazard was a “contributing factor to [Burnham] falling into the water.” Tr. 211. Had Hunter complied with the standard, it would have restricted access to the barge walkways or it would have eliminated the hazard and thus eliminated the likelihood of an employee slipping or tripping on the barge walkways. *Id.*

Conway also testified that she issued an order to Hunter because she concluded employees did not wear life jackets when exposed to the hazards of falling into the water. Tr. 211-12; Gov’t Exh. 12. Conway stated that she believed Burnham was not wearing a life jacket when he transferred from the dredge to the barge because the life jacket she thought was Burnham’s was sitting on a chair near his lunch box and because “no one saw [Burnham] floating.”¹⁹ Tr. 215-16.

Prior to disappearing Burnham was in the breakroom. Tr. 216. Conway was told that miners often took off their life jackets when in the breakroom. *Id.* Conway acknowledged that in addition to the life jacket sitting near the lunch box, other life jackets were available in the breakroom. Tr. 232, 267.

Conway calculated to be dragged down while wearing the kind of life jacket assigned to Burnham, a person would have to weigh 350 pounds. Tr. 219. Therefore, Conway believed if Burnham had worn a life jacket he would have floated, and no one saw Burnham floating.²⁰ Tr. 267. Although Hunter assigned life jackets to miners and typically miners wore the life jackets they were assigned, Conway admitted that she could not determine with certainty if a life jacket was missing because there were extra life jackets on the dredge. Tr. 219-20.

Conway did not review the company’s records to determine if Hunter enforced its life jacket requirement through discipline.²¹ *Id.* However, she saw nothing that led her to believe Hunter ever had taken disciplinary action against a miner for failing to wear a life jacket despite

¹⁸ Conway noted the lack of handrails around the barge walkways as well as the icy temperature of the water in December. Tr. 210-11.

¹⁹ Although an extensive search was conducted on the river and along its banks after the presumed accident, a life jacket that Burnham might have been wearing but lost once he was in the water was not found. Tr. 271.

²⁰ In fact, Conway also testified that winter clothing Burnham wore would have helped him float rather than drag him down because it would have trapped air and increased the buoyancy provided by the life jacket. Tr. 217, 401.

²¹ Hunter had no written progressive discipline policy at its Ohio River operation. Tr. 403. The superintendent imposed discipline either on his own or on the recommendation of the job foreman. Tr. 402. With regard to the subject dredge, if a dredge foreman, for example, Douglas, recommended discipline for one of the members of his crew, the superintendent decided whether to implement the recommendation. *Id.*

the fact she was told that Hunter officials were aware employees at times did not wear them.²² Tr. 221-22.

While life jackets were required to be worn by the company whenever there was a danger of falling into the water, if a management official saw a miner without a life jacket the miner was given a hand signal to put one on.²³ Tr. 236-37. However, based on the interviews she conducted and on the fact that Burnham was not found, she concluded that Hunter failed to effectively enforce its life jacket policy. Tr. 225. Conway testified that a non-compliant employee was likely to drown if he or she fell into the river. Tr. 222.

In addition, she found that the company was highly negligent. Management officials were aware that at times employees did not wear life jackets, yet Hunter did not discipline those employees. Tr. 226. As Conway put it, “[E]nforcement was very lax.” *Id.*

Despite her belief that the company did not effectively enforce its policy, Conway acknowledged that when she interviewed Fairfield he told her that “most times” when he saw employees on the company’s dredges they were wearing life jackets. Tr. 231. Conway also agreed that when she spoke with miner Eddie Henson who worked on the dredge the night Burnham disappeared, Henson stated that he, himself, was wearing a life jacket and that when she asked Henson if he ever saw Burnham on the dredge without a lifejacket, Henson said, “No.” Tr. 228-30. Further, she admitted that in her contemporaneous notes she made no reference to the company failure to enforce its life jacket rule. Tr. 231. Finally, when Conway asked Story, a deck hand on the Patsy M, if he knew of employees not wearing life jackets, she recalled him saying that employees must wear life jackets if they are in places where there was a danger of falling into the water. Tr. 236.

Robert Stone

Robert Stone is Hunter’s manager for sales and compliance. He markets Hunter’s products and interfaces with government regulatory agencies, including MSHA. Tr. 301. Stone is also responsible for health and safety training, including the training of new employees and the annual refresher training of all employees. Further, he reviews the company’s task training and its hazard recognition training. Tr. 302. Stone has worked for Hunter since September 2010. Prior to that, he worked as the general manager for Irving Materials, Inc. (“IMI”), the previous owner of Hunter’s various facilities. Tr. 302-03. Stone had the same responsibilities when he worked for IMI as he has for Hunter. Tr. 303. Stone also has extensive experience with other mining companies. He began training miners when he worked for those companies and when he started working for IMI he was responsible for initiating IMI’s miner training programs. *Id.* All

²² For example, she was told it was common for some employees to relieve themselves off the side of the dredge and not wear their life jackets when doing so. Tr. 223; Tr. 232-33.

²³ Stone testified that the first time a miner was found without a life jacket he or she was reminded orally or through hand signals to comply. Tr. 403. If it happened again, the employee was “told a second time.” *Id.* According to Stone, if it happened a third time, the employee “would be brought in and counseled.” *Id.* If an employee outright refused to wear a life jacket, he or she “would automatically receive [a written warning.]” Tr. 404-05.

told, Stone has worked at Hunter's various locations, including its dredges, for 19 years, and for most of that time he has been responsible for providing new miner training to employees. Tr. 304.

Stone described Hunter's new miner training:

When a decision is made to hire . . . a new individual, the first . . . day is spent with me. I'm given [a new individual's] application and I review that application and make a determination on the type of training that . . . [person is] going to be required to receive. And then I spend eight hours talking to [the individual] about introduction to the workplace and about . . . our training plan and [I follow] through with the requirements of our training plan. I try to meet the minimums in that eight, nine hour period, and then I prepare the forms [that are] sent with the individual when [he or she goes] out to the jobsite so that a competent person can complete the training.

Tr. 304-305. Job site training (also known as "task training") can take up to a year as employees work through each of the tasks their jobs require.²⁴ Tr. 305-06.

Stone was asked if Hunter provided inclement weather training to workers on its dredges and vessels including barges. Stone explained that training to work in adverse weather is "included in the indoctrination training." Tr. 306. He stated, "I have a set pattern that I use to go through the indoctrination training. And it includes lectures, it includes films and it includes demonstrations. And several of [the] demonstrations include caveats for inclement weather." Tr. 306-307. Stone stated:

My position is that an employee's not fully trained until they cycle through a whole year. And a whole year involv[ing] changing of weather conditions but also the cycle of the river conditions. So my position is that people . . . aren't completed in [their] training until they go through the whole river cycle. So yes, we talk to them or ask our people to talk to them about these changes. In the indoctrination training I make a point to tell people that their work environment is never the same two days in a row. And I allude to changes in the river conditions and the weather conditions that can affect their job environment.

²⁴ Stone described the process as follows:

[Y]ou can take a task training form, send it with the individual, and as they work through the tasks that they're being shown, a task training form can actually be out there on the job for as long as a year before we need to see [it] back in the office.

Tr. 305-06. Once an individual has been trained in all of the tasks his or her job entails the task training form is returned to the company's office, but until then, it is kept at the job site. Tr. 306; *See also* Tr. 330-31.

Tr. 331-32. He added, “We talk about snow, we talk about ice, but we also talk about fog and we talk about high winds [and] lightning.” Tr. 307. Although snow and ice “may not be a line item noted on our task forms . . . it’s talked about” during an employee’s indoctrination training. Tr. 307. He stated, “[T]he information that I provide in the indoctrination training . . . warns people about snow and ice conditions. [The training] warns people to move slowly, to move deliberately, to walk flat footed, [and to] take short steps.” Tr. 307; *see also* Tr. 390.

During indoctrination training Stone testified he also shows a 28 minute film on working in a marine environment. He stated, “and there’s excerpts in [the film] about inclement weather.” Tr. 334. The film is titled, “Slips, Trips and Falls: Don’t Let It Get You Down.” 334-35. According to Stone, “There are scenes of towing vessels in wintertime with ice and snow on decks. And there’s counseling in the film about walking flat-footed, walking deliberately. And there’s also special precaution given about when you come from outside back inside the boat, [where] ice and snow on shoes can cause falls in the interior.” Tr. 335. The training in the film is intended for those working on Hunter’s dredges. *Id.*

Burnham applied to work for Hunter on June 11, 2014, but he was not hired until October. Tr. 320; Hunter Exh. 4. Prior to being hired by Hunter, Burnham worked for Calver City Terminal (“Calver City”), a firm that transloads coal from railcars to barges. Tr. 322. Prior to working for Calver City Burnham worked for Marquette Transportation, where he was responsible for the crew that put barges together as units to be towed. He also did maintenance work on and around boats. Tr. 322-23. Marquette Transportation is a river towing company that operates large tow boats year-round along the Ohio and Mississippi rivers. Tr. 323. Prior to working for Marquette Transportation he worked for United Barge Line (“United”), another company that tows barges year-round on inland rivers. Tr. 324. For United he put barges together as units and did boat maintenance work, just as he did for Marquette Transportation. *Id.* Finally, before United, Burnham worked as a deckhand for Tennessee Valley Towing. Tr. 325. All told, before coming to Hunter, Burnham had approximately five years of experience working year-round on tow boats and barges. Tr. 326. However, he only had three months of MSHA-related experience. Tr. 383. Stone agreed that Marquette Transportation, United Barge, and Tennessee Valley Towing would not have given MSHA training to Burnham. Tr. 384.

Burnham signed his new employee training form on October 22. Tr. 334; Hunter Exh. 10. Burnham’s on-the-job new miner training was given by Robert Douglas, Burnham’s supervisor. It occurred between October 28 and November 7. Tr. 331, 385; Hunter Exh. 9. Training for the dredge was given to Burnham by Robert Douglas on October 28, and the training form was signed by Stone on November 11. Tr. 348; Hunter Exh. 13. The dredge training included the need to be alert for tripping hazards and to use extreme caution near the dredge’s edges. Tr. 338; Hunter Exh. 11.

Burnham also received experienced miner training. According to Stone, during that training, issues relating to working in winter conditions were covered, including working when snow or ice was present on the barge. Tr. 349-50; Hunter Exh. 14. Moreover, Burnham received newly employed experienced miner training when he worked for Southern Coal Handling

("SCH") before coming to work for Hunter.²⁵ Tr. 343; Hunter Exh. 12. Further, at Hunter, he received new task training. This included the specific tasks involved in working with a barge when it was towed to a dredge, for example, properly positioning a barge that was to be loaded. Tr. 352; Hunter Exh. 15. Stone was asked whether Hunter provided new training for specific tasks every time there was a change in weather conditions, and Stone replied, "We do not." Tr. 352. He added that while Hunter's trainers talk to miners new to various jobs about the hazards posed by snow, ice, fog, and lightening, "It would be terribly onerous to document every different condition." Tr. 353.

Regarding the presence of snow and/or ice on working surfaces, Stone maintained that "a lot" of the training films emphasize "that you try to abate the [snow and ice] condition by removing the ice and snow, putting some sort of a deicing agent down." Tr. 308. The recommended deicing agents are salt or sand, and Stone added, "[W]e use sand wherever possible."²⁶ *Id.* Stone thought it was a good practice to use sand on iced-over walkways. Tr. 393-94. Further, during annual refresher training, training that Burnham would have received had he not disappeared, the need to take note of icy surfaces would have been emphasized. Tr. 378; Hunter Exh. 19. Stone agreed, however, that Hunter's training while recommending caution to miners did not require them to salt or sand icy and/or snow covered surfaces. Tr. 398.

According to Stone, the company's policy with regard to working in snow conditions "depend[s] on the conditions." Tr. 308.

If there is a circumstance where we're going to get a little sunlight, for example, [we will] take a hose and wash [the snow and/or ice] off, because the sun on the metal deck . . . [of the] barge structure . . . will actually dry off [the water], and that [was] apparent after [the] MEM 611 was cleaned that morning. But overnight it's safer to walk in the snow because any water you put on at that time is simply going to freeze and reduce the snow to ice.

Tr. 308-09; *see also* Tr. 396.

Therefore, in Stone's view, whether or not to hose down snow with water depends on the temperature. For example, if the temperature is in the mid-twenties (Fahrenheit), Stone believed, "if you wash a deck down, you're simply going to [exacerbate] the condition and it's going to turn to ice. And it would be a greater hazard than walking on snow." Tr. 310. In fact, temperatures during the evening and night of December 9 and 10 were in the mid to high

²⁵ SCH is a coal handling facility and the training Burnham received was coal facility specific. Tr. 392-93. Burnham was hired by SCH as a newly employed inexperienced miner. Tr. 393. He worked for SCH for three months before he was hired by Hunter. *Id.*

²⁶ Although Stone testified that "typically" ice melt was kept on a dredge, there was no salt or other ice melt on Dredge IV when Burnham disappeared, even though Stone agreed there likely was ice on the dredge. Tr. 390, Tr. 397-98, 411.

twenties Fahrenheit. Tr. 327-28; Gov't Exhs. 7, 8. There also was a light snow fall, which continued into the early morning after Burnham disappeared.²⁷ Tr. 329-30.

Stone also testified concerning the company's policy regarding the wearing of life jackets, to wit, "that life jackets are to be worn at any time the potential exists for [an] individual to fall [into] the water." Tr. 310, *see also* Tr. 313. The policy is explained to employees during indoctrination training. It is reinforced during site hazard training, and it is emphasized in site specific training for the dredge.²⁸ Tr. 338; Hunter Exh. 11. In addition, Stone testified that he showed a film entitled "Minutes To Live" at all of Hunter's job sites. The film emphasized the wearing of life jackets and "how to survive falling in the river."²⁹ Tr. 339.

Stone recalled that in addition to being highlighted during training, the company's life jacket policy is reviewed when the company experiences a "stand down situation."³⁰ Tr. 310. However, Stone noted that even if an employee is wearing a life jacket, if he or she falls overboard the employee may not survive.³¹ Tr. 340.

²⁷ The temperature during the shift Burnham worked on December 9 and 10 was 29 degrees Fahrenheit at the start of the shift. By 11:00 p.m. on December 9, it fell to 26 degrees. Tr. 327; *see also* Hunter Exh. 7. By 3:00 a.m. on December 10, the temperature was 24 degrees. Tr. 328; Hunter Exh. 8.

²⁸ However, the site specific training given by Stone consisted solely of class room type training. Douglas is the person who actually supervised Burnham's carrying out of the various tasks for which he was trained. Tr. 391-92.

²⁹ Stone was so impressed by the film he reduced its contents to a written outline and every newly hired miner, including Burnham, was given a copy of the outline to keep and review. Tr. 355, 366; Hunter Exh. 17. Stone also added his own comments to the outline. Tr. 357-58. The comments included the danger posed by wet and icy decks and a reminder of the importance of wearing life jackets. Tr. 358-59; Hunter Exh. 17.

³⁰ A "stand-down" is when an unusual event occurs, for example, when there is exceptionally high water on the river. If the event affects working conditions, a special safety meeting is held to discuss the condition and to review the safety measures employees should take. Stone stated that during a stand-down safety meeting involving high water, "[W]e admonished everyone to wear their life jackets, to move slowly and deliberately, [and to] use the buddy system. And we outlined a great many guidelines that we'd like them to follow during periods of extraordinary high water, citing to them in these circumstances -- you're not allowed to make a mistake." Tr. 311.

³¹ Stone explained that if an employee falls off a dredge or barge and is pulled under the vessel, "wearing a life jacket will not save [him or her]." Tr. 341. In addition, if an employee is carrying heavy equipment and becomes trapped by the equipment, the employee may be pulled under despite his or her life jacket. *Id.* Another problem as described by Stone is that even with a life jacket on, when a person falls and hits the water, his or her arms tend to be extended upward, and the life jacket may "ride up" on the person's body, slip over the person's head and

According to Stone, the company's lifejacket rule is enforced by management and by rank and file employees. Both remind non-compliant employees by gesture (hands to shoulders) to put on missing life jackets. *Id.*, Tr. 313. The policy is also enforced through Stone's unannounced "mock inspections." Tr. 313. Stone maintained that he conducts such inspections on a quarterly basis and that he has never noticed an employee who should be wearing a life jacket without one. *Id.* Stone stated that there never has been an instance where an employee "blatantly" failed to comply with the company's life jacket policy and therefore he never disciplined a miner in writing for noncompliance. Tr. 314. ("I have not written a citation for [non]compliance with the life jacket rule. I've always been able to do it with a simple . . . reminder." *Id.*)

Stone also testified that wearing life jackets when in danger of falling into the water is a topic that is raised during annual refresher training in February when boat crew concerns are discussed. Employees are reminded to always wear a life jacket when on a boat. Tr. 367-368, 370; Hunter Exh. 18. They are also reminded to always wear a life jacket on the deck of a barge, to watch for tripping hazards on the barge, to be extremely cautious of wet or icy deck surfaces, to move slowly and deliberately, to use sand or salt to lessen the hazard of slipping and to warn others of any hazardous conditions. Tr. 370, 372; Hunter Exh. 18. Three of the five members of the crew of the Dredge IV were employed by Hunter in February 2013, and they received annual refresher training. Tr. 369-70. During the training slip and trip hazards were emphasized as a reason for falling overboard (Tr. 375), and even though Burnham missed the training, a "good portion" of the subject matter was provided to Burnham during his training in October 2013, including the company's emphasis on complying with its life jacket policy. Tr. 376-77

Stone confirmed that while the life jacket policy is always in effect on the deck of the dredge, it is not in effect in the break room, the control room, or the engine room of the dredge because there is no danger of falling into the water while in those rooms Tr. 312. He also stated that usually there are extra life jackets on the dredge. Tr. 316.

Stone was asked about the length of Burnham's shift on December 9 and 10, and he testified it was a twelve hour shift beginning at 6:00 p.m. on December 9 and ending at 6:00 a.m. on December 10. Tr. 317-318. According to Stone the preshift examination form for the crew boat that took the miners who worked on Burnham's shift to the dredge indicates there was at least one lifejacket for each person working on Burnham's crew that morning. Tr. 318; 381-82; Hunter Exh. 3.

become free, in which case the person finds himself or herself in the river without a means to stay afloat. Tr. 360. Nonetheless and despite the fact that life jackets do not provide fool proof protection, Hunter's training film emphasizes the necessity of wearing a life jacket at all times when there is a danger of falling into the river. Tr. 341.

Rodney Story

Rodney Story, a Hunter employee, has worked for the company for eight years. At the time of the hearing he was 42 years old. Tr. 417. In December 2013 Story was a deck hand on the Patsy M. Tr. 417-18. As a deck hand Story also occasionally worked and traveled on barges. Tr. 418. Story testified that he worked the night shift on December 9 – 10, 2013. During the shift Roger Fairfield piloted the Patsy M. Tr. 419. Close to midnight on December 9 the Patsy M. picked up the MEM 611 barge and towed it to Dredge IV. Tr. 420. The barge was empty, and it was riding high in the water. *Id.* In the course of the operation Story testified that he walked on the stern deck of the barge and along its sides. According to Story, there was snow on the deck, but no ice. *Id.* Story had no trouble walking on the snow. Tr. 421, 449. Story connected cable from the Patsy M. to fittings at the stern end of the barge and then walked down the side of the barge to the barge's bow to disconnect the barge from the other barges to which it was still cabled. Tr. 421-22. Although there was snow on the side walkway, just as there was on the stern, Story had no difficulty walking. He took draft readings at all four corners of the barge. Tr. 426. He further testified that he could hold onto the coaming as he walked along the side. *Id.* The towing operation began, and when the Patsy M and the MEM 611 barge reached Dredge IV it was shortly before midnight on December 9. Tr. 438. Story then transferred back to the deck of the MEM 611 barge and helped secure the barge to the dredge. Again, he maintained that he had no problem walking on the barge's deck and that he had "sure footing." Tr. 427. He agreed, however, that when walking on snow on the deck he had to be cautious and pay attention. Tr. 428.

With regard to the wearing of life jackets, Story described Hunter's policy as requiring employees to, "Always wear one buckled up when there's a potential to fall in the water." Tr. 429, *see also* Tr. 481. As far as Story knew, this had been the policy ever since Hunter acquired the company from IMI. Story believed that the policy was standard in the industry. *Id.* The policy is enforced by "everybody watch[ing] one another." *Id.*

Although Story wore his life jacket all of the time (Tr. 430), he acknowledged other employees sometimes did not. "From time to time they were all guilty, but we always made sure, hey, go put it on." *Id.* While he had seen "some" employees walking around a dredge or barge without life jackets, he believed their failure was, "mainly just out of accident." Tr. 445. He was not aware of anyone ever being disciplined for failing to wear a life jacket. Tr. 445-46. Story also acknowledged that working as a deckhand is hazardous and that unfavorable weather conditions (wind and snow) and high water can make falling overboard more likely. Tr. 443-44

During his testimony Story recounted the events surrounding Burnham's disappearance. At some point during the early morning hours of December 10 while Story was in the galley of the Patsy M, he remembered hearing Fairfield give a "man overboard" call over the tug's radio. Tr. 431. Story rushed out of the galley to unmoor the Patsy M. so she could engage in rescue efforts. Tr. 431-32. Story stood in the bow of the tug as it backed away from the barge and turned downriver. Tr. 432-33. As the boat turned Story saw a light in the water. Tr. 433. Both the Patsy M. and the light were moving downriver, but the boat was moving faster, gaining on the light. Story stated, "When we got closer to the light, I didn't see . . . any movement or know who it was or anything." Tr. 433-34. Story added, "[W]e continued . . . to get close to the light

so I could actually get ahold of whoever it was just to try to get them stable to the boat so maybe we could get some assistance to drag the victim . . . up[.]” Tr. 434. Even though lights on the boat illuminated the area, all Story could see at first in the water was the light and then he saw what he thought was a portion of arm from the elbow to the shoulder.³² Tr. 436. The Patsy M. continued to gain on the light and it got within 15 to 20 feet when “the light went out of sight and nothing was seen after that.” Tr. 437. The Patsy M. moved further downstream. Management was notified and the search continued, but to no avail. *Id.*

Roger Fairfield

Roger Fairfield is the 44 year old pilot of the Patsy M. He has worked for Hunter since the company acquired the business. Tr. 451-53. Prior to that, he worked for IMI as a dredge operator. Tr. 451-52. He worked in the latter capacity for seven or eight years, and before that he worked as a deck hand. Tr. 453.

Fairfield testified that he was piloting the Patsy M. on the night of December 9 and 10. Tr. 453-54. Around midnight Fairfield picked up an empty barge (the MEM 611) and towed it to Dredge IV. Tr. 455. The deckhand, Rodney Story, had to walk on the barge’s deck to uncable the MEM 611 from other empty barges so it could be towed. Tr. 456-57. According to Fairfield, snow covered the deck of the barge, and Story walked on the snow to secure the cables. Fairfield testified that Story, who walked on the port side from the stern up to the bow of the barge and back again, had no trouble. Tr. 456-58. Fairfield was not surprised by this because, he maintained, the snow provided “more traction.” *Id.* He added, “If you’re walking on ice you pretty well got to kind of baby step it and hold on real tight. With snow you just seem like you get a whole lot better traction[.]” Tr. 456-57. Fairfield did not consider the snow to be a hazard, and he had never been taught in his training that it was a hazard.³³ Tr. 482.

If there had been ice on the barge Fairfield maintained that the situation would have been “a lot different.” Tr. 458. He stated that with ice, “you just slip, slide. You[‘ve] got to really hold on . . . [a]nd baby step it, just kind of keep your balance.” Tr. 458. According to Fairfield, if there is ice on the deck of a barge Hunter’s practice is to put sand on the ice. The sand is usually kept on the dredge. *Id.* He stated the sand is a “non-skid” that “kind of keep[s] you from sliding.” Tr. 458-59. Fairfield did not know of any environmental concerns preventing the use of sand on ice, and he stated Hunter uses sand “because we got plenty of it.” *Id.* However, Fairfield maintained that he never put sand or ice melt on snow. Tr. 458, 480. In his opinion doing that would “just pack [the snow] down.” Tr. 459. Also, he believed washing off snow could be dangerous. He stated, “[I]f you wash it off, it’s just a matter of seconds before it’s going to be iced right back up.” Tr. 481.

³² When asked if he also saw a life jacket, Story responded, “What appeared could have been a life jacket, but I can’t say definitely it was a life jacket, just the shoulder section.” Tr. 447.

³³ However, somewhat contradictorily, Fairfield also agreed that walking on a snow covered walkway was more dangerous than walking on a clear walkway. Tr. 480.

As for Hunter's lifejacket policy, Fairfield stated, "It's policy and everybody knows it and it's preached a lot." Tr. 460. If there is any chance of falling into the river, an employee must wear a life jacket. *Id.* The rule is discussed at both the company's weekly safety meetings (tailgate meetings) and at MSHA refresher training. *Id.*, Tr. 461. In addition, there are other times when the rule is talked about. Tr. 460. He stated that he never has seen anyone working outside a room on the dredge or on a barge without a life jacket. *Id.*; Tr. 483. He knows of no employee who has been "written up" for failing to wear a life jacket or for wearing one but not properly fastening it. Tr. 485.

When the Patsy M. reached the dredge, Story walked onto the stern of the MEM 611 to moor it to the Dredge IV. The dredge then began loading the empty barge with sand. Fairfield, who was in the wheelhouse of the Patsy M., was looking down at Story as he moved about the barge and returned to the dredge. Story had no trouble walking. Tr. 465-66.

There are movable steps on the dredge which are used to provide access to the barge. Because an empty barge rides higher than a dredge, the steps are needed to get onto the deck of the barge. Tr. 467. On December 10 the steps were placed about 25 to 30 feet from the stern of the barge on the barge's port side. *Id.*, 467. The Patsy M. was facing the stern of the barge. Fairfield, looking from the wheelhouse, noticed Burnham as he mounted the steps and crossed from the dredge to the barge.³⁴ Fairfield testified he could only see the top part of Burnham's body. He could not determine if Burnham was wearing a life jacket. Tr. 471. As he looked down on Burnham, Fairfield heard a radio communication from another boat that was coming up river behind the Patsy M. Fairfield swung around in his chair to see how close the boat was to the Patsy M. Tr. 473. (She was approximately three fourths of a mile downriver. *Id.*) Fairfield continued:

[A]fter I turned [back] around . . . I kind of looked down and I couldn't see [Burnham]. I thought . . . maybe he's kind of hunched down over on the starboard side maybe checking the draft or something. That's when I stood up and really started looking. Then I didn't see him, and that's when I got turned back around. And when I turned all the way around, then that's when I see a light going across the stern . . . in the water.

Tr. 474.

Fairfield was sure the light was from a headlamp. Tr. 478. It was tantalizingly close, five to ten feet away, but moving downriver fast. Fairfield saw no motion. Tr. 475. He placed a "man overboard" call on the radio. Tr. 475. At that point, the light was significantly further down river. Story unmoored the Patsy M., and it motored toward the light. When it got approximately 20 feet from the light -- about 400 to 500 feet from Dredge IV -- Fairfield could "see the light go down underneath the water." Tr. 476. Fairfield testified he also observed an "orangeish" or reddish color that could have been a lifejacket or a coat; he wasn't sure. Tr. 477.

³⁴ Burnham did not notify Fairfield that he intended to cross to the barge. Tr. 478. However, five or ten minutes before seeing Burnham, Fairfield heard a radio instruction issued to Burnham to take a draft reading. Tr. 482-83.

III. THE ISSUES

The principal issues are whether the alleged violations existed. If so, what was their gravity? Were they S&S? Were they the result of Hunter's unwarrantable failure and negligence? And if the violations existed what are the amounts of the civil penalties that must be assessed for the violations, taking into account the statutory civil penalty criteria? 30 U.S.C. § 820(i).

IV. THE ALLEGED VIOLATIONS AND THE COURT'S FINDINGS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728537	2/25/14	56.11016	\$70,000

THE VIOLATION

The citation was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). The citation contains Inspector Conway's findings that the alleged violation of section 56.11016 could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter's unwarrantable failure and high negligence. The citation states:

On December 10, 2013, a fatal accident occurred at this dredge operation. A dredge hand walked onto the snow and ice covered deck of the barge to obtain a draft reading. The victim slipped and fell into the water. The mine operator was aware the deck of the barge was covered with snow and ice. However management did not take action to sand, salt, or clear the barge deck's regularly used walkway of snow and ice. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management had been made aware of the snow and ice hazard and failed to take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.[³⁵]

Gov't Exh. 9 at 1.

Section 56.11016 states, "Regularly used walkways and travelways shall be sanded, salted or cleared of snow and ice as soon as practicable." Something that happens "regularly" happens in a "[c]ustomary, usual, or normal" fashion.³⁶ The record establishes that the walkways on both sides of the MEM 611 barge and at its stern were normally used by dredge

³⁵ The alleged violation was abated on December 10 after the accident but later in the day after the temperature rose above freezing. In a section of the citation titled "Termination Action," the inspector wrote, "On December 10, 2013 at 15:37 hours [3:37 p.m.], the barge walkway was observed cleared of snow and ice eliminating exposure to the hazards." Gov't Exh. 9 at 1.

³⁶ *The American Heritage Dictionary of The English Language*, Fourth Edition, Houghton Mifflin Harcourt (2009) at 1471.

hands who were sent onto the barge to take draft readings and perform other tasks. Inspector Jewell offered the best description of how the readings were taken. He explained how a miner transferred from the dredge to the barge, walked along the side of the barge to the stern, crossed the stern and traveled up the outboard side of the barge to where the draft marks and numbers were visible. Then, leaning out over the water and looking down at the numbers and marks on the side of the barge, the deck hand reported a reading to the dredge operator so the operator could load the barge evenly. Tr. 40-41; *see also* Tr. 77, 80 and 159-60, 162 (Conway's description of the task). Conway was told that miners also regularly transferred to the barge to perform other tasks, *e.g.*, taking sand samples and mooring and unmooring the barge. Tr. 173. Hunter did not challenge the description of the tasks nor the fact that deck hands who regularly transferred to the barge traveled its walkways. The court therefore concludes that the walkways were "regularly used."

In reaching this conclusion the court has considered Hunter's argument that the walkways along the sides of the barge were not "travelways" because the Part 56 regulations do not encompass "transient, moveable barges in underwater dredging operations." Tr. 23. The court is not persuaded. Part 56, under which section 56.11016 was promulgated, applies to "surface metal or nonmetal mines." 30 C.F.R. § 56.1. "Mines" include "equipment . . . on the surface . . . used in, or to be used in, or resulting from, the work of extracting . . . minerals [in this case, sand and gravel] from their natural deposits in non-liquid form." 30 U.S.C. § 802 (h)(1)(C). The "surface" can be composed of land or water. It only needs to be a top most layer, and MSHA has long exercised jurisdiction over mining carried out from the top (the surface) of rivers, lakes and ponds. Further, barges used to haul material from mining operations carried out on top of the water are "equipment . . . used in the work of extracting . . . minerals," just as trucks used to haul minerals extracted from operations carried out on the surface of the land are such equipment.

The standard also requires that an operator clear snow and ice from regularly used walkways "as soon as practicable." 30 C.F.R. § 56.11016. A great deal of testimony was offered regarding whether or not ice was on the barge walkway when Burnham disappeared. Although Conway in issuing the citation stated that both "snow and ice" were present (Citation No. 8728537) the record only supports finding the presence of snow. Conway saw neither snow nor ice because whatever was on the barge walkways was removed by the time she arrived. Tr. 135, 238. Story, who was called to the scene before Inspector Jewell arrived, testified that there was snow on the walkways but no ice, and the essence of the testimony of the Patsy M.'s pilot, Roger Fairfield, who had a first-hand view of the conditions on December 9 and 10 was the same, to wit, that there was snow but no ice. *See* Tr. 458-59. The presence of the snow is not surprising. It was December, and an area weather report for that night shows temperatures in the high 20s Fahrenheit with light snow. Tr. 327-28, 329; Gov't Exhs.7, 8. Further, the photographs taken by Jewell shortly after he arrived on the scene show snow but no identifiable ice. *See* Gov't Exh. 2. The court therefore finds that on the night of December 9 and 10, only snow covered the regularly used walkways of the MEM 611 barge.

The question then is whether this snow was cleared from the walkways "as soon as practicable." Commission Judge Richard Manning considered the meaning of the phrase "as soon as practicable" and offered helpful guidance. Judge Manning stated:

The issue of what constitutes “as soon as practicable” is not entirely clear. “As soon as practicable” is not defined in the Secretary's regulations. The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines “practicable” as “possible to practice or perform: FEASIBLE.” *Webster's New Collegiate Dictionary* 895 (1979). Relying on such, a reasonable interpretation of the cited standard would require that snow and ice be sanded, salted, or cleared as soon as possible.

Caballo Coal Co., LLC, 32 FMSHRC 1736, 1741 (Nov. 2010).

During the early morning hours, enough time elapsed prior to Burnham's disappearance to allow the empty MEM611 barge to be brought to the Dredge IV and moored, for dredging to get underway and for sand to be loaded into the barge. Was there enough time to sand or salt or to otherwise safely remove the snow before Burnham was ordered to take a draft reading? The court concludes the Secretary did not prove that there was.

The court recognizes the pragmatic problems faced by Hunter in this regard. Any miner assigned to clear the snow prior to Burnham's disappearance would have encountered at least the same hazards that Burnham faced. As Stone and Fairfield suggested, washing off the snow would have created a greater hazard on the barge by icing over the barge's walkways and transforming any remaining snow to an icy, snowy mix. Tr. 308-09, 310, 481. The fact that ice formed on the dredge at the spot where suctioned water spilled onto the dredge deck supports this conclusion. Tr. 95-96. In addition, Fairfield's testimony that using sand on the snow would have packed down the snow making it more slippery was not refuted by the Secretary. Tr. 459. Indeed, the Secretary did not provide any solution to the problem presented by the snow aside from suggesting Hunter not assign the task of taking a draft reading to Burnham, but this “solution” is not contemplated by the standard, which speaks only of the removal of snow or ice as soon as practicable. The record thus leads the court to conclude that the first practicable time to remove the snow from the barge deck was later in the morning when the temperature warmed enough to allow snow to be washed off the deck without the water freezing, a procedure followed to abate the alleged violation. In reaching this conclusion the court discounts Conway's view that washing off the barge at night in below freezing temperatures would “[n]ot necessarily” create more hazards. Tr. 248-49. Her opinion defies a law of physics. Water freezes at 32 degrees Fahrenheit and below, especially water on a metal surface. Indeed, as the court just noted, ice had formed on the dredge screening area, and similar accumulations of ice could be expected on the barge. Tr. 95-96.

Conway believed that until the snow could be eliminated, Hunter had an obligation to eliminate the hazard:

You address it and you don't allow people to walk on it if it's

hazardous. Find another way of doing that. If you have a miner, restrict the access. It may take you time to get whatever you need to wash, sand or salt, but do address the hazard. Don't say be careful while you're walking across there because it might be slick.

Tr. 248.

Conway's instincts were sound. Operators ought to restrict access to hazards by those under their care. Indeed, 30 C.F.R. § 56.11001 in effect contains such a requirement. Section 56.11001 states, "Safe means of access shall be provided and maintained to all working places," which the operator arguably failed to do when it permitted Burnham entry to the barge in the midst of hazardous conditions. However, the Secretary did not allege the company violated that standard, although he could have amended his pleadings to do so. Rather, he cited the company for violating a standard that requires the sanding, salting or clearing of snow "*as soon as practicable*." The standard does not require barring miners from using snow covered walkways until snow has been sanded, salted or cleared. Had the Secretary wished he could have, and perhaps should have, promulgated the regulation to so state, but he did not. The court holds to the notion that words have consequences and that the court must judge whether the Secretary proved a violation of the standard as it is written. Here, the court finds that the Secretary did not prove that Hunter failed to sand, salt or clear snow from the walkways of the MEM 611 Barge as soon as practicable, and the citation will be vacated.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728540	2/25/14	46.7(b)	\$70,000

THE VIOLATION

The order was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1) The order contains Inspector Conway's findings that the alleged violation of section 46.7(b), C.F.R. § 46.7(b), could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter's unwarrantable failure and high negligence. The order states:

On December 10, 2013 a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. The task of obtaining a draft reading changed due to snow and ice accumulations on the barge deck surface. The snow and ice slip and fall hazard affected the health and safety risk encountered by the victim. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management failed to provide safe work procedures that addressed snow and ice accumulation on deck surfaces and the additional safety risk that it poses. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 15 at 1.

Section 46.7(b) relates to new task training. The standard, which is addressed to the mine operator, states, "If a change occurs in a miner's assigned task that affects the health and safety risks encountered by the miner, you must provide the miner with training under paragraph (a) [30 U.S.C. § 46.7(a)] of this section that addresses the change.

Paragraph (a) of section 46.7 advises a mine operator in part:

You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task This training must be provided before the miner performs the new task.

30 U.S.C. § 46.7(a).

The order alleges that, "[M]anagement failed to provide safe work procedures that addressed snow and ice accumulation on deck surfaces and the additional safety risk that it poses." Order No. 8728540. The change that occurred in Burnham's assigned task (to take a draft reading) was snow covering the walkways of the barge. (As previously noted, the record does not support the presence of ice.) The parties agree and the record confirms that snow in fact covered the barge walkways when Burnham was assigned to the task. The court finds ample evidence that the snow created a slip and fall hazard. The court further finds the slip and fall hazard changed the task in that it changed the way the task should have been undertaken or it warranted delaying the task until the snow could be removed. Thus, the court finds in the words of section 46.7(b) that "a change occur[red] in [Burnham's] assigned task that affect[ed] the . . . safety risks encountered by [Burnham]," and the court concludes the standard required Hunter to "provide [Burnham] with additional training under paragraph (a) [of section 46.7]."

Section 46.7(a) in turn required Hunter to "provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the . . . safety aspects of the task . . . including the safe work procedures of such task" and to do so "before the miner performs the new task." 30 C.F.R. § 47.7(a). The Secretary does not contend that the new miner training Burnham originally received was deficient. Conway testified "it appeared [Burnham had] gone through the task training at the time, and [it] had been sufficient." Tr. 191. It is the alleged failure to train Burnham in how to take a draft reading when snow covered a barge's walkways that constituted, in the Secretary's view, the violation. As Conway stated, "[W]hen the conditions changed in that the weather change[d] . . . when he had to take draft readings, at that time the task training should have been revisited in order to train [Burnham] on how to deal with the snow and/or ice on the walkways, what to do if it was on the barge." Tr. 191.

The Secretary argues that Hunter failed to train miners to identify snow covered walkways as a hazard and failed to inform Hunter employees of the requirement to sand, salt, or clean barge walkways when practicable. Gov't Br. 31. Conway believed that miners taking draft readings on a barge should be trained either to address the snow hazard prior to attempting their

task or to avoid exposing themselves to it. Tr. 199. Unlike earlier, the validity of this argument does not depend on the precise definition of “practicable” or require a conclusive finding on whether it was practicable for Burnham to sand, salt, or clear snow from the barge walkway during the night he disappeared. The evidence in the record that Hunter employees did not recognize snow covered barges as hazardous (*see* Tr. 195, 466, 482) and were not trained on the necessity of neutralizing snow or ice hazards when practicable (Tr. 445) establishes the inadequacy of Hunter’s task training. Moreover, given Section 46.7(b)’s broadly worded requirement to address task changes that affect health and safety risks, Hunter’s task training should have included instruction to delay the task of taking a draft reading when snow covers the barge walkways until the hazardous snow can be cleared from the deck, even if the much more narrowly worded standard dealing with removal of snow does not include such a requirement.

The court has considered Hunter’s position that given Burnham’s work experience prior to being hired by Hunter, the company was under no obligation to provide Burnham with new task training when conditions changed and snow covered the walkways of the MEM 611 barge. Hunter points to the language in section 46.7(a) which requires an operator to provide “any miner who is reassigned to a new task in which he or she has no previous experience with training in the health and safety aspects of the task to be assigned” (30 C.F.R. § 46.7(a)) and it notes that MSHA’s accident report states that “Burnham had about 55 months of mining and/or river experience that included . . . loading barges . . . [and] putting barges together.” Gov. Exh. 8 at 17; *see* Hunter Br. 31-33. The court agrees with Hunter that the record establishes that Burnham had extensive experience working in a marine environment before he was hired by the company. He also had more limited experience working for a surface coal facility. Tr. 320-26, 343, 383-84, 392-93. What is missing is any evidence that Burnham’s prior experience brought him under Part 46 because of his engaging in the words of Part 46 in “shell dredging” or because he was “employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines.” 30 C.F.R. Part 46. The “task training” reference in section 46.7 refers to tasks as performed in the specific kinds of mining referenced in Part 46, and there is no evidence that Burnham previously worked at facilities engaged in such mining.

Further, the company’s argument that “hazard recognition training specific to the assigned task” was given to Burnham before December 10 (Hunter Br. 33-34, *quoting* 46.7(d)) is not supported by the record. The type of training required by the standard is training addressing the specific task of taking a draft reading (or other task) on a barge when snow covers the walkways of the barge. Hunter may well have provided Burnham training in which “issues related to winter condition on a barge . . . including snow or ice on a barge were addressed” (Tr. 349-350; Hunter Br. 35), but this is not training “specific to the assigned task” that is referenced in section 46.7(d).

Conway believed that Hunter made no effort to new task train miners, including Burnham, in safe ways to conduct assigned tasks in the presence of snow and/or ice (Tr. 201), and Stone agreed that the company did not provide new training for every task when there were changes in the weather. Tr. 352. To do so and to document the training would have been, in Stone’s view, “terribly onerous.” Tr. 353. While it indeed might have been burdensome to give and document weather driven new task training, the burden is beside the point. The fact remains that Burnham was assigned the task of taking a draft reading under a changed condition that

affected his safety. Pursuant to section 46.7(b) he should have been trained to perform the task in a way that took account of the hazard posed by the new condition. Since this did not happen, the court concludes Hunter violated section 46.7(b) as charged.

S&S AND GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety hazard.” 30 U.S.C. § 814(d)(1). 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 (Apr. 1081).

The Commission has explained that,

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc., v. MSHA*, 52 F. 3d 133, 135 (7th Cir. 1999); *Austin Power v. Secretary of Labor*, 861 F. 2d 99, 103-104 (5th Cir. 1988, *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission has recently clarified the key distinction between the second and third *Mathies* prongs. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir.)) The second prong concerns the “likelihood of the occurrence of the hazard,” while the third prong is “primarily concerned with *gravity* – the seriousness of the expected harm.” *Id.* The ALJ must “clearly” and “adequately define the particular hazard to which the violation allegedly contributes” in terms of “the prospective danger the cited safety standard is intended to prevent.” *Id.* at 2038. After “[h]aving clearly defined the hazard,” the ALJ’s next task at the second prong is to assess “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.*

If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the ‘hazard’ defined in the second prong, the Judge then *assumes* the occurrence of the hazard and analyzes whether the assumed hazard would be reasonably likely to result in injury in the third prong. *Id.* (citing *Knox Creek Coal Corp.*, 811 F. 3d at 161-62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135). 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 Eng’g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013). 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.*, 6 FMSHRC 1573, 1574 (July 1984).

The court has found that a violation of section 46.7(b) occurred. Further, the court finds that a discrete safety hazard contributed to by the violation existed, *i.e.*, the danger of an inadequately trained dredge hand slipping on a snow covered barge walkway and falling into the icy Ohio River while taking a draft reading, and if not falling into the river, the danger of slipping and falling onto the metal and object strewn walkway. The prospective danger that section 46.7(b) is intended to prevent will vary based on the particular change in conditions necessitating new task training. In this instance, new task training was necessary because of the prospective danger of slipping and falling.

While not as hazardous as walking on ice, walking on snow nonetheless posed a serious slip hazard. In reaching this conclusion the court is aware that the record supports finding the barge’s walkways were snow covered, not ice-coated, and it has not discounted Fairfield’s testimony that, “With snow . . . you get a whole lot better traction.” Tr. 456-457. But while Fairfield may be right that a person walking on a snow covered barge walkway has better traction, he was speaking in comparative terms. Compared to walking on ice, a person’s traction may indeed be better, but still not good, as witnessed by the precautionary manner in which Hunter recommended its employees proceed slowly, deliberately, and with short, flat footed steps. Tr. 307, 311. 372, *see also* Tr. 390. The court concludes it would defy common sense to find it was not dangerous in early December when temperatures were in the 20s Fahrenheit to walk on a snow covered, raked³⁷, object strewn walkway at night, and above a high and icy river with light from a cap lamp illuminating the way. Tr. 162, 327-328; 443; Hunter Exh’s 7, 8. The hazard of slipping and falling may be greater on ice than on snow, but the barge’s snow covered walkways under these conditions still presented a very significant hazard, and Burnham had no training as to how to accomplish the assigned task in the event of this hazard other than altering his gate and pace, a “solution” that still left him exposed to the hazard. Therefore, the lack of new task training to address the change of conditions on the barge was reasonably likely to lead to a slip and fall hazard.

The court next finds a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Given the time of year (December) and the location of the barge on an Ohio River that was, as Jewell described, “pretty wild . . . swift . . . up . . . [and] high” (Tr. 59), the court finds it reasonably likely that a dredge hand who slipped on the snow would fall into the river and suffer a serious injury (hypothermia) or death (hypothermia and/or

³⁷ Stone estimated the barge was approximately 16 degrees out of level when Burnham disappeared. Tr. 409.

drowning). Even if the miner avoided falling into the river, falling to the metal walkway where numerous objects lay under the snow, was in the court's opinion, reasonably likely to result in a seriously sprained or broken extremity, injuries that are reasonably serious. For these reasons the court concludes the violation was S&S.

There is also no doubt the violation was very serious. As the court reads *Newtown* the third and fourth prongs of the S&S test and the gravity of a violation are closely related. 38 FMSHRC at 2838. They both focus heavily on the effect of the hazard if it occurs. The hazard was a likely slip and fall into the river or onto the equipment strewn deck. If the slip and fall resulted in the dredge hand ending up in the river but surviving until rescued, hypothermia that can lead to vascular constriction and organ failure, including cardiac arrest, was likely. If he or she was not timely rescued death from hypothermia or drowning was virtually a given. And if the dredge hand was fortunate and the slip and fall did not send him or her into the water, he or she nonetheless was likely to suffer broken bones, sprains, cuts and/or bruises.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In *Manalapan Mining Co.*, the Commission summarized the factors to be evaluated in determining whether a violation was caused by an operator's "unwarrantable failure:"

In *Emery Mining Corp.*, 9 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. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353

(Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013).

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. See *Beth Energy Mines, Inc.*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams “presented a danger” to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992 (finding unwarrantable failure based upon “common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment”)); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were “highly dangerous”). The Commission has specifically noted that the factor of “dangerousness,” by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining*, 35 FMSHRC at 294. Indeed, and as noted, in making a finding regarding unwarrantable failure, all of the factors must be considered by the judge.

The court concludes that the factors it must consider point in the direction of unwarrantable failure. The violation was extensive. The record supports finding there was no specific training given to any employee, including Burnham, regarding how safely to take a draft reading when snow covered the deck of a barge. The violation had existed for some time. The snow fell along the Ohio River on the night of December 9 and the early morning of December 10. The court notes that snow along the Ohio River in December is not unusual. Hunter should have anticipated the change in conditions and should have known to conduct the training in advance of the snowfall, especially given the widespread lack of recognition at the mine of the hazards posed by snow on the barge walkways. See Tr. 195, 466, 482. There is no doubt the violation posed a high degree of danger. The most significant danger was that a worker who was not trained to perform his or her task in the presence of the snow would slip and fall into the river. As has been observed by the court the result of such an event was likely to be serious injury or death. Even if the worker avoided going overboard there was a significant danger of broken bones, sprains or contusions caused by slipping and falling on the metal deck or on some of the equipment piled onto the deck. The likelihood of snow during Hunter’s December operations made the violation obvious. And although there is no evidence in the record that Hunter had been placed on actual notice that the training was required, it should have been clear to Hunter that additional training was needed to comply. Given these factors, and the lack of any evidence of mitigating efforts to abate the violative condition the court concludes that the company unwarrantably failed to train Burnham in how safely to take a draft reading when snow covered the deck and walkways of a barge.

The court further concludes that Hunter was highly negligent. The court is convinced that a prudent operator would have provided the training. In reaching this conclusion the court recognizes a feasible argument can be made that the company’s negligence is lessened by the experience Burnham brought to the job when he was hired and by some of the training he

received upon being hired. In employing Burnham the company hired a person with approximately five years of prior experience working year in, year out, on and around barges. Tr. 326; *see* Tr. 321-25. Hunter's management might reasonably have assumed that Burnham brought to the job at least a few basic safety techniques required for winter work on barges. Moreover, the record confirms after Burnham's hiring working in winter weather conditions was discussed during his new miner training. Tr. 306-07. The court also recognizes that like all new miners trained by Hunter, Burnham was told that when working in the presence of snow and/or ice, a miner needed to move slowly, to take short steps and to walk flat footed. Tr. 307, 390. The court further accepts Stone's testimony that near the end of October, Burnham watched a training film about working in a marine environment, including working during winter, and that the film addressed tripping and falling hazards and also advised miners to walk deliberately and in a flat footed manner in the presence of snow and/or ice. Tr. 334-35. Nonetheless, there is no evidence specific training was given regarding safe work procedures to implement when required to take a draft reading from a snow covered walkway, and this is what the law required.³⁸ Given the extreme danger the task posed, the court concludes Hunter failed in its duty to meet the high standard of care demanded by the circumstances despite factors that might otherwise be viewed as mitigating Hunter's negligence. Therefore, it is the court's conclusion that the danger inherent in assigning Burnham to take a draft reading was such that the standard of care required of Hunter was very high and its failure to meet the standard was equally high, and the court concludes that Hunter was highly negligent.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728538	2/25/14	56.15020	\$5,645

THE VIOLATION

The order was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1) The order contains Inspector Conway's findings that the alleged violation of section 56.15020 could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter's unwarrantable failure and high negligence. The order states:

On December 10, 2013 a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. The victim was not wearing a life jacket. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management was aware miners, not wearing life jackets, were working and traveling where there was a danger of falling into the water. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 12 at 1.

³⁸ Only instructing a deck hand to walk slowly, to take short steps and to walk flat footed was clearly inadequate under the circumstances.

Section 56.15002 states: "Life jackets or belts shall be worn where there is a danger of falling into the water."

The regulation is straightforward. If there is a danger of falling into the water, a miner must wear a life jacket or a life belt. The Secretary alleges Burnham was not wearing a life jacket when he crossed to the barge and traveled its walkway on his way to taking a draft reading. The court first considers whether Burnham was in "danger of falling into the water" when he was on the walkway and the court finds he was. There was nothing to restrain Burnham if he slipped or fell. The sides of the barge adjacent to the walkway were open. There were no railings. There were no fences. There were no ridges along the edges of the barge. There was nothing to impede him if he slipped and fell toward the edge of the barge. Therefore, the court finds in the words of section 56.15020, "there [was] a danger of falling into the water," and it concludes that Burnham was required to wear a lifejacket.

The court next considers whether Burnham was not in compliance. The Secretary must prove the violation by a preponderance of the evidence. The Commission has set forth what the burden entails:

The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. See 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). The Supreme Court, in *Concrete Pipe*, 124 L.Ed.2d at 563 . . . explained that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" See also 2 *McCormick* § 339, at 439 n.12, citing Model Code of Evidence, Rules 1(3) & (5).

In Re: Contests of Respirable Dust Sample Concentration Citations, Keystone Coal Mining Corp. 17 FMSHRC 1819, 1837 (December 1995).

Although the record is void of testimony that anyone saw Burnham with or without a life jacket [³⁹], although Burnham's body with or without a life jacket was never recovered, although the record does not establish that of the life jackets available to miners on the Dredge IV all but one were present, and although a life jacket downstream was never found, the court concludes it

³⁹ Story and Fairfield, eyewitnesses to what was almost certainly Burnham being swept downriver, could not say for certain whether he was or was not wearing a life jacket. Tr. 447, 477.

is more probable Burnham was not wearing a life jacket than he was wearing one.⁴⁰ Tr. 84. First, prior to transferring to the barge and before he entered the sample room, Burnham was wearing a life jacket. Tr. 84. A life jacket, the one he was most likely assigned, was found next to the chair in which he was sitting while in the sample room. Tr. 84, 232, 267, 316; Gov't Exh. 2 at 12. Second, Conway's testimony that she determined a life jacket of the kind worn by Hunter's miners normally would "float" a person of up to 350 pounds and that Burnham, who weighed considerably less, would have "floated" had he been wearing a jacket was persuasive and is credited by the court. Tr. 219, 297-299. Finally, the area of the river downstream from the barge was searched and neither Burnham nor a life jacket was found. Tr. 271. Given these facts the court concludes it is much more likely Burnham was not wearing a life jacket than he was, and that the violation existed as charged.

S&S and GRAVITY

The court has found that a violation of section 56.15020 occurred. Further, the court finds that the violation was reasonably likely to lead to a discrete safety hazard; *i.e.*, without a life jacket a person falling into the river was in grave danger of failing to float to the surface of the river. This hazard would in turn likely result in a miner suffering hypothermia or drowning. In fact, given that the river was high ("pretty wild"(Tr. 59)) and very cold (approximately 41 degrees Fahrenheit (Tr. 137)), a person falling into the river without a life jacket was virtually assured of such consequences. In the court's view the violation was obviously S&S.

The violation also was very serious. As noted above, severe hypothermia or death were virtually a given.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The record establishes that although Hunter did not exercise the care required, its failure was not unwarrantable. The Secretary acknowledges that Hunter had a policy of requiring its miners to wear life jackets when in danger of falling into the water. Hunter also had a method of enforcing the policy by reminding offending miners through hand signals to put jackets on when they were seen in situations where jackets were required but not worn. Tr. 237. Although Conway described Hunter's enforcement of its policy as "very lax," the record does not support her description. Tr. 226. Rather, Robert Stone, who was in charge of regulatory compliance, described Hunter's progressive discipline policy. He explained that when an employee was seen without a life jacket, he or she was reprimanded orally on site. When he or she was seen a second time, the miner was again reprimanded orally. The third time the miner was brought into the office and counseled. If he or she refused to wear a life jacket he or she received a written reprimand and warning. Tr. 404-05. Stone indicated that the company never had to issue a written reprimand and warning and that it always found oral warnings sufficient. Tr. 314. The court credits Stone's testimony. It further finds that the company's measures to abate violations of the standard as they arose weigh against an unwarrantable finding, and it notes that there is no

⁴⁰ The court accepts as circumstantial facts that the light seen by both Fairfield and Story was the light from Burnham's cap lamp and the part of an arm from the elbow to the shoulder seen by Story was part of Burnham's arm. Tr. 434-36; 474-78. In other words, the court accepts that it was Burnham who was in the water.

evidence that Hunter previously had to remind or discipline Burnham regarding his failure to wear a life jacket.

In addition, the company made sure its employees were trained that life jackets always had to be worn where there was a danger of falling into the water. The policy was explained during indoctrination training. The policy was again emphasized during site specific training for the dredge. Tr. 338. Moreover, the life jacket requirement was one of the subjects of a video entitled "Minutes to Live," which all new employees were shown. Tr. 339. The topic was also covered in a written outline of the video which each new employee was given. Further, Stone testified there were times when because of adverse river and/or weather conditions, employees were reminded during company safety "stand downs" to wear life jackets. Tr. 311. The topic was also discussed at annual refresher training. Tr. 367- 68, 370; Hunter Exh. 18. Fairfield described the policy of wearing life jackets on the job when there was a danger of falling into the water as being "preached a lot," and the record bears him out. Tr. 460. Moreover, the company made sure life jackets were readily available, as evidenced by the fact that on the Dredge IV there were more life jackets than deck hands. Tr. 332.

The court has not discounted the fact that there is evidence that miners occasionally were seen without life jackets when they were in danger of falling overboard. Tr. 445. For example, there was credible testimony that miners sometimes removed their life jackets when they needed to relieve themselves. Tr. 232-33. But there is no evidence of a long or extensive pattern of disregard of the requirements of section 56.15020, a pattern of non-compliance putting Hunter on notice that greater efforts were necessary to ensure its life jacket policy was followed. Moreover, as previously noted, in Burnham's case there is no evidence he habitually disregarded the standard and that Hunter should have anticipated his noncompliance. Nor is there any evidence that Hunter had been cited previously for its employees violating section 56.15020.

While the failure to wear a life jacket when in danger of falling into the river is a very serious violation and while failing to wear a life jacket under such circumstances is a visually obvious violation (assuming other employees and/or management officials are present), the evidence does not support finding Hunter knew or should have known that Burnham was not wearing a life jacket when he responded to the instruction to take a draft reading early on the morning of December 10.

This stated, the record certainly supports finding that Hunter should have been more careful in ensuring compliance with the standard. Hunter knew that its employees were inclined to remove their life jackets when entering the sample room of the dredge, yet there is nothing to indicate it took any measures to remind employees to don their jackets when they left the room. There were no pictorial or written reminders posted by the room's exits. Further, there was no evidence Hunter posted signage on its dredges or barges reminding miners not to remove their life jackets when nature called. Nor is there any evidence that Hunter included such specific reminders in its training. These are things a reasonably prudent operator would have done, and the court concludes that the company was moderately negligent in failing to meet its requisite standard of care.

<u>CITATION NO.</u> 8728541	<u>DATE</u> 2/25/14	<u>30 C.F.R. §</u> 56.18002(a)	<u>PROPOSED PENALTY</u> \$1,530
--------------------------------	------------------------	-----------------------------------	------------------------------------

THE VIOLATION

The citation was issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). The citation contains Inspector Conway’s findings that the alleged violation of section 56.18002(a), 30 C.F.R. § 56.18002(a), contributed to a fatal accident, was S&S and was due to Hunter’s high negligence. The order states:

On December 10, 2013, a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. Miners travel barge walkways to obtain draft readings and collect samples. Management failed to ensure that a competent person examine each working place at least once each shift for conditions which may adversely affect safety and health.

Gov’t Exh. 17 at 1.

Section 56.18002(a) states: “A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.”

The Court concludes the Secretary easily met his burden of proof. The standard requires the Secretary to prove that the walkways of the cited barge were a “working place.” Section 56.2 defines “working place” as “any place in or about a mine where work is being performed.” The walkways of the cited barge were used by Burnham and others to take draft readings and for other work-related tasks. The miners exerted themselves while on the walkways to perform the tasks. The walkways were more than simple travelways; they were areas from which and on which work was performed and as such, they came within the standard. Indeed, so integral were the walkways to the tasks, the court considers the barge itself as a workplace. The walkways should have been examined for conditions that affected the safety of Burnham and others.

Conway testified she was told barge walkways were not included in workplace examinations at Hunter’s facility. Tr. 208. The company does not dispute the truth of what Conway was told.⁴¹ Tr. 208. The court therefore finds that a competent person did not examine the walkways on the MEM 611 barge before Burnham was assigned to take a draft reading and

⁴¹ Hunter claims that it did informally inspect the barge for hazardous conditions, but that it could not perform a “formal on-shift examination” because the barge arrived at Dredge IV “nearly 6 hours after the . . . shift began.” Hunter Br. 37. The court finds this informal inspection to be insufficient. Given that the barge was present at the mine long enough for sand to be loaded onto it and for Burnham to attempt to take a draft reading, there was ample opportunity for the company to perform a formal on-shift examination before Burnham performed his assigned task.

that, as a result, Hunter did not eliminate a serious slipping or stumbling hazard prior to Burnham transferring to the barge's walkway. Tr. 209-10. Conway was right to cite the company for a violation of section 56.18002(a), and the court finds the violation existed as charged.

S&S and GRAVITY

The court has found that a violation of section 56.18002(a) occurred. Further, the court finds that a discrete safety hazard contributed to by the violation existed. The standard is directed against hazards that may be missed or inadequately addressed absent a workplace examination, in this case a slip and fall hazard from snow on the barge's walkways. The failure to conduct the workplace examination resulted in the failure to eliminate the snow covering the barge's walkways or to otherwise eliminate the hazard by using an alternative means to take the draft reading or by postponing the work until the temperature rose above freezing. The company's failure in turn led to assigning Burnham to a task whose execution was reasonably likely to result in a slip and fall accident. The court's finding in this regard is informed by the common knowledge that snow can be slippery, that snow covered the barge's walkways and obscured the presence of items lying on the walkways, that the barge on which Burnham was assigned to walk was listing, and that its walkways were open to the river with nothing to restrain a slipping or stumbling person from falling into the water. A fall into the river could reasonably be expected to result in hypothermia and/or death. A fall onto the metal and object strewn walkway could reasonably be expected to result in broken bones, cuts or sprains. It is clear to the court that the violation was S&S.

The violation which presented a high degree of danger was also very serious and the court so finds.

NEGLIGENCE

Inspector Conway found that the violation was due to the company's moderate negligence, and the court agrees. Gov't Exh. 17 at 1. Although Conway believed that when conducting the examinations certified persons concentrated too much of their efforts on looking for mechanical defects rather than for safety hazards, she stated that except for failing to include the barges in the examinations, the company's examinations met the requirements of the standard. Tr. 208-09. The company appears not to have understood that if employees were assigned to work on a barge and the work involved travel along the barge's walkways, the barge became a "working place" within the meaning of the standard and its walkways had to be examined. Tr. 207-09. A reasonably prudent operator who intended to assign an employee to a task involving travel on a barge's walkways would have included the barge and its walkways in its workplace examination. Hunter did not do this and therefore did not exercise the care required of it.

OTHER CIVIL PENALTY CRITERIA

The company is not a serial violator of the regulations. As counsel for the Secretary agreed, its violation history is small. Tr. 288-89; *See* Gov't Exh. 21. The Secretary did not offer any testimony or introduce any evidence regarding the company's size. However, when proposing penalties, the Secretary assigned three size points to Hunter. *See e.g.*, Secretary of Labor's Petition For The Assessment of Civil Penalty, Exh. A, Docket No. KENT 2014-566. Under the Secretary's regulations for proposing penalties, three points indicates an operator that is small in size. 30 C.F.R. § 100.3. Hunter does not argue that the size of any penalties assessed will affect its ability to continue in business, and the court concludes it will not. Further, although at the hearing the Secretary did not address whether the company exhibited good faith in abating the violations, it is clear from the record that in each instance it did.

V. ASSESSMENT OF CIVIL PENALTIES

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728537	2/25/14	56.11016	\$70,000	\$0

The court has found that the Secretary did not prove the violation. Therefore, a penalty cannot be assessed.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728540	2/25/14	46.7(b)	\$70,000	\$45,000

The court has found that the violation was very serious and that it was caused by Hunter's high negligence. Given the court's gravity and negligence findings and the other civil penalty criteria discussed above it is clear that a substantial penalty is warranted, although not in the amount proposed by the Secretary. Pursuant to the Special Assessment provision in Part 100 of his regulations the Secretary arrived at the proposal through electing to waive the regular assessment. 30 C.F.R. § 100.3. The Commission has recently clarified that the Secretary's special assessment "does not negate the Judge's duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria." The Commission has further instructed that, "Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge's findings and conclusions." *The American Coal Company*, 38 FMSHRC 1987, 1993-94 (Aug. 2016). The Secretary's special assessment in this matter is premised in part on his finding that "the violation contributed to a fatal accident. The snow . . . on the barge deck created a slipping and tripping hazard. The miner slipped and fell into the water and drowned." Petition for the Assessment of Civil Penalty, Exh. A, Narrative Findings for a Special Assessment, at 6-7 of 11. Therefore, the court will make specific findings on the alleged facts and circumstances supporting this rationale for the maximum penalty.

The Secretary's factual statement that Burnham "slipped and fell into the water" may or may not be true. It is fair to note that the Secretary did not and could not prove the claim. With no eyewitness to the accident and no physical evidence as to what actually happened (for example,

no evidence of footprints indicating Burnham slipped) there is no way to know if he actually slipped, and there are other possible explanations that are unrelated to the violation. For example, he may have stumbled over something; he may have inadvertently stepped off the edge of the barge, or he may have suffered a sudden loss of consciousness. The same is true of the Secretary's assertion that Burnham drowned. The Secretary cannot prove the claim. Because Burnham's body was not recovered the cause of his death will never be known for certain. For example, it is possible, albeit unlikely, that Burnham suffered a physical catastrophe and died before or upon falling into the water. The court believes that in the interest of justice, it is within its province to take these uncertainties which impinge on the gravity of the violation into account when assessing a penalty. The court also concludes it would be inequitable to assess the maximum penalty allowed (30 U.S.C. § 820(a)) in the face of such uncertainties. Given that the violation was very serious and was due to the company's high negligence as well as the other civil penalty criteria referenced above, it is the court's judgement that a penalty of \$45,000 is warranted. In the court's view, the penalty is large enough to have a substantial deterrent effect while it avoids fiscally punishing Hunter based on causational premises that have not been established. In addition, the assessment recognizes that Hunter is not a habitual offender but rather an operator with a small history of prior violations, and a "very cooperative" operator that Jewell described as being free of "significant" safety issues before the events of December 9 and 10. Tr. 101.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728538	2/25/14	56.15020	\$5,645	\$4,000

The court has found that the violation was very serious and that it was caused by Hunter's moderate negligence. Since in the court's view the company's negligence is less than the Secretary asserts, the court departs somewhat from the Secretary's proposed penalty. Given the court's gravity and negligence findings and the other civil penalty criteria discussed above, the court finds that a penalty of \$4,000 is appropriate. The assessment also reflects Hunter's small history of prior violations.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728541	2/25/14	56.18002(a)	\$1,530	\$1,530

The court has found that the violation was very serious and that it was caused by Hunter's moderate negligence. Given the fact that the court's gravity and negligence findings are consistent with the Secretary's allegations and in view of the other civil penalty criteria discussed above, the court concludes that the penalty proposed by the Secretary is appropriate, and it assesses Hunter \$1,530 for the violation.

ORDER

Citation No. 8728537 **IS VACATED**. The negligence finding on Order No. 8748538 **IS MODIFIED** from "high" to "moderate." In addition, the finding of unwarrantable failure on Order No. 8748538 **IS DELETED**. Within 30 days of the date of this decision, Hunter **SHALL PAY** total civil penalties of \$50,530 for the violations found above. In addition, and within the

same 30 days, if he has not already done so, the Secretary **SHALL VACATE** Order No. 8728539 (Stip.9). Upon payment of the penalties and vacation of the order(s), this proceeding **IS DISMISSED**.⁴²

David F. Barbour

David F. Barbour
Administrative Law Judge

Distribution:

Willow Eden Fort, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Suite 230, Nashville, Tennessee 37219

Robert Nienhuis, Esq.; Elana Charles, Esq., Hunter Sand & Gravel, LLC, One Memorial Drive,
Suite 1000, St. Louis, Missouri 63102

⁴² Payment shall be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.