

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 2015

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

v.

REGENT ALLIED CARBON
ENERGY, INCORPORATED,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-0404
A.C. No. 44-07081-323471

Mine: No. 2

DECISION AND ORDER

Appearances: Billy Shelton, Esq., Jones, Walter, Turner, & Shelton, Lexington,
Kentucky for Petitioner

Paige Bernick, Esq., U.S. Department of Labor, Office of the
Solicitor, Nashville, Tennessee for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petitioner, Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, Regent Allied Carbon Energy, Inc. (Regent) with an unwarrantable failure to comply with 30 C.F.R. §75.511, which sets forth requirements to be met when miners perform electrical work on low-, medium-, or high-voltage distribution circuits and equipment in an underground coal mine.¹

¹ 30 C.F.R. § 75.11 (2013) states:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such

A hearing was held in Blountville, Tennessee. The parties presented testimony and documentary evidence. Witnesses were sequestered. Thereafter, the parties submitted post-hearing briefs.

The single 104(d)(1) citation at issue was given to Regent on January 28, 2013 at its No. 2 mine during a regular inspection by MSHA Inspector Marty Robinson.² Citation No. 8201921 alleges a violation of 30 C.F.R. §75.511 for performance of electrical maintenance on a shuttle car trailing cable that had not been properly locked and tagged out. The citation also alleges that the maintenance was performed without proper supervision by a qualified person. The violation was designated significant and substantial. Initially, Citation No. 8201921 was issued under Section 104(a), but was modified to a 104(d)(1) unwarrantable failure citation after Robinson conducted additional investigation on January 29. The modified citation also reduced the injury or illness that could reasonably be expected to occur as a result of the violation from “fatal” to “lost workdays or restricted duty” and increased the level of negligence from “moderate” to “reckless disregard.”

MSHA specially assessed the proposed penalty at \$20,900, but testimony elicited from the inspector by the Secretary was limited to the fact that the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence.

The threshold issue presented is whether the work that inspector Marty Robinson observed Regent miners Jonathon Browning and Bradley Martin performing on January 28 was “electrical work” under Section 75.511. Other issues concern the appropriateness of the gravity, negligence, significant and substantial (S&S) and unwarrantable failure designations and the appropriateness of the proposed, specially-assessed civil penalty of \$20,900.

Section 75.511 imposes three duties on the operator. First, electrical work may only be performed by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Second, the disconnecting device of an electrical component being repaired must be locked out and tagged by the person performing such work. Third, the locks or tags may

person. Locks or tags shall be removed only by the persons who installed them, or, if such persons are unavailable, by persons authorized by the operator or his agent.

² All subsequent dates are in 2013, unless otherwise indicated.

only to be removed by the person who installed them, or by an authorized individual if this person is not available. *See* 30 C.F.R. Sec. 75.511.

Since section 75.511 only applies to electrical work, the dispositive issue is whether the work done by Browning and Martin in handling and taping the shuttle car trailing cable constitutes electrical work. Neither party contends that Browning and Martin were qualified to conduct electrical work or that the work they performed was supervised by a qualified person. Both Respondent and the Secretary have recognized that if the work done by Browning and Martin does not constitute electrical work, then no violation of section 75.511 occurred. Tr. 73, 98; R. Br. 14.

Neither the Mine Act nor MSHA regulations specifically define “electrical work.” The MSHA Program Policy Manual (PPM), however, provides guidance that electrical work is “work required to install or *maintain* electric equipment or conductors.” P. Ex. 3, at 54 (emphasis added). To clarify this definition, the PPM lists 11 examples of electrical work within the scope of the standard.

1. Locating faults in cables;
2. Replacing blown fuses, except blown fuses on trolley poles may be replaced by miners other than persons qualified to do electrical work [in certain circumstances];
3. Making splices, connections, and terminations in electric conductors and cables;
4. Installation of couplers on the end of cables.
5. Repair of electric components of electrically-powered portable, mobile or stationary equipment;
6. Installation of electrical wiring;
7. Electrical maintenance of permissible equipment;
8. Any type of work performed inside rooms, vaults, substations and other similar enclosures where energized parts of conductors are exposed;
9. Any type of work performed inside transformers, power centers, rectifiers, switch boxes, switch houses, panels, and other enclosures of electric equipment or conductors;
10. Electrical troubleshooting and testing; [and]
11. Handling energized high voltage power cables.

P. Ex. 3, at 55–56.

The PPM also includes 12 examples of non-electrical work that does not require the supervision of a qualified person:

1. Operation of electrical equipment;
2. Normal operation of control switches, switch boxes, or circuit breakers, provided no energized parts or conductors are exposed;
3. Operation of cutout switches in trolley circuits;
4. Hanging or removing fuse nips from trolley wires;
5. Changing bits;
6. Lubrication;
7. Handling energized trailing cables;
8. Inserting low- and medium-voltage cable couplers into receptacles or withdrawing low- and medium-voltage cable couplers from receptacles;
9. Transportation of electric equipment and cables;
10. Mechanical repairs on electrically-powered equipment, provided no energized parts or conductors are exposed;
11. Installation and repair of equipment and circuits in which shock hazards do not exist (having a nominal rating of 40 volts or less), provided such equipment is not required to be permissible; and
12. Installation, repair, and guarding of trolley wires and trolley feeder wires.

P. Ex. 3, at 56-57.

For the reasons set forth below, I find that the miners were handling and re-taping splices on a shuttle-car trailing cable during a power outage and the cable was not locked and tagged out. I find that this was electrical work and the standard was violated. I affirm the citation, as written, but assess a penalty of \$11,500 because the basis for special assessment was not substantiated at trial.

II. Stipulated Facts

At hearing, the parties agreed to the following stipulations:

1. Regent Allied Carbon Energy (Regent) was the operator of Mine #2.
2. Regent Mine #2 is a mine as defined by Section 3(h) of the Act. 30 U.S.C. § 802(h).
3. At all material times involved in this matter, the product of the subject mine entered commerce, or the operations thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act. 30 U.S.C. § 803.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission pursuant to Section 105 and 113 of the Mine Act.
5. MSHA Inspector Marty Robinson, whose signature appears in block number 22 of the Citation, was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
6. True copies of the Citation were served on Regent as required by the Mine Act.
7. The total proposed penalty assessed for the Citation will not affect Regent's ability to remain in business.
8. The alleged violation was abated in good faith.

Jt. Ex. 1.

III. Apercu of Regent's Underground Power System

The #2 Mine runs three shifts. The first two are production shifts. The third is a maintenance shift. Tr. 200.

Underground power is supplied to Regent's Mine #2 by a 7,200-volt cable, which extends from a surface power substation to an underground power center. Tr. 217.³ On the back of the power center is a visible disconnect device so one can see the blades in the back of the power center. When the blades are closed, the circuit can be energized. Tr. 152-53.

A distribution circuit distributes power to various areas on the mine, like the power center. Tr. 150. An equipment circuit powers a particular piece of machinery. The miners in this case were working on an equipment circuit. Tr. 150. Once power reaches the power center, a transformer reduces the voltage and supplies it to various receptacles at the power center. Tr. 218. These receptacles provide necessary electrical power in various voltages to the equipment via cables. Tr. 38.⁴

³ The power center in the No. 2 mine is located on the floor in the number 3 entry. Tr. 22, 143. The power center is about five feet wide, twenty to thirty feet long, and three feet high. Tr. 261, 327. A curtain is located behind the power center, extending from one rib to another. Tr. 262.

⁴ The side power center at Regent's No. 2 mine has a dozen receptacles, located in a row. Tr. 104, 264.

A cable extends from an individual machine or piece of equipment and is connected to a receptacle and disconnected via a plug, or cathead, at the end of the cable. Tr. 38, 151. For example, a shuttle car has a trailing cable that provides 480 volts of electrical power necessary for operation. Tr. 34. A trailing cable is usually two to three inches wide and has an insulated jacket that protects copper cable conductors inside. Tr. 230-31.

Each receptacle within the power center can be disengaged by a circuit breaker. Tr. 38. A receptacle can also be locked and tagged out, preventing a plug from being inserted into a receptacle and power from being supplied to a cable or piece of equipment. Tr. 39. To lock out a receptacle, a lock is placed through a pre-drilled hole or tab on the receptacle, which would house the cathead if it were plugged in. Tr. 62. The tab is used to hold a plug in place. A lock or bar inserted into the tab, prevents the plug from lining up with the tab and making contact with the receptacle. Tr. 62. A lock also prevents a circuit breaker on the receptacle from being plugged in or reset. Tr. 38. A tag or warning sign is placed on the device to alert others to refrain from energizing the circuit. Tr. 38.

IV. Summary of Testimony

A. Inspector Robinson's Testimony

On January 28, MSHA inspector Marty Robinson conducted a regular inspection at Regent's No. 2 Mine. Tr. 31. When Robinson arrived on the property that morning, he was met by mine superintendent Robert McClanahan. Tr. 32. McClanahan called John Senter, the belt foreman, to accompany inspector Robinson into the mine. Tr. 32. There was no power extending underground at the time Robinson arrived at the mine. Tr. 33. Robinson first inspected Senter's personnel carrier, and then Robinson and Senter went underground through the primary escapeway. Tr. 33.

Inspector Robinson performed an imminent danger inspection immediately after arriving at the MMU. Robinson and Senter then went down the number two entry to check the power center. Tr. 33. As they did so, Robinson observed two miners, Jonathan Browning and Bradley Martin, near a shuttle car pulling the 480-volt cable through their hands and "feeling every inch of the cable" as if they were doing an exam. Tr. 33-34. According to Robinson, the miners were holding the cable, sliding it through their hands, pulling it off a reel, and taping spots and splices on the cable. Tr. 34-35, 116, 136.⁵ Robinson credibly testified that the miners were looking for damage to the inner

⁵ A splice is a mechanical joining of the inner conductors or copper wires of a cable that have been severed. Tr. 268-69.

conductors, which required require bending the cable to check for ruptures on the outer jacket. Tr. 35, 134. Bending the cable can open the jacket to show if there is damage and the insulating material is compromised. Tr. 135. Robinson further credibly testified that the miners may have been refreshing electrical tape that had been previously applied to cover splices in the cable, but they were definitely looking for damage based on the way they were handling and pulling the cable from hand to hand. Tr. 35.

Robinson considered this task to be maintenance on an electrical component of the shuttle car, which was electrical work. Tr. 35. Essentially, Robinson determined that the re-taping was repair of electric components of electrically-powered mobile equipment and not mechanical repair on electrically-powered equipment. Robinson explained, “A mechanical repair would not involve electricity. It wouldn’t involve the electrical conductors. The trailing cable is the conductor[s] for the machine. Without that trailing cable the machine will not function.” Tr. 37. Robinson did not examine the cable himself to see if it was damaged. Tr. 69.

After observing the miners working with the cable, Robinson and Senter went to the power center in the number three entry. Tr. 37. Robinson inspected the power center. Tr. 39. Robinson observed that all the cathead receptacles were plugged in. Tr. 37. Robinson also observed that there were no locks anywhere on the power center, the circuits were tripped, and the blades on the back were in the closed position, which would allow the section transformer to automatically energize upon restoration of power. Tr. 39–40, 63, 153. Robinson credibly testified that with the blades in the closed position, the power center would automatically reenergize when power was restored, allowing the high voltage to feed directly into the power center and energize the branch circuits. Tr. 64.

Robinson also noticed that the circuit breakers were tripped, as expected after a loss of power. Tr. 63. Thus, if the circuits were reset, they would be re-energized. Tr. 63. Robinson testified that without locking and tagging out the circuit, anyone could come by and pull a breaker, energizing the circuit. Tr. 38.

Based on his experience as a certified electrician and MSHA inspector, Robinson concluded that the way the miners were handling the cable suggested that they were examining it to check for damage, and not just generally re-taping previously taped areas of the cable, although the only places that Robinson observed the miners apply additional tape were to previously taped areas on the cable. Tr. 51, 87. Robinson opined that only a qualified electrician would be able to determine whether damage to a cable’s outer jacket was superficial or extended into the inner conductors, and to determine the type and extensiveness of repair necessary. Tr. 51, 60. Robinson also testified that the only way a miner can guarantee that the circuit he is working on cannot be energized is to lock and tag the circuit out, thereby making other miners aware that someone is working on

the circuit. Tr. 38. Robinson had no direct knowledge about whether Browning and Martin had participated in an MSHA-approved training plan that covered electrical hazard recognition practices. Tr. 91.

Robinson informed Senter that he intended to issue a section 104(a) citation for violation of 30 C.F.R. § 75.511 because the shuttle car was not locked and tagged out to prevent the cable from becoming energized while the miners were working on it. Tr. 37–38. Robinson testified that the miners pulling the cable from hand to hand could encounter a damaged spot with exposed energized conductors. Tr. 38-39. If the cable was energized, an exposed conductor or a fault created from bending the cable would cause electrocution, shock, or burns. Tr. 39, 40, 57. Robinson testified that there was a risk of bending an energized cable with a damaged outer layer because exposed inner conductors in contact could create a fault condition and blow up. Tr. 39. If there was a fault, an energized cable could have an arc flash, causing an explosion, which would burn miners. Tr. 56.

After Robinson told Senter that he was going to issue a citation, Senter yelled out to Browning and Martin to stop working on the cables. Tr. 41. Senter then called Leon Kelly, the section foreman, and asked him to come to the power center. Tr. 41.

Once section foreman Kelly arrived, Kelly and Robinson discussed the citation he would issue. Kelly informed Robinson that the power was locked and tagged at the surface. Tr. 41. Richard Ventro, a certified electrician, had informed Kelly via telephone that he had locked and tagged out the surface substation that provided power to the mine. Tr. 185. Robinson replied that the locking and tagging out on the surface power source was irrelevant because the cables themselves needed to be locked and tagged out. Tr. 41.

Kelly called to the surface to inform superintendent McClanahan of the citation. Robinson, who was about five feet away from the mine phone, heard McClanahan tell Kelly, “you know better than that, that’s stupid.” Kelly then began to unplug some of the receptacles. Tr. 41.

Shortly thereafter, Kelly received another call, and a few seconds later the power center began humming and was energized. Tr. 41–42. Robinson testified that no one went to the back of the power center to turn it on, confirming, contrary to Clark’s testimony *infra*, that the blades were in closed position. Tr. 106. At this point, Kelly immediately plugged the receptacles back in and energized the circuits. Tr. 42.

Robinson did not observe Kelly inform anyone that the power was coming back on. Tr. 43. Kelly and Robinson were the only people present at the power center when the power came back on, although Don Clark, the certified electrician, arrived at the

power center about 20 minutes later. Tr. 42, 50. According to Robinson, Clark had been outby trying to troubleshoot the problem with the high-voltage circuit. Tr. 154.

Robinson testified that if the miners had not been pulled from their work on the trailing cable, they would have been working on live cable. Tr. 42. Further, Robinson testified that from the power center, it impossible to see the location where the two miners had been handling the trailing cable. Tr. 43, 148.

After power was restored, Robinson continued with the E01 inspection. Tr. 43. Robinson was unsuccessful in obtaining any information from the miners about why they had been patching the trailing cable. Tr. 44. Once above ground, Robinson reviewed the Program Policy Manual (PPM), typed up Citation No. 8201921, and served it upon Senter. Tr. 36, 44. The condition or practice section of the January 28, 2013 citation alleges:

TWO MINERS ARE PERFORMING MAINTENANCE ON THE TRAILING CABLE FOR THE COMPANY #2 SHUTTLE CAR AND THE MACHINE IS NOT LOCKED OUT OR TAGGED. THE MINERS ARE PULLING THE CABLE BY HAND AND CHECKING SPLICES AND DAMAGED PLACES IN THE TRAILING CABLE. THE MACHINE CATHEAD IS PLUGGED INTO THE SECTION POWER CENTER. THE CIRCUIT BREAKER IS OPEN AT THE TIME. MINERS REPAIRING THE CABLE WOULD RECEIVE FATAL INJURIES IF THE CABLE WERE TO BECOME ENERGIZED. THIS CABLE PROVIDES 480 VAC TO THE SHUTTLE CAR.

The citation further alleged a Section 104(a) significant and substantial (S&S) violation of 30 CFR § 75.511, which was reasonably likely to result in a fatal injury, with two persons affected, as a result of Respondent's moderate negligence. P. Ex. 1. Robinson determined that the violation was "reasonably likely" to result in a fatal injury or illness because if power had been restored to the unlocked circuit during continued normal mining operations, the miners would be handling the trailing cable when the circuit became energized. Tr. 55. Robinson testified that an acquaintance had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Robinson returned the next day (January 29) to continue the inspection and interview miner informants and management. Tr. 44-46. Robinson was informed by miners that section foreman Kelly had instructed them to check splices and re-tape the trailing cable because Robinson had not yet checked the cable cars and equipment during his quarterly E01 inspection. Tr. 45-46. At hearing or during pre-hearing depositions, Martin and Browning testified that they had been instructed to perform this work by

section foreman Kelly. Tr. 232 (Martin testimony; R. Ex. 6, at 4 (Browning deposition)).⁶ Robinson also learned that the two miners working on the live shuttle car cable the previous day were not on the mine's list of qualified electricians. Tr. 47.⁷ In addition, Robinson found out that while Browning and Martin were performing work on the trailing cables the day before, Don Clark, the qualified electrician, had been in a different part of the mine troubleshooting the power failure, and therefore Clark had not supervised the work that was performed by Browning and Martin on the trailing cable. Tr. 48, 53.

During the investigation, superintendent McClanahan informed Robinson that miners were asked to check trailing cables a few times a week when power was out, or a machine was down. Tr. 49. Respondent had received previous citations because trailing cables were not maintained properly, and McClanahan told Robinson that Respondent was trying to stay ahead of the game and prevent reoccurrences. Tr. 49-50.

Based on the information obtained from Robinson's January 29 investigation, MSHA modified S&S Citation No. 8201921 under 104(a) to a S&S 104(d)(1) Citation. Tr. 53. In the condition or practice section, the unwarrantable failure citation alleged:

TWO MINERS ARE PERFORMING ELECTRICAL MAINTENANCE ON THE COMPANY #2 SHUTTLE CAR TRAILING CABLE AND THE MACHINE IS NOT LOCKED AND TAGGED. THE MINERS ARE PULLING THE CABLE BY HAND AND CHECKING SPLICES AND DAMAGED PLACES. THE MACHINE CATHEAD IS PLUGGED INTO THE SECTION POWER CENTER. THE CIRCUIT BREAKER IS OPEN AT THE TIME. THE MINERS PERFORMING THE WORK ARE NOT CERTIFIED ELECTRICIANS NOR UNDER THE SUPERVISION OF A CERTIFIED ELECTRICIAN. THE OPERATOR HAS ENGAGED IN AGGRAVATED CONDUCT CONSTITUTING MORE THAN ORDINARY NEGLIGENCE IN THAT THE MINERS WERE INSTRUCTED TO PERFORM THE WORK WITHOUT BEING UNDER THE DIRECT SUPERVISION OF A CERTIFIED ELECTRICIAN AND WITHOUT THE MACHINE BEING

⁶ Absent objection from the Secretary, Browning's December 12, 2013 deposition was received into evidence as sworn testimony. Tr. 350; R. Ex. 6.

⁷ Don Clark and Chester Hubbard were listed as the only qualified electricians working underground on day shift at the time of the January 28 inspection. Tr. 47. Clark was working about 30 crosscuts away from where the miners were examining the trailing cable. Tr. 48, 52. Hubbard was working outby. Tr. 53.

LOCKED AND TAGGED. MINERS EXPOSED TO THIS CONDITION WOULD RECEIVE SHOCK AND BURN RELATED INJURIES.

The modified citation reduced the gravity of the injury expected from fatal to lost workdays based on the fact that the cable provided 480 VAC to the machine in relatively dry conditions, which would likely cause a burn or shock resulting in lost workdays, rather than a fatal electrocution. P. Ex. 1, Citation No. 8201921-01; Tr. 55. Robinson opined that gloves, if worn by miners, did not decrease the risk of being burned because a miner could still have exposed skin, and that the gloves were likely wet and dirty, decreasing their effectiveness. Tr. 56. The modified citation increased negligence from moderate to reckless disregard involving aggravated conduct because the miners were instructed to perform work on the circuit without being under the supervision of a certified electrician and without the machine being locked and tagged out. P. Ex. 1, Citation No. 8201921-01; Tr. 54, 58.

Robinson testified that “Mr. Kelly knew that the circuit was not locked and tagged because when he came to the power center he told me it’s locked on the surface. So by him knowing that it was locked on the surface, he had to know that it was not locked there. And it was obvious. Anyone could walk by the power center and tell that there’s no locks or tags installed on any of the plugs.” Tr. 65. Further, Robinson opined that Kelly knew or should have known that Clark, but not the roof bolters and shuttle car operators, were certified to perform the work. *Id.*

Robinson defended the unwarrantable failure modification because Kelly had instructed miners to perform work on an energized cable, knowing that the circuit was not locked and tagged. Further, it was obvious that the miners designated to do this task were not on the list of qualified individuals to perform electrical work. Tr. 61-62.

MSHA specially assessed the proposed penalty at \$20,900. Robinson’s testimony was limited to the fact that the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence.

B. The Testimony from Respondent’s Witnesses

1. Richard Ventro’s Testimony

Richard Ventro, an MSHA-qualified electrician, testified that he was the outside mechanic working at Mine No. 2 on January 28. After Ventro arrived at the mine, he received a call from the mine to inform him that the power was out in the mine. He does not remember who called him. Tr. 181. Ventro and Dean Addington, a mine mechanic, traveled to the above-ground substation and visually confirmed that the underground

power was out. Tr. 182. Ventro then locked and tagged out the pump that operates the power at the surface substation so that no one could turn the power back on in the mine. Tr. 183. Ventro testified that there was no way the power could be on within the mine if the power at the substation was locked and tagged out. Tr. 190. Ventro and Addington traveled back to the main shop and called underground to Kelly and Clark to inform them that Ventro had locked and tagged out the substation power source. Ventro and Addington then returned to the substation and identified the power problem. Tr. 184-85.

Ventro and Addington turned the power back on at the substation, but the power source to the mine remained locked and tagged out. Tr. 185-87. Ventro remained in communication with Kelly and Clark inside the mine while they were troubleshooting the power at the substation. Tr. 187. Ventro informed Clark that they were going to turn the power back on in the mine, but waited until receiving confirmation from Clark that "everybody was in the clear." Tr. 188. After receiving that confirmation from Clark, Ventro unlocked and untagged the pump and turned the mine power source back on. Tr. 189. By Ventro's estimate, the power outage lasted between one and one-half hours and two hours. Tr. 194.

2. Dean Addington's Testimony

Dean Addington was working as a mechanic with certified electrician Ventro at the mine on January 28. Addington became aware of the power problem when he and Ventro received a call from underground. Tr. 199, 206. Addington and Ventro went to the substation and Addington witnessed Ventro lock and tag out the underground power source. Tr. 201. Then they returned to the shop and informed Clark and Kelly that Ventro had locked and tagged out the power. Tr. 201.

Addington knew that Clark had been troubleshooting the problem underground. Tr. 206, 211-14. Addington communicated with Clark, who was on the phone at the life shelter, to try to pinpoint the problem. Tr. 214. Clark informed Addington that he had been unable to diagnose any problem underground. Tr. 206.

Addington and Ventro then returned to the substation, where Addington diagnosed and fixed a problem with the potentiometer in the monitoring package above ground. Tr. 202. They returned to the shop a second time and informed Clark and Kelly that they had fixed the problem and were ready to turn the power back on. Tr. 202. After receiving the all-clear, Ventro and Addington went back to the substation, where Addington witnessed Ventro unlock and untag the power supply before turning it back on. Tr. 202, 216. Addington and Ventro then went back to the main shop and called Clark and Kelly underground to inform them they had turned the power back on from the substation. Tr. 207.

On the third shift (maintenance shift), Addington has had mechanics work under him, who have experience maintaining trailing cables. Tr. 218-19. In Addison's opinion, taping a cable without exposed wires does not constitute an electrical repair. Tr. 219-20. He testified that when he examines cables to check for pinholes and nicks, *he locks and tags out the cable*, and then bends the cable to identify any nicks or cracks, and to make sure that no red or white electrical leads can be seen. If there are no exposed wires, then he just tapes over the nick. Tr. 220-21.

In Addington's opinion, working on a cable after the power had gone out would not normally pose any risk of shock because the power outage would have tripped the breakers in the underground power station and the cable would not re-energize even if the power was turned back on. Tr. 223. Addison also opined, however, that a cable could automatically re-energize and pose an electrocution risk when the power comes back on at an underground power center if someone had already re-engaged the breakers. Tr. 223. Addington further testified that it was possible for someone to energize or put the breaker in after the high-voltage power was restored if there was no lock on the cathead of the cable being maintained. Tr. 225. When asked by the undersigned how that would happen, Addington testified, "Well, the guy putting the high voltage in is not going to holler underground." Tr. 225. Addington further explained that somebody could put the breaker in after the high-voltage power was restored, but volunteered that Kelly was at the power center and would know if somebody was going to put the breaker in. Tr. 226.

3. Bradley Martin's Testimony

Bradley Martin is a shuttle car operator at Respondent's Mine #2. Tr. 228, 231. Martin testified that the power was out when he arrived at the mine on January 28. Tr. 231-32. Martin, two other shuttle car operators, and two roof bolters were instructed by Kelly, the foreman, to "Pull our shuttle car cables off and just tape over our splices." Tr. 232-33; 236, 246. Martin opined that he was not asked to do anything that he felt was unsafe. Tr. 239.

Martin testified that "we never pulled the cable off [shuttle car] two because it had new cable on it the day before. It had no splices in it. It was solid cable." Tr. 234; see also Tr. 238. The number two shuttle car, which Martin drove all the time, was the car cited by inspector Robinson. P. Ex. 1. The cars are not labelled with numbers. Rather, they are identified based on distance from the power center. Martin testified that the closest shuttle car that is plugged into the power center is the number one car "and then the next one is two and the next is three." Tr. 238.

Martin testified that he never worked with Jonathan Browning on the morning of January 28. Tr. 235, 244. Browning was never asked in his deposition whether he was

working with Martin. See R. Ex. 6. Martin testified that Browning was at the number one car and that Martin was not with him and could not see him from where he was working. Tr. 244.

Martin further testified that he and shuttle car operator Greg Hall were pulling the cable off the number three shuttle car when they were instructed to stop by someone whom Martin could not remember. Tr. 235. Hall did not testify. Martin further testified, "They just come, you know, towards where we was at and just hollered over there and got our attention and told us that we needed to quit pulling our cable; you know, quit pulling the cables off." Tr. 235; see also Tr. 246. Martin testified that power was still out when they were told to stop working. Tr. 248

Martin wore fairly new, insulated, rubber-palmed gloves when performing the work. Tr. 236, 248. Martin testified that they did not bend the cable and that they had not pulled much cable off and had just started on the car when they were told to quit. Tr. 237, 249. Martin testified that he did not find any gashes or damaged places with exposed wires, but if he had, he would have notified Clark, the electrician. Tr. 237. Martin testified that he did not bend the cable or place tape where there was not already a taped splice. Tr. 237.

Clark was not nearby while Martin was working on the cable. Tr. 246. Martin remembers Clark yelling to the miners that day that he was going to put the breakers back in. Tr. 250.

Martin is not a qualified electrician, but he has received training from Regent on handling cables and electrical hazard recognition. Tr. 229. Martin testified that, based on his training, handling a cable is "no big deal," but that a cable needs to be locked and tagged out if the work involves cutting into the cable. Tr. 229-30.

I discredit Martin's testimony that he never worked with Browning on January 28. I credit Robinson's testimony, as supported by his January 29 investigation, and corroborated by Senter's testimony discussed *infra*, that Martin was pulling cable with Browning that day. I also discredit Martin's testimony that he heard Clark holler that he was going to put the breakers back in. I have discredited Clark's testimony *infra* that he did so. I also discredit Martin that he never pulled cable from the number two shuttle car because new cable was placed on it the day before. No documentation was proffered to support this testimony and it was not corroborated by any other witness. Browning, the other miner doing re-taping on the cable, did not indicate which trailing cable was repaired. When asked, Clark was not sure which shuttle car trailing cable was being worked on, but he thought that it was probably the number two car. Tr. 299. Further, I find it unlikely that inspector Robinson would specifically cite work on the wrong shuttle car. In any event, I further credit Robinson's testimony about the manner in which

Martin and Browning were pulling cable even if Robinson was somehow mistaken about which shuttle car cable was being worked on by them. See Tr. 238-39. Martin testified that he was working on the number three car, which was also plugged into the power center and not locked or tagged out. Tr. 244.

4. John Senter's Testimony

John Senter works as a belt boss at Respondent's #2 Mine. Senter accompanied inspector Robinson into the mine on January 28. Tr. 253-54. Senter does not recall seeing Clark underground that day. Tr. 266.

Senter testified that he and Robinson saw two miners, Brad Martin and Jonathan, taping cables shortly after they arrived on the section in the power center entry or number three entry. Tr. 255-58. Senter saw the miners, Browning and Martin, holding the cable and visually checking it for cracks, but did not see them bend or twist the cable. Tr. 260. Senter did not observe the miners using any tools to examine the cables. Tr. 269.

After observing the miners working on the cable, Senter accompanied Robinson to the power center, where Robinson checked the catheads for the cables and saw that they were not locked and tagged out. Tr. 256. Senter testified that he did not check to see whether the blades on the back of the power center were in or out, nor did he see Robinson check the blades. Tr. 260. In fact, on questioning from the undersigned, Senter testified that he knows that Robinson did not check the blades because he was right there looking at the catheads. Tr. 260. According to Senter's testimony, Senter and Robinson remained at the side of the power center, and at no time did Robinson move to the back of the power center to check the blades. Tr. 264. I find it noteworthy, however, that Senter never went behind the power center to see if the blades had been locked out. Tr. 275.

I discredit Senter's testimony that Robinson never checked the blades on the back of the power center. Rather I credit Robinson, after specific questioning from the undersigned, that he walked to the back of the power center while the power was still off and observed no lock on the back of the power center and the blades in the closed position. Tr. 63-64. Robinson testified that this occurred shortly after he told Senter he was issuing a citation. Tr. 64. I note that Senter had to leave to holler out to Martin and Browning and to call foreman Kelly. Moreover, Robinson persuasively testified that part of the normal examination of the power center is to make sure there is a means to lock and tag out the power center. Tr. 64

5. Don Clark's Testimony

On January 28, Clark was the qualified underground electrician at Mine #2. Clark

testified that after he discovered the underground power outage, he called the surface to inform Ventro. Tr. 285. After Ventro informed Clark that there was no problem with the surface power, Clark reset the underground power center, and asked Addington and Ventro to check the power again. Tr. 286. When the underground power was still out, Ventro locked and tagged out the underground power at the above-ground substation. Tr. 288.

Clark testified that he then locked and tagged out the blades on the back of the power center. Tr. 287, 296. The process involves locking a chain through a hole in the handle of the breaker so that it physically cannot be re-engaged. Tr. 297. Clark testified that he specifically remembers locking and tagging out the breakers because it allowed him to eliminate the section power center as the problem while troubleshooting. Tr. 290-92. Clark had the only lock, so he was the only person who would be able to lock the blades. Tr. 298. At that point in time, Clark remembers that the trailing cable catheads were plugged into the power center. Tr. 297. Clark testified that he did not lock and tag them out because he was not going to be working with them. Tr. 297-98.

I do not credit Clark's testimony that he locked and tagged out the blades at the back of the power center. Rather, I have previously credited Robinson's testimony on specific questioning from the undersigned that he checked the power center and there were no locks anywhere on the power center, and the blades on the back of the power center were in the closed position. Tr. 39, 63-64. Moreover, Clark never told foreman Kelly that he locked the blades in the back of the power center, and Kelly, who assigned the work, did not know whether the blades were locked. Tr. 344-45. Clark did not show or tell Robinson that the blades were locked and tagged and Robinson did not see Clark until 20 minutes after power had been restored. Tr. 311, 154. Robinson also testified that the power center became energized immediately after power was restored, without the blades being flipped. Tr. 105-06.

Clark testified that he then proceeded down twelve or fifteen breaks from the power center to perform a visual check on the underground circuit. Tr. 287. Clark had already checked the first junction box when Ventro and Addington called him from the surface and informed him that the surface monitor had tripped and caused the underground power outage. Tr. 289-90, 293. Clark testified that he returned to the power center, where Kelly informed him that Robinson was going to issue a citation for the cables. Tr. 294-95.

Clark instructed Ventro and Addington to attempt to turn on the power to the section power center. They did so and were successful. Tr. 295. After checking to be sure that everyone was clear of electrical equipment, Clark testified that he unlocked and untagged the breakers and turned the section power back on. Tr. 295. I discredit this testimony and specifically credit Robinson that only he and Kelly were at the power

center when it began humming and was reenergized. Tr. 41-42, 106. Moreover, Clark could not specifically remember, when asked, whether Kelly or Robinson were in the area. Tr. 294.

After Kelly told Clark about the citation, Clark testified that he went and looked at the cable. Tr. 299. Clark testified that it looked like Browning and Martin had put new tape over two or three existing taped places. Tr. 299-300. In Clark's opinion, the miners were not exposed to any kind of danger by placing tape on the cable. Further, Clark had never seen nor heard of an instance in which mine management asked an unqualified miner to perform electrical work. Tr. 301-02.

Clark also recalled occasions where Martin and Browning have asked for his assistance when they have encountered electrical problems. Tr. 301-02. Clark did not consider taping cables to be electrical work because no conductors were exposed. Tr. 303.

6. Leon Kelly's Testimony

Leon Kelly was the section foreman working on January 28. Since the power was out underground, Kelly told miners to re-tape the splices on their shuttle car cables. Tr. 319. He testified that he did not instruct them to bend, cut into, or go into the cables. Tr. 334. Rather, he specifically instructed them to put tape on existing splices. Tr. 322.

Kelly's section had previously received a citation and a \$5,900 penalty assessment for a cut in a cable that was not sufficiently taped over. Kelly wanted to avoid receiving another citation for the same kind of violation. Tr. 320-21. Kelly testified that he knew that only qualified persons could cut into cable. He testified that he did not think that the miners were in any danger because the power was locked and tagged out at the surface. Tr. 322.

Kelly explained that three things had to happen for the cables to become energized: the power would have to be put back in from outside; the blades would have to be put back in on the power center; and the cathead breakers would have to be put back in. Tr. 339. Kelly testified that the cathead breakers at the front of the power center were out. Tr. 345.

Kelly was at the face when someone told him (presumably Senter) that he was needed at the power center because Robinson was looking at the catheads. Tr. 323. When Kelly arrived at the power center, Robinson informed him that he was going to issue a citation because miners were working on a cable that had not been locked and tagged out. Tr. 323. Kelly told Robinson that the power was locked and tagged out at the surface. Tr. 323. Kelly did not go to the back of the power center to check whether

the power center itself had been locked and tagged out, and was unaware of whether or not Clark had done so. Tr. 324-25. Kelly also did not check to make sure that the miners were clear of the cable immediately before the power came back on because he had previously told them to stop working on the cable after Robinson had informed him that he was going to issue a citation. Tr. 343.

Kelly learned that Ventro and Addington were going to try to turn the power back on when they called the power center. Tr. 324. Kelly told everyone to stay clear of the power center, since he was unaware that the center itself was locked out. Tr. 325. Kelly did not see Clark unlock and untag the blades at the back of the power center because he stayed at the telephone 40 feet away from the front of the power center. Tr. 325-326. Kelly's view might also have been blocked because the blades could have been behind the curtain at the back of the power center. Tr. 338. Kelly testified that from where Robinson was standing, he would not have been able to see whether the blades on the back of the power center were locked out, and he did not see Robinson go to the back of the power center to check. Tr. 328.

Kelly trains new hires at Mine #2. Tr. 329. Part of that training includes instructing the miners that if there is problem with their cables, the electrician has to work on it. Tr. 329. Kelly has instructed miners to tape cables before, although not often, and sometimes he instructs the miners to mark nicks in the cable with paint so that the electrician can fix them. Tr. 335. On those previous occasions, Kelly admitted that the cables were locked and tagged out, but he did not lock out and tag the cables on January 28 because the power was out in the mine. Tr. 336.

7. Jonathan Browning's Deposition Testimony

Jonathan Browning is a roof bolter at the No. 2 mine. Browning Dep. 4. Browning has been told to tape cables before, and did as instructed by Kelly on January 28. Browning testified that he does not do any electrical work on cables and only wraps tape over splices. Browning Dep. 5.

Browning tapes cables after the cables have been locked and tagged out, but Browning testified that on January 28, the power was locked and tagged out above ground. Browning Dep. 5-6. Browning testified that he does not tape over nicks or look inside the outer jacket, and that if he encounters a nick, he calls for the electrician to perform the work. Browning Dep. 6.

Browning wore gloves while he was taping the shuttle car cable at issue. Browning testified that he was never in contact with any exposed leads, and he did not believe that there was any potential for such contact. Browning Dep. 6-7.

V. The Position of the Parties

A. Brief Summary of Arguments

The Secretary argues that section 75.511 contains three distinct requirements: 1) electrical work shall only be completed by a qualified electrician or under the supervision of a qualified electrician; 2) the disconnecting device shall be locked and tagged by the person completing or supervising the work; and 3) only the person who installed the lock and tag shall remove the lock and tag, unless that person authorizes another individual to remove the lock and tag. P. Br. 9. The Secretary argues that the work performed by Browning and Martin on the #2 shuttle car cable constitutes a violation of section 75.511 because Browning and Martin were performing electrical work, they were not qualified to do so, nor working under the supervision of a qualified electrician, and the shuttle car trailing cable was not locked and tagged out.

The Secretary admits that section 75.511 does not provide a definition of electrical work, but points out that the MSHA Program Policy Manual's (PPM's) definition of electrical work includes any "work required to install or maintain electric equipment or conductors." P. Br. 10; P. Ex. 3, at 54. The MSHA PPM also lists examples of work that must be performed by certified persons, which include locating faults in cables; repairing electric components of electrically-powered portable, mobile, or stationary equipment; and electrical maintenance of permissible equipment. P. Br. 9–10; P. Ex. 3, at 55. The Secretary argues that the #2 shuttle car trailing cable should be considered an electrical component because it provides power to the shuttle car, and the work the miners were doing should be considered "electrical maintenance." P. Br. 11; Tr. 303.

There is no dispute that Browning and Martin were not persons qualified to conduct electrical work and there is no dispute that the shuttle car trailing cable cathead was not locked and tagged out. P. Br. 12, 14; Tr. 276, 336, 297. Although Clark's and Robinson's testimony conflicts regarding whether the blades on the power center were locked out (compare Tr. 39 with Tr. 287), the Secretary argues that the failure to lock and tag out the cathead itself still poses an electric shock hazard to Browning and Martin. P. Br. 13.

The Secretary argues that under *Chevron*, courts must defer to reasonable agency interpretations when Congress' intent is not clear. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1983). Further, the Secretary's litigation position, "is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard," and is therefore due the same deference as any other agency interpretation. *See Sec'y of Labor v. Excel Mining, LLC* 334 F.3rd 1, 6 (D.C. Cir. 2003). Since inspector Robinson reasonably believed that the

miners were conducting electrical work on the cable, the Secretary argues that his litigation position is entitled to deference under the *Excel Mining* standard. Sec’y Post-Hr.’g. Br. 9–12.

Respondent argues that the work performed by Browning and Martin in handling and re-taping the shuttle car cable did not constitute electrical work. Based on the examples in the MSHA PPM, *see* P. Ex. 3, at 56, Respondent argues that what distinguishes electrical from non-electrical work is the potential for exposure to energized parts. Under the Respondent’s interpretation of the MSHA PPM, locating faults in cables, making splices, making repairs of electrical components, and electrical maintenance all qualify as electrical work which requires electrical training because the person performing those kinds of tasks could come into contact with energized parts. By contrast, handling energized trailing cables, operating electrical switches, and performing mechanical repairs on electrical components do not constitute electrical work because those tasks lack the potential to expose a person to energized parts. R. Br. 15.

Although inspector Robinson characterized the miners’ work on the cable as an examination, Respondent argues that whether or not an examination occurred has no bearing on whether the work was electrical. R. Br. 16. Moreover, Respondent argues that since the cable was not damaged, the miners’ work cannot be considered electrical maintenance. Instead, it should be characterized as “upkeep” designed to increase the cable’s usefulness as distinguished from actual maintenance. *Sec’y of Labor v. Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan 1997), *aff’d* 156 F.3d 1076 (10th Cir. 1998); R. Br. 16. Specifically, Respondent argues that “the work of re-taping previously taped splices was not maintenance, because it was not designed to maintain the cable in a state of repair or efficiency.” R. Br. 16. Respondent relies on *Walker Stone*, 19 FMSHRC 48 (Jan. 1997), *aff’d*, 156 F.3d 1076 (10th Cir. 1998), and *Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992), to distinguish the work that Browning and Martin were doing from repairs or maintenance. The Respondent argues that the “miners were simply applying more tape to previously taped areas on cable to prevent future violations for inadequate taping of splices,” and this did not constitute maintenance, as anticipated by the standard. R. Br. 16, citing Tr. 49. The Respondent uses the definition of maintenance supplied by the Commission in *Walker Stone* to support its contention that the work performed by the miners on the trailing cable was not “maintenance.”

VI. Discussion and Legal Analysis

A. The Violation of 30 C.F.R. § 75.511 -- The Work That Browning and Martin Were Performing on the Shuttle Car Trailing Cable was Electrical Work and the Secretary’s Interpretation of Electrical Work is Entitled to Deference

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or they lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). In the absence of a regulatory definition or technical usage of a word, the Commission looks to the ordinary meaning of the word. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997).

Where a standard is ambiguous, however, courts defer to the Secretary's reasonable interpretation of the regulation. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *La Farge Construction*, 20 FMSHRC 1140, 1143 (1998); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990). An agency's interpretation of a regulation may prevail, even if it is not the only or best interpretation, as long as it is not inconsistent with the regulation or plainly erroneous. *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Emery Mining Corp.*, 744 F.2d 1411, 1414 (10th Cir. 1984)(holding that where there is an interpretation of ambiguous regulation that is reasonable and consistent when viewed in light of the statute it implements, that interpretation is preferred); *Island Creek Coal Co.*, 22 FMSHRC 823, 827 (2000)(holding that a safety standard should be interpreted in a way that furthers the objectives of the Mine Act).

I find that the meaning of the phrase "electrical work" under Section 75.511 is ambiguous. As noted, neither the Mine Act nor MSHA regulations specifically define "electrical work." The MSHA Program Policy Manual (PPM), however, provides guidance that electrical work is "work required to install or *maintain* electric equipment or conductors." P. Ex. 3, at 54 (emphasis added). To clarify this definition, the PPM lists 11 examples of electrical work within the scope of the standard and 12 examples of non-electrical work that does not require the supervision of a qualified person:

The Secretary reasonably relied on MSHA's Program Policy Manual to offer guidance as to what is "electrical work" under Section 75.511. In issuing Citation No. 8201921, Robinson specifically relied on the PPM example No. 5 (repair of electric components of electrically-powered mobile equipment) and example No. 7 (electrical maintenance of permissible equipment) to find that the work that Browning and Martin were performing on the shuttle car cable was electrical work. Tr. 36; P. Ex. 3, at 55, paras. 5 and 7. Further, Robinson did not consider the work to fall under PPM exception para. 10 for non-electrical work, (i.e., mechanical repairs on electrically-powered equipment, provided no energized parts or conductors are exposed), because the trailing cable is an electrical component that provides power to the machine, and a mechanical repair would not involve electricity. Tr. 37; see P. Ex. 3, at 56, para. 10.

The Respondent argues that re-taping is not electrical work and that the potential to come into contact with energized components is the deciding factor for whether a task is electrical work. R. Br. 15. Specifically, the Respondent argues that, “the more common sense approach is to determine the potential for coming into contact with energized components and to determine the level of electrical training required to complete the work in defining whether or not work being performed is ‘electrical work.’” R. Br. 17. Respondent relies on the PPM to support its contention and notes that while the PPM characterizes “repair of electrical components of electrically powered . . . equipment” and “electrical maintenance of permissible equipment” as electrical work, *see* P. Ex. 3, at 55, paras. 5 and 7, non-qualified persons are allowed to conduct non-electrical work such as “handling energized trailing cables” and “mechanical repairs on electrically powered equipment, provided that no energized parts or conducts are exposed.” *Id.* at 56, para. 10.

I reject Respondent’s argument that the litmus test for determining whether a task is “electrical work” is whether there is potential to come into contact with “energized components.” The trailing cable is an electrical component that can be energized if the cathode receptacle is not locked and tagged. Moreover, the repair or maintenance was performed on the trailing cable, not the electrically powered shuttle car itself.

Even if I accepted Respondent’s proposed approach to defining “electrical work,” I would still find that the work performed by Browning and Martin was “electrical work,” within the meaning of Section 75.511. The risk of exposure to an inner conductor is not apparent upon first glance, but the risk increases the longer a miner inspects and holds a trailing cable. Concededly, there was no evidence that the trailing cable was damaged. R. Br. 16; Tr. 49, 68, 69, 88, 138, 299. But this fact is more appropriately assessed under the third *Mathies* factor in the S&S analysis, i.e., whether the shock hazard contributed to by the failure to lock and tag out the cable when performing electric maintenance on it was reasonably likely to result in an injury. Indeed, the very fact that splices were on the trailing cable in the first place means that the cable was damaged at some point, although the damage was mitigated by tape over the jacket. Tr. 108.

Concededly, the PPM permits the “handling of energized trailing cables” without requiring lock and tag protocol or particular qualifications. P. Ex. 3, at 56, para. 7. Robinson persuasively testified that such work meant picking up and moving a particular portion of cable, rather than handling an entire cable as Browning and Martin were doing. Tr. 78, 80, 111, 136; P. Ex. 3, at 55, para. 7. Robinson further opined that this exception was to allow a miner to pick up a cable in one spot and move it to another spot in order to allow a machine or person to pass by. Tr. 111-12. By contrast, Robinson testified that if a miner felt and examined the cable by hand, as Browning and Martin

were doing, the task became an inspection and fell under the classification of electrical work. Tr. 92.

I credit Robinson's specific and detailed testimony that he saw Browning and Martin, near the shuttle car pulling the 480-volt cable through their hands and "feeling every inch of the cable" as if they were doing an exam. Tr. 33-34. According to Robinson, the miners were holding the cable, sliding it through their hands, pulling it off a reel, and taping spots and splices on the cable. Tr. 34-35, 116, 136. Robinson credibly testified that the miners were looking for damage to the inner conductors, which required bending the cable to check for ruptures on the outer jacket. Tr. 35, 134.⁸ Bending the cable can open the jacket to whether there is damage and whether the insulating material is compromised. Tr. 135. Robinson further credibly testified that the miners may have been refreshing electrical tape that had been previously applied to cover splices in the cable, but they were definitely looking for damage based on the way they were handling and pulling the cable from hand to hand. Tr. 35. He convincingly testified:

The manner they were examining the cable, I believe they were looking for damage to the cable, not just, you know, general re-tape of a splice or spot that had already been taped. If you were doing that, you would just pull the cable off until you seen a spot and then you would freshen that spot up.

⁸ Respondent argues that Robinson's testimony that he saw the miners bending the cable and sliding it through their hands should not be credited because he admitted on cross examination that he did not record that observation in his notes. R. Br. 6; Tr. 34, 56, 81, 83, 111; P Ex. 2; R. Ex. 4. I note, however, that Robinson did say that the miners were bending the cable in his affidavit/statement during the related section 110(c) investigation. P. Ex. 5.

Martin testified that he pulled the cable off and placed new tape over splices, but did not bend the cable. Tr. 233, 236. Senter testified that he saw the miners "just sort of looking at it [the cable]; just lay it out in front of them and sort of looking to see if there were any cracks or anything, just any damage on them and things like that. And they had a little tape in their hand. But as far as seeing them going into the cable, bending it, no." Tr. 259-60. Kelly initially testified on cross examination that the miners were not bending the cable, but on further questioning from the undersigned, he recanted and said that he did not know whether they were bending the cable because he was not present during the task and had simply instructed them to tape over old existing splices. Tr. 341. Based on demeanor and the specificity and detailed nature of Robinson's testimony, I credit Robinson over Respondent's witnesses and Martin's general denial.

But to feel the cable by hand, you're examining the cable for further damage. And only a qualified person can recognize if that damage to that outer jacket is truly just to the outer jacket and would require only tape or if the cable needs to be gone further into because there's damage to the inner conductors. And a person who's trained and qualified along those lines in electrical certifications and qualifications, he's trained to make that determination and know what type of repair and how extensive it needs to be.

Tr. 51.

Robinson considered the work to be maintenance on an electrical component of the shuttle car, which was electrical work. Tr. 35. Essentially, Robinson determined that the examination and re-taping was repair of electric components of electrically-powered mobile equipment and not mechanical repair on electrically-powered equipment. Robinson explained, "A mechanical repair would not involve electricity. It wouldn't involve the electrical conductors. The trailing cable is the conductor[s] for the machine. Without that trailing cable the machine will not function." Tr. 37.

Respondent calls Robinson's interpretation of the work as electrical rather than mechanical repair of electrically powered equipment "nonsensical." R. Br. 17. I disagree. Merriam Webster defines electrical as "[o]f or related to electricity, operated by electricity, providing electricity."⁹ On the other hand, "mechanical" is defined as "of or relating to machinery or tools; or produced or operated by a machine or tool."¹⁰ There is no doubt that the cable is the electrical component sourcing power to the shuttle car and thus is "electrical" equipment.

In my view, Robinson reasonably characterized the miners' work as electrical maintenance because the miners were examining and maintaining the taped spots in the cable by applying new tape, and because the taping was done to the cable, i.e., the part of the machine that supplies electric power to the shuttle car. Tr. 133, 37; 75; *see also* P. Ex. 3, at 55, para. 7. Robinson noted that the shuttle car needs the trailing cable and plug in order to operate. Tr. 133. Robinson further testified that even reapplying or refreshing tape would be considered maintenance of a weak spot on the cable, and work necessary

⁹ *Merriam-Webster*, "Electric," <http://www.merriam-webster.com/dictionary/electric> (last visited Jan. 16, 2015).

¹⁰ *Merriam-Webster*, "Mechanical," <http://www.merriam-webster.com/dictionary/mechanical> (last visited Jan. 16, 2015).

to keep the cable in a state of repair. Tr. 138, 142. Although Clark testified that he did not believe that the work was electrical work because the miners were not exposed to the conductors, Clark conceded that the work was electrical maintenance. Tr. 303. Under the circumstances, I find that the Secretary's interpretation of electrical work was reasonable and entitled to deference.

The Secretary's interpretation is also consistent with Commission precedent. The Commission has held that "'repair' means 'to restore by replacing a part or putting together what is torn or broken: fix, mend ... to restore to a sound or healthy state: renew, revivify'" *Walker Stone Company, Inc.*, CENT 94-97-M (Jan. 1997) (quoting *Webster's Third New International Dictionary, Unabridged* 1923 (1986)). I find that the trailing cable is an electrical component of the shuttle car and that re-taping was repair of an electric component of electrically-powered mobile equipment.

Alternatively, the work being performed was electrical maintenance of permissible equipment. Generally, electric face equipment, such as shuttle cars, must be maintained in permissible condition under 30 C.F.R. §75.506. Further, several MSHA regulations, including 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, and 77.501, require that lock and tag out procedures be followed when work on electrical equipment poses a danger of electric shock. *See Island Creek Coal Co.*, 22 FMSHRC 823, 827 (2000). That same hazard was present here when power was restored and the cable was not locked and tagged out.

The Commission held in *Walker Stone* that "maintenance is defined as 'the labor of keeping something in a state of repair or efficiency: care, upkeep. . . proper care, repair, and keeping in good order.'" *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997) *aff'd* 156 F.3d 1076 (10th Cir. 1998). I find that re-taping a splice is upkeep meant to keep the trailing cable in a state of repair. The taping or re-taping was clearly intended to "keep [the cable and the tape] in a state of repair or efficiency," *see Walker Stone*, 19 FMSHRC at 51, especially in light of section foreman Kelly's testimony that he was concerned about receiving citations for damaged or worn tape over existing repairs. Tr. 320-21.

Respondent argues that the re-taping was not "maintenance," but rather activity designed to "increase usefulness" of equipment. *S. Ohio Coal Co.*, 14 FMSHRC 978, 982-983 (June 1992). In *Southern Ohio Coal*, the Commission held that an extension of a conveyor belt was not designed to keep the belt in good repair, but rather to increase its usefulness. *S. Ohio Coal Co.*, at 983. The Commission explained that the improvement "did not preserve the ability of the existing belt to convey material." *Id.*

I reject Respondent's arguments that the taping the cable in this case was similar to the extension of the conveyor belt for the purpose of increasing its usefulness in

Southern Ohio Coal. I further reject Respondent's arguments that the taping should not be characterized as maintenance or repair because there was nothing wrong with the cable, the taping was done merely to prevent future citations for inadequate taping of splices, and the re-taping was "performed to increase the functionality of the previously taped cable splice by increasing the level of safety." R. Br. 16-17; Tr. 49. I find to the contrary. Taping over a splice, or taping over previous tape that was applied to a splice, does not increase the usefulness of a trailing cable, rather it *preserves* the cable's ability to *convey* power to the shuttle car for operation.

I also reject Respondent's reliance on the judge's decision in *U.S. Steel Mining Co.*, 13 FMSHRC 1451 (Sept. 1991) (ALJ) to support its argument that taping cables does not constitute electrical work. *U.S. Steel Mining* involved a section 75.511 citation issued after a section foreman instructed a shuttle car operator to lock and tag out a shuttle car cable before applying tape to a nick on the training cable. The judge found that simply because a miner performs work involving a piece of electrical equipment or component, such as a trailing cable, does not *ipso facto* make such work electrical work required to be performed only by a qualified person." The judge found the work more akin to mechanical work. 13 FMSHRC at 1463-64. The judge noted that the miner "simply taped over a nick or split in the boot of the permanent splice, and other than a roll of electrical tape, he used no tools or other equipment." *Id.* at 1462-63.

I am not persuaded by the reasoning in *U.S. Steel Mining* for several reasons. Electrical tape is used as a tool to insulate a splice and prevent electric shock. In any event, the use of tools should not be a controlling factor in categorizing a task as electrical work. In fact, another Commission judge has rejected an argument that the absence of tools used in work which resulted in electrocution, somehow excepted the task from the category of "electrical work." *Day Mining Inc.*, WEVA 2001-0066, 2002 WL 31236050, at *4 (Sept. 2002) (ALJ) ("Respondent's argument that no work was contemplated by [miners] because they did not bring tools with them is overly simplistic. That [miner] died without a tool in his hand is very hard evidence of the hazard involved even without tools.").

Furthermore, the facts in *U.S. Steel Mining* are markedly different from those at issue here. *U.S. Steel Mining* involved one discrete spot on a cable, and although no bare wires were exposed, the trailing car cable had been locked and tagged. Regent's #2 shuttle car cable was not locked and tagged out when work was being performed on it. When power was restored at the surface and at the power center, the cable would become energized and expose any miners working on it to electric shock and burn hazards. Fortunately, the miners in this case were no longer working on the cable when power was re-energized because Robinson intervened and wrote the citation. It is mere speculation to ponder what would have occurred had Robinson not been present. The standard was written to preclude the possibility of injury when electrical work is

performed on distribution circuits and equipment that are not locked and tagged out. That standard was applicable here.

Finally, I find additional support for my conclusion in legislative history. The House Report from the Federal Coal Mine Health and Safety Act of 1969,¹¹ is instructive on lock and tag out procedures and the training required for work performed on electrical wiring or equipment. The Report states that the standard:

“requires an operator to disconnect electric power from all electric wiring and equipment before repairs are made . . . Only persons supervised by competent electricians may work on medium and high voltage distribution equipment and circuits. Switches must be locked in an open position where the power is disconnected to prevent accidental reclosing. The persons performing the work must retain possession to the key to guard against such reclosing.”

House of Representatives Report No. 91-563, 1969 Coal Act. Instead of using the term “electrical work,” the report states that power must be disconnected from all electrical wiring and equipment before repairs are made. The purpose of this safeguard was to “prevent accidental reclosing” of a switch. House Report No. 91-563, 1969 Coal Act.¹²

In sum, I find that the Secretary’s interpretation that Browning and Martin were performing electrical repair or maintenance on the shuttle car cable under section 75.511 was reasonable and entitled to deference. The standard was violated because Browning and Martin were not certified electricians or working under the direct supervision of a certified electrician, and the shuttle car trailing cable on which they were working was not locked or tagged out to prevent it from being energized.

¹¹ Public Law 91-173, 83 Stat. 742, amended by the Federal Mine Safety and Health Act of 1977, Public Law 95-164, Federal Mine Safety and Health Act of 1977, Public Law 95-164, 91 Stat. 1290, amending 30 U.S.C. ch. 22 Sec. 801 et. seq.

¹² The 1969 Coal Act was the precursor to the underground coal safety standards in 30 C.F.R. §75.1 *et seq.* The relevant portion of the House Report was a summarization and clarification of the interim standards applicable to underground coal mines. Electrical equipment standards are described in the record and were discussed *infra* to illustrate legislative intent. The analog standards are found in Section 305 of the Federal Coal Mine Health and Safety Act of 1969. Section 305 addressed the requirements for electrical equipment, while the present standard governing electrical equipment begins in Subpart F of 30 C.F.R. Ch. I. Section 305(f) of the 1969 Coal Act uses language nearly verbatim to that used in standards codified in 30 C.F.R. §§75.509, 510, and 511.

B. The Violation of Section 75.511 was Significant and Substantial

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission’s subsequent *Mathies* test: (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. See *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)). Accordingly, when evaluating an S&S designation, the Commission looks to the particular facts surrounding the violation, in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

For the reasons explained above, I have found the underlying violation of mandatory safety standard 75.511 as Browning and Martin were performing electrical work without the proper qualifications and the circuit was not locked and tagged out.

With regard to the second *Mathies* factor, the violation created a discrete safety hazard or measure of danger to safety. The Secretary need only identify a safety hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). This prong of the test does not require a “reasonable likelihood” analysis. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Respondent’s failure to lock and tag the shuttle car cable being repaired leaves open the possibility that anyone could reset the circuit when power is restored and miners still working on the cable would be exposed to energized inner conductors. Accordingly, I find that the second *Mathies* factor is satisfied.

The third *Mathies* factor is typically the most disputed aspect of an S&S analysis, and often the most difficult to apply. The Secretary must prove a reasonable likelihood

that the hazard contributed to by the violation will result in an event in which there is an injury. *U. S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985).

The Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., exposure to energized inner conductors because of the failure to lock and tag out, was reasonably likely to result in a shock or burn injury to two miners when power was restored during continued mining operations. Robinson credibly testified as follows:

Q. How was it reasonably likely?

A. Because the circuit was energized right there while I was at the power center. There was no lock and tag on the circuit. Unannounced to those miners. Nobody called to the miners to let them know that the power was coming on. The power was restored to the section transformer and the branch circuits to all the equipment began to be energized.

Q. And what was the danger?

A. The danger is electric shock, burns, a cable blowing up in somebody's face or hands.

Q. How many persons did you say were affected?

A. I affected two people, because both of those miners that were pulling the cable were in contact with the cable. And depending on the type of fault condition, or an exposed conductor, current can actually travel down the outer jacket of those cables depending on where it finds its ground. So both miners were handling the cable, so it was likely both miners would be injured.

Tr. 56-57.

Consistent with the standard, Robinson testified that any time one works on an electrical circuit, they should lock and tag it themselves "[b]ecause that is the only way that you can guarantee one hundred percent that that circuit you're working on cannot be energized." Tr. 59. Robinson testified that an acquaintance had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Even though Robinson failed to examine the cable for damage, the record establishes that areas of the cable had already been spliced and the damaged areas were being re-taped. Given the failure to lock and tag out the circuit, miners who continued to pull the trailing cable from hand-to-hand, looking for nicks to tape and re-taping already damaged splices, were reasonably likely to encounter the hazard of exposed inner conductors when power was restored, which would result in a lost-workdays or restricted-duty injury from electric shock or burn. Evaluating the specific facts as inspector Robinson found them before the citation was written, had the miners continued their task with the circuit unlocked when power was restored, a shock and burn injury was reasonably likely to have occurred. In these circumstances, I conclude that an injury was reasonably likely to occur from the failure to lock and tag out the shuttle car cable once power was restored during continued mining operations.

Concerning the fourth *Mathies* factor, I find a reasonable likelihood that any such injury would be of a reasonably serious nature and result in lost work days or restricted duty. During continued normal mining operations, once power was restored, the likely exposure to energized inner conductors because of the failure to log and tag out during electrical repair or maintenance of the cable was reasonably likely to result in a shock or burn injury, which the Commission has found to be a reasonably serious injury. *See e.g., Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (operator showed gross negligence and reckless disregard for cited safety standards by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the miner attempted to work on the cable. The miner received an electrical shock with serious burns, and probably would have been killed had a fellow employee not pulled the cable from his hands); *Spartan Mining Co.*, 29 FMSHRC 465, 466 (June 2007) (ALJ) (electrician electrocuted while repairing a continuous miner trailing cable that was not locked and tagged out when mine power was restored and circuit breaker for miner was closed by another miner).

Robinson credibly testified that once the cable was energized there was a danger that an exposed conductor would cause electrocution, shock or burns. Tr. 39, 40, 57. Robinson also testified that once an energized cable with a damaged outer layer was bent, exposed inner conductors could touch, creating a fault condition and “blowing up.” Tr. 39. This would result in an arc flash causing an explosion, which could burn or blind miners. Tr. 56. Kelly, who instructed the miners to perform the electrical work, admitted that the miners could be shocked or electrocuted from handling an energized cable. Tr. 342. These injuries are all reasonably likely to occur from exposure to energized conductors on a trailing cable, and they are all of a reasonably serious nature. Accordingly, the Secretary has established a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious.

Based on the factors above, I find that the violation of Section 75.511 was properly designated as significant and substantial.

C. Respondent's Negligence was Appropriately Designated as Reckless Disregard

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

The Respondent challenges Robinson's designation of its negligence as reckless disregard. The level of negligence is properly designated as "reckless disregard" when "the operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3 Table X.

Robinson credibly testified that after further investigation the day after writing the citation, Robinson modified negligence from moderate to reckless disregard because

foreman, Mr. Kelly, instructed these miners to perform this electrical work. He knew the circuit wasn't locked and tagged that these miners were working on. He knew that those miners weren't qualified or certified, and he showed the slightest degree of care for the safety of these miners.

Tr. 58.

I affirm the reckless disregard designation. As further explained below under unwarrantable failure factor C.4., section foreman Kelly created a substantial and unjustifiable risk of harm to unqualified miners by assigning them to perform electrical work without taking the minimal step of ensuring that the electrical circuit was locked and tagged out, thereby demonstrating indifference to the risk and exalting production over safety. There were no safeguards in place to ensure that these miners would not be

handling a live cable if power were to be restored. No mitigating factors were presented. In these circumstances, I find that the Secretary properly designated the level of negligence as reckless disregard. *See e.g., Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (respondent displayed gross negligence and reckless disregard for cited safety standards by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the miner attempted to work on the cable).

D. The Unwarrantable Failure Designation Was Appropriate

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136.

Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See, e.g., Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Excel Mining, LLC* 497 F. App’x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

I discuss below, the applicability, *vel non*, of all of the relevant factors.

1. The Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal*, 32 FMSHRC at 1195, citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988).

Extensiveness involves the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002).

Here, the violation is the performance of electrical work (maintenance) on the shuttle car trailing cable by non-qualified persons without locking and tagging out the machine. Several miners in addition to Browning and Martin were performing the same type of electrical work on the trailing cable. Martin, two other shuttle car operators, and two roof bolters were instructed by foreman Kelly to pull the shuttle car cables off and re-tape over splices. Tr. 232-33. Thus, five miners were placed at risk of electric shock injury as a result of the violation, although Robinson wrote the citation as only affecting two persons. Further, this was not the first time miners were instructed to do such a task and they may have been asked to do it again, but for the issuance of Citation No. 8201921-01. I find that the violation was fairly extensive and would have continued during normal mining operations, absent intervention by MSHA. Accordingly, this factor weighs in favor of an unwarrantable failure finding.

2. The Duration of the Violation

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). The duration or length of time that the violation existed is particularly critical, as the longer a violative condition or practice exists, the more likely miners would be injured. *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010). It must be noted, however, that a violation can be found unwarrantable even when the duration is a relatively short period of time, where the violation poses a high degree of danger, involves a foreman, and would have continued, but for the occurrence of an accident. *Midwest Material Co.*, 19 FMSHRC 30, 34-36 (Jan. 1997); *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998).

There is marginal evidence of exactly how long the miners were re-taping the trailing cable. Martin testified that he only performed the task for a few minutes, but the electrician and troubleshooter indicated that the power was off for one to two hours. Tr. 146, 194. During this time, no lock out or tag out of the cable occurred. The trailing cable on shuttle cars is at least a few hundred feet long, which meant greater exposure to nicks, splices, and damaged areas as the task continued, but for Robinson's issuance of the citation and Respondent's subsequent instruction to the miners to stop working. Tr. 147. Furthermore, as noted above, the violative practice occurred as a direct result of direction from foreman Kelly and the violation posed a high degree of danger of electric

shock injury should power be restored during continued normal mining operations. In these circumstances, I conclude that the duration factor weighs in favor of an unwarrantable failure finding.

3. Whether the Operator Was on Notice that Greater Efforts Were Necessary for Compliance with Section 75.511

The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious . . . problem.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

Regent had no previous citations for a section 75.511 violation. P. Ex. 4. Furthermore, the Secretary failed to establish any prior discussions with Regent about any problem failing to comply with section 75.511. In these circumstances, I find that the Secretary has failed to establish that Respondent was placed on notice that greater compliance efforts with 30 C.F.R. § 75.511 were necessary. Accordingly, this factor militates against a finding of unwarrantable failure.

4. Section Foreman Kelly’s Knowledge and Reckless Disregard for the Existence of the Violation

The Commission has held that knowledge is established by showing “the failure of an operator to abate a violation [that] he knew or *should have known* existed.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also*, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) (“Coal Act Legis. Hist.”). In the absence of past violations, an operator’s knowledge may be established “where an operator reasonably should have known of a violative condition.” *IO Coal Company, Inc.* 31 FMSHRC 136, 1356-57 (2009); *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Further, the Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors

are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). A section foreman is held to a “demanding standard of care in safety matters.” *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987)(quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)). A mine superintendent is also held to a heightened standard of care. *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

Regent miners Martin and Browning, who were not qualified to perform electrical work, performed electrical maintenance on a trailing cable that had not been locked or tagged out under the direction of section foreman Kelly. With power down and an inspector on his way underground, section foreman Kelly instructed the five miners to begin taping the splices on the trailing car cable, aware that the cable was not locked out and that the miners were not certified electricians. Tr. 333, 334-36.¹³

Kelly also knew that Regent had received a citation for a poorly maintained trailing cable less than a year before. Tr. 319-20. He remembered it well because the fine was \$5,900, enough to buy two new cables. Tr. 321. Kelly testified that he wanted to prevent another citation like that. Tr. 320-21, 334. “Why sure. That’s my job, to take care of the mine, see that that mine makes money.” Tr. 334. So when power went down, Kelly told the miners “. . . to get some tape -- because there wasn’t no power on the catheads, I told them to get some tape, pull the cable off the cars, go over their splices and tape them back up. That’s not the first time we done that.” Tr. 335.

Q: Did you put a lock and tag on the cathead on this occasion?

A: No, I did not, because there wasn’t no power underground.

Q: Did you watch them work on the cable?

A: No, I did not.

Q: Is Mr. Martin a certified electrician.

THE COURT: We know neither one of them is.

¹³ As noted, Clark and Hubbard were listed as the only qualified electricians working underground on day shift at the time of the January 28 inspection. Tr. 47. Clark was working about 30 crosscuts away from where the miners were examining the trailing cable. Tr. 48, 52. Hubbard was working outby. Tr. 53.

....

Q: You weren't aware that the blades were logged and tagged out at the time you were issued the citation.

A: No, I was not, because, see that, that don't fall in my category of running the section. That's an electrician's category.

Tr. 336-37.

Kelly's prioritization of section production over safety is the type of indifference and reckless disregard for safety that justifies designating this particular violation an unwarrantable failure to comply with a safety standard. "Reckless" is commonly understood as "without thinking or caring about the consequences of an action." *The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). The term "disregard" is commonly understood as "to treat without fitting respect or attention: to treat as unworthy of regard or notice: to give no thought to: pay no attention to." *Webster's Third New International Dictionary (Unabridged)* 665 (1993). For civil penalty purposes, 30 C.F.R. §100.3, Table X, defines "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care."

As a legal term, "reckless" has been described as conduct—

[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash.... Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.

Black's Law Dictionary 1298 (8th ed. 2004). For comparative purposes, in tort law—

a person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Restatement (Third) of Torts: Phys. & Emot. Harm § 2 (2010).

Superintendent McClanahan aptly captured Kelly's indifference when Kelly informed McClanahan of the violation because the circuit was not logged and tagged out. Robinson overheard McClanahan admonish Kelly, "You know better than that; that's stupid." Tr. 41. I find McClanahan's statement to be an admission that foreman Kelly grossly deviated from what a reasonable person would have done, i.e., take the minimal precaution of ensuring that the cable was logged and tagged out.

In short, section foreman Kelly knew or should have known of the violation. This knowledge, rises to the level of reckless disregard, and strongly supports an unwarrantable failure finding. Kelly created a substantial and unjustifiable risk of harm to unqualified miners by assigning them to perform electrical work without taking the minimal step of ensuring that the trailing cable was locked and tagged out, thereby demonstrating indifference to the risk and exalting production over safety.

5. Whether the Violation was Obvious

The failure to lock and tag out the circuit, including the catheads, was obvious upon inspection. Robinson testified that "Mr. Kelly knew that the circuit was not locked and tagged because when he came to the power center he told me it's locked on the surface. So by him knowing that it was locked on the surface, he had to know that it was not locked there. And it was obvious. Anyone could walk by the power center and tell that there's no locks or tags installed on any of the plugs." Tr. 65. McClanahan's admission that Kelly knew better and his failure to lock out was stupid supports the obviousness of the violation. Tr. 41.

Further, Robinson testified that it was obvious that the miners designated by Kelly to do the work were not on the list of qualified individuals to perform electrical work. Tr. 61-62. Further, Robinson opined that Kelly knew or should have known that Clark, but not the roof bolters and shuttle car operators, were certified to perform the work. Tr. 65. Accordingly, the factor of the obviousness of the violation supports an unwarrantable failure finding.

6. Whether the Violation Posed a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1988). For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 125, 132-33 (remand for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is unwarrantable. It is but one factor to be considered in evaluating whether a violation is unwarrantable. *Manalapan Mining Company, Inc.*, 35 FMSHRC 289, 294 (2013), citing *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan, supra*, 35 FMSHRC at 294. Further, the Commission has held that a violation may be aggravated and unwarrantable based on "common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). A serious hazard warrants heightened precautions by an operator. *LaFarge Construction Materials*, 20 FMSHRC 1140, 1146 (1998); *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997).

Inspector Robinson testified that the violation was dangerous because the unlocked circuit can become energized and the miners would be working with a live circuit in their hands and would be unqualified to determine whether they were taping single damaged conductors or damaged multiple phase conductors creating other fault conditions. Tr. 64-65. The danger was electric shock, burns, or a cable blowing up in a miner's face or hands. Tr. 57. Robinson testified that an acquaintance of his had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Section foreman Kelly, who instructed the unqualified miners to perform the electrical work without ensuring that the circuit was lacked and tagged out, acknowledged the danger of shock or electrocution when handling a trailing cable that could become energized. Kelly testified that it was possible for the miners to contact an energized conductor if they touched a nick in the outer jacket of the cable. Tr. 342. Mechanic Addington acknowledged that bending and examining cable with power not locked and tagged out could cause injury if the insulation was not adequate. Tr. 223. This testimony of Regent personnel supports a finding that unqualified miners working on a circuit that was not locked or tagged out was an obvious danger in violation of a safety standard.

In short, the degree of danger supports an unwarrantable failure finding. See *Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (electric shock with serious burns resulted from operator's gross negligence and reckless disregard by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the

work was done on the cable; *Spartan Mining Co.*, 29 FMSHRC 465, 466 (June 2007) (ALJ) (electrician electrocuted while repairing a continuous miner trailing cable that was not locked and tagged out when mine power was restored and circuit breaker for miner was closed by another miner).

7. The Operator's Efforts in Abating the Violative Condition

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal, supra*, 31 FMSHRC at 1356, citing *Enlow Fork Mining, supra*, 19 FMSHRC at 17. The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). Here, Respondent was never placed on notice of a problem under section 75.511. Respondent made no efforts to abate the violation before the Citation was issued. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1356 (2009); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). I find that this factor is neutral in the unwarrantable failure analysis.

E. Conclusion on Unwarrantable Failure Issue

In sum, after considering the relevant Commission factors, I find that the factors of extensiveness of the violation, duration of the violation, obviousness of the violation, high degree of danger posed by the violation, and section foreman Kelly's knowledge and reckless disregard for the existence of the violation all support an unwarrantable failure finding. Regent was not placed on notice that greater efforts were necessary for compliance with section 75.511 and this factor militates against a finding of unwarrantable failure. Regent's efforts in abating the violative condition is a neutral factor. On balance, however, the five aggravating factors and Kelly's reckless disregard suffice to establish aggravated conduct and an unwarrantable failure beyond ordinary negligence.

F. Civil Penalty Assessment Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority 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 “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) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria: [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 of the operator’s ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (*citing* 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination “substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed.” *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the “credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Sellersburg*, 5 FMSHRC at 293.

As Senior Judge Zielinski explained in *American Coal Co.*:

The purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Similarly situated operators, determined to be liable for violations with similar gravity, negligence and other penalty criteria, ideally should be assessed similar penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of \$100 to \$70,000. The Secretary's regulations for determination of a penalty amount by a regular or special assessment, 30 C.F.R. §§ 100.3, 100.5, take into consideration the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of these assessment formulae provide a useful reference point, which promotes consistency in the imposition of penalties by Commission judges.¹⁴

Accordingly, in determining a penalty for the litigated violations, the penalty produced by application of the Secretary's assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria in section 110(i). The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. § 100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving extreme gravity and/or gross negligence, or other unique aggravating circumstances may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any

¹⁴ *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the assessment process set forth in 30 C.F.R. § 100.3, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

35 FMSHRC 1774, 1823-24 (May 2014) (ALJ).

Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A proposed penalty is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies proposed penalties ranging from \$112 for 60 or fewer points, up to the statutory/regulatory maximum of \$70,000 for 144 or more points for non-flagrant citations and orders. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. § 100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. § 100.3(h).

The undersigned recognizes that the Secretary has developed, pursuant to his authority under 30 C.F.R. § 100.5, a process for the special assessment of proposed penalties. MSHA, Office of Assessments, Accountability, Special Enforcement & Investigations, Special Assessment General Procedures (Sep. 7, 2011), <http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf>. These procedures, however, have not been codified as binding regulations, and thus, have not been subject to notice and comment rule making, unlike the normal assessment procedures in section 100.3. Where the Secretary has provided adequate documentation of how he determined the specially assessed penalty and is able to demonstrate the appropriateness of proposing a specially assessed penalty, the guidance in the Special Assessment General Procedures may also provide a helpful guide for assessing an appropriate penalty.

The Secretary has not done so here. MSHA specially assessed the proposed penalty at \$20,900, but testimony elicited by the Secretary from the inspector was limited to the fact that the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence. No testimonial support for special assessment was given.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (June 19, 2014) (ALJ). Accordingly, consistent with my findings above, section 110(i) criteria, and regular assessment criteria, I normally would find a penalty of \$6,997 to be appropriate. However, because MSHA established a factual, although not an evidentiary basis for a special assessment, I conclude that a greater penalty is warranted here. Applying section 110(i) criteria with particular emphasis on the serious gravity of the violation and the reckless disregard level of negligence of the operator, I assess a penalty of \$11,500 for the S&S, unwarrantable failure violation, with reckless disregard.

VII. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8201921, as written and modified. It is **ORDERED** that the operator pay a civil penalty of \$11,500 within 30 days of this decision.¹⁵

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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¹⁵ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.