FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2012-0891 A.C. No. 15-17651-284668
v.	Mine: Mine # 1
ROCKHOUSE ENERGY MINING, Respondent	

DECISION AND ORDER

Appearances: Brian Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;

Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves two section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Rockhouse Energy Mining ("Rockhouse" or "Respondent") at its Mine # 1 mine. The parties presented testimony on July 16, 2013 in Pikeville, Kentucky.

For Citation No. 8260352:

- Rockhouse violated § 75.202(a) of the Mine Act.
- Rockhouse was not negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- The citation was not properly designated as significant and substantial.
- I assess a penalty in the amount of $100.00.

For Citation No. 8260354:

- Rockhouse did not violate § 75.360(a)(1) of the Mine Act.
- The citation is vacated.

Stipulations

The parties submitted the following stipulations at the hearing: (Tr. 15:21 – 16:18)

1. Respondent is subject to the Federal Mine and Safety Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission;

2. The presiding administrative law judge has the authority to hear this case and issue a decision;

3. Respondent has an effect on commerce within the meaning of Section 4 of the Federal Mine and Safety Health Act of 1977;

4. Respondent operates Mine #1, Mine ID No. 15-17651;

5. The citations in this docket are complete, authentic, and admissible;

6. The inspector notes for the citations identified in paragraph 5 are complete, authentic, and admissible;

7. Mine #1 produced 605,866 tons of coal in 2010; 598,636 tons of coal in 2011; and 283,483 tons of coal in 2012;

8. The penalty will not affect Respondent's ability to remain in business;

9. The Respondent abated the citations involved herein in a timely manner and in good faith; and

10. The parties have also stipulated to the authenticity of each parties' exhibits.

Basic Legal Principals

Significant and Substantial

One of the citations in dispute and discussed below has been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

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

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

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

Negligence is relevant in cases under the Mine Act, but since the Act creates a strict liability enforcement model,[1] negligence is not an essential part of the calculus to determine whether an operator is at fault. When an MSHA inspector observes conditions that create mine

[1] "*If, upon inspection or investigation, the Secretary* or his authorized representative *believes that an operator* of a coal or other mine subject to this chapter *has violated* this chapter, or *any mandatory health or safety standard, rule, order, or regulation* promulgated pursuant to this chapter, *he shall, with reasonable promptness, issue a citation to the operator.*" 30 U.S.C.A. § 814(a) (emphasis added). This Court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ Gill) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC 1632 at 1636.

hazards or otherwise fall short of the Act's requirements, a citation is required, irrespective of fault.[2] Negligence is, however, central to the assessment of civil penalties and to the evaluation of the enhanced enforcement elements of S&S, unwarrantable failure, and flagrant violation.

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

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

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

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

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

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at

[2] The logic of this is borne out by reference to the standard citation form used by MSHA, MSHA form 7000-3. Section 11 of that form lists an option for those circumstance when there is no negligence underlying the issuance of the citation. (*See* Ex. S-1)

the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

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

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme

gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

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

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

Special Assessment

Through notice and comment rulemaking, the Secretary promulgated regulations specifying the "Criteria and Procedures for Proposed Assessment of Civil Penalties." 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the "regular assessment" process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[3] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory. The lack of transparency in the Secretary's special assessment process coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially assessed penalty is of little consequence and is not binding on the Commission because the Commission imposes civil penalties *de novo*.

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[3] In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. 72 Fed. Reg. at 13,621.

Citation No. 8260352

On August 8, 2011, at 3:06 p.m., MSHA Inspector Billy Ray Meddings[4] issued Citation No. 8260352 to Rockhouse Energy's Mine #1, alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a)[5] of the Mine Act. The regulation requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). Section 75.202(a) is a mandatory safety standard. The citation alleges:

> The roof, face and ribs of areas where persons work or travel is [*sic.*] not being supported or otherwise controlled to protect persons from hazards related to fall of the roof, face or ribs on active 010-0 MMU (#3 Section) Starting two X-cut out-by Survey Spad # 30396 and extending to the working face including all six entries, loose ribs and over hanging brows exist at several locations in the affected area. This section produced coal two shifts per day and average of five days a week. A non-fatal accident involving a roof bolter operator also occurred today on this section from falling rib. This condition exposes miners working on this section to hazards associated with fall of roof and rib.

Ex. S-1.

The Violation

The citation alleges reasonably likely injury that could be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the operator's negligence was moderate. *Id.* Meddings initially alleged moderate negligence but later amended the citation to allege high negligence. (Tr. 54:14-18; Ex. S-1) Respondent does not contest the gravity of the violation or its S&S designation, however it takes issue with the negligence designation and the special assessment penalty. (Tr. 11:16-21; Tr. 54:8-12) It can be inferred by this that it also does not contest the fact of the violation.

According to FMSHRC's Procedural Rule 69(a), a judge's "decision shall [...] include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion *presented by the record* [...]" 29 C.F.R. § 2700.69 (emphasis added). Additionally, the Commission has made clear that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his

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[4] At the time of the trial, Meddings had worked for MSHA as a coal mine inspector for approximately six years. (Tr. 17:5-12) Meddings had the initial 20 week training in 2008. He has received investigation training, and refresher training. (Tr. 17:18 – 18:9) Meddings was in the coal industry for 25 years before joining MSHA, (Tr. 18:16-25) had worked exclusively in underground coal mines his entire career, and was a foreman for 20 of those 25 years. (Tr. 19:1-22)

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

decision." *Broken Hill Mining Co.*, 19 FMSHRC 477, 478 (Mar. 1997) (citing *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994)); *see also L & J Energy Co.*, 18 FMSHRC 118 (Feb. 1996). Therefore, despite the fact that Respondent does not contest certain aspects of the citation, my decision is based on my review of the record and is not limited to what the Respondent conceded at trial. Notwithstanding, substantial record evidence supports the conclusion that there was no operator negligence, and that the S&S designation is not warranted.

There is case law specific to Section 75.202(a) violations regarding liability. In *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998), the Commission held that:

> The adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

(citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987))[6]

Meddings was at the mine to conduct a quarterly E01 inspection. (Tr. 22:16-23) During his inspection, he was informed by mine foreman John Stanley that an accident had occurred in a different section of the mine, Section 2 in the Number 10 unit. (Tr. 23:10-14; Tr. 23:17-21; Tr. 28:8-9) Meddings went to the accident site, 30 to 40 minutes away. (*Id.*; Tr. 25:1-3) Another MSHA Inspector, Darrell Hurley[7], arrived at the mine later that morning, August 8, 2011, to investigate the rib roll accident at issue here. (Tr. 119:2-7; Tr. 125:17-21)[8]

When Meddings arrived at the accident scene, he was informed that a roof bolter, William Maynard, had been struck by rocks from a rib roll as he was spot bolting Section 2. (Tr. 25:16-22; Tr. 35:5-12; Tr. 127:9-15) Two rocks fell on Maynard; one struck him the face, resulting in lacerations, the second fell on top of him, pinning him down until two miners lifted the rock off him. (Tr. 31:17 –32:12; Tr. 119:19-25)[9] While these background facts shed light on the events that occurred on August 8, 2011, and why Meddings was in the area in question,

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[6] I am aware of the recent Commission decision, *Jim Walter Resources*, Se 2007-203-R and SE 2007-0294 (Mar. 31, 2015), however, this decision is not relevant to the case and facts now before me.

[7] At the time of the hearing, Hurley had worked at MSHA since 1999 and had been a roof control specialist since 2002. (Tr. 115:25 – 116:7) Part of Hurley's duties as a roof control specialist is to investigate roof falls and roof accidents. (Tr. 119:11-14) Hurley had additional roof control specialist training in addition to his regular mine inspection training, and yearly refreshers for both. (Tr. 116:12-24) Before joining MSHA, Hurley spent 29 years working in underground coal mines, the majority of which was spent in Kentucky, and he worked as a foreman or a supervisor for 23 of those years. (Tr. 117:5-12; Tr. 118:1-4)

[8] Hurley and James Tackett, a Commonwealth of Kentucky mine inspector, traveled underground together to investigate the accident site. (Tr. 120:12-14)

[9] Meddings drew a picture of the rock and measured its size. He testified that the rock measured 4-12 inches thick and ranged from 11-36 inches in height. (Tr. 29:17-23; Ex. S-3)

Meddings testified multiple times that the citations were not issued merely because the accident occurred. (Tr. 86:3-10; Tr. 90:20-21)

The area in question had been idle for approximately two to three years. The operator had been rehabilitating the area for approximately three weeks prior to August 8, 2011, in preparation for resumed production, by cleaning, scooping, and spot bolting. (Tr. 36:3-12; Tr. 37:6-13; Tr. 121:2-6; Tr. 164:20 – 165:11; Tr. 207:9-18) Meddings testified that if an area of the mine is left unattended, under normal wear and tear and due to weather conditions, the roof and ribs deteriorate, and some sections may fall. (Tr. 36:17 – 37:3) Hurley also believed the alleged violative conditions were caused by weathering and the amount of time that this area had not been mined. (Tr. 132:16-21)

The Secretary's position is based on Meddings' testimony that he observed poor conditions in the area, including areas where the rib material and brows (overhangs) were loose. (Tr. 40:3-9; Tr. 53:19-22) He claimed he inspected rib areas in Sections 2, 5, 6, and 7, and found sections of loose or fallen material ranging in thickness from one to 19 inches. (Tr. 46:5-9) Meddings issued Citation No. 8260352 for violating Section 75.202(a) for those loose rib area and brows. (Tr. 53:6-14)

According to Hurley, the violating conditions were obvious, such that a casual observer would recognize the rib issues, and extended through two crosscuts comprising approximately six to eight entries. (Tr. 143:18 – 144:2; Tr. 131:1-6)

Meddings', and to a certain extent Hurley's, testimony is undercut by the evidence presented by Respondent's witnesses.

Jonah Puckett[10] testified that at the time of the accident he had not drawn up a cut plan to begin mining coal, which was his responsibility. Production mining was not to start until the rehabilitated Sections had been checked for hazards. (Tr. 207:23 – 208:4; Tr. 215:9-19) That morning, Puckett brought his crew down to the sections to check for hazards and to address any they found before production was to begin. (Tr. 209:4 – 210:10) During this process, Puckett saw a wide corner and told a roof bolter to spot bolt it. (Tr. 210:11-14) He did not notice any loose rib material in the area, but he did pull down a small amount of draw rock from the roof. (Tr. 216:5 – 217:5)

David Scott[11] was in charge of rehabilitating Sections 1-7 and testified that as part of the rehabilitation process his crew pulled down loose rib material and spot bolted the surrounding

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[10] At the time of the hearing, Puckett was a section boss at Process Energy for Alpha Natural Resources. (Tr. 205:19-20) Additionally, at the time of the hearing, Pucket had been in the coal industry for 10 years. (Tr. 205:21-22) Puckett received his foreman's certification in 2006. (Tr. 206:1-3) On August 8, 2011, Puckett was the section foreman at Mine #1. (Tr. 206: 15-18)

[11] At the time of the accident, Scott was employed at Rockhouse Energy Mining, but is currently employed by Process Energy. (Tr. 163:24 – 164:3) At the time of the hearing, Scott had been mining since November, 1998, and was a certified mine foreman and an underground

area. (Tr. 166:8-16; Tr. 167:15 – 168:4; Tr. 207:9-18) On the morning of the accident, Maynard was setting up a roof bolter to continue rehabilitating the area by adding more roof support. (Tr. 128:3-6) Scott testified that in Section 3, the roof and ribs had some sloughage, but he did not see any hazards. (Tr. 169:20 – 170:4).

Day shift mine foreman Ricky Mays[12] testified that before the accident, he had been to Section 3 to help John Stanley, the mine foreman. According to Mays, it looked "pretty good" and only needed spot bolting. (Tr. 224:22 – 225:20) Mays did not think the rib conditions were bad; there was only some scaling. (Tr. 228:14-25)

Mine superintendent Jonah Varney[13] testified that the ribs and roof were intact but just looked flaky. He did not believe it posed a hazard of injury to a miner. (Tr. 248:4-17)

Additionally and importantly, Terry Coleman,[14] a Kentucky mine examiner and unaffiliated witness, was in the area near the section where the accident occurred. Coleman had inspected Section Nos. 1, 2, 3, 4, and 5 before the accident occurred. (Tr. 99:11-14; Tr. 101:7-10; Tr. 181:24 – 182:5) He did not recall noticing any roof or rib problems that would rise to the level of a citable hazard, and at the time of his inspection, he did not issue any citations for the area. (Tr. 186:3-18)

My evaluation of the record evidence relating to this citation derives from a thorough weighing of the evidence, some of which is in conflict on key points. In particular, I find that Meddings' testimony about and documentation of areas of loose ribs and hanging brows is substantially contradicted and undercut by the testimony of the other persons who were in the area prior to the accident and who were tasked with the same responsibility to look for and document any hazardous conditions. I am also convinced that Meddings felt obligated to write a citation that matched the seriousness of the incident, even though there was objectively no way to anticipate or prevent it and the resulting injury. Starting from a desire to justify what he felt was an appropriate response to the event, Meddings documented conditions that were not evident to equally competent and neutral pre-incident observers. Starting with a predetermined degree of seriousness in mind makes it tempting to find "evidence" to support the desired

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EMT. (Tr.164:4-8). In August, 2011, Scott was the general mine foreman for the second shift. (Tr. 164:12-14)

[12] At the time of the hearing, Mays had been in the mining industry for 23 years and was working at Process Energy Sydney Coal plant. (Tr. 221:7-14) Mays got his foreman certification in 1998 and had been bossing since then. (Tr. 221:22 – 222:3) At the time of the accident, Mays was employed by Rockhouse Energy Mining as mine foreman for the day shift. (Tr. 221:18-21; Tr. 239:13-14)

[13] At the time of the hearing, Varney had been in the mine industry for 25 years and obtained his foreman certification in 1993. (Tr. 241:12-18). At the time of the issuance of the citation, Varney was the mine superintendent. (Tr. 242:12-14).

[14] At the time of the hearing, Coleman had been working for the Office of Mine Safety and Licensing for Kentucky as an underground safety analyst for five years. (Tr. 179:7 – 108:1) Coleman had been in the coal industry for 37 years. *Id.* Coleman testified that as a safety analyst, he observed employees through a cycle of their work and made corrective suggestions if he saw anything wrong, or if there was poor job performance. (Tr. 181:3-10)

outcome. I am sure it seemed inadequate to write a simple "technical" violation of the roof control plan based on the mere fact that the incident occurred (strict liability) and equally appropriate to reach for facts that would justify a penalty commensurate with the seriousness of the accident. However, that is what happened in my view.

I find that the violative conditions that Meddings and Hurley testified about were exaggerated. This finding is due in large part to the testimony of the third party witness Coleman, who was present on and near the section before and after the accident, who did not believe there was any hazard requiring the issuance of a citation. I also find that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would not have found a violation of the standard here. Therefore, because the Respondent conceded the violation, and because of the strict liability nature of the Mine Act, I find that there was a violation of Section 75.202(a).

Negligence

Meddings assessed the violation at high negligence because of the numerous locations where he claimed to find loose rib material, his belief that the section was active, and the fact that a preshift examination was performed in the area. (Tr. 54:19 – 55:5; Tr. 56:1-7) Meddings did not note any mitigating circumstances, nor did he mention that mine management had claimed any. (Tr. 64:19-23).

At the trial, counsel for the Secretary stressed repeatedly that the area where the incident occurred was in production and active. Whether the section was active is immaterial to my conclusions here. In an earlier iteration, Section 75.202(a) limited its coverage to "active" areas in a mine, i.e. "active underground roadways, travelways and working places," Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354-01, 2355. Section 75.202(a) was amended to broaden its protective scope to include areas where "persons work or travel." 30 C.F.R. § 75.202(a). Therefore, whether the section was "active" is of no importance here.

Scott testified that during rehabilitation, he was looking for hazards and directed his crew to fix any problem areas. (Tr. 169:10-19) On August 8, 2011, Scott traveled through the section where the accident occurred and did not observe any dangers or hazards. (Tr. 170:17-22) Additionally, in the preshift examination conducted by Ralph Lockard[15] the morning of the accident, loose rib material in the Number 3 Section and draw rock in the Number 5 Section were pulled, indicating that the mine was actively looking for hazardous roof and rib conditions in the rehabilitated area. (Tr. 82:23 – 83:2; Tr. 84:13-23; Tr. 107:11-13; Ex. S-3). In addition to Lockard pulling loose rib material and draw rock, Scott instructed miners to spot bolt, and Puckett instructed miners to spot bolt and pull draw rock, all on the day in question and before the citation was issued.

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[15]At the time of the hearing, Lockard worked for Process Energy and was no longer employed by Rockhouse Energy. (Tr. 194:8-10) Lockard had been in the mining industry since 1993. (Tr. 194:11-14) Lockard received his foreman certification in 2007. (Tr. 194:15-23) Lockard testified that he began performing preshift examinations in 2007 and was trained by his mentor, the previous foreman. (Tr. 194:24 – 195:7)

As a Kentucky mine examiner, Coleman is tasked to look for rib and roof issues during an imminent danger inspection. (Tr. 185:6-10) If he sees a violation, like MSHA inspectors, he must issue a citation. (Tr. 188:24 – 189:13) Coleman testified that while he did find a small area where there was some loose rib material, he did not believe the area was hazardous and did not issue a citation. Because the sections had been inspected by Coleman, and no hazards were found, the Respondent is not expected to know that there was a hazard. Additionally, as discussed further below, there was an adequate preshift examination performed on the section. Thus, I conclude that the Secretary failed to prove by a preponderance of the evidence that Respondent was highly negligent.

Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3(d). No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.* The nature of the violation was exaggerated by the Secretary, its scope was limited based on Coleman's testimony, and Meddings' testimony was not credible regarding the extent of the violation. It is clear that the citation was written in response to the fact that a serious rib roll incident happened and not because of an identifiable hazard in the rehabilitated area of the mine. Respondent was actively rehabilitating the section and had been pulling loose ribs and roof material during the preceding three weeks of rehabilitation, during the preshift examination on the morning of August 8, 2011, and before production began on the section on August 8, 2011. Indeed, the mine decided to forego immediate production in the interest of safety. (Tr. 209:4 – 210:10; 210:11-14; 216:5 – 217:5) I cannot find that the operator knew or should have known that a violating condition existed. There were also considerable mitigating circumstances. The operator exercised reasonable diligence in assuring the rehabilitated area was safe for its employees. I conclude that the Respondent was not negligent.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Meddings testified that he marked the citation as lost work days or restricted duties because the miner in the accident was injured. (Tr. 57:21 – 58:3) He further stated that, at a minimum, a miner would suffer lost workdays or restricted duty from a rib roll. He was aware of miners sustaining injuries such as broken ankles or ribs, even permanently disabling injuries, from rib rolls. (Tr. 58:7- 59:1) The citation also alleged that one person would be affected. (Ex. S-1) I find and concur that an injury from a rib roll is serious in nature and could result in lost work days or restricted duty.

Significant and Substantial

There was a violation of a mandatory safety standard. There is a reasonable likelihood that an injury of a reasonably serious nature, i.e. broken bones, could result from such a violation. The rib conditions here did not contribute to a discrete measure of danger of injury to a miner that the operator could have foreseen. This alone prevents this violation from being S&S. In addition, the evidence did not establish a reasonable likelihood that the conditions observed by Meddings would result in an injury. The violation was not S&S.

Penalty

The Secretary specially assessed the penalty for Citation No. 8260352 at $42,000.00. Mine #1 produced 605,866 tons of coal in 2010, 598,636 tons of coal in 2011, and 283,483 tons of coal in 2012. Rockhouse's business would not be significantly affected even if the full special assessment were imposed. Meddings recommended that the citation be specially assessed "to protect the miner." (Tr. 66:3-6) Hurley testified that from June 1, 2011, through August 7, 2011, Rockhouse received only one 75.202(a) citation. (Tr. 148:24 – 150:2; Ex. R-3) Rockhouse was not negligent. According to the parties' stipulations, Rockhouse demonstrated good faith in abatement of the violative condition. The violation is not S&S.

The Secretary failed to prove the magnitude of the gravity necessary to sustain a special assessment. Operator negligence was neither gross nor extreme. There were no unique or aggravating circumstances to warrant a higher or "special" penalty assessment. I assess a penalty of $100.00.

Citation No. 8260354

On August 9, 2011,[16] at 10:45a.m., Inspector Meddings issued Citation No. 8260354, alleging a violation of 30 C.F.R. § 75.360(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation requires that "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8–hour interval during which any person is scheduled to work or travel underground [...]" 30 C.F.R. § 75.360(a)(1). Section 75.360(a)(1) regulates a mandatory safety standard. The citation alleges:

> The operator failed to conduct an adequate exam of the active 010-0 MMU (# 3 Section) on 08/08/2011. Several loose ribs and brows exist starting 2 X-cuts outby survey spad #30396 and extending to the work faces, including all 6 entries. The foreman's date, time and initials are in the area showing preshift was conducted between 05:00 to 05:38. This mine produces coal two shifts per day and average of five days per week. A non-fatal accident also occurred on this MMU on 08/08/2011 involving a roof bolter operator being stuck [*sic.*] by rib roll in the preshifted area. In order to abate this citation the operator must conduct and record additional training for all examiners at this operation on hazard recognition and proper steps when hazards are observed. The operator must start this training immediately with each on-coming shift examiners until all three shifts have been trained.

Ex. S-2.

[16] The citation was issued the day after the alleged violating condition occurred. (Tr. 72:10-15) Meddings testified that he did not review the preshift examination books before he left the accident site, but reviewed them the next day when he returned to the mine. (Tr. 73:11-16)

The Violation

The citation alleges that injury was reasonably likely; the injury could reasonably be expected to result in lost workdays or restricted duty; the violation was significant and substantial; nine persons could be affected; and the violation resulted from high negligence. *Id.* Meddings cited the Respondent under Section 75.360(a)(1), which requires operators to conduct a preshift exam mine three hours before a shift begins in working and travel areas of the mine. (Tr. 67:22 – 68:9) Meddings issued Citation No. 8260354 for an inadequate preshift examination because of the loose ribs and brows present in the violative area. (Tr. 67:4-13)

To establish a Section 75.360(a)(1) violation, the Secretary must prove that violating conditions existed at the time of the pre-shift examination and were obvious. *CONSOL Penn. Coal. Co.*, 32 FMSHRC 545, 552 (May 2010)(ALJ Bulluck). A violation exists where "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent." *Canon Coal Co.*, 9 FMSHRC at 668.

Lockard conducted a preshift examination between 5:00 and 5:38 a.m. on August 8, 2011. (Tr. 84:8-12; Tr. 144:3-5; Ex. S-2) Meddings reviewed the preshift paperwork which had been completed three hours prior to start of the shift. No hazards were noted in the preshift exam records. (Tr. 57:13-18; Tr. 67:4-19; Tr. 68:3-4; Tr. 70:8-11; Tr. 74:1-5)[17] Meddings concluded that the miners were exposed to loose ribs and brows which were not corrected, and that the oncoming foreman was not notified of the alleged hazards. (Tr. 70:25 – 71:6)

The weight of the evidence does not support this version. Meddings' own contemporary notes, his own testimony, and the testimony of other witnesses at the hearing contradict this. In his notes taken on August 9, 2011, Meddings wrote: "[a]lso, preshift conducted on 8/8/11 between 5 a.m. and 5:38 a.m. Shows loose rib in Number 3 and draw rock in Number 5. Loose rib and draw rock was pulled." (Tr. 82:23 – 83:2; Ex. S-3). Meddings noted and testified on cross examination that Lockard noticed a loose rib in Section 3 and addressed the situation by pulling it down. (Tr. 84:13-18; Tr. 107:11-13). Meddings also stated that Lockard had mentioned draw rock in Section 5 in his exam notes, which was pulled down. (Tr. 84:19-23) Lockard confirmed this. He saw some loose rib material in the Number 3 and 5 entries and used a slat bar to pull it down to make the area safe. (Tr. 197:21 – 198:2)

Meddings testified that based upon his 25 years of mining experience, the violating conditions existed at the time of the preshift examination and it would take more than few minutes, a few hours, or even an entire shift for the amount of loose rib and brow material that was present to occur. (Tr. 68:10 – 69:7; Tr. 79: 16-25; Tr. 109:11-19) Hurley also believed that the conditions cited across the sections occurred over a longer period of time. (Tr. 144:6-12) The categorical nature of these statements is contrary to Meddings' testimony that, in his

[17] If the preshift examiner had noticed hazardous conditions, Meddings testified he could have closed the area off with signs to make sure no one traveled the area, and corrected the conditions. (Tr. 71:7-12) This, however, is unconvincing because of Medding's testimony on cross examination and his own notes taken on August 9, 2011, which are discussed in more detail below.

experience, he had seen a rib roll occur in an area that had appeared fine, but burst seconds later. He testified of other instances where rib and roof conditions had changed in seconds. (Tr. 78:18-25; Tr. 92:20-22) Hurley also agreed that poor rib conditions could develop instantly. (Tr. 156:20-23) Also, Meddings did not testify at a prior deposition nor did he put in his notes that these conditions existed for several shifts. (Tr. 81:2-6)

Most importantly, Meddings did not inspect the sections until almost 10 hours after the preshift examination had occurred and hours after the accident happened. (Tr. 77:13-18; Tr. 92:11-19) Casting further doubt on his testimony, Meddings testified that the area in question had been rock dusted, but that he did not recall if there was rock dust in the cracks. (Tr. 98:4-10) Hurley's notes confirm this, and indicate that the area was clean and well rock dusted. (Tr. 161:2-4) The testimony and contemporaneous records indicate that whatever issues Meddings claimed to have with the ribs and roofs, occurred after the area was rock dusted, and presumably after the preshift examination was done.[18]

Lockard testified that when he performs a preshift examination, he looks at the ventilation and air flow, checks for methane accumulations, spillage, curtain issues, loose ribs, and draw rock -- anything that could hurt miners. (Tr. 195:21 – 196:3) He takes his job seriously and would not want to expose any of the miners to potential harm. (Tr. 196:8-17) Lockard testified that when he saw the two rib issues mentioned in his preshift records he addressed them right away. He did not think he left any hazardous conditions behind. (Tr. 198:11 – 199:21)

Additionally, Coleman was present near the section when the accident occurred and had inspected entries Number 1, 2, 3, 4, and 5 before the accident occurred. At the time of his inspection, Coleman did not recall there being any roof or rib problems, other than a small section between Sections 1 and 2. He did not issue a citation because the area was small and he did not believe it to be hazardous. (Tr. 185:11-20; 185:22 – 186:2) This, coupled with the fact that Lockard had pulled loose ribs and draw rock during his preshift and did not believe he left any hazards behind, evidences the adequacy of the preshift examination.

The Secretary did not prove that the alleged conditions were present at the time of the preshift examination, nor did the Secretary prove that the condition was obvious. A reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would not have considered the small section of loose rib in between Sections 1 and 2 a hazard warranting protection under this standard. The Secretary failed to prove that the Respondent violated Section 75.360(a)(1). Thus, I vacate Citation No. 8260354.

WHEREFORE, it is **ORDERED** that Rockhouse pay a penalty of $100.00 within thirty (30) days of the filing of this decision.

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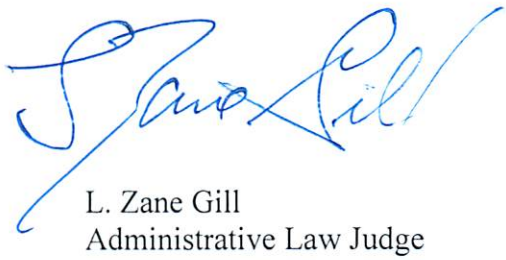
[18] It must be noted that the Secretary in his brief points out that because the roof was spot bolted during the shift, this is evidence of an inadequate preshift examination. (Resp. Br. at 11) However, the Respondent was cited for loose ribs and brows, not inadequate roof support, i.e. inadequate roof bolting. (Ex. S-2)

It is further **ORDERED** that Citation No. 8260354 be **VACATED.**



L. Zane Gill
Administrative Law Judge

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